EUROPEAN COMMISSION

Brussels, 27.6.2011
SEC(2011) 853 final

COMMISSION STAFF WORKING PAPER

Evaluation Report
Impact and Effectiveness of EU Public Procurement Legislation

Part 1

This document is a working document of the Internal Market and Services Directorate General of the European Commission for discussion. It does not purport to represent or pre-judge the formal proposal of the Commission.

FOREWORD

The EU Public procurement Directives regulate the publication and organisation of tender procedures for contracts with an expected value above designated thresholds. The Directives apply common principles of transparency, open competition and sound procedural management to public contract award procedures which are likely to be of interest to suppliers across the single market. Open and well regulated procurement markets are an important means to securing the best use of public resources.

The public sector is the largest consumer in the economy. In 2009, the public sector spent over 2'100 billion€ on goods, services and works – amounting to around 19% of EU GDP. Almost 75% of this amount was spent on purchases of public administration services, education or health and social work services. The efficient and strategic management of public purchasing is an issue of paramount policy importance on a number of levels: the sound management of increasingly scarce public resources; the daily administration of the numerous government departments, agencies and public bodies involved in the award and management of public contracts; the impact on the supplier base, many of whom are heavily dependent on public sector business; the pattern of public sector consumption can contribute to other policy outcomes.

The first EU legislation in the public procurement sphere date back to the 1970s. The initial focus was firmly on establishing disciplines to overcome entrenched fragmentation of national public procurement markets. Over time, the objective of EU public procurement policy has been broadened to support public purchasers in securing the best value for money or most economically advantageous outcome. Increasingly, the desire is to permit public purchasers to take account of the contribution of public purchasing to the achievement of other policy objectives – such as environmental protection, support for innovative enterprise and socially responsible procurement.

In addition to EU legislative developments, public procurement has also been the focus of work in the international arena over this period, culminating in the Government Procurement Agreement (GPA) which binds the EU and 14 other WTO members.

In keeping with the growing policy demands on public purchasing, the legislation has undergone a number of revisions to extend its scope to previously unregulated areas and to reinforce its effectiveness as a policy instrument. The most recent legislative modifications of the Directives were adopted in 2004.

This evaluation will describe how the current legislative framework has evolved, what its main characteristics are, how Member States have implemented the provisions, and analyse what contracting authorities and entities buy and how they buy it before moving on to the evolving policy environment and a detailed examination of the costs and benefits of the provisions and procedures. Finally the evaluation will consider the extent of cross border trade and competition in public procurement markets and the extent of the impact on public expenditure in terms of savings, in order to assess to what extent the directives have achieved their objectives.

The findings of this evaluation will inform policy debate and help the Commission services in identifying possible improvements to the existing legislation and policy. Along with responses to the Commission Green Paper on modernisation of public procurement legislation, the evaluation will constitute an important input for the preparation of the Commission proposals for review of the Directives.

The revision of EU public procurement Directives is one of twelve key actions identified in the Single Market Act[1], which will help to leverage growth and employment in Europe. The revision should '*underpin a balanced policy which fosters demand for environmentally sustainable, socially responsible and innovative goods, services and works. This revision should also result in simpler and more flexible procurement procedures for contracting authorities and provide easier access for companies, especially SMEs'*. The Single Market Act foresees the publication of the Commission proposal before the end of 2011, paving the way for adoption of the revised legislation before the end of 2012.

EXECUTIVE SUMMARY

INTRODUCTION

EU Public procurement Directives regulate the publication and organisation of tender procedures for higher-value contracts. The Directives apply common principles of transparency, open competition and sound procedural management to public contract award procedures which are likely to be of interest to suppliers across the single market. Open and well regulated procurement markets are expected to contribute to a better use of public resources.

This evaluation assesses whether EU public procurement Directives 2004/17/EC and 2004/18/EC have succeeded in putting transparency and cross-border competition to work for better public procurement outcomes. It examines whether those objectives remain relevant in the light of evolving economic and policy priorities. It analyses the trade-off between the costs and the benefits of the legislation with a view to identifying the need for improvement.

The findings of this evaluation will provide a factual basis for drawing lessons about the impact and effectiveness of EU public procurement. Evaluation will inform policy debate and help the Commission services in identifying possible improvements to the existing legislation and policy approach. Along with responses to the Commission Green Paper on modernisation of public procurement legislation, the evaluation will constitute an important input for the preparation of the Commission proposals for review of the Directives.

The revision of EU public procurement Directives is one of twelve key actions identified in the Single Market Act[2], which will help to leverage growth and employment in Europe. The revision should '*underpin a balanced policy which fosters demand for environmentally sustainable, socially responsible and innovative goods, services and works. This revision should also result in simpler and more flexible procurement procedures for contracting authorities and provide easier access for companies, especially SMEs'*. The Single Market Act foresees the publication of the Commission proposal before the end of 2011, paving the way for adoption of the revised legislation before the end of 2012.

BACKGROUND TO THE EU PUBLIC PROCUREMENT DIRECTIVES

The management of public procurement is a matter of primary public policy importance – particularly in the context of fiscal consolidation and retrenchment in which most Member States must now manage public resources. Total public expenditure on goods, works and services accounts for a large part of economic activity – amounting to over €2 trillion in 2009. This money is spent by a very large and heterogeneous population of public authorities - over 250 000 contracting authorities in Europe managing procurement budgets of different sizes and possessing very different administrative capacities. The money is spent in a wide variety of ways and disbursed via an enormous number of distinct procedures (over two million procedures for the award of public contracts per year). The administration of public procurement is therefore highly fragmented and complex. The organisation of public procurement

administration – and notably the extent of centralisation/decentralisation - varies from Member State to Member State as a function of the organisation of their public administration.

