



**Recommendations for the review
of European Procurement Directives**

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The National Council for Voluntary Organisations (NCVO) is the largest general membership body for charities and voluntary organisations in England. We cover a wide spectrum of organisations including social enterprises, charities and voluntary groups. Established in 1919, NCVO represents over 8400 organisations with members in every local authority area, from large household names to small groups operating at the local level.

In the context of the current European Commission review of EU procurement rules, this paper brings together a wide range of perspectives from civil society practitioners, national umbrella bodies and legal professionals in England, and offers some recommendations to policy-makers.

1. Introduction

The European Procurement Directives¹ ('the Directives') are underpinned by the EU Treaty principles to set out a legal framework for public procurement, to which all public contracting authorities in Member states must adhere.

The EU Treaty principles include the following:

- Free movement and non-discrimination
- Mutual recognition
- Transparency
- Proportionality

Shaped by these principles, the Directives aim to safeguard against corruption and favouritism, open up the procurement market, and ensure free movement and value for money in the public acquisition of supplies, services and works within the EU.

These aims are highly commendable, and in accordance with the objectives outlined in the European Commission ('the Commission') communication *Towards a Single Market Act* of 27 October 2010², to realise the concept of a "highly competitive social market economy".

However the Directives' aspirations are not always realised in their practical application at public contracting authority level in Member States, due to a range of issues. This directly impacts upon the achievement of the goals set out in the Europe 2020 strategy, the wider European economy, and most importantly the lives of citizens and communities through service provision.

EU context

Procurement is a cross-cutting issue in a range of EU policy agendas and initiatives, including aspects which affect competition in the Single Market Act, the Europe 2020 strategy's social and environmental targets, and innovation within the Social Business Initiative.

The improvement of the policy and legal framework for Social Services of General Interest (SSGI) has been under discussion for many years. Member States are engaged in the process of transposing Community legislation concerning **public procurement**, **state aid** and **service provision** in the internal market into national legislation. It is clear that current application of Community rules on competition, state aid and public procurement on social and health services of general interest presents a range of challenges for service providers and commissioners. The European Commission's review offers a real opportunity to re-shape the policy framework in this area.

- European Parliament

The European Parliament's ('the Parliament') comprehensive report³ on the modernisation of public procurement rules outlines key tasks to be undertaken:

- First task: improving legal clarity
- Second task: developing the full potential of public procurement – best value for money
- Third task: simplifying the rules and allowing more flexible procedures
- Fourth task: improving access for SMEs
- Fifth task: ensuring sound procedures and avoiding unfair advantages
- Sixth task: expanding the use of e-procurement

¹ OJ L 134, 30.4.2004, p. 1.

² COM(2010) 608 final.

³ A7-0326/2011, European Parliament A series, commission report, seventh parliamentary term (2009-2014), no.326 of 2011.

NCVO agrees with many of the report's findings, and this paper further explores the civil society sector's concerns regarding tasks 1-5 above. The Parliament's conclusions begin to highlight and succinctly illustrate some of the key issues:

“By contrast, other costs have risen: a disproportionate emphasis on legal considerations has led to increased transaction costs, with considerable expense incurred for external consultancy services. Another unintended consequence has been to reinforce the tendency among public contracting authorities, where any legal uncertainty is present, to rely on bureaucratic procedures, with the result that they have avoided risks and, when in doubt, have awarded contracts to the tenderers offering the cheapest products or services rather than the most innovative or simply the best. This is a particularly problematic development in times of economic crisis when public budgets are squeezed.” (p15)

- Wider European Stakeholders⁴

Overall the general consensus among European state and committee representatives suggests there is little need for a radical overhaul of the Directives. Whilst we agree with this sentiment, a thorough review is necessary to ensure current rules are appropriately translated into practical application in Member States, and maintain relevance for current and emerging market changes. This includes new business forms, changing employment structures and the move to large-scale decentralisation of public services across the Union. These factors will be instrumental in shaping the internal market and the provision of public services.

