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**TRANSPARENCY INTERNATIONAL'S CONTRIBUTION TO THE
EUROPEAN COMMISSION'S PUBLIC CONSULTATION
ON MODERNISING PUBLIC PROCUREMENT POLICY IN THE EU**

Introduction

It has been widely documented that procurement, due to its scale and nature, is a field highly susceptible to corruption and bribery.¹ Public procurement accounts for around 16% of the Union's GDP², and modernisation efforts of procurement policy will therefore have a significant economic impact Union-wide.

Transparency International (TI), the global civil society organisation leading the fight against corruption, welcomes the European Commission's desire to modernise its public procurement policy. TI believes that:

- **Although the EC Directives on public procurement from 2004 made advances in ensuring sound procedures, there is still more that can be done on the EU level to combat corruption in the field of procurement.**
- **There is significant scope for increasing transparency within public procurement processes at the EU level. Improving accessibility to procurement contracts, either online or other means, will allow accountability gains and serve the broader public interest.**

Transparency International has long promoted improvements in public contracting at the EU. Most recently, in January 2011, TI submitted its response to the consultation on e-Procurement. TI has also focused on debarment issues within use of EU structural funds and has closely monitored the elaboration of rules on public procurement in foreign aid programmes financed from EU resources.

¹ OECD. 2010. Collusion and Corruption in Public Procurement. Pg 489.

² European Commission, 2004. A report on the functioning of public procurement markets in the EU: benefits from the application of EU directives and challenges for the future. Accessed at: http://ec.europa.eu/internal_market/publicprocurement/docs/public-proc-market-final-report_en.pdf on 13.01.2011

Overview – Scope of the Legislation

It is clear from the premise of the Green Paper that the modernisation process is driven by a desire for efficiency savings and increased competition. Previous directives were viewed to have had significant impact on transparency, fairness and overall improvement of procurement practices. The 2004 directives went some way to addressing shortcomings in the legislation. The evaluation undertaken by Europe Economics in 2006 reiterates this conclusion.³ Yet there is evidence that suppliers and officials believe the directives to be too burdensome in places, resulting in stifled efficiency. There may also be a significant amount of non-compliance.⁴

The European Union must ensure that there are sufficient enforcement mechanisms and resources in place to penalise and sanction those not complying with directives. Transparency International believes that the Commission can make steps forward in simplifying procedures while retaining and improving upon the elements in the 2004 directives that promote integrity and help to ensure sound procedures.

Key Principles

Utilising principles rather than just prescription in the legislative approach will enable flexibility and ensure that important core values of integrity, accountability and transparency are engrained in the European procurement system. This mix of principles and prescription ensure that minimum standards in these areas are set and that a coherent framework is in place.

With an expansion in e-Procurement, for instance, the Commission may find it is difficult to control the overall procurement system with prescriptive legislation, as technology is constantly changing and developing. Advances in other legal areas may also elicit a change in procurement practices, requiring some flexibility. Enshrining basic principles, alongside basic prescriptive legislation that ensures suitable enforcement, would be an appropriate and sustainable approach to EU procurement policy.

Within this paper we refer to the concepts of accountability and integrity, as we believe them to be fundamental values for any procurement system. TI uses the following definitions for these terms:

- **Accountability:** “The concept that individuals, agencies and organisations (public, private and civil society) are held responsible for executing their powers properly.”⁵
- **Integrity:** “Behaviours and actions consistent with a set of moral or ethical principles and standards, embraced by individuals as well as institutions, that create a barrier to corruption.”⁶

In the context of public procurement, this means that all stakeholders, be it contracting authorities or suppliers, must be accountable for the correct functioning of their tasks and duties and for the decisions made in their area of responsibility. Records explaining and justifying all decisions and actions should be created and maintained. Wherever violations

³ Europe Economics, 2006. Evaluation of Public Procurement Directives Markt/2004/10/D - Final Report. Executive Summary, iii.

⁴ Europe Economics, 2006. Evaluation of Public Procurement Directives Markt/2004/10/D - Final Report. pg 22

⁵ Transparency International, 2009. Anti-Corruption Plain Language Guide. Accessed at: http://www.transparency.org/publications/publications/other/plain_language_guide on 15.04.2011

⁶ Transparency International, 2007. Combating Corruption in Judicial Systems. Berlin: TI

of legal or contractual obligations occur, action must be taken through the correct disciplinary, contractual, civil and/or criminal sanctions as appropriate. Accountability also requires that the views of all stakeholders on the issue are taken into account as part of the process. At the same time, procurement processes must be honest, and the correct technical expertise should be employed in a non-discriminatory manner.

