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Green Paper on the modernisation of EU Public Procurement policy – comments from the Norwegian Government

Introduction and main views

Reference is made to the launching of the Green Paper on the modernisation of EU public procurement policy by the European Commission on 27 January 2011, and the invitation to submit comments.

The Norwegian Ministry of Government Administration, Reform and Church Affairs will hereby submit comments on behalf of the Norwegian Government.

A more flexible regime

The Norwegian Government welcomes a process of reforming public procurement policy. The current Public Procurement Directives are in many respects too complex, causing great administrative burden for public authorities and problems for SMEs. Due to this complexity and an unclear legal situation, contracting authorities sometimes end up breaching the rules despite a diligent process and good faith. This situation, in combination with stricter enforcement rules, may cause contracting authorities to focus more on formalities than on obtaining better and more cost efficient procurements. Norway finds this situation unsatisfactory. A more flexible regime with less complicated rules is therefore required.

Public-public cooperation

Public procurement accounted for over 16% of Norway's GDP in 2009. The Norwegian public sector consists of both government bodies, regional authorities

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and 430 local municipalities. The average municipality has about 11 000 inhabitants, but they vary significantly regarding size and population and most of them are small: more than half of the municipalities have less than 5 000 inhabitants and only eight have more than 50 000 inhabitants. This results in many small contracting authorities with limited administrative resources. In Norway, the possibility of carrying out public tasks through public-public co-operation is therefore essential to the public administration, both on the central, regional and local level. In many cases, the public authorities cannot provide all services only by using their own resources. Through public-public co-operation the participating authorities are enabled to control the provision of services in a manner that would not be possible through public procurement resulting in a more traditional contractual relationship. Public-public co-operation is therefore widely used.

Public-public co-operation takes place in many different forms and for carrying out a range of different tasks – from co-operation on "classic" public tasks involving exercise of public authority (like social and health services, waste treatment services, etc) to co-operation on supporting services (like auditing services, IT services, procurement services, etc). Common for different types of contracts concluded between public authorities is the underlying objective of providing better, and in some cases less expensive, services to the public. When public-public co-operation simply is the best way to organize the public sector in order to obtain the best possible services, public procurement legislation should not be an obstacle. Even though public-public co-operation is widely used, the boundaries of public-public co-operation in relation to public procurement law have not been clear. In that sense, the case-law from the ECJ has been of great practical importance. However, there are still aspects which are not entirely clear. Norway is therefore of the opinion that further clarification on the concept of "in house" would be beneficial, based on recent case law. We urge the Commission to expand the scope of action for public authorities so that they can achieve the best organization of public services, for example through various forms of inter-municipal cooperation.

Strategic use of public procurement in response to new challenges
The Green Paper focuses on enabling public contracts to be put to better use in support of other policy goals such as climate change, innovation, working conditions etc. Norway agrees that important goals can be reached by requiring public authorities to set a good example. It is therefore important that EU rules allow public procurement to be used as a tool to achieve such policy objectives.

However, one must be aware that there are conflicts between the various goals: As described, public procurement rules are already very complex and a great deal of additional binding and detailed requirements designed to achieve broader policy goals will make the rules even more complex. In the Norwegian Government's view it must therefore be carefully assessed whether binding requirements is necessary to achieve the policy goals in question, or if the goals can be better achieved with

other instruments.

The Agency for Public Management and eGovernment (Difi)
The Agency for Public Management and eGovernment (Difi) was established 1 January 2008, following a merger of the previous public agencies Statskonsult, Norway.no and the Norwegian eProcurement Secretariat. The agency is subordinated to the Ministry of Government Administration, Reform and Church Affairs. Difi aims to strengthen the government's work in renewing the Norwegian public sector and improving the organization and efficiency of government administration. Difi's Department of Public Procurement (DPP) aims to ensure cost efficient and high quality procurement that benefits society, including sustainable and social responsible procurement, by providing information and guidance on legislation and best practice on its website www.anskaffelser.no. The agency has a special focus on developing guidance and templates that can assist contracting authorities and purchasers to undertake useful, efficient and high quality purchases. Furthermore, Difi has developed a process tool for implementing a procurement strategy, and is working on a process tool and guidance for internal audits in the field of public procurement. DPP has developed and strengthened several networks, presenting central themes in public procurement as well as best practice.

Difi works, on behalf of the Ministry of Trade and Industry, to promote innovative public procurement. In 2010 Difi received about 38 500 Euro to engage in measures to increase public procurers' awareness and competence on innovative public procurement. In 2011 this work is continued with a grant of 90 000 Euro. Difi co-operates closely with the Confederation of Norwegian Enterprise (NHO). Main activities include the development of a guide for more innovative public procurement, identification of possible pilots, general information and network activities. Difi is also, to a certain degree, involved in international activities in this field.

Furthermore, Difi has been given the responsibility for following up the implementation of the National Action Plan for environmental and social responsibility in public procurement by the Ministry of Environment and the Ministry of Children, Equality and Social Inclusion. This gives Difi a unique opportunity to integrate and coordinate procurement, legal, environmental and social issues and instruments in its procurement guidance and tools. Difi has a funding of about € 2,5 million from the Ministry of Environment and the Ministry of Children, Equality and Social Inclusion p.a., which pays for focal points in 18 counties promoting and supporting green public procurement, the development of tools for green and socially responsible procurement, the development and maintenance of relevant guidance and information on the national internet site for public procurement, as well as the development and distribution of a national internet-based reporting system for environmental management for all national government institutions.

(Only questions that the Norwegian Government has responded to are cited in the following)

1. What are public procurement rules about?

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

The Norwegian Government does not think that limiting the scope of the directives to the purchasing activities of the contracting authorities - in contrast to situations where contracting authorities conclude agreements that are not connected with their own purchasing needs - will contribute to simplification. Such a limitation may open up for circumvention of the rules and create problems with borderline situations and mixes contracts.

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

4-5: The Norwegian Government recognises the need to review the distinction between A and B services in the light of the economic and legal development.

However, it is important for the Norwegian Government to maintain flexibility for certain kinds of services, for instance health and social services. As stated in the answer to question 97, the public procurement principles are not always well designed for the specificities of these services. If the distinction between A and B services is eliminated, and the Public Procurement Directives should apply to all services, we strongly recommend making an explicit exception for these kinds of services.

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 Norwegian Government is of the opinion that the thresholds for the application of the EU Directives should not be raised. It is important to keep in mind that increasing the thresholds would exempt more contracts from the requirement of an EU-wide publication of a contract notice, reducing business opportunities for

undertakings throughout Europe.

The thresholds laid out in the EU Directives determine market access opportunities and as such constitute an important element in the public procurement policy. Raising the thresholds imply that fewer contracts are tendered, and that the firms must have higher capacity to be able to tender for the contracts, thus limiting the number of suppliers, all other things being equal. The OECD Competition Assessment Toolkit points out that limiting the number of suppliers, leads to the risk that market power will be created and competitive rivalry will be reduced. When the number of suppliers declines, the possibility of diminished competition (or collusion) among the remaining suppliers increases, and the ability of individual suppliers to raise prices can be increased. This will work contrary to the objectives of the public procurement rules. That being said, the question of possibly raising the threshold must also be considered in relation to the level of detail and procedures (questions 14-22). Achieving considerable costs saving relating to simplifying procedures might reduce the need to raise the threshold.

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?

There is a need for clarification of the individual exclusions, be it by guidelines based on practice or by including such clarifications in the relevant provisions or definitions. In particular, there is a need to clarify the specific exclusion on the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property or concerning rights thereon, cf. Article 16(1) (a) and the exclusion on service contracts awarded on the basis of an exclusive right, cf. Article 18.

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

Clarification of the concept "body governed by public law" could be useful, be it by including such clarifications in the relevant provisions or definitions, or by guidelines based on practice.

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

10 -13: There seem to be no need to change these rules at this point. In the Norwegian Government's opinion, Article 30 of the Directive constitutes an effective way of adapting the scope of the Directive to changing market patterns. However,

the general need for a more flexible regime with less complicated rules also applies to these sectors.