We welcome the proposals laid out by DG Internal Markets and Services⁵, which indicated:

- A review of raising current thresholds
- Linking public procurement to support the EU2020 strategy
- Changing mind-sets of public procurers and ensuring better implementation of rules
- Supporting innovation

Clearly, the Commission is aware of the varying issues within the public procurement debate, however this paper will demonstrate concerns from the civil society sector and the potential impact on the future landscape of public services, with key examples and cases in UK practice.

UK context

Over a number of years, the UK has taken a wider market approach to the delivery of social and public services where both the civil society and commercial sectors play a significant and changing role.

The Coalition Government's 'Big Society' agenda⁶ is the latest mark of strong political commitment for public service reform in the UK, with its emphasis on supporting civil society organisations to have much greater involvement in the running of public services, and creating a diverse market to drive choice and empowerment of users.

For example, the UK Government has adopted David Freud's blueprint⁷ to tackle unemployment and welfare reform. This aims to stimulate development of a new welfare-to-work service industry, and requires civil society organisations to work with 'prime contractors' to deliver defined welfare outcomes in a 'payments by results' scheme. It is clear that this diversified approach presents opportunities and challenges for civil society organisations.

Europe 2020 strategy

⁴ Views from the Modernising Public Procurement Conference, 30 June 2011

⁵ http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/conference062011/summary_en.pdf

⁶ Cabinet Office (2010) Building the Big Society http://www.cabinetoffice.gov.uk/sites/default/files/resources/building-big-society_0.pdf

⁷ <http://www.dwp.gov.uk/docs/welfarereview.pdf>

In the Commission communication on *'Europe 2020: a strategy for smart, sustainable and inclusive growth'*⁸, Commission President Barroso outlines five EU targets for 2020 to measure the success of Europe in 2020. These include:

- Employment
- Research and innovation
- Climate change and energy
- Education
- Combating poverty

Commission President Barroso acknowledged that the civil society sector had an important role to play in the success of this agenda:

“Our new agenda requires a coordinated European response, including with social partners and civil society. If we act together, then we can fight back and come out of the crisis stronger.”

Procurement is a fundamental instrument through which to deliver these objectives, through its potential economic value and social impact. With 17% of the EU's GDP acquired from public procurement activity, contracting authorities have a duty to ensure that their decision-making and spending power is used not only to attain best market rates for public goods and services, but also to serve the immediate and long-term social needs of their constituents, and foster a sustainable plan for the advancement of society⁹. Whilst the Europe 2020 strategy begins envisioning this societal progress, the importance of social procurement in its achievement needs to be better recognised across the Union.

In the UK the civil society sector's involvement in delivering services is on the rise. The UK National Survey of Charities and Social Enterprises ('the UK survey') shows that 24% of the sector was involved in the service provision in 2010, a 10% increase from 2008¹⁰. The results are indicative of the increasing complexity of social issues and the political shift to outsourcing public services.

Furthermore the UK survey demonstrated a direct link between the sector's activity and the Europe 2020 objectives. For example, 46% of the sector's main areas of work were in training, education, employment and poverty. This is especially important for the achievement of three of the five key strategic areas outlined above, and as well as the flagship initiatives.

Whilst the Europe 2020 flagship initiatives acknowledge the need for social partners' involvement in the achievement of the strategy's objectives, the sector's full potential and value in direct service provision is overlooked in many EU documents, communications and debates. Therefore, there is a risk that the ongoing review of procurement rules has neglected to fully consider the needs of civil society organisations to bid for and deliver services. Current practice in the procurement field will need to be reformed and developed in order to maximise the social outcomes and outputs from the sector's contribution, skills and expertise.

2. Major aspects of procurement policy

a) Services of General Economic Interest (SGEI)

SGEI are defined as public services which include an economic relationship between supplier and consumer, and are subject to EU internal market and competition rules.

In accordance with the *Guidance Notes*¹¹, published by the competent UK national authority, Member States are given wide discretion to define SGEIs. Public authorities are allowed to define an SGEI

⁸ COM (2010) 2020 Final

⁹ A7-0326/2011, European Parliament A series, commission report, seventh parliamentary term (2009-2014), no.326 of 2011.