Transparency in Public Procurement

TI favours full public disclosure of all information relating to the procurement process, providing for adherence to privacy and data protection legislation. This means that laws, regulations, institutions, processes, plans and decisions are made accessible to public oversight. Such public access enables stakeholders to monitor, review, comment upon and all processes and decisions. It also holds decision makers to account.

Transparency needs to pervade all steps in the procurement cycle, from the earliest decision making by the contracting authority about a new purchase or investment throughout the entire process to the awarding and execution of the contracts and the final accounting and auditing phase. It is essential that transparency is engrained in all new legislative developments so that every step in the long decision-making process can be viewed and influenced in a timely manner.⁷

Transparency requires that all the stakeholders in an investment are fully informed and consulted about all aspects of the project. Data needs to be provided in multiple formats to reach all necessary audiences. The significance of any transparency measures will be limited if the wider public cannot easily access the information. Steps need to be taken to ensure that this data is not only logged transparently and is open, but that it is honestly explored, standardised and structured so that end users are able to take the data in a way such as to induce and inspire trust in the system and attached processes. Rather than just being accessible in an arbitrary format, data must be provided in such a way that it is possible to connect documents from tender call, outcomes, contracts, contract amendments and analyse them to make sense of the procurement process as a whole.⁸

Despite claims that openness of certain procurement process information could have an adverse effect on the quality of the process, e-Procurement systems have proven extremely effective in countries⁹ that place everything, from procurement opportunities and bid documents to results of the tenders, on the Internet and allow free access to information to everyone.¹⁰

When contract conditions and related documents can be accessed in real-time, the opportunity for manipulation and bribery is greatly reduced. Overall, TI believes that, as long as all privacy and data protection laws are observed, it is in the public interest to know about the nature of the bids and the bidding process and this data should be made available to the maximum extent.

⁷ Transparency International, 2006. Curbing Corruption in Public Procurement. Accessed at: http://www.transparency.org/publications/publications/other/procurement_handbook on 26.10.2010

⁸ An example of transparency that does not go far enough is the Georgian government's e-Procurement system, which published information, but in a closed format (PDF) that didn't allow the public to analyse the data Transparency International | Georgia Website, 2010. Accessed at: <http://www.transparency.ge/en/blog/pgeorgia%E2%80%99s-new-e-procurement-platform-%E2%80%93-making-public-information-public> on 26.10.2010

⁹ (Chile, Colombia to some extent, Mexico and New Zealand among others) See Transparency International, 2006. Curbing Corruption in Public Procurement. Accessed at:

http://www.transparency.org/publications/publications/other/procurement_handbook on 26.10.2010

¹⁰ Transparency International, 2010. Working Paper on Corruption in Public Procurement. Accessed at http://www.transparency.org/publications/publications/working_papers/wp_05_2010_corruption_public_procurement on 18.03.2011

Public Stakeholders in Public Procurement

With large amounts of public expenditure going through a variety of different procurement systems, public consultation in the development and later implementation of any new legislation or mechanisms is critical. Transparency International welcomes this consultation period but reiterates the need for public interest groups, civil society and the public at large to be consulted beyond this particular consultation stage. Trust can only be developed if new mechanisms are accountable and the public is engaged in their development. The public also has a vital role in monitoring and evaluating new mechanisms, and sufficient amounts of time and resources should be allocated to bring all stakeholders into the discussions and next phases of the process.

Ensuring Sound Procedures

Chapter 5 of the Green Paper addresses areas of key concern to Transparency International. Considering all the efforts to open markets and facilitate cross-border procurement, the utmost must be done to ensure that procedures are as robust as possible. Even though Transparency International is in favour of enshrining the principles into procurement legislation, there are elements that need clarification, such as thresholds. Chapter 5 covers the most significant topics relevant to the issues of accountability, integrity and transparency that are at the core of Transparency International's advocacy mission. Each of these are addressed below, in turn.

Question 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.)?

Some elements within this area should be regulated at EU level such as financial interests, family relationships and previous employment engagements. However a full and comprehensive EU definition is perhaps beyond the scope of possibility, as it could contain too many varying elements and thus be impractical. Here, key principles would be useful. A declaration of absence of conflict of interest by procurement officials, with regard to their personal situation, would be suitable in this respect, ensuring that adequate data protection is provided for.

