



# Position Paper

**European Commission public consultation on  
the modernisation of EU public procurement  
policy**

**“Towards a more efficient European  
Procurement Market”**

**ANEC response**

**April 2011**

**ANEC-DFA-2011-G-016**

## **Executive Summary**

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With annual purchases of over 2 Trillion Euros, the public sector is the single biggest consumer market<sup>1</sup>. The aim of the Public Procurement Directives<sup>2</sup> is to help authorities buy "best value for money", that is to use public money to best fit the needs of the community. Therefore, in ANEC's opinion, it is not only the price which is important but also the social and green considerations. Social considerations can be combined with green considerations in an integrated approach to sustainability in public procurement<sup>3</sup>. This is why ANEC is actively contributing to the execution of standardization mandates M/376 on accessibility of ICT goods and services in public procurement and M/420 on access to the built environment in public procurement.

ANEC welcomes the present public consultation as we believe that the current public procurement framework should integrate other policies in order to allow procurers to make better use of public procurement in support of societal goals.

We contribute to the public consultation on how to modernise the present Public Procurement rules by focusing on the aspects which have more direct relevance from a consumer point of view (Section 4 "Strategic Use of Public Procurement in response of new challenges" of the European Commission Green Paper "Towards a more efficient European Procurement Market", questions 62-90). We will in particular address sections 4.1 and 4.2 "How and What to buy in order to achieve we Europe 2020 objectives".

### **Fostering accessibility products and services**

According to the Public Procurement Directives, accessibility requirements can be integrated into the technical specifications of contract documentation for public bids. The use of technical specifications containing accessibility criteria/standards is

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<sup>1</sup> According to Mario Monti's report to the President of the European Commission, José Manuel Barroso 'A new strategy for the Single Market', May 2010: "*In 2008, EU public procurement amounted to around 2155 billion Euros, equivalent to 17-18% of EU GDP. Out of this, public procurement tenders worth approximately 389 billion Euros were covered by the rules set out in the EU Directives on public procurement.*"

<sup>2</sup> Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (hereafter the 'Directive 2004/17/EC'); Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (hereafter the 'Directive 2004/18/EC').

<sup>3</sup> Public consultation on the Single Market Act, ANEC response (ANEC-SG-2011-G-007)

possible in all stages of the tender from the issuing to the award and performance of the contract<sup>4</sup>.

ANEC calls for the use of public procurement to foster the accessibility of public buildings as well as ICT product and services. The US experience shows that the mandatory use of section 508 has proven very effective at driving the procurement of accessible ICT equipment and developing the market, and it is widely recognised that public procurement has the potential to stimulate innovation and encourage organisations and individuals to meet certain requirements<sup>5</sup>.

ANEC also calls to strengthen existing public procurement rules and make accessibility requirements mandatory in public tendering by making accessibility clauses binding in the planning of public tenders<sup>6</sup>. Furthermore, we believe that the role of European Standards in defining accessibility requirements in public procurement contracts offers a vital opportunity for mainstreaming accessibility.

### **"Greening" products and services**

At present many countries implement national Green Public Procurement (GPP) action plans<sup>7</sup>. They define targets in terms of percentages - how many contracts are based on green criteria - and, of course, in terms of performance to be achieved. The trouble is that there are no real obligations for minimum percentages to be achieved by Member States as the Commission has defined 50% as voluntary target by 2010. ANEC also believes that "Green" can mean a lot and nothing at the same time. Some voluntary European GPP "core criteria" have a very low level of ambition.

ANEC therefore calls for obligatory targets for Member States to be introduced - preferably 100% for the sectors identified by 2020, possibly with different focus depending on the product group - and at the same time for preventing an inflationary use of the term "green" which could lead to confusion for consumers, industry and public procurers alike<sup>8</sup>.

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<sup>4</sup> art 19 and 23 of Directive 2004/18/EC

<sup>5</sup> 2003 European Commission Report on the Use of Equality and Diversity Considerations in Public Procurement

<sup>6</sup> The European Union ratified the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) in December 2010 and the convention came into force on 22 January 2011. In relation to public procurement, the European Union and Member States should pay specific attention to obligations set out in articles 4, 9 and 21 of the UNCRPD. In the Green Paper, the European Commission states that legislative changes "*will have to be consistent with EU international commitments*". We think that that compliance with the UNCRPD is one such commitment.

<sup>7</sup> Commission's Communication COM(2008) 400/2 on 'Public procurement for a better environment'.