¹⁰ <http://www.nscsesurvey.com/download/2010/Overall.pdf>

¹¹ Dept. for Business, Innovation and Skills (2009) How the State Aid rules impact upon funding for the delivery of Public Services including Services of General Economic Interest (SGEI): Guidance Notes

within reasonable parameters, making such a decision challengeable only when it is manifestly unreasonable. This is a very desirable structure for the application of intervening European law. However the wide discretion in relation to the definition of SGEIs should be beneficial, and in practice this discretion seems not to be recognised for flexible practice.

Defining social services of general interest has also proved problematic. SSGI such as social and health care services are often “characterised by an asymmetric relation between providers and recipients, unlike a commercial relation of the supplier-consumer type”¹². However, often procurement practice stipulates that non-economic SSGI are subject to the same notification procedures as economic SGEIs, due to contract size.

The additional administrative burden on contracting authorities and contract bidders is unnecessary when the service contract does not affect the competitive market. For more appropriate application, a review of exemptions for SSGI should be considered on the basis of service type rather than contract size. Thresholds for these services should also be considered for the same reasons.

Recommendation

- Provide simpler and more practical guidance on implementation of the Directives, with case law examples, in addition to the FAQs currently available. This reference tool would assist in decision-making, and enable more flexible and appropriate procurement practice.
- Launch a Commission consultation to establish wider exemptions and higher thresholds for SSGI on the basis of service type and not contract size, since they do not significantly affect competition and still considered compatible with the internal market.

b) Existing frameworks and processes

There is a well established basis in frameworks for public procurement however this is a rapidly changing field and it is essential that legislation is appropriate for the new environment.

Existing regulatory frameworks, and procurement officers’ experience and knowledge, do not account for new forms of social businesses and not-for-profit entities (e.g. tax, commissioning cycle, database systems). The reduced chances of winning contracts hampers Social Business Initiative aims to enable the growth of innovative business models and practice.

Many processes and frameworks often apply rules and require extensive administrative obligations, which are disproportionate to the value of the contract. They require significant investment of resource to complete with a low chance of return for SMEs and not-for-profit organisations.

The Commission’s interpretive communication on the Directives¹³ (‘the interpretive Communication’) demonstrates how the Treaty principles of fairness and equality to all economic operators are to be realised in the rules’ application. For example, by ensuring equal access to operators from all Member states, and allowing appropriate time limits for expression of interest and submission of offers (Section 2.2.1).

However the interpretive Communication places more emphasis on fairness and transparency for **cross-border activity only**. Instead, recognition for unfair advantage and inequality **across sectors** throughout the EU is required, as these same issues specifically affect not-for-profit providers.

- Mechanisms to shortlist providers such as the Preferred Provider List (PPL) are a good example of rigid and often inaccessible frameworks used in the UK¹⁴. The range of challenges for voluntary and community organisations in PPLs included:
 - Monitoring the application process is a lengthy task, with the advertising and length of deadlines are not well-communicated or realistic when considering often-reduced staff and skills capacities in civil society organisations.

¹² CESE 867/2011 final

¹³ Commission Interpretative Communication COM Brussels 23.3.2006
http://ec.europa.eu/internal_market/publicprocurement/docs/keydocs/communication_en.pdf

¹⁴ NCVO Procurement roundtable

In 2010, 83% of UK charities and social enterprises had 10 or less full-time equivalent employees in their organisations¹⁵.

- The process of joining the PPL requires extensive commitment of time and financial resources, with little guarantee of final contract award. This redirects resources from their frontline service activities for little gain.
- Although service delivery quality is assured by inclusion into the framework, post-qualification these bids are frequently reduced to lowest cost, where civil society organisations often lose to commercial enterprises in bidding wars.

The interpretive Communication advises:

“Contracting entities may take measures to limit the number of applicants to an appropriate level, provided this is done in a **transparent and non-discriminatory manner**...In any event, the **number of applicants shortlisted** shall take account of the need to ensure adequate competition” (p8).

NCVO recognises many advantages for shortlisting frameworks like the PPL, such as quick start for contracts, immediate presentation of offers, and a smaller and more controlled pool of providers. We agree with the principles of a timely process and robust selection of suitable providers, however current procedure excludes many suitable civil society providers from successfully competing for contracts. More consideration is required for reduced capacities in skill, time and financial resources of civil society organisations, to fulfil extensive administrative burdens and disproportionate requirements to enter frameworks.

