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**Annual Public Procurement Implementation Review
2012**

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2012

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Glossary of terms

OJ TED (Tenders Electronic Daily): TED is the online version of the *Supplement to the Official Journal of the European Union*, dedicated to European public procurement.

Public Sector Directive: 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, OJ L 134, 30.4.2004, p. 114.

Utilities Directive: 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, OJ L 134, 30.4.2004, p. 1.

Public Sector Remedies Directive: Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, OJ L 395, 30.12.1989, p. 33.

Utilities Sector Remedies Directive: Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ L 76, 23.3.1992, p. 14.

Directive 2007/66/EC: Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, OJ L 335, 20.12.2007, p. 31.

Defence Procurement Directive: Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC, OJ L 216, 20.8.2009, p. 76.

Review: The Annual Public Procurement Implementation Review.

TFEU: The Treaty on the Functioning of the European Union.

Introduction

The correct, efficient and effective application of EU public procurement rules across the Union remains a constant challenge. The Commission considers that it should step up its activities aimed at collecting, analysing and reporting on the information available on the application of the public procurement rules in Member States and should take the lead in exchanging information, experience and best practice in partnership with the Member States. A structured approach to exchanging information on relevant policy developments at national level could also help to improve the response to new policy challenges (*inter alia* by achieving savings, using public procurement to support other policy objectives and strengthening national administrative capacity for public procurement).

The Review is structured in three chapters: the first one gives an idea of the economic significance of the European public procurement market.¹ The second chapter presents an overview of national structures for applying procurement law and of the situation with e-procurement and central purchasing systems. The third chapter addresses the implementation of EU law: infringements at EU and national levels and the experience acquired from managing EU funds from the procurement angle.

The sources of information for this first edition of the Review include data collected by Commission staff from the available databases, such as TED/MAPPS for general figures and economic data or Commission databases on infringements of EU law. This was supplemented by information gathered by the Commission from the Member States. The Commission received feedback from 23 MS.² It must be stressed that not all of the information requested was available in many of these Member States. Therefore, this first edition of the Review is necessarily not exhaustive and complete on all issues covered.

The Commission expects fuller, more consistent information to become available in the future once this Review is established as a regular contribution to EU public procurement policy. This will allow an even deeper analysis of the legal and economic dimensions of public procurement, which in turn should help policy-makers and public procurement practitioners alike to make better policy choices and to use public procurement rules more efficiently.

The Commission therefore intends to draft an Annual Public Procurement Implementation Review each year with the aim of monitoring application of the public procurement rules across the EU. The Review should be a valuable means of sharing knowledge for the Member

¹ For most Member States, the data collected relate to the year 2010. Other Member States provided data for 2009.

² The four Member States that did not contribute to the data gathering are: EL, LU, NL and SI.

States, the European institutions and stakeholders across Europe. Conclusions drawn from the Review will also feed into future policy initiatives to improve application of the EU public procurement rules. In addition, some material from this Review will constitute input for the Annual Report on the integration of the single market, which will be published later this year.³

³ See the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Better Governance for the Single Market (COM(2012) 259/2).

Chapter A — Measuring public procurement in the EU

This chapter gives an overview of the European public procurement market with statistics, based on the OJ/TED database, desk research undertaken by DG MARKT, the statistical reports from the Member States⁴ and the replies provided to the questionnaire by the 23 Member States.

1. Values and economic indicators

Nature and size of the market

Government and utilities expenditure is a significant and influential factor in the economy — every year around one fifth⁵ of EU GDP is spent by different levels of government (central and sub-central), bodies governed by public law and utility service providers to procure goods, works and services. Almost 20% of this total is spent on purchases exceeding the value thresholds set in the Public Procurement Directives and is therefore governed by EU public procurement rules. According to Commission estimates, the total value of invitations to tender for contracts above the thresholds in 2010 was approximately EUR 447 billion (3.7% of EU GDP). Other sources — Member States' annual statistical returns — reported that the contracts awarded in 2010 were worth approximately EUR 340 billion.

Table 1: Commission estimates for the value of tenders published in the OJ/TED and the total value of procurement above the thresholds reported by Member States in 2010⁶ [in EUR billion]

<i>[EUR billion]</i>	Stat. reports	EC estimates
Belgium	4.85	10.96
Bulgaria	1.24	2.30
Czech Republic	6.57	8.07
<i>Denmark*</i>	8.59	10.28
Germany	16.69	32.85
Estonia	0.76	1.51
Ireland	7.64	3.65

⁴ Required under Article 75 of Directive 2004/18/EC and Article 67 of Directive 2004/17/EC.

⁵ In 2010, the total expenditure of government, the public sector and utility service providers on works, goods and services was estimated at EUR 2 406 billion (i.e. 19.7 % of EU GDP); see: http://ec.europa.eu/internal_market/publicprocurement/docs/indicators2010_en.pdf.

⁶ Data based on 2010 statistical reports submitted by 24 Member States. Data for Sweden refer to a mid-point between two estimates submitted to the Commission (marked in the table: **). Data for Denmark and the Netherlands are based on 2009 Statistical Reports (marked in the table: *). Data for Slovenia have not been taken into account as the country has failed to submit the Statistical Reports for more than two years.

Greece	2.46	5.47
Spain	29.55	34.06
France	53.03	66.71
Italy	30.77	53.12
Cyprus	0.43	0.90
Latvia	1.52	2.06
Lithuania	1.35	1.33
Luxembourg	0.35	0.61
Hungary	3.95	5.52
Malta	0.36	0.26
<i>Netherlands*</i>	20.34	10.92
Austria	6.20	6.59
Poland	22.21	30.90
Portugal	3.57	7.08
Romania	6.09	7.60
<i>Slovenia</i>	0.00	1.63
Slovakia	3.41	7.62
Finland	5.61	8.25
Sweden**	22.36	16.88
UK	80.55	109.88
EU TOTAL	340.43	447.03

Source: DG MARKT, based on OJ/TED data and Member States' statistical reports

The observed difference of almost a quarter of the value of the Commission's estimates is due to various reasons, such as the level of compliance with the statistical obligations amongst Member States,⁷ the difference in economic phenomena reported,⁸ differences in coverage of procurement in the utilities sectors⁹ and possible time-lags between the two estimates.¹⁰

Similar differences between the two data sources can be observed over time (see Figure 1).

As the scale of discrepancies between the above two data sets is significant, Commission staff are currently analysing this issue in further detail. The data collection methods used in the statistical reports (including measures potentially simplifying the statistical obligations) are currently being discussed with the Member States in the context of the ongoing modernisation of the public procurement legislative package. In parallel a study focusing on

7 In the case of two MS (DK and NL) data from 2009 Statistical Reports were used. Slovenia has not been included in the global figure for the Statistical Reports, as the country has not fulfilled its statistical obligations for more than two years.

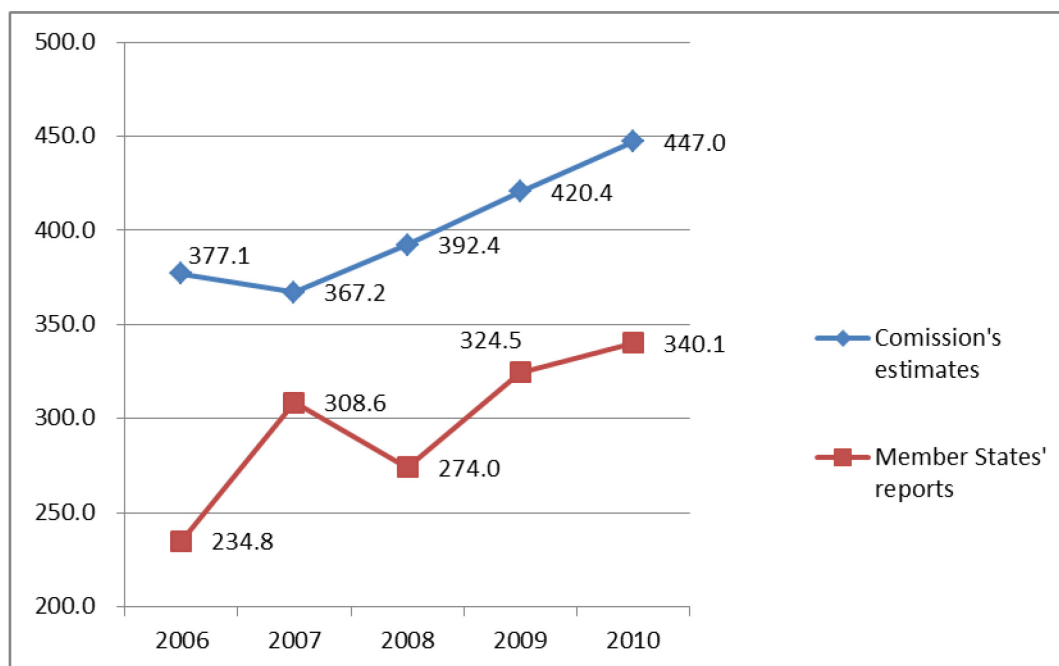
8 The Commission estimates the value of tenders published in TED (it estimates the value of 'invitations to tender'), whereas the Statistical Reports provide the total value of contracts awarded (i.e. the value of 'contract awards'). As a result, the apparent discrepancy between the two figures might be due to the fact that not all invitations to tender were followed by an award of a contract (due to cancellations of procedures, for example).

9 The Statistical Reports only partially cover above-threshold procurement in the utilities sectors (i.e. five out of ten sectors are not covered by the GPA and hence not subject to obligations concerning above-threshold statistical reporting [sectors covered by the GPA: Annex II — Production, transport or distribution of electricity, Annex III — Production, transport or distribution of drinking water, Annex V — Urban railway, tramway, trolleybus or bus services, Annex IX — Maritime or inland port or other terminal facilities, Annex X — Airport installations]).