2. Improve the toolbox for contracting authorities

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

As mentioned earlier, there is a need for simplification. Even if simplification will come up against certain limits, as referred to in pp 12 – 13 in the Green Paper, such changes must be considered.

As regards the question of *more negotiation*, this is dealt with in question 19 ff. below.

Another difficult area for the contracting authorities, is the challenge of conducting *assessments* and *evaluations*, e.g. assessing offers in light of the award criteria, and to provide reasons therefore, e.g. when producing documentation of the procurement process.

As regards time limits, there might be room for simplification, taking into account the different time limits for receipt of requests for participation and submission of tenders in the different procurement procedures, and the development and widespread use of electronic communication. In our view, it might be possible to operate with fewer different time limits. Regarding the length of time limits, setting a suitable time limit will necessarily be the result of a compromise. In some cases, it might be too short, taking into account the size and complexity of the procurement and the time needed for drawing up tenders. In other cases, in particular when dealing with less complicated procurements, it might be too long. However, it might be possible in general to shorten the "minimum" time limits.

As regards *dynamic purchasing systems*, provided for in Article 33, it could be an attractive alternative to parallel framework agreements and the use of mini competition provided for in Article 32. However, the dynamic purchasing system is very little used. The explanation can be found in the requirement in Article 33(5), that contracting authorities, before issuing the invitation to tender, shall publish a simplified contract notice, inviting all interested economic operators to submit an indicative tender within a time limit of minimum 15 days, and not proceed with tendering until they have completed evaluation of all the indicative tenders received by that deadline. The administrative burden, the transaction costs and the duration of the procedure could be reduced if this requirement and delay of minimum 15 days could be abandoned. In addition, more guidelines, best practice and examples, would be helpful.

As regards *competitive dialogue*, we believe it is a useful procedure for promoting innovation, but it seems necessary to lower the thresholds for contracting authorities to take it into use. It would probably reduce the administrative burden and the transaction costs if the procedure could be a little more flexible and allow negotiations as an option in the final stage of the procedure. The possible prolongation of the procedure could be balanced by a possible reduction of the time spent on the dialogue phase and a reduction in the resources used by tenders.

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?

Yes, the procedures set out in the current Directives allow contracting authorities to obtain the best possible procurement outcomes. However, and with reference to question 14, the administrative burden, the transaction costs and the duration of the procedures, could be reduced by the measures proposed under question 14. Also, the directives should allow for more negotiation, cf. question 19.

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?

Dynamic purchasing system and competitive dialogue should be simplified as proposed under question 14.

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?

As stated in question 14, the Norwegian Government suggests that the rules on time limits should be simplified and time limits, in general, shortened. If such time limits are not set at an absolute minimum, it is our view that there still, under certain circumstances, will be a need for an accelerated procedure.

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

The flexibility provided by the Utilities Directive should be extended to the public sector as well, and allow the contracting authority's free choice of the negotiated procedure with prior notice.

In order to ensure transparency, non-discrimination and equal treatment, guidelines are needed, in particular on which types of procurements such procedures are expedient, e.g. in intellectual services, complicated design and construction work, as well as examples of procurement where such procedures normally should not be used, e.g. commercial goods, simple services etc.

There is a need for guidelines/best practice examples on physical meetings and the alternative use of telephone/ audio visual equipment, in particular because negotiations, in addition to the extra administrative burden on the contracting authority, is a financial burden on tenderers and thus could create an effective barrier to trade. The rules should also make it clear that it is possible to conduct negotiations in writing, and not necessarily by oral proceedings in a meeting. Electronic communications, audio visual equipment, and negotiations in writing, would also open for more participation and opportunity for cross border tenders by reducing the costs of participation at physical meetings, as well as reducing the carbon foot print of the procurement process.

In general, the possibility to communicate with suppliers will help taking better account of policy-related considerations and also complex procurements. This communication could in any case take place before the competitions are published; however, the suppliers often seem to be reticent to contribute with suggestions and solutions before they are in an actual negotiating position. The possibility to use a negotiated procedure is therefore preferable.

Under the current rules, a negotiated procedure has to be conducted in two phases: In phase 1, interested suppliers are invited to request for participation. In phase 2, selected candidates are invited to submit their tenders and/or to negotiate. In some cases, this might be a cumbersome procedure. The Norwegian Government therefore suggests that it should be allowed for contracting authorities to conduct a negotiated procedure in a one-phase procedure: Interested economic operators are, in a contract notice, invited to submit a tender. The negotiation will then be conducted on the basis of the submitted tender, with the qualified tenderers.

Some Member States may be reluctant to open up for more negotiations in public procurement procedures, fearing this will lead to more favouritism and corruption. Such resistance may be accommodated by introducing the possibility to negotiate as an optional provision the states may choose to implement.

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?

The negotiated procedure with prior publication should be allowed for all types of contracts and all types of contracting authorities, but extensive guidelines are needed, in particular on which types of procurements such procedures are expedient, e.g. in intellectual services, complicated design and construction work, as well as examples of procurement where such procedures normally should not be used, e.g. commercial goods, simple services etc.

The Norwegian Government has experienced that the limitations in the regulation toward the use of negotiated procedure have a negative impact e.g. on the public procurements in the field of Research and Development (R&D). The general limitation of negotiations for these services gives a disproportionately high risk for incorrect acquisitions of particularly complex services such as evaluations and assessment reports and intellectual work requiring different kinds of academic and practical knowledge. Research and Development work is often nearly impossible to describe in detailed specification because it is by nature exploring. In addition, the contracting authority is obligated to secure the need of independence and academic freedom, something that is in conflict with a too detailed and instructed description of the task. Rightly there are some openings for exceptions in the regulations, and specifically for intellectual work, these exceptions shall however be interpreted narrowly. The general limitation of negotiations in today's rules build on a principle that the possibilities for negotiations should be smaller and the rules stricter with increased costs and scope. For R&D work the situation is opposite since the need for negotiations and dialogue between the parties increases when the scope and complexity of the work grows larger.

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?

In general the answer is yes, a generalized use of the negotiated procedure opens up for greater discretion and more subjective decisions and consequently may entail an increased risk of abuse/discrimination, against which additional safeguards might be necessary, cf. question 68.

Also, the rules could be more specific and detailed on the conduct of negotiations, e.g. by requiring written communications, protocols or minutes, revised tenders, etc. In addition, more guidelines could be provided through best practice.

Unfortunately, purchasers expressing most loudly their need for more leeway do not always have the necessary technical expertise, knowledge of the market and skills to negotiate a good deal with the suppliers, but believe that negotiations may compensate for the purchaser's lack of these qualifications. Therefore, more detailed rules on the conduct of negotiations, as well as extensive guidelines, as mentioned under question 19 and 20, is needed.

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?

Yes, it would be appropriate to provide simplified procedures for the purchase of commercial goods and services, for instance a "modified" dynamic purchasing system as proposed under question 14, or an "open market place" with characteristics similar to a modified dynamic purchasing system and a qualification system. The open market place should be based completely on electronic means. A contracting authority should publish, at least annually, a notice similar to a Prior Information Notice, cf Article 35(1) indicating the estimated value of contracts, the nature of the purchases envisaged, for which it intends to use the open market place, and the selection criteria which have to be satisfied. The open market place shall be open at any time to new suppliers pretending to satisfy the selection criteria for which necessary documentation must be provided when registering. The contracting authority or the open market place operator shall complete evaluation of new suppliers within a maximum time limit. The contracting authority should be entitled to make a call for competition at any time by inviting only economic operators fulfilling the qualifications, to submit a tender in accordance with the chosen procedure, which should include the possibility to use electronic auctions.

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

It would reduce the burden on both economic operators and contracting authorities if it would be possible to postpone the examination of certificates and other proofs of qualification and to limit it to only the selected candidates or, in an open procedure, the winner. Under the present rules, economic operators have to provide documentation proving they are qualified, as well as certificates issued by competent authorities or self-declarations, certified in various ways, proving they are not covered by any grounds of exclusion. It follows from Article 44 Verification of suitability, covering the choice of participants and awarding of contracts, that "1.Contracts shall be awarded on basis of criteria laid down in Articles 53 [...] after suitability of Economic Operators not excluded ... has been checked by Contracting Authorities in accordance with criteria of economic and financial standing, of

professional and technical knowledge or ability... ". However, as stated in the Green Paper on expanding the use of e-procurement in the EU, some Member States allow economic operators to provide a statement/declaration of eligibility/compliance with criteria, e.g. as a simple electronic document, electronically signed or not. Only the winner has to provide actual documents (electronically or paper). This practice should be reflected in the Directive.