In the UK, voluntary and community organisations have worked closely with commissioners to identify local need and service innovation. However lengthy arrangements like the increasing use of frameworks like PPL, stifle this expertise and the potential for better public service design and delivery.¹⁶

Recommendations

- Review regulatory and procurement frameworks at Member State and EU levels to encourage flexibility for emerging social business models and civil society organisations, accounting for their size and resource capacity in relation to tenders.
- Provide dedicated funding for training on the operations and capacities of SMEs and non-profit providers at EU and national levels, for commissioners and procurement officers to better understand sectors and their suitability for contract awards.

In the UK, the National Programme for Third Sector Commissioning¹⁷ provides effective training to commissioners to better understand the civil society sector. This should be supported as a fundamental component of procurement policy-making and training.

- Reduce administrative and accounting obligations where possible at EU- and national-level, to lessen the burden on SMEs and not-for-profit providers by accounting for their reduced capacities, and so encouraging their further participation in the procurement market.

c) Application of the Directives

The Directives', and their transpositions into national legislation, rightly pursue fairness, transparency and value for money in public acquisition of goods, works and services. However this is not always realised through the practical application of Community rules at contracting level.

Evidence shows that there are a number of challenges:

¹⁵ <http://www.nscsesurvey.com/download/2010/Overall.pdf>

¹⁶ NCVO (2011) Public services and the Big Society: finally putting users in control?

¹⁷ <http://www.idea.gov.uk/idk/core/page.do?pageId=6583598>

- There is a strong culture of risk-averseness and inflexibility in public contracting authorities when applying the Directive 2004/18/EC, even when the Directive allows for flexibility and use of discretion.
- Procurement officers seem to have become more preoccupied with applying rules and fulfilling EU requirements rather than assessing service delivery outcomes, and in turn the potential for vast innovation in services.

This is a costly exercise for the contracting authority and wastes economic resources which could be used for social and more economically advantageous purposes.

The National Housing Federation¹⁸ calculated that yearly costs of the EU procurement rules to the housing association sector in England equates around £30million, which could be used to lever £450million worth of private finance to develop new affordable homes.

“This in turn has a negative impact on Small Medium Enterprise (SME) bidders who are unable to deliver large-scale contracts. Experience shows that SMEs are generally put off from bidding by the complexity of the process and the resulting costs in time and staff to them”.

- Lack of clarity on the distinctions between Part A and Part B services results in contracting authorities placing the same reporting and accounting obligations for both Parts, regardless of reduced legal requirements for Part B services at EU level. This disproportionate practice hinders opportunity for innovation and service provision from voluntary and community organisations, which often deliver Part B services.

Case study: The Learning and Skills Council¹⁹

The case of the Learning and Skills Council (LSC) and the introduction of the “51% rule” is an example of poor implementation due to lack of clarification in Community rules. The LSC had moved towards procuring ESF vocational and educational services by means of large contracts, and as a way of engaging small SMEs, had encouraged the forming of consortia. However this arrangement was threatened by misinterpretation of Community rules, on the basis that the LSC was unable to procure services from consortia unless the lead partner delivered more than 51% of the contract, so that the nature of the service did not change from Part B to Part A.

The following appeals process and seeking of legal advice for clarification resulted in wasted time and money for both the contracting authority and not-for-profit provider, and potential bid failure for the not-for-profit sector. Although the case concluded the consortium was suitable for contract award, greater clarity would have led to a simpler decision-making process.

Recommendation

- Provide greater clarity and simplification of the rules, with more guidance on application, for authorities to better exercise professional judgement, and enable implementation of the Directive as intended.
- Ensure the distinction between Part B services and Part A services is maintained in legislation and practical application at EU and national levels, to prevent unnecessary restrictions and requirements on Part B service procurement.

d) Balancing policy objectives

- There is a tension between **competition policy** and **social policy objectives** in the current EU agenda. We recognise the importance of free trade between Member States as a fundamental EU priority but believe that under the current regime this has not always been balanced by social and environmental policy objectives.