10 Statistical Reports will normally lag behind the Commission's estimate — differences observed in time series most probably mirror the time that elapses between the invitation to tender and the award of a contract.

the methodology used by the Commission to produce its estimates will be completed in 2012.

Figure 1: Commission estimates for the value of tenders published in the OJ/TED and the total value of procurement above the thresholds reported by Member States in 2006-2010 [in EUR billion]

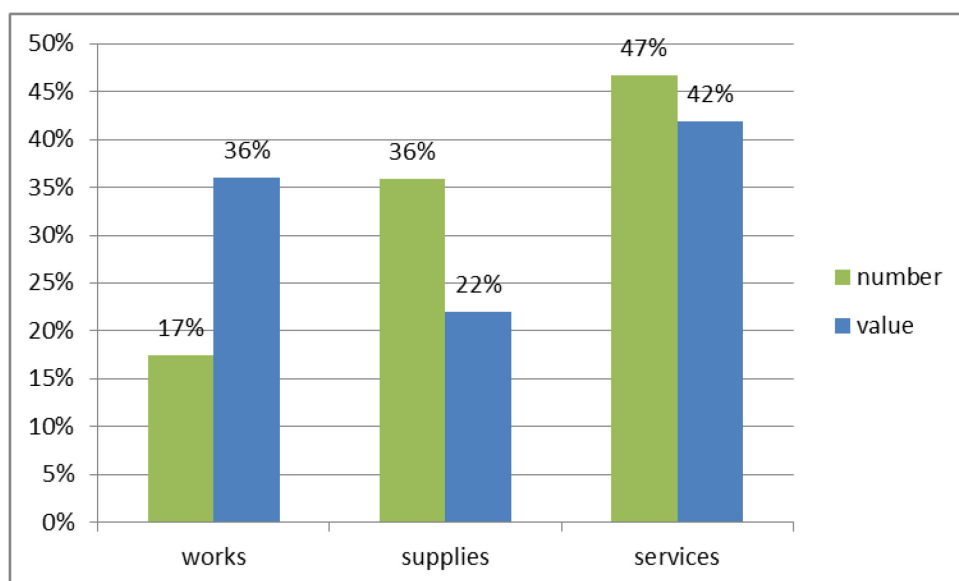


Source: DG MARKT, based on OJ/TED data and Member States' statistical reports

Market structure

In 2010, approximately 36 % of the value of contract award notices published in the OJ/TED was attributable to works contracts. 42 % was spent on services and 22 % on goods. If these proportions were to be extrapolated to the Commission estimates of the value of invitations to tender published in the OJ, the total values would be EUR 161 billion spent on works, EUR 99 billion on supplies and EUR 187 billion on services.

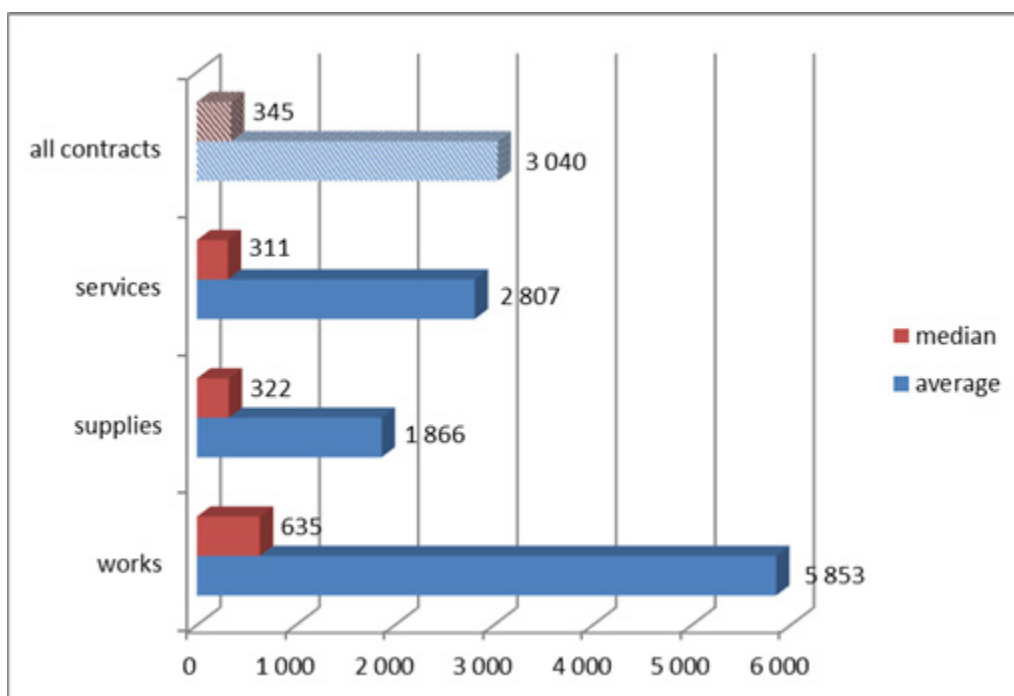
Figure 2: Number and value of contract award notices published in the OJ/TED in 2010, grouped by type of contract [in %]



Source: DG MARKT, based on OJ/TED data

Services contracts accounted for almost half of the notices published in the OJ/TED (47%), followed by supplies (36%) and then works (17%). The differences between the number and the value of contracts in works and supplies mirrors the fact that works usually involve much higher sums than supply contracts (the average total value of a works contract is around EUR 5.8 million, whereas for services it is around EUR 320 000).

Figure 3: Average and median value of contract award notices published in the OJ/TED in 2010, grouped by the type of contract [in EUR thousand]



As shown in Figure 3, the typical value of a contract awarded in line with the EU rules on public procurement was around EUR 345 000.

Around 90% of notices are for contracts governed by the Public Sector Directive and the remaining 10% fall under the rules of the Utilities Directive. In terms of value, utilities accounted for 19% of the contract award notices published in 2010 (hence, authorities belonging to the public sector awarded 81% of the total value of contracts published in the OJ/TED). Data from the statistical reports show an identical split in the number of contracts (i.e. 90/10), whereas the reported total value of contracts awarded in 2010 was 76% to 24% for the public and the utilities sectors respectively.

Transparency

Notices for contracts above the thresholds are published in the OJ/TED, which is the single point of access to information available to any interested company. The two main types of notice published in the OJ/TED are the contract notice (CN), which contains the invitation to tender addressed to potential bidders, and the contract award notice (CAN), which the contracting authority should publish once a contract is awarded, announcing the result of the procurement procedure, including the total final value and details of the winning company.

Transparency in the public procurement markets has been continuously improving over recent years. Not only has the number of contract notices advertised continued to grow steadily over the past few years, as can be seen in Figure 4, but the number of contract award notices has grown even faster, demonstrating increased compliance with post-award publication requirements.

Figure 4: Number of CNs and CANs published by EU MS in the OJ/TED in 2007-2011



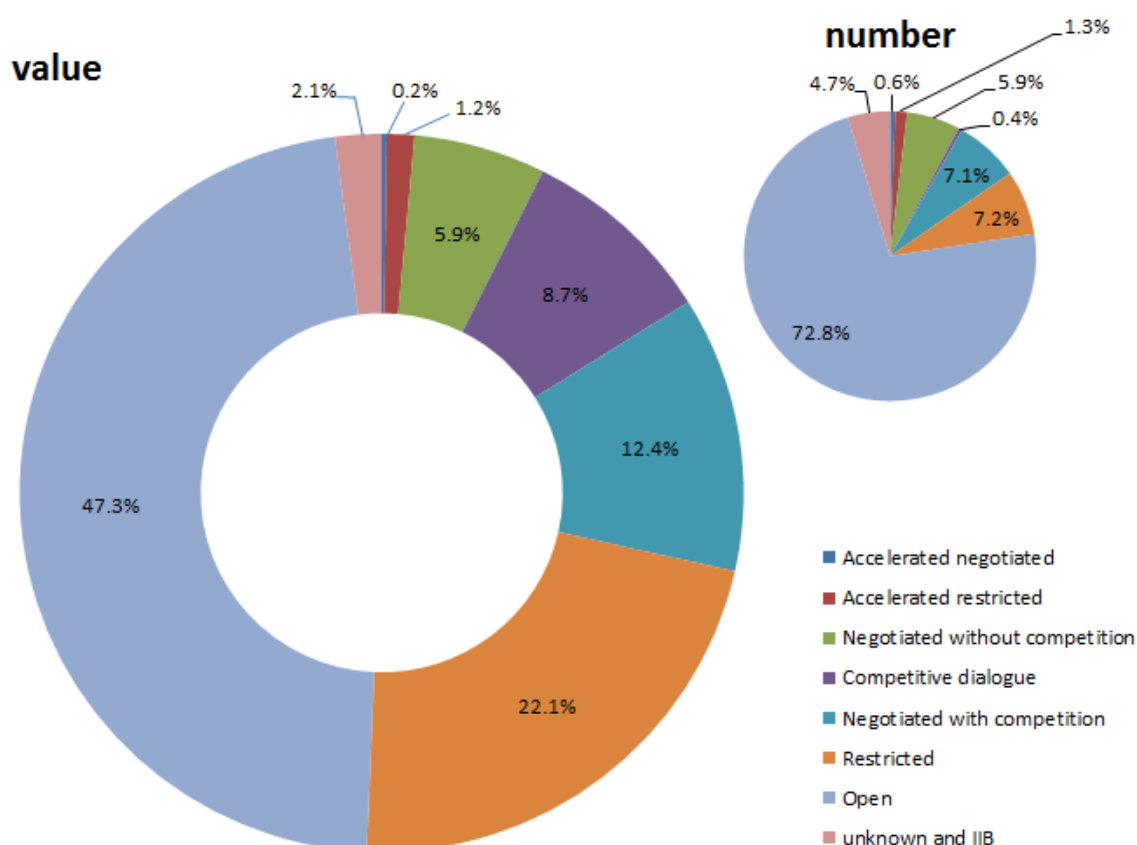
Source: DG MARKT, based on OJ/TED data

Procedures used

The most common way of running public procurement is to publish a notice inviting all interested bidders to submit their tenders (the 'open procedure'). Open competitions account for approximately 73% of all contract award notices. This procedure is, however, used for relatively smaller contracts and accounted for only 47 % of the value of all contracts awarded and published in 2010. The second most popular procedure is the 'restricted procedure', which is used for contracts of much higher value (7% of CANs but 22 % of the total value).