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?

The distinction between "qualification criteria" and award criteria is principally a problem when it comes to procurement of services and works: How do you assess the quality of the proposed solutions? In such cases, the quality of what you are buying is to a great extent determined by the people performing the contract. In order to assess the quality, it should therefore be allowed for contracting authorities, in the award phase, to take into account the tenderer's qualifications to carry out the service. In the qualification phase these criteria only lead to a decision on whether or not the tenderer is qualified to participate in the competition or not. In the view of the Norwegian Government it is – and should be – possible to evaluate the tenderer and the relevant personnel offered to perform the task in regard to how well they can perform the contract in question, to the extent this serves as an indicator of the expected quality offered in an objective and verifiable manner.

However, there is great uncertainty among contracting authorities when it comes to the distinction between qualification and selection criteria and the boundaries for using criteria pertaining to the tenderer himself in the assessment of quality criteria. This uncertainty has lead to many breaches made by Norwegian contracting authorities. The Lianakis judgement (C-532/06) has not clarified the situation. Therefore, the Norwegian Government thinks that there is a need for clarification and guidelines on the subject.

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?

Yes, product samples and previous deliveries can be used as a reference and indicator of the quality of the product or work offered. Likewise, it is true that past performance of services could provide useful pointers to the quality of the future delivery offered. Not only should it be possible to take into account past performance or deliveries to other contracting entities, the Directive should explicitly allow also previous (own) experience with one or several bidders to be taken into account. In principle, this is not different from taking other authorities'

experience (reference) into account. To prevent discriminatory practice when taking (own) previous experience into account, the assessment should be based on objective and verifiable standards, and the previous experience should be documented by written references, complaints, etc.

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?

The Norwegian Government sees no need to make special changes in the rules applying to the utilities sectors. However, the general need for a more flexible regime with less complicated rules also applies to these sectors.

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.

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?

27, 28: Norway is in favor of a general simplification of the public procurement regime and that the regime as far as possible should be identical for all types of contracting authorities. Several exceptions and special rules will make the regulations more complicated and create more possible pitfalls for contracting authorities. Norway's view is that a more uniform regime makes it more perspicuous and easier to fulfill. A general simplification is in accordance with the main principle of efficient use of resources.

On the other hand, if the result of the EU process on modernization of EU public procurement policy is an establishment of various obligatory requirements for contracting authorities, an approach that Norway does not support, Norway's view is that these requirements should not be obligatory for smaller contracting authorities. They generally have less financial and specialist resources to follow up on the requirements and control that they are met. They are also very vulnerable to time-consuming processes.

Furthermore, in Norway we have a strong tradition for local self-government, which will be narrowed by introducing these kinds of obligatory requirements.
In relation to this question, it is also important to see the connection to possibilities for public-public cooperation. Norway considers the possibilities of carrying out public tasks through public-public co-operation essential to the public administration and that it is of particular importance to smaller contracting authorities. What is most important for small contracting authorities is to be ensured that public procurement law does not constitute an obstacle for public-public co-operation in

situations where this is the best way to organize the performance of public activites. See Norway's answers under questions 30-33.

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

Concerning the award of contracts below the EU Directives thresholds, the view of the Norwegian Government is that there is, on the EU/EEA level, a lack of legal certainty, though some clarification has been provided through the rulings from the ECJ and the Commission Interpretative Communication.

To better identify the contracting authorities/entities obligations for the award of contracts below thresholds, Norway would welcome additional guidance from the Commission. This could be done by amending the information provided in the Commission Interpretative Communications.

One area where more information is needed, is in relation to the cross-border interest. In section 1.3. "Relevance to the Internal Market" in the Commission communication, the Commission presents circumstances of relevance when assessing whether a contract is of interest to the internal Market. Norway would here welcome an elaboration on the circumstances listed, explaining in what way they may be of relevance when assessing a cross-border interest. For instance, in what way can geographical location be of relevance in the determination of a contract's relevance to the Internal Market?

Norway further points out the fact that the Commission in the current question only addresses the potential need for more legal certainty in regard to contracts below EU thresholds. On the other hand, the Interpretative Communication of the Commission goes beyond addressing these contracts only, and also covers contracts for services listed in Annex II B to Directive 2004/18/EC and in Annex XVII B to Directive 2004/17/EC that exceed the thresholds for application of these Directives.

Norway is of the opinion that additional clarification and guidance as mentioned above also in relation to so-called "B-services", would provide increased legal certainty for contracting authorities/entities when assessing the potential cross-border interest of such contracts. This is especially the case when looking at the statement of the Commission in relation to Questions 4 and 5 saying that for some of the "B-services" "it does indeed appear difficult to assume that they represent a lesser cross-border interest than the services on the "A" list". Norway believes that if the Commission considers current "B-services" to be of high cross-border interest,

this should be clearly communicated to the EU/EEA Member States, along with information on the necessary actions needed to comply with the Treaty of the functioning of the European Union and the EEA agreement when awarding such contracts. Confer also question 4.

Finally, Norway refers to the statement made by the Commission that contracts below thresholds "would most probably not be covered by a future legislative proposal." Norway supports this assumption. It is considered adequate to leave it to the discretion of EU/EEA Member States to govern the rules for the award of contracts below thresholds while assuring accordance with the principles deriving from the Treaty of the functioning of the European Union and the EEA-Agreement.

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?

There are both advantages and disadvantages connected to establishing legislative rules at EU level regarding the scope and criteria for public-public cooperation.

Such a legislative initiative would make it possible to expand the scope of action for public authorities in order to achieve the best organization of public services, for example through various forms of inter-municipal cooperation. Another advantage is that this would create greater legal certainty. The recent ECJ case-law contributing to clarifications has been of great practical importance. However, there are still aspects which are not entirely clear. Further clarification would be useful.

The main disadvantage is the danger of creating too rigid rules, e.g. by excluding other types of public-public co-operations which have not yet been tried by the ECJ. In the view of the Norwegian Government, public procurement legislation should not be an obstacle, when public-public cooperation simply is the best way to organize the public sector in order to obtain the best possible services.
The Norwegian Government will on this background recommend legislative rules at EU level, cf. questions 31-32, but these rules should not exhaustively list all situations where contracts between public authorities are excluded from the scope of application of the EU public procurement directives.

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?

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.

31, 32: The in-house exemption based on the Teckal criteria (vertical co-operation) could be explicitly regulated. In the opinion of the Norwegian Government, Article 23 of the Utilities Directive could be a good model. In particular, it is of interest that this article makes it clear that the exemption is applicable on contracts awarded to an affiliated undertaking, to a joint venture or to a contracting entity forming part of a joint venture. It is not entirely clear whether the current in-house exemption in the classical sector is applicable on deliveries from a parent entity to its subsidiary entity and on deliveries between two separate legal entities fully owned by the same owner (a triangular co-operation). It is the opinion of the Norwegian Government that the rationale behind the in-house exemption in the classical sector and the affiliated undertakings exemption in the utilities sector is the same. It should be possible for a public entity to organize itself in the most suitable manner without falling under the public procurement directives. Correspondingly, the direction of the flow of supplies and services should not be of importance in the classic sector either.

As specified above, cf. question 30, however, new rules on vertical public-public cooperation should not attempt to exhaustively list all situations where contracts between public authorities are excluded from the scope of application of the EU public procurement directives. That there can be other types of vertical public-public cooperation exempted from the directives is illustrated by the Tragsa/Asemfo case, C-295/05; here the ECJ found that Tragsa's relations with the contracting authorities having recourse to its services were not contractual, but in every respect internal, dependent and subordinate, inasmuch as Tragsa was an instrument and a technical service of the authorities concerned.