¹⁸ National Housing Federation – Response to COM(2011) 15 final

¹⁹ <http://www.networkforeurope.eu/success-change-51-rule>

This consideration is particularly important for Part B services, which are usually inextricably linked to local communities and meeting social need, and therefore assumed not to be suitable for cross-border interest.

- Greater weight to considerations of **efficiency** is highly laudable; it must not however focus on economic criteria alone, but also take account of the social, territorial and environmental aspects, and consider criteria such as quality, results and sustainability. This ensures that wider policy objectives and consideration for standards and continuation of good service delivery are included in the evaluation of “efficiency”.
- Prioritising “lowest cost” in procurement practice will increase the risk of irresponsible commissioning and tendering, when there is no guarantee that the bidder can successfully deliver a service for less money – instead “value for money” should be reframed as quality of service for the cost, rather than lowest cost.

With the Commission’s apparent encouragement of decision-making on “lowest cost” efficiency criteria, there is a substantial risk of increased bidding wars and unsustainable practice. The UK National Audit Office’s publication **Financial relationships with third sector organisations (2006)** states:

“A funder or commissioner has an **interest** in meeting its fair share of a provider’s central administrative costs because that will help to ensure that the provider can manage its activities and finances properly, and will contribute to the organisation’s sustainability...This principle is known as ‘full cost recovery’...[It is the responsibility of] the potential **provider** to bid at a price that it considers to be appropriate, taking account of all its costs”.

With the renewed focus on “lowest cost” there is an increased likelihood that bidders will forgo appropriate full cost recovery of service delivery to win contracts. This gives disproportionate advantage to commercial enterprises which are able to offer lower bid prices and cover own incurred costs. Not-for-profit providers will be unable to compete, or instead take on unsustainable financial risks. A resultant increase in prime- and sub-contracting relationships between sectors will need addressing.

In NCVO’s report of the Work Programme, feedback from the welfare-to-work sector suggested much potential profit from contracts was lost through “lowest cost” bidding wars, where some submitted bids offered up to 50% below the government department’s maximum price award.

“This arguably casts doubt over the ability of primes to pass sufficient funds onto sub-contractors. If both primes in an area have adopted this strategy, this leaves responsible sub-contractors in an area with no financially viable way of taking part in the Work Programme, losing their expertise.”²⁰

Civil society organisations lose out on financial income and security, and so social services could lose expertise, links with the community and potential innovation in service design and delivery.

- Related to this, social value tends to bring wider economic benefits too – for example job creation, regeneration, tackling poverty - all of which have a propensity to benefit the wider economy and the Exchequer. Consideration of economic efficiency and social value are not mutually exclusive.

Recommendations

- Review current EU and national procurement rules, guidance and procedures, to ensure there is equal weighting between the achievement of competition and social policy objectives.
- Provide and encourage Member State provision of tools for commissioners and procurement officers, to understand and evaluate soft outcomes in bid applications, which aim to achieve social and environmental policy objectives and targets.

²⁰ http://www.ncvo-vol.org.uk/sites/default/files/work_programme_concerns.pdf

- Ensure “value for money” is robustly measured in practice, and defined by criteria beyond “lowest cost”.
- Review public services in the area of SSGI which may qualify for block exemption, as they do not significantly affect competition or offer cross-border opportunities.

e) State Aid

The application of state aid can often lead to complications for organisations as this may not always be applied appropriately.

Currently there is a residual lack of awareness in contracting authorities about the notification procedures and the various exemptions. This results in a reduced market, as not-for-profit organisations reliant on compensation to provide an effective service are unable to compete.

- Administrative burdens of complying with rules and investigating appropriate exemptions lead to public contracting authorities applying the ‘de minimis’ exemption as a default procedure.

‘De minimis’ is the only exemption generally understood in the public sector, with little focus on other available, more appropriate exemptions relating to social services of general interest. These include exemptions for SMEs, environmental aid, training aid, employment aid, etc. The problem of calculating the applicability of such exemptions can prove problematic to understand and therefore avoided in order to ensure efficiency in the procurement process.

More importantly, the ‘de minimis’ exemption is taken as the only State aid question and replaces appropriate interpretation as to whether there is any potential unlawful State aid at all. The civil society sector is more vulnerable to this practice considering its diverse income stream, which includes statutory grants, contracts and other funding arrangements.