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

TI favours the exclusion of incumbent bidders or of bidders involved in stages prior to the actual procurement procedure if their informational head start has not been neutralised properly. This legal concept is also followed by the Court of Justice of the European Union in its decision from March 3rd, 2005 (joined cases C-21/03 and C-34/03 "Fabricom").

Question 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?

In TI's experience, all Member States' procurement markets are highly susceptible to corruption and favouritism, especially below the thresholds. Matters of criminal prosecution, however, should be left to the Member States. Within the Member States, criminal prosecution can be dealt with by each country's judicial system. More cross-border

procurement will require better cooperation between national police and judicial authorities in cases of irregular practices or wrongdoing. Member States should cooperate in the prosecution of such cases and utilise European level mechanisms to facilitate the process. Short of the establishment of a European Public Prosecutors Office, Eurojust (European Union's Judicial Cooperation Unit) should facilitate dialogue between the Member States involved.

Question 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)?

In Transparency International's extensive experience in the procurement field, all stages of the public contracting process are susceptible to corruption. While drafting further precautions and safeguards against corruption, the European Commission should take into account the whole procurement process from the definition of the subject-matter to the completion of the contract or purchase.

Among the most important areas of increased risk are:

- Definition of subject matter and preparation of the tender. In this stage, manipulation of requirements is less detectable due to ambiguity regarding scope and the subjectivity of needs assessments.
- Restricted access to information
- Abuse of exceptions and loopholes
- Ineffective monitoring and control mechanisms within the contracting processes, particularly during the contract implementation phase

The following are further examples of the most usual manifestations of corruption and corruption risks at each stage:

Needs assessment phase/ Demand determination

- The procurement is unnecessary. Demand is falsely created so that a particular company can secure a contract or sale.
- Political favours or "kickbacks" are paid by including in the budget a contract with a "certain" pre-arranged contractor.
- Conflicts of interest (revolving doors) are left unmanaged.

Preparation phase/Process design & bid documents preparation

- Bidding documents or terms of reference are designed to favour one particular provider rendering competition impossible or limited.
- Goods or services needed are over- or underestimated to favour a particular bidder.
- Bidding documents or terms of reference are overtly complex and are used to create confusion to hide corrupt behaviour and make monitoring difficult.

Contractor selection and award phase

- Decision makers are biased or selection criteria are subjective in a way that allows biases to go unnoticed.
- A particular bidder or supplier receives an informational advantage prior to the bid submission or during the clarification period.
- Confidentiality is extended beyond legally protected information which makes monitoring the process difficult.
- Bid evaluation is not made transparent, particularly for the winning bid.

Contract Implementation Phase

- Winning suppliers/contractors compensate bribes and other extra payments with poor quality or different specifications than those detailed in the bidding process.
- Contract renegotiation is undertaken that introduces substantial changes rendering the bidding process useless. These often occur in small increments that can be decided by site engineers. Overall increases in costs are therefore facilitated by a corrupt contractor and a corrupt control official.
- Those monitoring implementation are not independent and are willing to justify false claims, possibly in exchange from bribes or kickbacks.

Needs assessment phase/ Demand determination

- Accountants doing final accounts and Auditors are corrupt and willing to manipulate results.

Question 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)?

TI considers the EU-wide publication of contract notices and tenders, ex-ante as well as ex-post, as an essential measure to ensure the integrity of procedures. To extend the scope of this measure, TI recommends a considerable decrease of thresholds. Current EU public procurement rules generally lower the risk of misuse and corruption, but many below threshold contracts simply are not covered. There have also been cases where procurement has been divided into smaller contracts in order to remain under the threshold and evade compliance with the EU directives.¹¹

TI furthermore supports the mandatory publication of the award record as well as the concluded contract. However, bidders' genuine business secrets, e.g. technological know-how, must remain excluded.

As the EC mentions in point 5.2, increasing the level of transparency, particularly regarding the the decisions taken by procurement officials throughout the procedure, allows for

¹¹ Transparency International, 2011. Transparency International's response to the EU Consultation on e-Procurement. Available: http://transparency.org/content/download/58702/939761/file/2011-01-31_Transparency+International+-+EU+eProcurement+final.pdf

increased public scrutiny of the processes and would act as a safeguard against corruption. Enhanced transparency, including the mandatory publication of concluded procurement contracts and the reports documenting ongoing procurement processes, would be not only allow better scrutiny of procedures, but also introduce a democratic element of accountability that is vital for building public trust in procurement procedures. It is also vital that the final price of the concluded contract is published, as this is often quite different from the estimated price given by the contractor who won the tender.