This overall pattern is, however, marked by wide variation across Member States. Three Member States awarded half of all the contracts for which award notices were advertised in 2010 (France 26 %, Poland 14 % and Germany 13 %). The three countries with most contracts awarded in terms of their value were the UK (27 %), Italy (13 %) and France (12 %). In contrast to the rest of Europe, the UK is a frequent user of the restricted procedure (in 2010, the restricted procedure was used in 47 % of UK's contract award notices).

Figure 5: Procedures used by number and value in 2010 [in %]



Source: DG MARKT, based on OJ/TED data

Exempted utilities markets

The purpose of the Utilities Directive is to ensure the opening-up to competition of public procurement contracts awarded by entities operating in the sectors covered (water, energy, transport, and postal services). The two reasons given for introducing rules on procurement procedures for utilities are: the way in which national authorities can influence the

behaviour of these entities; and the closed nature of the markets in which they operate, due to the existence of special or exclusive rights granted by Member States concerning the supply to or provision or operation of networks for providing the services concerned. The aim is to ensure that utility operators, which themselves may not operate in competitive markets, adopt transparent and fair procurement practices to simulate competitive market conditions within the markets in which they procure.

Pursuant to Article 30 of the Utilities Directive, Member States or, where national legislation so allows, contracting entities may request exemptions from the application of the rules of that Directive for certain activities. The Commission may adopt a decision exempting activities from the rules of the Directive if two conditions are met, namely: that access to the activity concerned is not restricted; and that the activity is fully exposed to competition on the market in question.

The electricity, the oil and gas and the postal sectors have seen major developments over the past decade with the introduction and elaboration of EU Directives requiring the opening of markets to competition. Less progress has been made in establishing liberalisation regimes for railways, other land transport and ports. No liberalisation regime has been proposed for the water sector or for airports. Exploration for oil and gas has been subject to a separate regime governing the granting of exploration licences since 1994 and this sector is widely seen as being open to international competition.

However, even where the market has been opened up to competition, there has still been only limited development of competition in many Member States, with incumbent companies continuing to hold a dominant position in the market. Where effective competition has developed, Member States have applied successfully for exemption under Article 30.

As of 20 April 2011, 21 decisions had been issued (seven concerning the postal sector and 14 concerning energy sectors) in 12 Member States (CZ, DE, DK, ES, FI, HU, IT, AT, NL, PL, SE and UK). These decisions were either positive, negative or mixed (positive for certain activities, negative for others).

In the postal sector, there have been seven applications to date, which have resulted in the same number of decisions and concern financial services (HU, IT), some courier/parcel services (AT, IT, DK) or the sector as a whole (SE, FI).

In the energy sector, the requests concerned electricity (production and wholesale; distribution), oil and gas (exploration, production, gas storage), and hard coal mining. In the oil and gas sector there were six applications, resulting in four decisions¹¹ (England, Scotland and Wales, NL, DK and IT). In the electricity sector, out of 12 applications for exemption, five

¹¹ Two applications having been withdrawn.

positive decisions were issued (concerning AT, SE, England, Scotland and Wales — two decisions, and FI), two decisions were negative (PL and CZ), and two mixed (IT and DE). One application did not result in a decision as it was withdrawn by the applicant and one is currently ongoing.

2. Procurement below the EU thresholds

The Public Procurement Directives apply only to contracts above the threshold values set in Article 7 of Directive 2004/18/EC and Article 16 of Directive 2004/17/EC. Nevertheless, contracting authorities and entities have to comply with the rules and principles of the TFEU whenever they conclude public contracts that are potentially of cross-border interest. These principles, explicitly enshrined in or derived from the Treaty, include free movement of goods and services, the right of establishment, non-discrimination and equal treatment, transparency, proportionality and mutual recognition. As the Commission pointed out in its Interpretative Communication on this matter,¹² the Court has developed a set of basic standards for the award of public contracts with a potential cross-border interest, which are derived directly from the rules and principles of the TFEU. Non-compliance with these standards, which include rules on advertising, principles of the contract award and judicial protection, are actionable infringements of EU law. Therefore, since these principles of EU law can be relevant also to public contracts which have a value below the thresholds but are potentially of cross-border interest, it is also important for the Commission to gather data on public procurement procedures below the thresholds set in the Directives.

In this part of the questionnaire, Member States were requested to provide information on the total value and volume of contracts below the thresholds in 2010.

The following replies were received:

AT	BE	BG	CY	CZ	DE
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¹² Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives (2006/C 179/02).

Information not available	Number: ca. 12000 Value: not available	Number: 5 805 Value: BGN 2 067 300 802 (EUR 1 057 010 329) ¹³	Number: 10 770 Value: EUR 440 million	Number: not submitted Value: CZK 320 000 000 (with VAT) (EUR 12 678 288) ¹³	Information not available
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¹³ Figures provided for information only (value in EUR based on the exchange rate of the European Central Bank of 30/12/2010).

DK	EE	ES	FI	FR	HU
Information not available	Number: 4 927 Value: EUR 470 000 000	Data incomplete	Number: 12 484 Value: EUR 6.8 billion	Number: 80 716 Value: EUR 142 537 460 000	Number: 7 881 Value: HUF 397 109.53 million (EUR 1 423 331 649) ¹³
IE	IT	LT	LV	MT	PL
Number: information not available Value: EUR 9.3 billion	Number: 18 295 Value: EUR 7 751 062 920 ¹⁴	Number: 10 591 Value: LTL 4144.8 million (EUR 1 200 417 053) ¹³	Number: 3 750 ¹⁵ Value: LVL 503 021 790 ¹⁶ (EUR 708 681 023) ¹³	Number: 3 052 Value: EUR 126 686 008	Number: 177 449 Value: EUR 48.5 billion
PT	RO	SE	SK	UK	
Number: 185 1145 Value: EUR 4.78 billion	Number: 77 525 Value: LEI 148 415 26 (EUR 3 461 742) ¹³	Number: 13 828	Number: 1 325 Value: EUR 934 057 000	Comprehensive information not available	

In many of the MS that replied to the DG MARKT questionnaire these data are not or are only partially available. In DK these figures will be available only from 2012 onwards. Based on the information received from the Member States, a total of 2 291 543 public contracts were awarded in these MS under the EU thresholds, adding up to around EUR 102 billion in value.

3. Information on concessions

The award of service concessions is subject only to the aforementioned Treaty principles, notably equal treatment, non-discrimination and transparency, while works concessions (with the exception of the utilities sector) are also partially covered by some secondary

¹⁴ Information available only for contracts above EUR 150 000.

¹⁵ Not available for utilities.

¹⁶ Information available only above the value of EUR 20 000 for supplies and services and EUR 120 000 for works.

legislation.¹⁷ The impact assessment report¹⁸ on the proposal for a Directive on the award of concession contracts demonstrated the existence of serious problems related to the way concessions are awarded throughout the EU. Among other things, the report pointed at distortions and market access hindrances arising from the lack of a clear definition of concession contracts, the absence of uniform interpretation of the Treaty principles and overall legal uncertainty as regards the rules applicable to the award of this type of contracts.

The aim of this part of the questionnaire was to gather additional data on the prevalence and value of concessions in Member States and to verify to what extent the aforementioned problems affect the availability of crucial data concerning in particular the number and the volume of the concession awarded.

MS were requested to provide information on the number and value of service and works concessions awarded in the year 2010.

The following replies were received:¹⁹

AT	BE	BG	CY	CZ	DE
'relatively few'	Works: 7 Services: 28 ²⁰ Value: not submitted	Works: 1 Indicative value: BGN 740 000 (EUR 378362) Services: 23 Indicative value: BGN 61547543 (EUR 31469242) ¹³	0	Total number: 11 Total value: CZK 7 493 443 238 (without VAT) (EUR 296 887 608) ¹³	No information available

¹⁷ Title III of Directive 2004/18/EC.

¹⁸ Page 11 of the Impact Assessment of an initiative on concessions accompanying the proposal for a Directive of the European Parliament and of the Council on the award of concession contracts, Brussels, 20.12.2011, SEC(2011) 1588 final.

¹⁹ Where 'total number' or 'total value' is indicated, information broken down to works and services concessions was not submitted.

²⁰ This number does not include notices that may have been published in specialised publications (e.g. in the field of construction). The number of such notices is not known.