When it comes to horizontal public-public cooperation, Norway welcomes the more functional approach recently applied by the ECJ in the Hamburg-case, C-480/06. However, there is very little case law and the legal situation is therefore still unclear. It is probably premature to identify firm criteria that will cover all situations where public-public co-operation, both horizontal and other types of cooperation not yet tried by the ECJ, is the best way to organize the public sector. Norway is concerned that a legislative initiative regulating such co-operation would limit the scope of action more than what is necessary in order to prevent circumvention of the public procurement rules and distortion of competition in the market.

Should such a legislative initiative, nevertheless, be proposed, the Norwegian Government points to two important elements:

As described above, public procurement legislation should not be an obstacle, when public-public cooperation simply is the best way to organize the public sector in order to obtain the best possible services. An important criterion should therefore be whether the cooperation aims at jointly ensuring the execution of a public task. Another important criterion is how the cooperation affects the market, in order to achieve the objective of free and undistorted competition and the principle of equal

treatment. In this connection it will be relevant to look at to what extent the entity operates in a market and whether any private entity (or mixed public-private entity) is offered an advantage over its competitors.

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

Our experience is that many public authorities have limited knowledge of the scope of the exemption on transfer of competence from one public authority to another. It could therefore be useful to either include this exemption in a legislative initiative and/or to provide guidance on the application of the exemption. A related question is to what extent the derogation under Articles 45 and 55 EC for the exercise of official authority is applicable to procurement. Guidance in this respect would also be welcomed.

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?

34 – 38: The Norwegian Government is currently carrying out an analysis on the effects of joint procurement in Norway. This rapport will be ready during spring 2011. Before we have the analytical results we find it hard to answer these questions.

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

There is often a need for modifications of a contract while it is still in force. Guidelines on which modifications are allowed, taking into account the Pressetext case and subsequent practice, could be useful. However, we do not see a need for regulation this in the directives.

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, allowing for a more flexible procedure in such circumstances would not contribute to simplification of the rules. It is rather the fear of the Norwegian Government that such a flexible procedure would lead to efforts to circumvent the rules.

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

Norway recognizes the need to deal with violations of the procurement rules, and believes that simplification of the procedural rules in addition to sufficient guidance to avoid legal uncertainty are important tools in this regard. Norway stresses on this point that due to the complexity and sometimes unclear legal situation in the public procurement area, contracting authorities may end up breaching the rules, despite a diligent process and good faith.

The Norwegian Government would further pinpoint that the current EU Directives, though their primary task is to govern the process up until the contract award, allows for the contracting authorities to lay down EU compatible conditions relating to the performance of a contract. This offers a possibility for the contracting authorities to include rights and obligations in their contracts, including provisions on the termination of the contract. The right is nevertheless limited to the discretion of the contracting authority (and not the Member State). In this regard, the proposal to introduce new rules in the Directives on the right to cancel contracts leaves important issues unanswered or uncertain at the least. For instance, - who will have the right to cancel a contract awarded in breach of public procurement law - the Member State, the contracting authority, the contracting party or all of them? Further, it is not clear who is to conclude on a breach of public procurement law – is it sufficient that contracting authorities and/or the contracting party is of this opinion? This would, in our opinion, be very problematic as this would give the parties a possibility to get out of an unprofitable contract, in a manner not consistent with the procurement rules. Or should it be under national or EU/EEA jurisdiction to conclude on a breach? Another question is whether any breach of procurement law activates the right to cancel the contract? And what is the relation to the new rules in the Remedies Directives on ineffectiveness?

Having the above in mind, Norway does not agree that the EU public procurement Directives should require EU/EEA Member States to provide in national law for a right to cancel contracts awarded in breach of public procurement law.

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?

The Norwegian Government is of the opinion that there may be true value added by subcontracting. Subcontracting should therefore not be excluded. However, the contracting authority should be allowed to decline *undesirable* and *unnecessary* subcontracting from the suppliers to subcontractors of core services in the contract. It is reported examples of suppliers winning the contract that is cutting costs by outsourcing the core tasks to a great number of small subcontractors at margins which are not possible to achieve within the law. In some cases the successful tenderer is hardly executing any part of the contract himself. Even though the contracting authority may supervise or control that the subcontractors are following

e.g. tax law and labour law, these control tasks are in practice overwhelming due to the great number of subcontractors. Efficient control is therefore not always realistic. Limiting the possibility of subcontracting could be an efficient way of fighting unlawful business practice and ensuring fair competition. It could for example be made clear in the directives that the contracting authority may limit subcontracting of core business to a limited numbers of subcontractors. This should be left to the discretion of the contracting authority.

3. A more accessible European procurement market

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

One of the greatest challenges for SMEs to participate in public competitive bidding is the administrative burden of the procedures. The Norwegian opinion is that the regulations in general should be simplified, and that this also will accommodate the participation of SMEs. This will inevitably stimulate competition. In addition to lower costs on both the procurer and the bidders' side to prepare and execute the tender, enhanced competition will also lower the expected costs of the procurement.

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

Obligatory regulations will make the public procurements even more complex and difficult to carry out, and may not always lead to the best procurement. The contracting authorities must have the freedom to make these decisions on their own on a case by case basis, taking into account the different consequences of subdivision into lots in order to find the best possible solution for the procurement in question. However, we believe that there is a need for more guidance, and best practice sharing and benchmarking would be useful in this respect.

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

Yes, Norway is in favour of such a solution, cf. question 23.

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

Generally, the Norwegian Government does not find self-declarations sufficiently reliable in all circumstances, and we do not believe them to be a valuable replacement for certificates. To reduce administrative burdens, one could rather establish registries and simple routines for obtaining and making certificates available.

It is also important to focus on public procurement practices. There are reasons to believe that selection and/or award criteria often are set at a higher level than actually needed, leading to an unnecessary administrative burden for both economic operators and contracting authorities.

The Norwegian Government is very much in favour of a solution where submission and verification of evidence is only required by short-listed candidates / the winning bidder (question 49). In such a solution, self-declarations could be obtained from all bidders to ensure the correct understanding of the certificates required if the economic operator is selected/awarded the contract.

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

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

51, 52: Compulsory regulations will make public procurement even more complex and difficult to carry out, and may not always lead to the best procurement. The contracting authorities must have the freedom to make these decisions on their own in accordance with the procurement in question, cf. question 47.

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?

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?

53, 54: Designing an efficient public procurement policy will depend on the characteristics of the particular market, i.e. the public procurement share in the

specific market. Moreover, a specific procurement policy, like aggregating demand, can have negative long term effects on the market structure and competition.

Enforcing competition law implies that mergers with a negative impact on competition can be blocked. In addition, abuse of dominance and collusion is prohibited. Competition authorities have limited possibilities to affect market structures once they have materialized.

That being said, a carefully designed public procurement can have positive effects on market structure and competition, for instance by designing the tender in a way that allows SMEs to compete for the tender, or parts of the tender, or choosing contract lengths which are a good compromise between incentives and investment recoupment for the winning bidder and allowing SMEs a new opportunity to compete before they are forced to leave the market.

However, it is our understanding that the current procurement rules already, to some extent, allow this discretion in the design of the tender. The challenge is more on the procuring entity's side, i.e. to design the tender relative to the characteristics of the market, being aware of the long term effects of the choices made.

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?

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?

58, 59: The Norwegian Government is of the opinion that the scope of the current safeguards probably is not the main problem related to the fight against anti-competitive behaviour in tenders. However, it is important to raise public procurers' attention to this important issue. The Norwegian competition authority (the NCA) has in that regard published guidelines to fight bid rigging, based on corresponding OECD guidelines. These guidelines have been distributed widely to public procurers, together with a wall poster presenting the most important indicators the procurer must look for when assessing submitted tenders.

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

The attribution of exclusive rights normally tend to impede competition in well-functioning markets. However, the EU Competition law aiming to promote fair and effective rivalry between enterprises, does allow anti-competitive agreements in circumstances where the arising efficiency gains exceed the economic loss, to the

benefit of consumers. In the same way, public authorities should not organize their supplies of goods and services in ways involving exclusive rights or other lawful anti-competitive arrangements, unless the gains from doing so exceed the economic damage due to the lessening of competition.