Question 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?

The establishment of corruption registers plays a crucial role in sanctioning and deterring corruption. The EU should make this an obligation for its Member States. A key requirement of such registers is that information is accessible to the public. For a company to enter the register, it must not require *res judicata* but a lower standard such as “no reasonable doubt”. This should be implemented EU wide.

Member States should be obliged to enact and implement whistleblowing legislation and enforcement mechanisms that comply with best practice. Such legislation should cover the public and private sector, protect whistleblowers against reprisals and ensure a fair compensation for damage. It should further support the establishment of appropriate and reliable reporting channels and provide for an independent review. As the EC mentions in point 5.2 of the Green Paper, a free phone or internet based fraud notification system open to procurement officials or participants in the bidding process would allow irregularity and wrongdoing to be reported and could be advertised throughout the tendering process.

Additionally, TI endorses an obligation to disclose subcontractorships during the selection stage. This obligation should be implemented in the EU Public Procurement Directives.

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?

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

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?

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

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?

Questions 104 - 108:

Debarment – i.e. exclusion from further contracts, on a temporary or permanent basis, of companies which have engaged in corrupt practices in the award or during the implementation of public contracts – is a genuine sanction and one of the most effective deterrents.

The European Commission should strive for the design, implementation, management and operation of an effective and transparent debarment system that promotes trustworthiness among users, managers and providers of funds subject to public trust.

A harmonised system could be developed allowing for the adoption of a 'shared' debarment system that covers exchange of information across Europe.

Generally, the precautions met by Art. 45 concerning the exclusion of bidders are sufficient. However, there should be an explicit obligation for the Member States to establish a corruption register. Authorizing officers should also be obliged to consult a consolidated debarment "register" before contracting.

Public access to the Central Exclusion Database is vital in order to increase its deterrent effect. The internal rules for handling the finely tuned "early warning system" enumerate indeed very clearly the authorised users of the blacklist, which excludes public access.

In order to substantiate the self-cleaning measures it would also be helpful to specify in Art. 45 the basic elements of self-cleaning: the removal from the firm (or economic agent as the EU refers to firms) of the corrupt individual(s), the publicly stated policy of zero tolerance to bribery and corruption and documented evidence of the implementation and monitoring of management systems to support the zero tolerance policy, as well as the compensation of damages caused by the corrupt action.

In summary the Commission should move towards a harmonised system, including a shared EU debarment system that covers exchange of information and "cross debarment" Europe-wide. A company which has been found guilty of corrupt practices in one Member State should not continue to have access to public tender procedures or other public financing in other Member States or at EU level.

Question 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?

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

Questions 109 – 110:

TI advocates regulation that offsets the informational advantages of incumbent bidders or of bidders involved in stages prior to the actual procurement procedure (see above the answer to Question 99). This could include as the paper suggests an obligatory measure to disclose all privileged information available to an incumbent bidder, or bidder holding this information prior to the tender, in order to compensate and mitigate discrimination.

Concluding Remarks

Transparency International welcomes the European Commission's efforts to modernise public procurement legislation and put transparency and anti-corruption at the forefront of the agenda. Combined with the recent Green Paper on e-Procurement, Transparency International fully supports this as an opportunity to move forward and provide a procurement system that can be globally recognised for its standards of integrity, accountability and transparency.

Transparency International sees considerable scope for improving the suggested legislation. Increased transparency of the processes including but not limited to public access to debarment databases and mandatory publishing of contracts would be a vital step forward. If appropriate principles are engrained and fairness is achieved through increased competition, this modernisation could result in benchmark procurement legislation that benefits government, business and society as a whole.

About Transparency International

Transparency International (TI) is the global civil society organisation leading the fight against fraud and corruption. Through more than 90 chapters worldwide (i.e. in almost every EU Member State and in many developing countries world wide) and an international secretariat in Berlin, Germany, TI raises awareness of the damaging effects of corruption and works with partners in government, business and civil society to develop and implement effective measures to tackle it. There is strong evidence of the devastating impact of corruption on poverty reduction and sustainable and participatory development. Advancing development by fighting corruption is therefore one of TI's main areas of expertise and experience.

TI looks forward to discussing these issues with you. If you need further information, please contact:

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