DK	EE	ES	FI	FR ²¹	HU
Works: 0 Services: not submitted Value: not submitted	0	Works: 106 Value: EUR 667 147 899 Services: 473 Value: EUR 808 989 058	Works: 6 Value: EUR 16 230 000 Services: 8 Value: EUR 2 052 000	Information not available broken down to the year 2010.	Works: 4 Value: HUF 11.76 billion (EUR 42 150 538) ¹³ Services: 19 Value: HUF 6.99 billion (EUR 25 053 763) ¹³
IE	IT	LT	LV	MT	PL
'relatively few'	Total number: 109 Total value: EUR 1 016 692 897	0	'no publication of concession notices'	0	Works: 48 Value: not submitted Services: 6 Value: not submitted
PT	RO	SE	SK	UK	
Information not submitted	Works: 17 Value: EUR 167 319 244 and LEI 292 260 000 (EUR 6 812 587, totaling EUR 174 131 831) ¹³ Services: 244 Value: EUR 233 920 180 USD 50 981 (EUR 38 332) ¹³ LEI 1 659 672 023.97 (EUR 387 113 574, totaling EUR 621 072 086) ¹³	Total number: 49	Total number: 1 Value: not submitted	Information not available broken down to the year 2010.	

21 France did not provide data for the year 2010 in its reply to the questionnaire, but according to data provided by the French authorities for the impact assessment of the concessions initiative, France is among the Member States with the largest concessions market. There is an estimated stock of 10 000 concession-type contracts worth around EUR 80 billion (equivalent to 2.1 % of GDP).

Only the above MS were able to provide information on both the number and value of concession contracts. This proves that the existing level of transparency leaves much room for improvement. Data received show that there is a significant spread as regards the number and value of concessions awarded by the Member States. In CY, DK, EE, MT, LT and LV no concession contracts were awarded or published in the year 2010, followed closely by SK with only one such contract awarded. In IT 109, in RO 261, in ES 579 and in FR around 10 000 concession contracts were concluded. The other Member States fall between the two extremes with a few dozen concessions awarded during the year. In two of the countries (DE, IE) that did reply to DG MARKT's questionnaire, such data are not available.²²

The substantial difference in the prevalence of concessions throughout the EU may be partly due to the specificities of national legal traditions, different approaches to the involvement of private capital and know-how in the performance of public tasks, but also to the disparity of national definitions and therefore the classification of existing arrangements as concessions and consequently the determination of the applicable legal framework.

The disparity of national definitions justifies approaching the present results with caution.²³ Concessions are commonly confused with public contracts or authorisation schemes. For certain Member States, such as Spain, the figures provided might, in the light of the information presented in the Impact Assessment,²⁴ be actually underestimated.

As a means to overcome this unsatisfactory situation with regard to the working of the internal market, the Commission adopted in December 2011 a proposal for a Directive on the award of concession contracts which is currently under discussion in the European Parliament and in the Council. It includes provisions on compulsory publication in the *Official Journal of the EU* of both concession notices and concession award notices, and on the minimum content of such publications. It also provides for some minimum guarantees of transparency and equal treatment with regard to selection and award criteria and to judicial remedies.

The Commission considers that if these measures are adopted, an internal market for concessions will be created and therefore the availability of the aforementioned information will certainly improve.

22 According to the study procured by the Commission (CSES study 'Analysis of Sectors concerned by Service Concessions', p. 50) and in the light of the information obtained during the stakeholders' consultations, concessions are not uncommon in Germany.

23 Indeed, according to the consultation performed in the context of the Impact Assessment (p.59), 45.9 % of the respondents were aware of public contracts that had been awarded as services concessions or works concessions.

24 Page 8 of the Impact Assessment of an initiative on concessions.

4. Number of contracting authorities and entities

Information obtained in reply to this part of the questionnaire was intended to establish a relationship between the size (population) of an MS and the number of contracting authorities and contracting entities there.

The following replies were received from the Member States:

AT	BE	BG	CY	CZ	DE
5 000	Around 5 000	3 409	Around 700	1 989	Between 15 000 and 20 000
DK	EE	ES	FI	FR	HU
350	1 153	8 339	540	132 652	9 856
IE	IT	LT	LV	MT	PL
807 ²⁵	Comprehensive information not available	5 615	2 287	152	13 765
PT	RO	SE	SK	UK	
2 800	122 72	Around 4 000	2 287	Around 5 000	

The total number of contracting authorities/entities mentioned in the replies adds up to 102 800. This number has to be seen in the light of one key factor: some Member States have databases where all such entities feature once they are registered (e.g. HU, RO), whereas in others the calculation is based on the number of authorities that made a purchase in the given year (e.g. CZ, PL).

The analysis carried out demonstrates that in FR for instance there is one contracting authority/entity for every 500 citizens, in LT there is one for every 600 citizens, whereas this ratio is 15 000 for DK. For most MS it is between 1 000 and 3 000. In future Reviews, it should be considered whether in-depth correlations can be drawn, e.g. between the number of contracting authorities on the one hand and the size of the economy, the size of the administration and aggregation of demand on the other. Significant differences between the Member States regarding the number of contracting authorities per capita — all other conditions being equal — could either indicate a different organisational structure of the purchasing bodies in a country, which could be further examined to see if there are practices which are more effective, or it could also be an indication of diverging interpretations of the term ‘contracting authority’, which could also be followed up in future editions of this Review.

²⁵ With respect to contracts above the EU threshold.

Chapter B — Overview of national structures for procurement, national arrangements for reviews, central purchasing and e-procurement

5. Overview of national structures responsible for applying the EU public procurement rules

This part of the questionnaire was intended to gather feedback on the national structures with the tasks of framing procurement policy, providing guidance to contracting authorities/entities and tenderers, preparing legislation, monitoring implementation of the public procurement rules, publishing and information sharing and, finally, maintaining relations with their counterparts in other MS and following developments at EU level. Member States were also requested to indicate whether any specific institutions were in charge of the tasks listed above for the utilities and defence sectors or for procurements below the thresholds. All 23 MS which responded provided an answer to this question.

Most EU MS designate specific authorities which handle many or even all of the above tasks listed above across the board, with the exception of four MS where the institutions in charge are not designated specifically to handle procurement matters and procurement is only one of their tasks. For instance, in the UK procurement issues are handled by the Efficiency Reform Group of the Cabinet Office whereas in EE the Ministry of Finance is in charge. In three MS responsibility for procurement is coupled with competition matters (CZ and SE) or with competition and consumer affairs (DK).

Replies to this part of the questionnaire (BE, BG, CY, CZ, DK, EE, ES, FI, FR, HU, IE, IT, LT, LV, MT, PL, PT, RO, SE, SK and UK) indicate that the national institutions responsible for procurement perform almost all the tasks listed above. However, In IE, LT and PL the tasks are divided between two authorities, in BE, IT, HU and SE between three, in BG, FR, PT and RO between four and in ES between five.

All the MS which replied to the question whether the same structures are responsible for the utilities sector (AT, BE, CY, CZ, DK, FR, HU, LT, LV, PL, RO and SK) answered in the affirmative.

As for procurement contracts below the EU thresholds, in every MS which responded (AT, BG, CY, CZ, DK, FI, FR, HU, IE, IT, LT, LV, MT, PL, PT, RO, SE, SK and UK) the same institution(s) is also responsible for above-threshold contracts.

Among the Member States which provided an explicit answer to the question whether the same structures are responsible for the defence sector (AT, BE, CY, CZ, DK, FI, FR, HU, IT, LT, LV, PL, RO, SK and UK), in four cases this field is dealt with — at least partially — by

institutions distinct from the civil sector: in FI and the UK the Ministries of Defence, in IT the Ministry of Defence together with a public company and in RO the Agency for Offsetting Special Technique Procurements.

6. National arrangements for reviews

Information for this section was gathered from the replies provided by the 23 MS and the results of the survey on the transposition of Directive 2007/66/EC into MS law conducted by the Italian Presidency of the Public Procurement Network.²⁶ In the questionnaire, MS were requested to provide information on the bodies competent for review procedures and to describe the first- and last-instance review bodies, the appeals system and the nature of the review body (administrative or judicial). They were also asked whether lodging a complaint with the contracting authority is a prerequisite before proceeding to the next stages of review.

The Remedies Directives leave it to the Member States to decide whether reviews are handled by administrative or judicial bodies. First-instance independent reviews are carried out by judicial bodies in 13 MS (DE, FI, FR, EE, EL, IE, IT, NL, PT, LT, LU, SE and UK), and by an administrative body in 14 MS (AT, BE,²⁷ BG, CY, CZ, DK, ES, HU, LV, MT, PL, RO, SI and SK). The actual difference between the type of review body chosen is less acute than the terms 'administrative' or 'judicial' would suggest. On the one hand, many of the administrative bodies in the MS are quasi-judicial in nature²⁸ (information explicitly substantiating this was available from AT, HU and SI, but the situation is likely to be similar in many other countries). In these countries the standing of the persons deciding the cases is also similar to a judge. On the other hand, in some of the MS which provide for judicial review, the courts work to special, shorter deadlines for giving a decision (e.g. FR: 21 days, NL: usually dealt with in summary proceedings).

7. E-procurement

The use of electronic means may greatly improve public procurement efficiency, leading to a drastic reduction of costs. Given the magnitude of the EU public procurement market, there is a great public interest in transition to e-procurement. Further benefits are recognised in

²⁶ Summary table of draft transposition of Directive 2007/66/EC into Member States' law:

<http://www.publicprocurementnetwork.org/docs/mutual/Summary%20transposition%20table%20MS.pdf>.

²⁷ In BE review is carried out by an administrative court (the Conseil d'Etat) for tenders issued by administrative bodies, while the review body is judicial in nature for every other contracting authority or entity.

²⁸ The ECJ held in the *Dorsch Consult* case (C-54/96) that in order to be considered as a body of judicial character, the following multiple cumulative criteria must be met: the body must be established by law, it must be a standing body, its decisions must be binding, the proceedings before this body must be binding on the parties, the body must apply the rules of law, it must be independent.

terms of easier and cheaper participation in procurement for economic operators, reducing the administrative burden, and ensuring that public procurement opportunities are more widely accessible to SMEs and across borders. To unlock this potential, the 2004 Public Procurement Directives introduced provisions to enable e-procurement uptake in all Member States, including the electronic publication of procurement notices, electronic communication (including the submission of bids), and new, fully electronic procurement procedures such as dynamic purchasing systems (DPS) and e-auctions. The Directives were accompanied with an Action Plan. The plan specified flanking initiatives that would support the MS in e-procurement uptake and address the risk that divergent approaches in the MS would raise technology barriers hampering the single market.