61. If so, what instruments would you suggest in order to mitigate such risks / ensure fair competition? Do you think that the EU procurement rules should allow the award of contracts without procurement 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 all procurement markets are well-functioning, nor are all markets efficient. Public authorities must therefore be granted sufficient flexibility to organize their supplies of goods and services by applying organizational arrangements that may even involve exclusivity. Especially in circumstances where markets are not well-functioning, or even missing, in the first place.

In many circumstances, exclusive rights cannot be allocated by means of competitive procedures. Thus, the Norwegian Government cannot recommend that the EU procurement rules should allow the award of contracts without procurement procedures on the basis of exclusive rights only on the condition that the exclusive rights in question themselves have been awarded in a transparent, competitive procedure.

Furthermore, Norway also holds the view that publicly owned enterprises established because of market failure or due to other reasons, should always be allowed to compete for private procurement contracts whenever that is feasible. Anti-competitive behaviour such as cross-subsidization is not lawful according to the EU competition law. Furthermore, public authorities must be careful at all times not to inflict State aid rules forbidding public aid that tends to thwart competition to the benefit of those enterprises receiving public support.

4. Strategic use of public procurement in response to new challenges

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

Taking other policy objectives into account should be allowed within the frame of the public procurement rules. The rules on technical specifications should make this clear. In addition, more guidelines and best practice would be welcome.

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?

Performance and functional requirements are better than strict technical requirements as regard to innovative environmental solutions. This will be neutral as regard to technology and also enable the suppliers to offer their best solution. However, while the technical requirements are relatively easy to design in a transparent way, functional requirements might be difficult to formulate to meet the transparency requirement and when comparing the bids against each other. This might lead to more need for using the negotiated procedure. The contracting authority requires great competence in order to express themselves transparently when specifying functional requirements. Making it mandatory under certain conditions would probably not result in simplification, but rather in more complicated rules which would necessarily require exemptions that would be difficult to administer in practice.

64. By way of example, do you think that contracting authorities make sufficient use of the possibilities offered under Article 23 of Directive 2004/18/EC concerning accessibility[80] criteria for persons with disabilities or design for all users? If not, what needs to be done?

According to Norwegian law, contracting authorities have to take into account design for all users (universal design) when they are planning the procurement. It is the Norwegian Government's view that the present EU rules are leaving sufficient and necessary room for contracting authorities to establish accessibility criteria for persons with disabilities or design for all users.

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

Both competitive dialogue and design contests are not only suitable for taking into account environmental, social, accessibility and innovation policies, but will also usually provide the procurer with better products or services. These procedures allow for innovative solutions. Even if there is a possibility in today's framework to use performance or functional requirements, there also has to be flexible procedures. The possibility to communicate with the supplier will ensure comparable tenders and enable procurers to benefit from the supplier's specific competence in the area.

In order to reach the goals in the Europe 2020-strategy, the use of more flexible procurement procedures is an important step.

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?

In general, Norway is in favour of more flexible procedures. For the purpose of environment, social, innovation and accessibility policies, it would be better to increase the use of performance or functional requirements instead of stricter and more detailed technical requirements.

Procurers should also be motivated to increase the use of market researches and to announce broadly their future needs well in advance of a procurement process to make possible suppliers aware of unfulfilled needs. TED should be used for early announcements of future needs, e.g. by publishing a Prior Information Notice, requests for proposals, general information, etc.

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?

Restriction to local or regional suppliers is ordinarily not legitimate. However, there are examples of situations where such restrictions could be justified by legitimate and objective reasons. One example could be public local cultural events. These will, to some extent, be required to promote the local area, for example through promotion of locally produced food that is also being served at the event. However, it will not be appropriate to make a geographical restriction of competition such as the procurement of planning services for the same cultural event (e.g. from an event company).

68. Do you think that allowing the use of 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?

The opportunity to communicate with suppliers will help in taking better account of policy-related considerations. This could be done before the competition is published, but the suppliers seem to be reticent about disclosing suggestions and solutions before they are in an actual negotiating position. Therefore we would recommend the negotiated procedure as an optional procedure.

One can mitigate the potential risk factors by introducing procedural requirements to the negotiation by requiring written documentation (report, protocol etc) from oral/physical meetings.

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

Technical competence such as: Having implemented an environmental management system, having analysed and documented the most significant environmental aspects of production/supply of relevant goods and services, having evaluated alternative measures for reducing these loads. Further, having a corporate social responsibility management programme which can be described and accompanied with an action plan covering relevant social issues through the contract period. The programme could be based on for example a social risk analysis and is an option for those suppliers which do not have formal systems.

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 To eliminate the criterion of the lowest price only:

No, we do not share that opinion. It might be useful to have award criteria regarding environmental and social aspects, but these aspects can also be incorporated in the technical specifications or in the terms of the contract (requirements) which will not be subject for evaluation. Either the tender meets the demand or it doesn't and must be rejected. For some purchases, where few suppliers fulfil the environmental, innovative or social requirements or the procurer wants to recompense extra environmental friendly tenders, it would however be useful to use these requirements as award criteria and award these tenders additional scores.

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

No, limiting the use of the price criterion and weighting of price against other criteria is a policy decision and should be decided by the contracting authority. In any case, such rules would be complicated to define and apply. It can be argued that competition is not fair where suppliers with low price due to lack of social and environmental concern will successfully outbid suppliers emphasising a sustainable solution. A way to avoid this is to specify environmental and social concern as requirements.

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 made it possible to both pursue other policy objectives more effectively and guarantee a level playing field and fair competition between European undertakings?

The term "economically most advantageous" is confusing since it is not entirely clear to what extent it is possible to include all externalities that have been given political priority, such as social or innovative criteria. This could, first of all, be more clearly stated on the list of possible subcriteria to the most economically advantageous tender in Article 53 of the directive. Furthermore, one could consider introducing a third criterion, such as "Most advantageous offer (for the society as a whole)" or "most sustainable offer".

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?

No, this decision should be made by the contracting authority. We believe that, in order to ensure sustainable products, and to communicate its importance, it is important to be able to prioritise sustainability over price in cases with overall policy aims regarding sustainability and the specification and need still can be met. This same principle applies for policies for responsibly sourced products. If this is not possible, it may hinder procuring organisations from meeting policy targets.

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?

For environmental aspects, it is understood, but many procurers are wary of the challenge of quantitative evaluation and complex weighting algorithms connected to this. Usage could therefore be improved with more standardisation of environmental data and evaluation tools. Social criteria are rarely used in the award phase (usually qualification and contract clauses/follow up).

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?

The Norwegian procurement regulations already require that a life cycle cost (LCC) approach should be used during the planning of a procurement, and we see that LCC is a trend that is strengthening and that opens for integrating environmental

considerations into the decision making. A major challenge is doing it in practise: tools and data from bidders are difficult to obtain and are uncertain. A standard methodology and standard datasets would certainly help progress in this area but some of the most important product areas (like building and construction) are difficult to standardise at the European level due to significant regional/national differences.

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.

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?

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?

74 -76: Contract performance clauses seem to be an 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. In the Norwegian Government's view, it should be made clear on EU level that contracting authorities have the opportunity to set as a condition that the workers performing work under the contract are subject to employment and labour conditions that are not inferior to those following from collective agreements regulating the area of work, or conditions that are normal at the place of work. This should be the case, regardless of whether the state has a statutory minimum wage or has made collective agreements generally applicable. This would make it possible for all EU/EEA states to fulfil the obligations stemming from the ILO Labour Clauses (Public Contracts) Convention no. 94, without forcing them to make substantial changes to their systems of wage regulations, which could pose a serious threat to the cooperation between the social partners and between the governments and the social partners.

Examples of environmental performance clauses which may be imposed by the contracting authority if relevant could be:

- Ensuring that the information provided in the bid can be verified and defining action to be taken in case of default,
- Ensuring that replacement goods satisfy the original environmental requirements
- Guarantee, service and spare parts in many years in order to ensure long life

- Regulating how changes to more eco-effective products and solutions can take place during the execution of the contract by for example improving products or training staff
- Handling of waste – packaging and extra goods that were not ordered and, at the end of life, re-use/disposal of goods
- Monitoring and reporting on environmental and energy performance of delivered goods and services and defining what should happen in case of discrepancies between delivered and offered goods and services.