<sup>8</sup> ANEC/BEUC PRELIMINARY THOUGHTS IN VIEW OF THE REVISION OF THE EU ACTION PLAN ON SUSTAINABLE CONSUMPTION & PRODUCTION (ANEC-ENV-2011-G-004)

## ANEC replies

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### 1.3 Public Purchasers

Question:

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?

ANEC reply

We support a clarification and extension of the concept of "body governed by public law", according to the ECJ jurisprudence, in order to include all bodies and entities providing goods and services of general interests to consumers. We believe in fact that by extending this concept, the rules and provisions on social consideration and accessibility requirements, which we call for becoming mandatory, would apply to a larger set of entities.

### 2.1 Commercial goods and services

The GPA provides some special rules for "goods and services of a type generally sold or offered for sale in the commercial marketplace to, and customarily purchased by, non-governmental buyers for non-governmental purposes". Commercial goods and services are considered to be available on the market in a standardized form and hence procurement of such goods and services is simplified by the fact that price, quality and conditions are widely established on the markets. There might be a case for introducing simplified procedures for the purchase of such goods and services (for instance, streamlined procedures with shorter time-limits).

Question:

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?

ANEC reply

Although we can see the merits of introducing simplified procedures for the purchase of commercial goods and services, we would like to bring to the Commission's attention the need to ensure that the rules and provisions on social consideration and accessibility requirements, which we call for becoming mandatory, should not be weakened/forgotten.

#### **4.1. "How to buy" in order to achieve the Europe 2020 objectives**

Questions:

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

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?

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 criteria for persons with disabilities or design for all users? If not, what needs to be done?

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

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?

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?

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

ANEC reply

At present, public authorities have the possibility to include social considerations at every stage of the public procurement process, but Article 23.1 of Directive 2004/18/EC only provides that technical specifications should take accessibility criteria into account "whenever possible". Despite the European Commission emphasising the fact that this should allude to technical feasibility, there is wide recognition that the cost criteria has often been an overriding concern to the detriment of the accessibility criteria. **We think that accessibility requirements for goods and services should always be part of the subject-matter of the contract in as they should be part of the description of the works or activity that the public authority needs to buy and are linked to the contract. Accessibility features of the products or services should be contained in a description of the product or services but it could also be a performance-base definition. While standards can be**

specifically referenced in the technical specification, it might be worth also considering that if the performance/functional approach is chosen, the public authority does not need to provide many technical details. When dealing with accessibility requirements for example, it might be easier for the contracting authority to specify the functional criteria to be achieved and leave it up to the bidders to show the technical compliance in an innovative manner. Reference to the concept of 'Design for All' so as to ensure that the goods and services procured will be usable by most people, irrespective of their age and abilities, might also be useful.

At present, this is only an option and we believe that it should be made mandatory as consumers with disabilities are still facing many accessibility problems. As an example, the level of accessibility of ICT goods and services in Europe is significantly lower than in other region of the world where such requirements are mandatory<sup>9</sup>.

It is worth noting that the European countries who have achieved the highest levels of accessibility to Information Communications Technologies (ICT) products and services, so called e-Accessibility, are also qualified as "Innovation leaders"<sup>10</sup>.

### **Using the most appropriate award criteria**

Questions:

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

70.1.1. to eliminate the criterion of the lowest price only;

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

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

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?

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?

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<sup>9</sup> EC study "MeAC – Measuring Progress of eAccessibility in Europe", 2010

<sup>10</sup> European Innovation Scoreboard (EIS) 2009, <http://www.proinno-europe.eu/page/1-executive-summary>

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?

ANEC reply

We think that accessibility should also be considered as a criterion in the award of the tender in addition to the lowest price and the most advantageous offer. To this end we believe that a clarification of the present rules would be certainly beneficial. In addition, it should be better explained that contracting authorities can decide that the products or services which comply with extra accessibility requirements than the ones specified in the bid (by making reference to a specific accessibility standard for example) should get extra points at the award stage, in order to stimulate bidders to foster accessibility features.

As it is most expensive to "retrofit" accessibility features in products then insert them since the design phase of the products, we are of the opinion that the cost criterion should not be the main criterion. It should only be applied to choose between tenders complying with accessibility requirements.

#### **Verification of the requirements**

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

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?