Use of e-procurement has increased to some extent since publication of the 2004 Action Plan. Nevertheless, in aggregate terms, e-procurement is still used in only 5 to 10 % of procurement procedures carried out across the EU and the ambitious political targets set out in the Manchester Ministerial Declaration in 2005 have not yet been achieved.

A few Member States, such as IE, LT, PT and SE, have made significant progress towards full implementation of e-procurement in the pre-award phases. This increase is particularly significant in Member States where e-procurement has been made mandatory by national law, such as Portugal.

As indicated in the table below, most Member States have drafted an e-procurement strategy with the aim of making full use of electronic tools in conducting public procurement, normally as part of their national procurement strategy or as a component of their e-government strategy. In most cases, the strategy covers the full course of the tendering process and is deployed regardless of the type of purchase or contracting authority.

As the large majority of Member States leave it up to contracting authorities or to suppliers to decide whether to use electronic means, the transition is taking place gradually. Consequently, paper and electronic environments co-exist in parallel in many Member States.

Electronic platforms able to support a one-way flow of information — e.g. e-notification and e-access — are more widespread than those capable of supporting e-submission. While the first type of electronic platforms just enables a contracting authority to make procurement information available to interested economic operators, the latter enable the economic operators to send in their tenders using electronic means of communication. The success of TED for e-notification (which in some cases has become mandatory) can contribute to advances in implementing other more complex phases of e-procurement. Whereas 90 % of all notices sent to Tenders Electronic Daily (TED) for publication in 2004 were in paper form, today 94 % of notices are submitted electronically.

The increasing number of electronic platforms and portals demonstrates that e-procurement capacity is available in the EU. Overall, there are over 240 electronic platforms or portals in the EU for public procurement. However, estimates suggest that only about 50% of them are capable of receiving electronic bids, which is the key aspect of e-procurement. Such systems are operating in only about two thirds of the EU Member States.

The slow progress achieved to date is not primarily down to technical constraints, as the technologies needed to implement e-procurement are now widely available. The challenge is to persuade stakeholders to embrace new electronic tools and to make sure that the systems put in place facilitate wider access to these valuable markets across the EU.

Future efforts should focus on achieving the transition towards full electronic means of communication, especially electronic access (e-access) to tender documents and electronic submission (e-submission) of bids, as these have the greatest potential to increase transparency and boost competition on public procurement markets. The Commission proposal for the modernisation of the public procurement legislative package provides for a gradual transition towards full electronic means of communication. These would become mandatory for some phases of the procurement process and for some actors by the transposition deadline: e.g. e-notification to TED and electronic availability of procurement notices. Central purchasing bodies should also move to full electronic means of communication, including e-submission, by that date. All other contracting authorities would be required to perform all procurement procedures using electronic means of communication no later than two years after the transposition deadline, except in duly justified circumstances.

The table below assesses the progress made by the individual MS in specific areas of e-procurement.

Member State	Has a national strategy	E-submission capability	Key developments
Austria	Yes	Yes	
Belgium	Yes	Yes	As from 1 July 2012 all federal authorities are required to accept bids submitted electronically. The situation is, however, different at the level of the Regions: - In the Flemish Region, bids have had to be submitted electronically since 1 July 2012; - In the Brussels Capital Region and the Walloon Region

			electronic bids have had to be accepted since 1 December 2011 and 1 January 2012, respectively.
Bulgaria			
Cyprus	Yes	Yes	
Czech Republic	Yes	Yes	Mandatory from July 2012 for national procurement below a certain threshold
Denmark	No	Yes	Mandatory from 1 April 2012 for procurement contracts below the thresholds
Germany	No	Yes	
Estonia	Yes	Yes	
Spain	Yes	Yes	
France	Yes	Yes	As from 1 January 2012, contracting authorities are required to accept electronic bids or candidatures for all contracts for EUR 90 000 or more
Hungary	No	No	
Ireland	Yes	Yes	Piloting e-invoicing
Italy		Yes	
Latvia	Yes	Yes	
Lithuania	Yes	Yes	E-procurement mandatory since 2009
Malta	Yes	Yes	
Poland	Being developed		A new system is being rolled out to all public departments, entities and organisations for commonly used goods, consumables, etc. Gradual integration of services and eventually works.
Portugal	Yes	Yes	E-procurement has been mandatory since 2009. In February 2012 the Government decided to develop an integrated solution covering the whole public procurement value chain (from sourcing to e-invoicing).
Romania	Yes	Yes	
Slovakia	Yes	Yes	
Finland	NA	Yes	

Sweden	Yes		E-ordering and e-invoicing are compulsory for government agencies.
UK	Yes	Yes	

8. Aggregation of demand — central purchasing bodies and framework contracts

Over the last few years, a trend towards increased professionalisation of public procurement has been observed, in the form of aggregation of demand/centralisation by means of framework contracts and central purchasing. Government administrations, at both central and local levels, are increasingly using specialised bodies, such as central procurement bodies (CPBs), while greater use of framework contracts is changing the nature of the procurement function. Currently, however, practice varies widely across Member States.

Central procurement bodies

The share of contract notices published by contracting authorities buying on behalf of other authorities rose from 3.14% in 2006 to 5.73% in 2011. In some Member States (DK, EE, EL, LV, SE and UK) more than 10% of all contracts are awarded by contracting authorities purchasing on behalf of other authorities.

	2006	2007	2008	2009	2010	2011
CN(%)	3.14	4.65	5.33	5.44	5.54	5.73

The establishment of a CPB is an option offered in the Public Sector Directive. Most Member States have implemented this option in their national legislation, with the exception of EE, DE and LU. Of the Member States whose legislation allows the establishment of CPBs, some, such as PL, have not established any in practice and only a few of them (SI and RO) still intend to. There are also many different arrangements for buying on behalf of other contracting entities. These are not necessarily considered central purchasing bodies within the meaning of the Directives but can involve joint purchasing as explained below.

It can be observed that while most Member States have at least one central purchasing body, it is frequently only central government administrations that are required to use it. Other bodies may be encouraged to do so but are also often allowed to establish their own

group purchasing arrangements. Some purchasing of common services is based on a functional requirement (in the health sector, and police authorities often carry out central procurement at national level).

It has also been noted that the criteria by which they may be asked to evaluate bids can be much broader than simply obtaining better value for money through economies of scale, and include other policy objectives, such as sustainable development or encouragement of innovation, with the more general aim of increasing welfare.

Framework agreements

A framework agreement differs from an ordinary contract in that it does not commit the authority or authorities actually to buy. It sets out the agreed terms and conditions, including price, under which future contracts may be concluded with one or more suppliers.

Article 32 of the Public Sector Directive provides for an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged.

Framework agreements do not seem to be associated with any particular procedure. Across the EU as a whole, frameworks are most popular with the utilities sector and national or federal agencies.

Between 2006 and 2010 the number of framework contracts increased by a factor of almost four. In 2010 over 25 000 framework contracts accounted for about one seventh of the value of all the contracts published in the OJEU. In the same year 6.8% of all contracts were awarded by contracting authorities purchasing on behalf of other authorities. Over 40% of the value of contracts published by central or joint purchasing bodies was awarded through framework agreement contracts. In 2009, framework contracts covered more than a quarter of all contract notices in DK, NL, FR, RO, SK, SI and UK.

In terms of value, however, the contracts under framework agreements in the UK, FR, DE and DK together make up 70% of the value of all contracts awarded in 2009. The UK alone accounts for over 40 % of this: roughly EUR 25 billion out of EUR 60 billion.

	2009	2010
Number	19 436	21 549
Value	59 701 299 710	79 572 398 027

Chapter C — Application of the EU public procurement *acquis* at European and national levels

Infringements of EU procurement law are either pursued by the Commission in its role as guardian of the Treaties via infringement proceedings under Articles 258 and 260 TFEU, or handled by the Member States' review bodies. The two Remedies Directives set out the broad legal framework, the essential requirements for the review process and the powers of the review bodies. The purpose of this chapter is to give an overview of the state of play with regard to the number of infringements handled at those two levels, the types of infringements and the sectors most affected by the violation of public procurement rules.²⁹

9. Infringements at EU level

Member States are responsible for the implementation (transposition and application) of EU law in their legal systems. The Commission, in turn, monitors and verifies whether they are implementing it correctly. If a Member State fails to fulfil its obligations, the Commission can request it to put an end to the infringement and, if necessary, may refer the case to the Court of Justice of the European Union.

Infringement proceedings launched by the Commission can be grouped into three categories: cases of non-communication, where a Member State fails to notify any implementing measures by the deadline set, cases of non-conformity, where the transposition measure is not in line with EU law, and cases of incorrect application, where the infringement takes the form of some action or omission attributable to the MS.

Communicating the national transposition measures (NTMs)

Four Directives in the area of public procurement were examined from the point of view of timeliness of the communication of NTMs. In the case of the Public Sector Directive, nine MS fulfilled their communication obligations on time (AT, BG, CY, DK, MT, NL, RO, SK and UK), while for the Utilities Directive this number was 11 (AT, BG, CY, DK, LV, HU, MT, NL, RO, SK and UK). Measures implementing Directive 2007/66/EC were communicated on time by nine MS (AT, BG, CY, DK, MT, NL, RO, SK and UK), while for the Defence Procurement Directive, this obligation was fulfilled on time by only four MS (DK, EL, ES and LU).