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?

Standardized documentation would be helpful for the contracting authorities, but there is a great risk that standardization will counteract innovation and the suppliers' best solution.

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?

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?

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?

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?

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)?

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.)?

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)?

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?

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)?

79 -82: The Norwegian Government is not in favour of softening the link with the subject-matter of the contract on any of the successive stages of the procurement process. The main objective behind the rules on public procurement is high quality goods and services, giving best value for taxpayers' money. The goal is that contracting authorities who are following the obligations in the directives should behave more like private purchasers. Other policy objectives, such as for example the production process related to environmental, energy-related and social considerations, certainly also have a place in public procurement and may also positively affect the quality and policy of the products purchased. However, if the link to the subject-matter is weakened or even dropped, public procurement will end up being used as means to achieve other policy goals that can more efficiently be met by other means. Such a strategy may limit the competition for public contracts and lead to higher prices and/or lower quality goods and services.

The Norwegian Government also agrees that the link to the subject matter ensures cost efficient purchases and a measure of consistency between EU public procurement policy and the rules in the field of State aid, as it ensures that no undue economic advantage is conferred on economic operators through the award of public contracts. Loosening the link with the subject matter could therefore lead to a risk of more breaches of state aid rules.

However, there is some legal uncertainty if the condition that requirements imposed by the contracting authority must be linked to the subject matter of the contract, limits the possibilities for taking policies like emissions and energy use during the production process into account. For procurement of services, criteria relating to the production process can be set as contract clauses. But it is more challenging for the procurement of goods, since e.g. energy use in the production process does not per se change the inherent characteristics of the product.

The procurement directives must allow purchasers to procure ethical produced and environmental friendly products (for example by facilitating the possibility of taking environmental management systems into account). The Norwegian Government believes that there should be room for the contracting authorities to prefer suppliers

that take an effort in producing environmentally friendly goods and services. To take account of the production process and value chain, it will also be necessary to make it possible to take full responsibility for the specified good: this would allow the procurement process to consider for example working conditions at the places of manufacture and the communities affected the production process – for example through emissions or working conditions for the employees.

The Norwegian Government is of the opinion that the Commission should have a closer look upon if the present directives are too narrow when it comes to the possibility of taking into account the production process. We would also find it helpful with further guidance/interpretation from the Commission on this issue, e.g. in the form of an interpretative communication.

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.

The main objective behind the rules on public procurement is best value for taxpayers' money. The goal is that contracting authorities who follow the obligations in the directives should behave more like private purchasers.

However, other policy objectives, such as for example environmental, energy-related and social considerations, also have a place in public procurement. The Norwegian Government believes it is of great importance that the EU makes sustainable procurement possible. The current directives enable contracting authorities to take such policy objectives into account, but it is, with a few exceptions, not mandatory. As mentioned in the green paper there are a few legislative acts that have introduced obligations on "what to buy", for example the Energy Star Regulation (EC) No 106/2008 and Directive 2009/33/EC on promotion of clean and energy-efficient vehicles.

The Norwegian Government sees several challenges and disadvantages regarding the introduction of obligations on "what to buy" on EU level.

Firstly, the current directives are in many respects quite complex and causing great administrative burden for public authorities. Due to this complexity and an unclear legal situation, contracting authorities sometimes end up breaching the rules despite a diligent process and good faith.

An introduction of mandatory requirements on "what to buy" will make the EU rules on public procurement even more complex. This situation, in combination with

stricter enforcement rules, may cause contracting authorities to focus less on obtaining better and more cost efficient contracts.

The Norwegian Government is afraid that centrally imposed obligations on "what to buy" will create additional burdens for contracting authorities and economic operators, such as an increased workload to verify that undertakings meet the requirements.

Last year, the consultancy firm GHK made the study *Evaluation of SME's access to public procurement markets*[1] on behalf of DG Enterprise and Industry. According to the study, increasingly complex EU rules will make it more difficult for SME's to get access to public contracts. It is stated in the study that the costs of the complexity of the public procurement process and the legislative framework has resulted in fewer SME's trying to tender for public contracts.

It is important to be aware that introducing new requirements in public procurement can lead to higher barriers for firms to enter markets, reduce the number of competing firms and may ultimately lead to higher prices for the procuring entity. Thus the effect on competition must be taken into account when considering introducing further obligations on "what to buy".

It is not possible to promote all kinds of policy objectives at the same time, and some policy objectives may even be in conflict with each other. SME's might for example not have adequate knowledge about the environmental impact of the technologies and materials they use. If this becomes a mandatory public procurement requirement this may lower SME's chances for winning public tenders.

No procurements are equal. A specific policy objective is not necessarily relevant for all public procurements. Imposing mandatory obligations for all procurements is not an accurate instrument for the promotion of a certain political objective.

Norway believes that all EU/EEA Member State should have the freedom to decide by themselves which policy objectives they want to promote. This should not be imposed from the EU. The needs and political priorities in each EU/EEA state may differ. Salaries and labour conditions are an example where the EU/EEA Member States should have room for manoeuvre. Norway prioritize work against social dumping, and this is a field were Norway has found it necessary to adopt binding requirements.

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[1] Available here: http://ec.europa.eu/enterprise/policies/sme/business-environment/files/smes_access_to_public_procurement_final_report_2010_en.pdf

Public procurement is not always the right instrument for promotion of other policy objectives. In some cases the promotion of other policy objectives may conflict with the fundamental principle of efficient public spending. The Norwegian Government is of the opinion that imposing further mandatory obligations on "what to buy" in public procurement is not a good way to achieve other policy objectives.

However, if obligations on "what to buy" are introduced in any case, it is the Norwegian Government's view that "what to buy" requirements are most appropriate for goods that are homogeneous over the whole EU/EEA marked. The obligations should also be product specific. Some products are suitable for standardisation at EU level, while others will be more natural to coordinate at a national (or regional level).

Promotion of other policy objectives could be achieved by other means instead of mandatory requirements, for example through information, guidance and sharing of best practice. In Norway, the Agency for Public Management and eGovernment (Difi) has a key role in this regard. Difi's Department for Public Procurement aims i.a. to ensure sustainable and social responsible procurement, e.g. by providing tools for green and socially responsible procurement, developing and maintaining relevant guidance and information on the national internet site for public procurement, as well as developing and distributing a national internet-based reporting system for environmental management for all national government institutions.

Difi has also published environmental criteria for 20 products and service groups with great success. This seems to be a useful instrument for purchasers on how to take secondary policies into account in the procurement.

According to the Norwegian Procurement Act § 6 contracting authorities have a general obligation to take life-cycle costs (LCC), design for all users and consequences for the environment into account when they are planning the procurement, as mentioned in the answer under question 73. This general obligation gives the contracting authorities room for manoeuvre in regard to how such considerations should be taken into account in the procurement. It is the view of the Norwegian Government that this is a better alternative compared to more special and detailed obligations on "what to buy". Norway therefore supports that the EU introduces a similar provision in the procurement directives.

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?

As mentioned under question 83 the Norwegian Government's view is that further obligations on "what to buy" should be avoided. However, if further obligations on "what to buy" are introduced it is Norway's view that such obligations should be enshrined in policy specific legislation rather than in the general EU public procurements legislation.

Specific "what to buy" obligations are not necessarily relevant for all kinds of procurements. To gather together all "what to buy" obligations in the general EU procedure legislation will make the general procurement legislation very extensive. We believe that the distinction between "how to buy" legislation and "what to buy" legislation makes the regulations more easy-to-understand for contracting authorities and suppliers. The Norwegian Government believes it is most suitable to continue to distinguish between EU's general public procurement legislation and more specific "what to buy" legislation.