- In accordance with Commission Regulation 1998/2006, where pursuant to Council Regulation 994/98, up to €200 000 may be provided to any undertaking, regardless of size, so long as the enterprise has not received ‘de minimis’ aid from any other source in the last three years, which would result in the total de minimis aid to that enterprise exceeding the €200 000 threshold.

Not-for-profit organisations are often engaged in various social and health care activities that require dedicated statutory funding. In turn, the sector’s contract bids are frequently rejected on the basis of exceeding low ‘de minimis’ thresholds, and not due to unsuitability as service providers.

NCVO believes that the ‘de minimis’ thresholds for social and health care services must be increased, to ensure contracts are awarded to the best service provider through a fair and competitive bidding process.

Recommendations

- Communicate greater clarity and simplified guidance on the full range of available exemptions, to enable more flexible and appropriate use for social services and not-for-profit providers.
- Increase ‘de minimis’ thresholds for social and health care services, to allow not-for-profit providers to fairly compete for appropriate and non-economic public service contracts.

f) Innovation

In the drive to encourage innovation, it’s essential that the Commission provides an enabling environment. There are a number of challenges in this area, which include:

- Lengthy procurement reporting, and administrative obligations encourage Member States to tender out larger contracts – this is unhelpful for SMEs and start-up social businesses which are unable and even unwilling to deliver such large-scale services.
- The Work Programme in the UK excluded many civil society organisations from bidding for prime contracts due to their small reserves and limited access to capital, as the adopted payments-by-results model required an annual turnover of at least £20 million and the financial capacity to deliver large contracts that require significant cash-flow.

“This scale enables – and requires - primes to shoulder the upfront and transitional costs associated with an outcomes based model.”²¹

Chances of success in the open market are reduced as new enterprises are unable to earn revenue for growth and sustainability.

- Commissioners are unfamiliar with new types of social businesses and not-for-profit organisations, and therefore have a lack of confidence in their ability and suitability in delivering social services.
- Social businesses and not-for-profit providers are unable to effectively demonstrate value for money in bids, due to unfamiliarity with the application process or not meeting the expectations of commissioners in style or content of the application.
- Overall, existing procurement practices and systems are unlikely to create optimal conditions for growth and sustainability in new social businesses and not-for-profit organisations and therefore undermine ambitious EU initiatives, and social and environmental targets.

The Social Enterprise Coalition, an infrastructure organisation which supports social enterprises, published a guide entitled “Working with the Public Sector: Busting the Myths”²². The guide demonstrates that there are a range of misconceptions in both the public and civil society sectors surrounding procurement rules and practice that need to be addressed. It states:

“The rules surrounding public sector procurement are often complex and difficult to navigate, and this environment has perpetuated a number of myths that make it hard for social enterprises to start fulfilling their potential in public services. Contracting bodies and social enterprises alike should be prepared to constantly challenge these myths which often, sadly, form the basis of procurement decisions” (p1).

The lack of legal clarity for the new social economy market and new business forms remains problematic for public procurers. Left unchecked, the innovation in public services the Commission is seeking could be seriously hampered.

- Evaluating social outcomes in procurement decision-making is vital in the reform of public services. NCVO welcomes the Commission’s Social Business Initiative communication²³, which considers a greater emphasis in the Directives on the use of **social or environmental criteria** and assessment **of quality** in awarding contracts especially in the case of social and health services.
- In the UK, the Public Services (Social Value) Bill²⁴ looks to place higher levels of responsibility on contracting authorities to consider how they can improve the “social, economic and environmental” well-being, through public sector contracts. Moreover, it recognises the civil society sector’s expertise in identifying local and social need, and encourages their greater participation in the procurement process and service delivery.

NCVO feels strongly that a cohesive policy approach is required to achieve the targets and visions of the European Community. Public procurement legislation has a key role to play in the various policy agendas and therefore should be reviewed with diligence and caution.

Whilst there are concerns that changes to the Directives could create additional legal barriers and procedural regulations, we believe there is space to learn from existing practice of the current Directives, and improve regulations to foster innovation.

Recommendations

- Encourage “small-lots” contract structures to allow SMEs, start-ups, and civil society organisations to enter the procurement market and enable innovative solutions to service delivery.