²⁹ The period under scrutiny is mentioned in each sub-section.

Material infringements of law: incorrect transposition and wrong application

For the purposes of the Review, a snapshot of the current situation — as of 1 November 2011 — regarding ongoing investigations and open cases — is given.

The figures are put into perspective against the background of infringement proceedings over the last three years. Since 1 January 2009, excluding cases of non-communication, 61 infringement cases have been opened against MS in which the procedure reached at least the stage of sending a letter of formal notice:

BE	BG	CZ	DK	DE	EE	IE	EL	ES	FR	IT	CY	LV	LT	LU	HU	MT	NL	AT	PL	PT	RO	SI	SK	FI	SE	UK
1	2	0	0	6	0	0	16	2	0	6	1	1	0	0	4	3	4	1	2	2	3	1	1	0	1	4

Out of this number, 50 cases were based on complaints lodged with the Commission:

BE	BG	CZ	DK	DE	EE	IE	EL	ES	FR	IT	CY	LV	LT	LU	HU	MT	NL	AT	PL	PT	RO	SI	SK	FI	SE	UK
0	2	0	0	6	0	0	16	2	0	5	1	1	0	0	2	0	1	1	1	2	3	1	1	0	1	4

The other 11 were based on investigations carried out by the Commission on its own initiative.

BE	IT	HU	MT	NL	PL
1	1	2	3	3	1

Out of a total 61 cases, 53 concerned incorrect application of the procurement rules:

BE	BG	CZ	DK	DE	EE	IE	EL	ES	FR	IT	CY	LV	LT	LU	HU	MT	NL	AT	PL	PT	RO	SI	SK	FI	SE	UK
1	2	0	0	6	0	0	16	2	0	4	1	1	0	0	2	2	4	0	1	1	3	1	1	0	1	4

Six concerned incorrect transposition of the Directives:

HU	MT	AT	PL	PT
2	1	1	1	1

Two cases concerned violations of provisions of the Treaty.

During the same period, a total of 205 cases were opened in EU Pilot in the area of public procurement by DG MARKT.

Regarding the current situation, for the purpose of this exercise, two categories of cases were taken into account: (1) ongoing open infringement cases where a letter of formal notice has been sent by the Commission, and (2) cases where a letter of formal notice has not been sent but the alleged infringement is being investigated by DG MARKT in the context of EU Pilot. While these cases do not necessarily mean that an infringement of EU law has taken place or that a case will be taken forward to the next stage, they are nevertheless an indication of the number of issues raised by complainants or found by the Commission that seem serious enough to merit further analysis.

On 1 November 2011, there were 98 cases open in EU Pilot/NIF. In all 19 of the Member States have no more than three such cases. The eight countries with more than three active cases account for three quarters of the total number of open cases.

Cases of wrong application

The number of infringement cases stemming from incorrect application of public procurement rules stands at 97, with the three worst-performing Member States accounting for over half of them. Currently there are two cases open in court.

Among the cases of incorrect application we find illegal use of the negotiated procedure without publication of a notice (7), discrimination (7), direct awards (6), lack of transparency (3), illegal amendment of the contract (2), incorrect application of the in-house rules (2) or infringement of general principles of the Treaty (2). Other violations include confusion of selection and award criteria, incorrect application of the rules on public-public cooperation (other than in-house), calculation of the contract value, selection criteria (problems other than discriminatory criteria), undue exclusion from the procedure, framework agreements and undue use of the defence and security exemption. As can be seen, very often the cases concern more than just a procedural rule, but the applicability of the Directives themselves (direct awards, in-house rules, calculation of the contract value and the defence and security exemption).

The negotiated procedure is the type of procedure most affected by errors in application (even excluding cases of direct awards), followed by the open and the restricted procedures.

Among these cases of wrong application, the infrastructure sector comes top (10 MS concerned: BE, CZ, EL, ES, IT, NL, PL, RO, SI and SK), followed by sewage/waste (six MS: CZ,

DE, IT, NL, SI and SK), procurements of IT services (three MS: PL, PT and UK), railways (two MS: CZ and SK), the health sector (two MS: EL and IT) and energy (two MS: LV and RO).³⁰

Such cases of incorrect application involve central and sub-central levels nearly equally, with the sub-central level very slightly ahead.

Cases of incorrect transposition

There are fewer cases of errors in transposing EU procurement law: 18 cases have been initiated in the last three years. These too show an uneven spread between the MS: the two MS with the highest number account for over half of all the cases. However, continuation of the infringement proceedings was avoided by voluntary compliance in 59 cases at various stages of the procedure before the matter reached the Court.

On substance, the non-conformity cases regarding the Public Sector Directive concern the following issues: incorrect transposition of the definitions, the principle of equal treatment, the obligation for tendering economic operators to assume a specific form, the conditions for the performance of the contract, use of open, restricted and negotiated procedures and of competitive dialogue, cases justifying use of the negotiated procedure without publication of a contract notice, publicity requirements and the personal situation of the tenderer.

Infringements of the Utilities Directive include the definition of contracting entities, the principle of equal treatment and the conditions for performance of the contract.

Problems with transposing the Public Sector Remedies Directive include the requirements for review procedures (powers and independence of the review body) and the standstill period.

The complaints regarding infringements of EU law lodged with the Commission come mainly from aggrieved bidders. At one end of the spectrum, in five MS (BE, EE, FI, HU and LV) all the complaints were lodged by tenderers, while at the other end, in DE and IT half of the alerts came from citizens or civil society. In NL nearly all complaints originated from citizens. In the remaining MS aggrieved competitors generated 66 to 90 % of the complaints, with the rest coming from citizens or organisations independent of the tenderers.

The public sector is involved in most of the cases pursued by the Commission. For some MS, there are no cases against utilities (BE, HU, LV, NL, PL and UK), and in no country do utility-related infringements account for more than 25 % of the cases.

³⁰ To put this into its economic context, in 2008 EU governments spent more than EUR 500 billion on procurement in the health sector. According to estimates, up to 9 % of that value was competitively tendered and published in the OJ/TED (i.e. up to EUR 48 billion). In the environmental protection sector, contracts estimated at around EUR 25 billion were published in the OJ/TED, which accounted for approximately 55 % of government spending in that area.

During the three years preceding the Review, 16 cases were closed by the Commission because the contract under examination had been fully performed and there was therefore no longer any point in pursuing the investigation. 13 cases were not pursued because parallel appeals had been lodged at national level.

10. Review procedures at national level

In line with the idea behind the review system for public procurement in the EU — a decentralised system where Member States' authorities bear primary responsibility for correct implementation of the rules — review procedures before the national bodies outnumber those conducted by the Commission. Information on infringements handled at national level is therefore needed in order to have a complete picture of the application of EU law in the field of procurement. This is true for contracts both above and below the thresholds (see section 2).

Comparing the number of national review procedures with the total number of procurement procedures carried out in the MS,³¹ most of the MS have a ratio in the lower single digits (CY: 1%, PL 1.4%, LT and MT 3%, EE 4.2%, FI 4.9%, CZ 5%,) while in the remaining MS, where such data are available, the percentages are still below 20% (HU, RO, SK 13%, LV 14%, BG 16%, SE 19%). The average for these countries is 8.5%.

MS were asked to provide possible explanations if the ratio of review procedures was high. Only two replies were received — from RO, where this phenomenon was attributed to administrative capacity, and from SK, where the reasons included ignorance of the EU rules, in particular the principles, complicated legal regulations and the intent to violate the law. In SK measures taken to bring down the percentage include wider availability of a regulation on methods and publication of decisions stating violations of the rules.

Based only on the data submitted, it is difficult to judge the 'attractiveness' of the review procedures in a given MS. From the point of view of an aggrieved bidder, a review system may be considered attractive if it delivers quality judgments quickly and at a low cost. However, other factors can also determine the number of review procedures. From the information at hand it is not possible to tell whether a low percentage of reviewed decisions means that procurement procedures are generally in order and there is no need to turn to a review body or that trust in the review procedure in the MS is low and tenderers do not use the system in spite of infringements being committed. To give two examples, in LV, where procurement-related review procedures are free of charge, the figure is not particularly high. On the other hand, in FI, where the time necessary to deliver a decision is the longest (eight months), this percentage is particularly low. However, as explained above, this low

31 Out of the 22 MS that replied to the questionnaire, contributions were considered from BG, CY, CZ, EE, FI, HU, LT, LV, MT, PL, RO, SE and SK. Contributions from MS were left out if they were contradictory or if they were not broken down into the categories requested and, as such, would have thrown out the calculations.

percentage is not necessarily an indication of a problem, since it could mean either that procurement procedures are usually in order in FI or that the length of the review procedure deters tenderers from contesting wrong decisions. No data were received from two MS where the costs of procurement-related litigation are reportedly very high (IE and the UK).

According to the data received from the MS,³² in most countries the success rate of complainants in review procedures stands at around one third of the total number of cases (CY 32 %, DE above 20 %, ES 24 %, MT 29 %, PL 26 %, RO 31 %, SE 31 %). In CZ this number is significantly lower (15 %), whereas in four MS, the figures are somewhat higher (EE 37 %, HU 45 %, SK 39 %, LV 37 %). Three of these latter countries (EE excluded) are also among the ones where the proportion of review procedures compared to procurement procedures is relatively high (see previous paragraph).

A high proportion of reviews and of cases lost by contracting authorities could be an indication that the public purchasers in that MS are more error-prone. This should be a cause for concern and would merit further investigation on the part of the Member State concerned.

The breakdown of the contracts challenged by type (works, services and supplies) where available and submitted by the Member States are set out in the table below. The proportions show wide variety.