However, the Norwegian Government emphasize that both the general EU procurement legislation and obligations on "what to buy" must be implemented in a way that is easy to understand. Further obligations on "what to buy" will, as mentioned above, make the procurement legislation more complex. A measure that can help procurement officers and suppliers to navigate in the EU legislation is a EU webpage with updated information on relevant EU obligations on "what to buy" in other directives and regulations.

The Norwegian Government also emphasize that the Commission should improve the process of consulting and informing the Advisory Committee on public contracts regarding other EU-initiatives relevant for procuring officers. The coordination on EU level on the new "what to buy" initiatives has so far not been satisfactory.

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?

The Norwegian Government believes that any obligations on "what to buy" should be imposed at national level rather than at EU level. As mentioned under question 83 the needs and political priorities in each EU/EEA state may differ. Norway believes that all EU/EEA Member States should have the freedom to decide by themselves which policy objectives they want to promote. This should not be imposed on EU level.

However, if each EU/EEA member state develop its own standards for how to measure energy efficiency, CO^2 emissions etc. this will complicate the procurement process and could potentially limit cross-border trade. To avoid fragmentation of the internal marked the EU should develop standards for how for such effects shall be

measured, but it should be up to each EU/EEA member state to decide if any obligations shall be introduced on the national level and how strict such obligations shall be.

Another proposal to avoid potential fragmentation on the internal marked is that the EU continues to develop voluntary purchasing criteria that can be used by the EU/EEA Member States.

If obligations on "what to buy" are introduced in any case it is the Norwegian Government's view that "what to buy" requirements are most appropriate for goods that are homogeneous over the whole EU/EEA marked. The obligations should also be product specific. Some products are suitable for standardisation at EU level, while others will be more natural to coordinate at a national (or regional level).

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?

The Norwegian Government is of the view that further obligations on "what to buy" should be avoided. However, it such obligations are imposed it is Norway's view that the obligations should be generally formulated and that the EU/EEA member states should have extensive freedom in how the obligations should be implemented.

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

As mentioned under question 83, procurements are different both in type and size. A specific policy objective is not necessarily relevant for all public procurements. The contracting authorities are in many cases the ones which are best suited to consider which considerations are most relevant for the specific procurement. It is a risk that mandatory requirements for all kinds of procurements will not be sufficiently accurate. The Norwegian Government therefore believes that the contracting authorities should have a large room for manoeuvre when making purchasing decisions.

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

The Norwegian Government is of the view that further obligations on "what to buy" should be avoided. If mandatory requirements are imposed they should be set at the minimum level so that the individual contracting authorities could set more ambitious requirements.

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)?

It is the primary view of the Norwegian Government that further obligations on "what to buy" should be avoided. If obligations are to be introduced, one should aim for technology neutrality and use criteria based on performance so as to open for new technologies. As better technologies come on the market the criteria should be strengthened to give the technology a competitive advantage.

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?

As mentioned under question 83, it is important to be aware that introducing new requirements in public procurement can lead to higher barriers for firms to enter markets and may lead to higher prices for the procuring entity. Before any further mandatory criteria or mandatory targets are introduced, the effects on competition must carefully be taken into account.

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?

Centrally imposed obligations on "what to buy" would create an additional administrative burden for contracting authorities and economic operators, such as an increased workload to verify that undertakings meet the requirements.

SME's often have less knowledge and experience with tender procedures and relevant laws. Additional administrative burdens will accordingly affect SME's harder than bigger firms. Studies show that the administrative burdens in public procurement discourage SME's from responding to tenders.

As mentioned under question 83, Norway considers the increasing of administrative burdens, especially for SME's, as one of the most important objections against an introduction of mandatory requirements on "what to buy".

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

The Norwegian Government is of the opinion that imposing further mandatory obligations on "what to buy" in public procurement is not a good way to achieve other policy objectives. Promotion of other policy objectives could be achieved by other means instead, for example through information, guidance and sharing of best practice.

As mentioned above, Norway has good experience with the development of purchasing criteria. The Norwegian Agency for Public Management and eGovernment (Difi) has published environmental criteria for 20 products and service groups with great success. This seems to be a useful instrument for purchasers on how to take secondary policies into account in the procurement.

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?

Norway places great importance on public procurement as a tool for innovation and, in our opinion, there is an unrealized potential for more innovative public procurement. Given the importance of innovation to the development of the European economy, there is an obvious need to further promote and stimulate innovation through public procurement. Nonetheless, we do not currently see a need for changing the EU/EEA procurement framework as such. A number of other policy issues – such as implementing procurement as a strategic tool in public bodies – seem to be more efficient approaches.

In our view, the pre-commercial procurement approach is an efficient way of stimulating innovation and improving quality of public services. However, we believe that there is a need for more guidance, and best practice sharing and benchmarking would be useful in this respect. There might also be a need for a clear and transparent legal framework for the variety of pre-commercial procurement activities already in place, or being developed, in EU-27. Relation to State Aid legislation is one of the issues which might be clarified.

As "public procurement for innovation" (PPI) and "pre commercial procurement" (PCP) often involves more risk and requires more resources, it is very important to focus on the possible direct benefits to the procurer (better products, services or solutions; more efficient use of resources). The link between the organization's overall goals and the procurement strategy therefore has to be strengthened.

Innovation is a fairly new perspective to many public procurers, and both carrots and sticks are needed to ensure acceleration of the development in this field. Appropriate carrots would be financial support or tax incentives, while sticks could be direct requirements from Ministries in their governing (dialogue) with subordinate agencies, to engage in a certain number of innovative activities

including procurements.

Furthermore, the management of underlying agencies has to be evaluated on the basis of innovation and there has to be a long-term focus within the organization, so that there is sufficient time to consider innovation in the planning phase of procurements.

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

There is a difficult balance between the need for the suppliers to protect their ideas and the need for the procurers to ensure an open, competitive process. However, we think that even though some suppliers will reject to participate in public, innovative processes, many suppliers will also appreciate the possibility to interact with public procurers through competitive dialogue, and keeping the possibility open is important. To further motivate suppliers to participate in innovative public procurement we suggest expanding the use of negotiated procedures. Alternatively to change the requirements for competitive dialogue so that it opens up for negotiations also after the close of the competition.

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?

If the public procurer shares the risk with the possible supplier, it will make the barrier lower for the possible supplier to participate. Certain forms of public support schemes may be helpful to reduce the supplier's risk.

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

PCP is very important to stimulating innovation. We strongly support further best practice sharing and benchmarking of R&D procurement practices used across Member States to facilitate the wider usage of PCP. To encourage SMEs, there should be financial incentives and professional help to facilitate the process.

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

SMEs typically have restricted resources, both financially and professionally. They are also very vulnerable to time-consuming processes. A financial support scheme to help undertake financial risk combined with professional help, typically provided from a national innovation agency, would be of great importance.

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?

Directors of public agencies need to be measured on their ability to search for innovative solutions to fulfil their objectives. One should be able to move the focus from strictly economic performance, to more quality-oriented performance. To monitor innovative public procurement, adequate data would typically be the number of R&D-procurements per year, the percentage of the total procurement budget spent on innovative procurement and on R&D, the number of contracts with public support, etc.

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

Fundamental rights are at stake as far as social services are concerned, and the public procurement principles are not always well designed for the specificities of these services. When procuring social services, it is challenging to impose good and relevant quality requirements adapted to the specific service. Quality in these services is not always easy to observe and measure, but depends on a certain degree of discretion depending of the individual needs of the users/patients. We are also often dealing with vulnerable users/patients that are in need of stability in their treatment.

Sometimes following the logic of such an internal market approach causes unfortunate results, including lack of stability for the users of the services or inadequate quality requirements. At the same time, there are great differences between various social services and it is difficult to find one solution that fits all. Norway is therefore of the opinion that flexibility should be sought as regards procurement of social services in order to make it possible to take these specificities of the services into account in an appropriate manner on a case by case basis. Consequently, deregulation is a better tool than more detailed regulations.

Norway is of the opinion that reserving contracts for non-profit organizations is already allowed without having to make any further amendments to the directives.

Reference is made to the ECJ judgment *Sodemare*, case C-70/95. Non-profit organizations differ from commercial companies in ways that may influence the quality of the services that they provide. They have idealistic goals for their activities, not profit-making. Consequently, they have fewer incentives to cut costs related to the quality of the services or workers rights.