ANEC reply

ANEC is actively contributing to the execution of standardisation mandates M/376 on accessibility of ICT goods and services in public procurement and M/420 on access to the built environment in public procurement. Both mandates foresee, in addition to the development of standards, the analysis of the existing conformity assessment schemes. The analysis shall also address existing or propose requirements for suppliers' technical capacities and abilities in the accessibility domain, which can be used for the selection of suppliers or in support of the conformity process. Finally an on-line toolkit should also be elaborated to provide guidance in a clear and comprehensible text for public procurers. The functional requirements and technical performance criteria should be described in a user-friendly way so that the target audience, mainly procurer officers, designers and contractors, can use them as technical specifications and as award criteria in the tenders, or in support of conformity processes. Already existing requirements/guidelines/toolkits and best practices developed within this field in Europe and internationally should be taken into consideration.



We are of the opinion that this approach is suitable to help contracting authorities to verify the accessibility requirements and at the same time to minimise the administrative burden.

#### **4.2. "What to buy" in support of Europe 2020 policy objectives**

Questions:

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.

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?

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?

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?

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

86.2. Should mandatory requirements set the minimum level only so 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)?

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?

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?



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?

ANEC reply

ANEC calls for the use of public procurement to foster the accessibility of goods and services for consumers of all ages and abilities, including public buildings as well as ICT products and services. The US experience shows that the mandatory use of section 508 has proven very effective at driving the procurement of accessible ICT equipment and developing the market.

Although, based on several provisions of the TFEU<sup>11</sup> and the ratification of the UN Convention on the Rights of People with Disabilities<sup>12</sup>, there are now clear accessibility rights, a comprehensive legal basis for the accessibility of goods and services is still missing. And despite the recent announcement by the European Commission about a future proposal on an "European Accessibility Act"<sup>13</sup>, we think that the scope of application of this future possible instrument could be complementary to the public procurement provisions as it would probably not cover the accessibility of the built environment for example. Furthermore, the Procurement Directives do not apply to all public contracts such as for example contracts below the thresholds for application of the Directives. In such cases, the complementarity of different legal basis is even more evident. We support the elaboration of obligations at the European level as the existence of national provisions can lead to market fragmentation. This is already the case as far as the accessibility of public web-site is concerned where some Member States have national laws about the accessibility of web-site to be purchased through public procurement (so called "Legge Stanca"), in the absence of European provisions.

We also welcome the fact that the Green Paper makes explicit reference to the European Disability Strategy as far as the use of public procurement is concerned.<sup>14</sup>

As in the case of accessibility requirements in technical specifications, we consider that the introduction of minimum accessibility criteria to be achieved leaves plenty of opportunities for proposing innovative and competitive solutions.

As far as the potential burden of SMEs is concerned, we are of the opinion that mandatory accessibility requirements might represent a "niche market" for specialised small companies who could reap the benefits of new business opportunities.

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<sup>11</sup> Treaty for the European Union (TFEU)

<sup>12</sup> The UN Convention on Rights of Persons with Disabilities recognises accessibility as one of the general principles enshrined in Article 3.

<sup>13</sup> European Disability Strategy 2010 - 2020: A Renewed Commitment to a Barrier-Free Europe, <http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=933&furtherNews=yes&language=en>

<sup>14</sup> As regards social inclusion, the new European Disability Strategy 2010-2020 indicates that the Commission will explore the merits of adopting regulatory measures to ensure accessibility of products and services, including measures to step up the use of public procurement.

**Final questions:**

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

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ANEC reply

In ANEC's opinion, there are many important issues raised in the Green Paper. From a consumer point of view, we believe that the main priority issues are to ensure that the revision of EU public procurement directives introduces mandatory accessibility criteria for all goods and services procured for the public and to introduce Green Public Procurement obligatory targets for Member States, preferably 100% for the sectors identified by 2020.

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## **Acknowledgements**

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## **APPENDIX – About ANEC and other documentation**

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### **A.1 About ANEC**

*ANEC is the European consumer voice in standardisation, defending consumer interests in the processes of technical standardisation and conformity assessment as well as related legislation and public policies. ANEC was established in 1995 as an international non-profit association under Belgian law and represents consumer organisations from 31 European countries. ANEC is funded by the European Union and EFTA, with national consumer organisations contributing in kind. Its Secretariat is based in Brussels.*

*ANEC has signed the European Commission’s Register of Interest Representatives and accepted its Code of Conduct: Identification Number 507800799-30.*

### **A.2 Contact person at the ANEC Secretariat**

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More information about ANEC and its activities is available at [www.anec.eu](http://www.anec.eu)

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