	CY	DE	ES	HU	MT	PL
Works	23 %	36.15 %	7 %	43.1 %	18 %	31.83 %
Services	35 %	63.85 % services <u>and</u> supplies combined	67 %	36.2 %	30 %	36.65 %
Supplies	42 %		19 %	20.3 %	53 %	31.52 %

As regards the sectors most affected by procurement problems, MS indicate³³ health (six MS: AT, BG, CY, CZ, MT and PL), IT services (six MS: AT, CY, CZ, LV, PL and SK) and infrastructure (five MS: AT, CY, PL, RO and SK). This corresponds to the findings on infringements at EU level, with the exception of sewage or waste management services,

³² Figures based on contributions by: CY, CZ, DE, EE, ES, HU, LV, MT, PL, RO, SE and SK.

³³ Figures based on contributions by: AT, BG, CY, CZ, LV, MT, PL, RO, SE and SK.

which were not mentioned by the MS but are a sector of concern according to desk research by DG MARKT.

Six MS (AT, CY, CZ, ES, RO and SK) provided replies on the provisions violated. Discrimination and lack of equal treatment are featured in three replies (CY, CZ and SK); disproportionate selection criteria is a concern for three MS (CZ, LV and RO). Insufficient reasoning in award notices is featured twice (ES and CY), while the other categories (illegal composition of evaluation committees, direct award and abnormally low tenders) were each mentioned once.

Seeking a review by the contracting authority can be made obligatory by the MS (Article 1(5) of the Remedies Directives). This is the situation in CZ, ES, LT and SI, where an aggrieved tenderer first has to seek a review by the awarding body. Data regarding the success rate of these procedures are available only for ES, where 91 % of the disputes were settled in this manner, and for LT, where this proportion was 32 %.

The table set out below shows the number of first-instance decisions appealed against before higher-instance bodies in the Member States which submitted this figure.

AT	BG	CY	CZ	DE	ES	FI	HU	LT	LV	MT	PL	RO	SE
28	451	12	262	226	32	70	197	191	48	0	8%	917	544

Regarding the proportion of first-instance decisions that were challenged by the parties, the MS can be grouped into two categories: (1) MS with a high level of acceptance of the first-instance decision: in MT no decision was challenged, in PL and LV 8 % of the cases were taken to second instance, in ES and CY 9 %, in FI 12 %, in RO 14 %, in SE 15 % and in HU 19 %; and (2) MS where appeals are lodged against over 49 % of the first-instance decisions, as is the case in CZ and LT.

The success rate of the appeals (i.e. when decisions of the first instance were quashed or overturned by the higher body) is not exceptionally high anywhere (BG 10 %, LT 22 %, PL 14 %, SE 14 %, FI 17 % and DE 20 %) and is especially low in some countries (CY 0 %, HU 2.5 %, LV 4 % and RO 2 %).

Three MS replied about the breakdown of sanctions imposed by the review bodies. In CZ, in 60 cases the decisions of the contracting authority were set aside, in 29 cases fines were imposed and in one case the contract concluded was declared void. In ES, most of the cases ended with setting aside the decisions of the contracting authority and in three cases fines were imposed. In LT, 42 setting-aside decisions were imposed on contracting authorities.

EU procurement law imposes no obligation on the MS regarding the length of review procedures.³⁴ Clearly, though, swifter procedures are beneficial for both tenderers and contracting authorities, in particular in the case of the first-instance review. The situation in the MS varies widely.

PL and SK are at the end of the scale: the review procedure takes 14 days.

Most of the review bodies give their decisions after between one and three months (BG one month, the Federal State of Styria in AT 60 days, CY two to three months and CZ 2.5 months). In HU the general administrative deadline is 30 days, with many opportunities for the review body to seek extensions. In practice, however, less than 1 % of decisions are given after more than 60 days, while the rest of the procedures are handled in between. In LT decisions take 106 days on average, in LV 1.5 months and in MT 3 to 3.5 months. In RO decisions are given after 20 days, with the possibility of a 10-day extension.

At the other end of the scale stands FI, where it takes eight months to issue a decision. The type of review body — administrative or judicial — does not seem to influence the length of the procedure.

11. Procurement errors detected in the course of audits of EU-funded programmes

This year's Review examined compliance with the procurement rules of expenditure under the European Social Fund, the Cohesion Fund, the European Regional Development Fund, the European Agricultural Guarantee Fund and the European Agricultural Fund for Rural Development. The sources of information were three Commission Directorates-General in charge of those funds: DG Agriculture and Rural Development, DG Social Affairs and Inclusion and DG Regional Policy.

Public procurement has so far not been a dominant issue in projects financed by the EU's agricultural funds, since most of the measures do not involve procurement. Even when contracts have to be concluded, beneficiaries are mainly private bodies not subject to the procurement rules.

Compliance with public procurement law has not given rise to many problems during the implementation of projects funded by the European Social Fund (ESF) either. The main reason for this is that in most cases the value of the contracts is below the thresholds of the Directives. Therefore, these contracts are only subject to national law and the principles enshrined in or deriving from the TFEU. Even for procurement above the thresholds, since vocational training financed by the ESF falls within Annex II B according to the classification of the Public Sector Directive, these procurements are subject only to the aforementioned

34 Figures based on contributions by: AT, BG, CY, CZ, FI, HU, LT, LV, MT, PL, RO and SK.

principles and the provisions on technical specifications and contract award notices of the Directives. Nevertheless, unwarranted use of direct awards is the major issue when procuring for ESF-financed projects which may be of interest to operators located in other Member States. Other issues such as conflicts of interest have also been observed. The main sectors affected, besides vocational training mentioned above, are IT service contracts and service contracts for allowances to R&D workers and R&D studies.

For the regional development (ERDF) and cohesion (CF) funds, however, the picture is different. According to audit findings by the Commission's Directorate-General for Regional Policy,³⁵ incorrect application of the procurement rules still accounts for about 40% of the errors found for ERDF and CF projects and about 75% of the error rate for the Structural Funds estimated by the European Court of Auditors (ECA) in its 2009 annual report.

For the 2000-2006 and 2007-2013 programming periods, the following three groups of issues were identified: (i) inadequate assessment of bids; (ii) absence of tendering, award of the contract based on inappropriate tendering procedures or award of supplementary contracts without competition; and (iii) non-compliance with publication requirements.

Inadequate assessment of bids made up 40% of all the total procurement-related audit findings. Out of these findings, 59% relate to discriminatory selection and award criteria (e.g. the requirement to have an establishment, prior experience or a representative in the country or region, over-specific technical standards or use of the 'average price method' as an award criterion).

The categories of 'absence of tendering or award of contract based on an inappropriate tendering procedure' and the 'award of supplementary contracts without competition' cover 34% of all the procurement-related errors detected in the audits. The inappropriate tendering procedure chosen is, naturally, the negotiated procedure. This irregularity accounts for 65% of the errors. Cancellation of public procurement procedures and direct award (or negotiation without publication) of the main contract without sufficient reasons is the source of 16% of irregularities. Artificial splitting of the contract is the error found in 14% of the cases and incorrect specification of the predominant aspect for 'mixed' contracts and, thus, application of an inappropriate procedure in 5% of the cases.

The other subcategory is illegal award of contracts for additional works or services without competition. The reason for this type of error is sometimes incorrect transposition of the relevant EU *acquis* in the national legislation.

Non-compliance with advertising requirements accounts for 22% of all the errors found in audits covering PP rules. This category includes cases where the tender is advertised, but not fully in compliance with the publication requirements under EU law (e.g. award notice not

35 Working Document prepared by DG Regional Policy on main audit findings regarding application of public procurement rules in Member States found in projects co-financed by ERDF and the Cohesion Fund under cohesion policy, Brussels, REGIOJ.1/PL/D(2011).

published on TED, award notice published after the deadline or information missing from the notice), while 'weaknesses in tender specifications' cover potential infringements of the principle of equal treatment of bidders or cases where the tender specifications conflict with the requirements published.

In the course of such audits the Commission can build up a very comprehensive, yet detailed assessment of implementation of the procurement rules. This makes them probably the most important sources of information in this field. The shortcomings found are very important because the problems uncovered here are surely not specific to EU co-funded procurement, but give an indication of compliance with the rules in general.

More specifically, this detailed and comprehensive information has prompted the adoption of specific measures to deal with the problems identified. These measures include (1) training sessions for contracting and national managing authorities on the application of the public procurement law, (2) the laying-down of *ex ante* conditions on public procurement in the proposal for the revision of the general regulation governing the EU cohesion funds, and finally (3) the inclusion of a specific chapter on governance in the revised Public Procurement Directives with the aim of ensuring more effective application of public procurement law.

Conclusions

Replies received from the Member States to the questionnaire demonstrate that there is a lot of important and useful information available with regard to the situation on the EU public procurement market, and therefore untapped potential for more in-depth and better analysis. Appropriate use and classification of this information can be useful for the Commission but equally for the Member States in terms of sharing their experience in implementing the procurement legislation, market monitoring, enforcement or policy design.

Feedback from Member States shows, however, significant discrepancies in terms of availability of information on various aspects of procurement, its depth and comprehensiveness.

This in turn influences the manner in which such information can be used and possible conclusions drawn on the basis of it.

Overall, efforts to gather data on the implementation of the public procurement rules have to be stepped up. This is true not only for the Member States but also for the Commission. Greater engagement from both sides would be necessary.

To that end:

- The Commission intends to reflect on a better information-gathering tool in order to obtain better results for the next edition of the Review. This should allow it to come up with more targeted and specific conclusions;
- Member States, on their side, are requested to suggest how to improve data collection, including areas where the data can be collected and ways of searching for information and analysing and processing it;
- The Commission will undertake to coordinate this process by drafting and publishing the annual public procurement implementation review each year, after having consulted the Member States in the framework of the Advisory Committee on Public Procurement.