5. Ensuring sound procedures

General comments: In well-functioning and transparent procurement markets, contractors will not gain much by initiating lobbyism. Tender documents clearly underline both selection and award criteria that any outside third party may scrutinize. So whenever competition becomes intense, firms may alternatively try to increase their probabilities to win public contracts by engaging themselves into social dumping, corruption, or illegal anticompetitive behavior such as cartelization, bid rigging, market sharing, and other forms of prohibited collusive business behavior. It is important to be aware of the fact that many recently detected cartels operated in different countries and several sectors at the same time. More important, not only did the cartel members infringe competition and public procurement regulations, but also tax payment rules, labor market regulations, and so forth. Thus, in order to strengthen the fight against economic criminality, competition and public procurement authorities may have to cooperate on a larger scale than today, both nationally and internationally. Furthermore, competition authorities should also cooperate more extensively with authorities responsible for tax rules, labor market regulations, and investigation and prosecution of economic crime. Both OECD and EU could play a vital role when it comes to establishing and coordinating such cooperative activities aiming to improve the future enforcement of competition law, state aid regulations, public procurement rules as well as other laws in a mutually reinforcing manner.

EU is now in the middle of undertaking a comprehensive evaluation of the impact and cost-effectiveness of EU public procurement policy. The paper states that this evaluation will gather market-based evidence on the functioning of current procurement legislation with the view to provide empirical insight into the areas that need improvement. Hopefully, these analyses will also shed some light on how to improve and reinforce the enforcement of the rules pertaining to antitrust, state aid, and public procurement that together constitute the core elements of competition policies.

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.)?

In Norway we have requirements as to impartiality in the regulations of public procurement.

Pursuant to the Norwegian procurement regulation § 3-7, cf. the Administration Act ("forvaltningsloven") §§ 6 -10 and the Act Concerning Municipalities ("kommuneloven") § 40 nr. 3, a public official shall be disqualified from preparing the basis for a decision or from making any decision in an administrative case under certain circumstances. Such circumstances are:

a) if he himself is a party to the case;
b) if he is related by blood or by marriage to a party in direct line of ascent or descent, or collaterally as close as a sibling;

c) if he is or has been married or is engaged to a party, or is the foster parent or foster child of a party;

d) if he is the guardian or agent of a party to the case or has been the guardian or agent of a party after the case began;

e) if he is the head of, or holds a senior position in, or is a member of the executive board or the corporate assembly of a company which is a party to the case and which is not wholly owned by the State or a municipality, or an association, a savings bank or foundation that is a party to the case.

The public official is similarly disqualified if there are any other special circumstances which are apt to impair confidence in his impartiality; due regard shall inter alia be paid to whether the decision in the case may entail any special advantage, loss or inconvenience for him personally or for anyone with whom he has a close personal association. Due regard shall also be paid to whether any objection to the official's impartiality has been raised by one of the parties.

The Norwegian Government supports that the EU introduces similar impartiality provisions in the procurements directives to prevent conflicts of interest.

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?

There will always be a certain risk of corruption and favouritism in public procurement. This is an important challenge that needs to be addressed by all EU/EEA countries. However, the different Member States face different challenges in this area and a "one size fits all" solution might be difficult to find.

Furthermore, introducing further regulations to combat corruption and favouritism may easily result in additional administrative burdens for both contracting authorities and suppliers. Thus, the EU rules on public procurements may not

necessarily be the right instrument to fight corruption.

On this background, it is the view of the Norwegian Government that further measures to combat corruption and favouritism in public procurement are better solved at a national level instead of an EU level.

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

The contracting authorities have a certain margin of discretion in the procurement process, in particular in the award stage, and accordingly there is a risk of favouritism and corruption.

In procedures without publication – legal or illegal direct awards – the risk for integrity is also particularly critical, due to the fact that little or no transparency is provided.

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)?

Providing transparency is essential in the fight against corruption. In Norway the contracting authorities are required to keep a protocol throughout the whole procurement process. The protocol shall contain information on all substantial steps of the procedure and important decisions, including on the chosen procedures, rejection of candidates and tenderers, award of contracts etc. The obligation apply to procurements above NOK 100 000 (about 13 000 Euro). Templates for procurement protocols are provided as an annex to the procurement regulation, but these templates are optional to use. According to the Norwegian Freedom of Information Act, protocols are public from the award decision has been taken, so that any person may apply for access to the protocol.

The obligation to keep a protocol contributes to the transparency and verifiability of the procurement process and thus to combating corruption. The Norwegian Government supports that the EU introduces similar provisions in the procurement directives to prevent conflicts of interest.

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

As mentioned above, the different EU/EEA Member States have different challenges and it is difficult to find a "one size fits all" solution to be put in place at

EU level. It is therefore the view of the Norwegian Government that any additional instruments to tackle organised crime should be implemented voluntary by the EU/EEA Member States.

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?

The possibility of excluding economic operators from public procurement on the grounds of corruption etc. is an effective measure in the fight against corruption. However, the impact of the provision on exclusion is substantial and gives rise to a number of difficulties.

Article 45 affects economic operators' ability to supply to the public sector for a certain amount of time. This will again affect the turnover and potentially a lot of jobs. In other words, the impact on economic operators of exclusion is severe, and it would be of detriment to their competitiveness if the provision is practiced more strictly in some Member States than in others.

Because of this severe impact, there is a strong need for legal certainty. The economic operators should be able to foresee their legal status, and contracting authorities should have a clear and evident set of rules to relate to. This is not the case today. Furthermore, the case-law and other sources of law are scarce if not non-existent in this field, both at Norwegian and European level.

When dealing with a possible exclusion of an economic operator, however, it is also important that contracting authorities take into consideration the proportionality of the measure. In this regard, a number of questions arise, e.g. how severe a crime has been committed? Has the crime been committed by leading personnel/as part of the companies "policy"/by subordinate personnel? To what extent has the economic operator remedied the situation leading to the conviction? And ultimately, what should be the consequence: Is it no longer possible to exclude economic operators from participation in public procurement, when certain conditions are met? Or does the obligation to exclude become a possibility to exclude? And how does such factors affect the period of time in which an economic operator should be excluded (the duration of the exclusion)?

The legal uncertainty of the scope and interpretation of Article 45 does not only affect economic operators, but also contracting authorities deciding on whether to exclude an economic operator or not. If an economic operator is erroneously excluded, the contracting authority is liable for damages. That could also be the case, when an economic operator should have been excluded, but was not.

In the view of the Norwegian Government, it is essential to deal with these legal uncertainties, and we would find it very helpful with further guidance/interpretation from the Commission, e.g. in the form of an interpretative communication. The Commission should also make further clarifications in article 45, e.g. on the proportionality evaluation and the effect of self- cleaning measures.

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

The extent to which it is possible for contracting authorities to take into consideration "self-cleaning measures" is unclear. Furthermore, allowing for self-cleaning in some Member States and not in others could render the equal treatment of economic operators impossible and could ultimately lead to the distortion of competition. It is therefore the view of the Norwegian Government that "self-cleaning measures" should be expressly addressed in Article 45. Such regulation would ensure legal certainty for economic operators and contracting authorities alike.

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

Criminal law is not a part of the EEA agreement and thus this question does not seem to be EEA relevant. The Norwegian Government therefore refrains from commenting.

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?

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

109-110: Possible advantages of certain bidders might render the equal treatment of economic operators impossible, and should therefore be dealt with appropriately. In the view of the Norwegian Government this already follows from the principle of equal treatment. Furthermore, it follows from the preamble of directive 2004/18/EC point 8, that technical dialogue may not be used in such a manner that has the effect of precluding competition.

Whether such an unreasonable advantage exists, and how such an advantage could be remedied, if possible, must be determined on a case-by-case basis. No two cases are alike, and a "one-size fits all" type of regulation does not seem feasible. By referring simply to the principle of equal treatment, on the other hand, contracting

authorities are able to take into account all relevant aspects. The Norwegian Government is therefore of the opinion that further measures at EU level are not necessary.

Yours sincerely,

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