²¹ http://www.ncvo-vol.org.uk/sites/default/files/work_programme_concerns.pdf

²² http://www.socialenterprise.org.uk/data/files/publications/GUIDE_Working_with_the_Public_Sector_-_Busting_the_Myths.pdf

²³ COM(2011) 682/2

²⁴ <http://www.publications.parliament.uk/pa/bills/lbill/2010-2012/0113/2012113.pdf>

- Dedicate funding for networking fairs to allow commissioners and providers to meet and discuss the procurement process and quality indicators, and run practical workshops on applications procedures and effectively demonstrating “value for money”.
- Ensure cohesion between various EU policy agendas – the Single Market Act and Social Business Initiative – demonstrating political commitment to the market success of social business.
- Encourage commissioners to evaluate social and environmental criteria in procurement contracts, to ensure appropriate selection of service providers and achievement of policy objectives.

3. Final conclusions and key recommendations

Lack of clarity and threat of litigation: The uncertainty and lack of clarity both in legal and procedural requirements placed on different parties according to national and Community public procurement rules, threatens progress. In addition, it creates further costs in time, money and capacity, as well as unnecessarily opening the door to litigation by unsuccessful applicants.

Focus on community need: Unless commissioners consciously consider the wider implications of commissioning decisions, there is a risk that over time, ‘general interest’, ‘social capital’ or ‘community’ objectives are neglected and undermined by concerns over competition and efficiency. Civil society organisations are increasingly being seen only as competitive entities, and the wider and less easily measured benefits (e.g. involving volunteers, the knowledge of local conditions and needs, their intrinsic link to local and regional networks) are potentially lost.

Bureaucratic burden and the need for learning and flexibility in procurement: Experience reveals the risks of overly bureaucratic approaches burdening delivery organisations and threatening innovation and good practice. Furthermore, many contracting authorities commission public, social or welfare services in a fashion similar to commissioning building works or more traditional forms of contracting. Sector specific approaches, taking into account particular characteristics of social and health services and of their users are still rare yet clearly needed.

Contract structures must encourage innovation: The increasing move towards procurement of public services through large-scale contracts, in the aims of reducing administrative obligations and financial risks for the public contracting authorities, has excluded many civil society organisations from entering into the bidding process, even as highly suitable candidates for delivering local Part B services. Moreover, the opportunity for innovation and specialisation at the local service delivery level has been hampered by this disproportionate practice.

Increasing importance and recognition of social value in commissioning and procurement: The Private Member’s Bill – The Public Services (Social Enterprise and Social Value) Bill – in the UK, and the Commission’s Social Business Initiative, are indicative of the shift towards using social value as a determinant in commissioning and procurement decisions, and a positive development for the voluntary and community sector. Commitment to this new approach should be maintained to the reform and innovation of public services, and to meeting social policy targets in a difficult economic climate.

Key Recommendations:

- The Commission should provide clarification and more practical guidance on implementation of the Directives of what is permissible under existing rules – in particular on Part B services and not-for-profit providers, to ensure less risk-averse and more appropriate practice.
- The Commission should review current notification exemptions and thresholds regarding SSGI, within SGEI and State aid protocols, on the basis of service type than contract size. This should account for services of a local and non-economic nature, which do not affect the wider competitive market or cross-border interest.
- The Commission and Member States should reduce administrative and accounting obligations where possible in order to lessen the burden on SMEs and not-for-profit providers, and further encourage their participation in the procurement market.

- The Commission and Member States should provide dedicated funding for training on the operations and capacities of SMEs and not-for-profit providers for policy-makers, commissioners and procurement officers. This is to better understand the needs of the sectors and their suitability for service provision.
- The Commission should encourage the breaking up of large contracts to ensure fair competition by allowing SMEs, start-ups, and not-for-profits to enter the procurement market, and advancing the opportunities for innovative solutions to service delivery.
- The Commission should lead and facilitate in the exchange of good practice and case law examples of public procurement from across the Member States, for public procurers and economic operators to apply rules and better exercise professional judgement appropriately. The proposal of a database in the Social Business Initiative communication is welcomed as a positive move in this direction.