Annex

Available and useful reports from the Member States on the implementation of the procurement rules

Findings or conclusions are listed if they were provided by the Member State or if the document was available to DG MARKT.

Austria

Problem analysis issued by the Court of Auditors, available here: http://www.rechnungshof.gv.at/fileadmin/downloads/2010/beratung/verwaltungsreform/Effizienz_Verwaltung/Loesungsvorschlaege_Vergabewesen.pdf.

Bulgaria

Annual reports of the Public Procurement Agency, the Procurement Service of the Federal Public Service and the Commission for Public Procurement.

Cyprus

Annual Report of the Tenders Review Authority for 2010.

The main findings of this document have been used in the chapter on national review procedures of this Report.

Germany

Evaluierung der Vereinfachungsmaßnahmen bei der Vergabe von Aufträgen über Liefer- und Dienstleistungen nach dem Konjunkturpaket II; and

Abschlussbericht zur Studie im Auftrag des Bundesministeriums für Wirtschaft und Technologie, September 2011,

available at:

<http://www.bmwi.de/BMWi/Navigation/Service/publikationen,did=452274.html>

Main findings, room for improvement:

- simplify rules and raise national thresholds for application of the national PP rules;
- increase transparency;

- establish a uniform legal framework for procurement in DE;
- room for more negotiation;
- strengthen and professionalise the procurement activity;
- introduce long-term price monitoring;
- promote innovative procurement.

Denmark

Chapter 4 of the annual report from the Competition and Consumer Authority,
available at:

<http://www.kfst.dk/index.php?id=30195>.

Some of the findings are summarised below:

- The competition for public sector contracts has been increasing in recent years. The competition for municipal contracts rose by 0.7 percentage points from 2009 to 2010, with the result that 25.7 % of the tasks are now exposed to competition.
- Jammerbugt, Gribskov and Fano municipalities created competition for more than 35 % of tasks in 2010 and have simultaneously increased competition exposure. There is still great potential for creating competition for local tasks, particularly in the social area.
- The competition for state assignments stood at 26.4 % in 2010, an increase of 0.5 percentage points compared to 2009.
Public authorities can increase the benefits of public sector procurement by better and broader use of performance requirements in the bids.
- Public institutions are increasingly coordinating their purchases in joint purchasing collaborations.
- Danish authorities sent EU tender notices for approx. 21 % of the value of public procurement in 2008-2009. Denmark has for years been in the middle field of the EU countries.
- An increasing number of complaints are filed to the Complaints Board for Public Procurement.

Greece

Action Plan of the Greek authorities on the creation of the SPPA (August 2011) prepared by MOPADIS.

The paper provides a brief overview of the interaction between the SPPA and the other institutional actors. It finds that the SPPA must be integrated in a matrix of other bodies and entities in the public sector that perform similar functions in the field of public procurement. The key factor for the success of the SPPA will undoubtedly be the degree of coordination and cooperation between the Authority and the other public procurement bodies.

Finland

Lundström: 'The change in local authorities' service procurement. A study of problems and their causes in public procurement of services in Finnish municipalities.' Acta No 227. The Association of Finnish Local and Regional Authorities. Helsinki.

France

Activity report 2010 of the 'Commission Consultative des marchés publics'.

This document takes stock of legislative developments during the year, important non-legislative instruments (new guides, circulars and templates) and the development of national case law according to topics.

Reports and publications of the 'Observatoire économique de l'achat publique' (on 09.12.2011 the figures for 2010 were not yet available; only figures for 2009 had been made public).

Hungary

The Procurement Authority prepares an Annual Report each year. The one for the year 2010 is available here:

http://www.mkogy.hu/internet/plsql/ogy_irom.irom_adat?p_ckl=39&p_izon=3451.

The document contains mostly factual analysis, but importantly also mentions that the frequent amendments of the procurement law are mainly due to the incorrect general perception according to which all cases of (alleged) corruption have to be remedied by a change in the legal framework applicable to procurement.

Italy

Annual report of the AVCP (Autorità per la vigilanza sui contratti pubblici di lavori, servizi e forniture). Last one published on 15/6/2011 and presented to the national parliament. The report is voluminous and summarises the situation of the procurement market by topics of interest. It also highlights possible critical situations or markets. The report is available here: <http://www.avcp.it/portal/public/classic/Comunicazione/Pubblicazioni/RelazioneParlamento/relazioni?id=934270560a7780a5002fd50dd76ee884>.

Lithuania

The latest Annual Report for the year 2010 is available on the PPO website http://www.vpt.lt/admin/uploaded/2011/vp/VP_Ataskaita_2011-04-19.pdf.

Main findings of the Annual Report:

- The total number of procurement contracts increased from 7 633 to 12 511;
- The amount of green public procurement increased from 5.6 to 5.8% of the total number of public procurement contracts;
- The value of social procurement doubled;
- The number of users of the Central Portal for Public Procurement doubled in 2010;
- The value of e-procurement amounted to more than 60 % of the total published procurement value in 2010.

Other documents on procurement activities (Public procurement issues and their solutions; Final report on the project 'The development of a public procurement disputes examination system') are available on the Ministry of Economic Affairs website:

<http://www.ukmin.lt/lt/dokumentai/problematika/index.php/>.

The Annual Report on green public procurement is available on the Ministry of the Environment website: <http://www.am.lt/VI/index.php#a/11006>.

Malta

The National Audit Office (NAO) conducted various performance audits, including on public procurement. The following reports were published in 2010 and 2011:

Enemalta Corporation: Tender for generating capacity — April 2010;

Enemalta Corporation: Tender for Generating Capacity — Supplementary Investigation by Auditor General as commissioned by the Public Accounts Committee — May 2011;

Performance Audit — Road surface repairs on the arterial and distributor road network — March 2011.

All reports may be downloaded through the following web link:

<http://www.nao.gov.mt/index.aspx>.

Romania

Study by Deloitte on '*Assessment of the Public Procurement System in Romania*' (2011) commissioned by DG Regional Policy.

Summary of the main findings of the study:

(a) Legislative framework and remedies:

- lack of stability of the legal framework applicable to public procurement and inconsistencies between general and sectoral legislation;
- high number of complaints, due to lack of administrative capacity and insufficient preparation of the tender process and tender documents;
- ineffective mechanism for checking conflicts of interest;

(b) Institutional framework:

- misalignments and insufficient cooperation between the various institutions in charge of public procurement (ANRMAP, UCVAP, CNSC);
- the level of performance of the main PP institutions is hampered by a relative deficit of resources combined with rather inefficient internal processes;
- need to improve the functionalities of SEAP (the national electronic system for public procurement);
- need to take swift action to alleviate administrative burdens on economic operators;

(c) Contracting authorities' challenges:

- insufficient staffing and qualification of procurement departments of CAs;

(d) Capacity of the procurement system to efficiently regulate the market response:

- national public procurement is insufficiently orientated towards efficiently monitoring and regulating market response (need to develop reporting and analysis of key performance indicators in public procurement, and relevant statistics);
- need for more consistency and focus in addressing cartels issues in public procurement;
- need to facilitate exchange of information between different institutions in order to facilitate detection of cartels;

(e) Contractual price indexation practices:

- low level of maturity in the use of price indexation methods;
- need to define objective price indexation formulas and standards, as a way to ensure a reasonable and transparent balance of the contract economics, in particular for long-term contracts; need to develop guidance on the use of such formulas.

The annual report of ANR MAP is available here:

<http://www.anrmap.ro/indexro.php?page=rapoarte>.

The annual report of the CNCS is available here:

<http://www.cnsc.ro/>.

Sweden

Swedish Competition Authority's report 2012:3 (Siffror och fakta om offentlig upphandling), 2011:5 (Bättre statistik om offentliga upphandlingar).

Some of the findings:

- Statistics need to be strengthened.
- Information available in commercial databases should be used more.
- Roughly 5 per cent of all public contracts are reviewed.

Slovakia

Methodological guidelines:

<http://www.uvo.gov.sk/metodika/metodicke11.php?mesiac=-1&kde=reg-cislo>.

Document on the most common violations of the law on public contracts established by the Procurement Office during the supervision of public procurement available here:

<http://www.uvo.gov.sk/nedostatky/index.html>.

The documents assess the most common violations found by the review body. These findings have been used in the relevant part of the Review.

United Kingdom

The National Audit Office published a report on 25 March 2011 that reviewed the role and achievements of the Efficiency and Reform Group, set up within the Cabinet office in May 2010. The report can be found at:

http://www.nao.org.uk/publications/1011/efficiency_and_reform_group.aspx.

The report highlights that reducing procurement expenditure and costs is important for the overall value for money of government operations. Public bodies procured goods and services from third parties worth £ 236 billion in 2009-10, about one third of all public sector spending.

In order to make the spending reductions required by the 2010 Spending Review the Government's intention has been to introduce a significantly different approach to efficiency and reform. The Government intends the formation of the Group to be an important departure from previous arrangements — bringing together expertise from across departments on a large scale to work across organisational boundaries and focus on common issues core to the Government's agenda.

The main findings relating to procurement are:

- In September 2010, the Efficiency and Reform Group launched a programme to centralise Category Procurement with the aim of reforming the ways in which government procures and manages the supply of commonly used goods and services.
- The Group expects centralising category procurement to deliver sustainable cost reductions from the existing estimated baseline spend of £ 13 billion — in the region of 25 per cent over the next four years.
- The Group is also working to improve procurement efficiency in order to reduce both administration costs and suppliers' costs.

The report states that it is too early to reach a judgment on the success of the Group. However, they will continue to report on developments as the Group continues to play a leading role in promoting change and improving efficiency in central government.