Public purchasers cannot be assumed to have the same commercial pressure or organisational incentives in sound management of their expenditure as private sector purchasers subject to strong competition. This has prompted the imposition, by many jurisdictions around the world, of disciplines to encourage the better use of resources, greater efficiency and to reduce the risk of favouritism or corruption in public purchasing.

EU Public procurement rules exist to bring some common disciplines to regulation of this critical government function. In particular, EU Directives seek to ensure that companies from across the single market have the opportunity to compete for public contracts (above defined thresholds). As far as possible, they also seek to remove legal and administrative barriers to participation in cross-border tenders, to ensure equal treatment and to remove scope for discriminatory purchasing by ensuring transparency.

Key principles of EU public procurement legislation:

EU procurement rules govern the way that public money is spent – rather than what the money is spent on. The focus of EU legislation is therefore primarily on the procedures that individual contracting authorities must follow when organising a public purchase for an expected value above the thresholds laid down in the Directives. EU Directives impose a number of steps that public purchasers must follow before awarding public contracts. These include rules to:

- Ensure **transparency** (through publication of notices in the Official Journal (OJEU), normally both before and after award procedures); apply pre-announced criteria (in particular concerning the requirements to be met in order to participate as well as the award criteria that will be used to designate the "winner"); award the contract on the basis of objective criteria (linked to the subject-matter of the procurement);

- Regulate the conduct of the procurement procedure so as to give interested tenderers a fair chance. The Directives establish a menu of **common procedures**. This was enlarged by the 2004 Directives through the introduction of the competitive dialogue and provisions on other procurement techniques such as electronic auctions, dynamic purchasing systems, central purchasing bodies etc.;

- Define the subject-matter of the purchase through non-discriminatory **technical specifications**, thereby limiting foreclosure of markets by reference to proprietary or idiosyncratic specifications.

Directive 2004/18/EC applies these principles to procedures for the award of public contracts for works, supplies and services. Directive 2004/17/EC extends these principles (with some variations) to the award of public procurement contracts by utility operators in water, transport, energy and postal sectors.

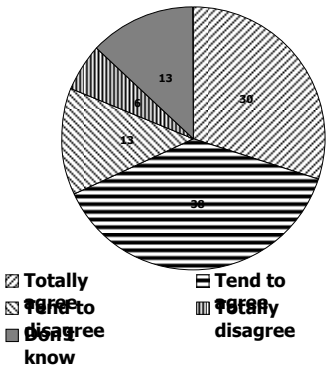
Substantial changes were introduced through the 2004 Directives to many aspects of the Directives – including in particular enlargement of the menu of procedures and techniques that public purchasers can use when organising procedures for award of public contracts. These changes were implemented by most Member States in 2006 and 2007.

The objectives of EU procurement legislation remain well-understood and widely supported by EU citizens. A recent Eurobarometer (2011) survey shows a large understanding/support for the role of

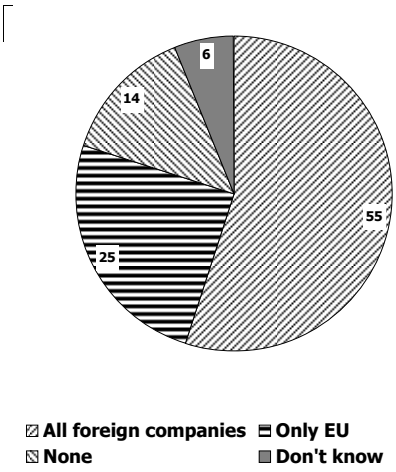
procurement in the fight against favouritism and corruption. It also demonstrates widespread understanding for the importance of opening procurement markets to competition.

Figure 1: Public perceptions of EU procurement policy (2011)

To what extent do you agree or disagree with the fact that common EU-wide rules for public authorities on how they have to award contracts help to combat favouritism and corruption?



Do you think that foreign companies should be able to compete for public contracts in your country?



OVERVIEW OF EU PUBLIC PROCUREMENT MARKETS

3.1. Implementation of EU Directives by Member States

While EU procurement legislation establishes common rules and procedures for high-value procurements, Member States have considerable discretion in implementing the provisions of the public procurement Directives – in particular as regards the mechanisms and administrative arrangements that are put in place to ensure compliance with those provisions.

Directives 2004/17/EC and 2004/18/EC were adopted on 31 March 2004, with a deadline for transposition into national legislation of 31 January 2006 for all Member States. Romania and Bulgaria were required to implement the Directives by 1 January 2007, the date of their accession to the EU.

There were delays in several Member States, resulting in a number of infringement procedures for non-transposition, but both EU public procurement Directives have now been fully transposed by all the Member States (the last country to transpose being Belgium in 2010).

Most of the Member States use the same legal instrument for the classical and utilities sectors in the regulation of procurement above EU thresholds. With only two exceptions, all Member States have the same regulatory instrument covering the supply, services and works contracts.

Member States retain full discretion for the regulation of public procurement outside the scope of the EU Directives. They have exercised this responsibility in very different ways as evidenced by their

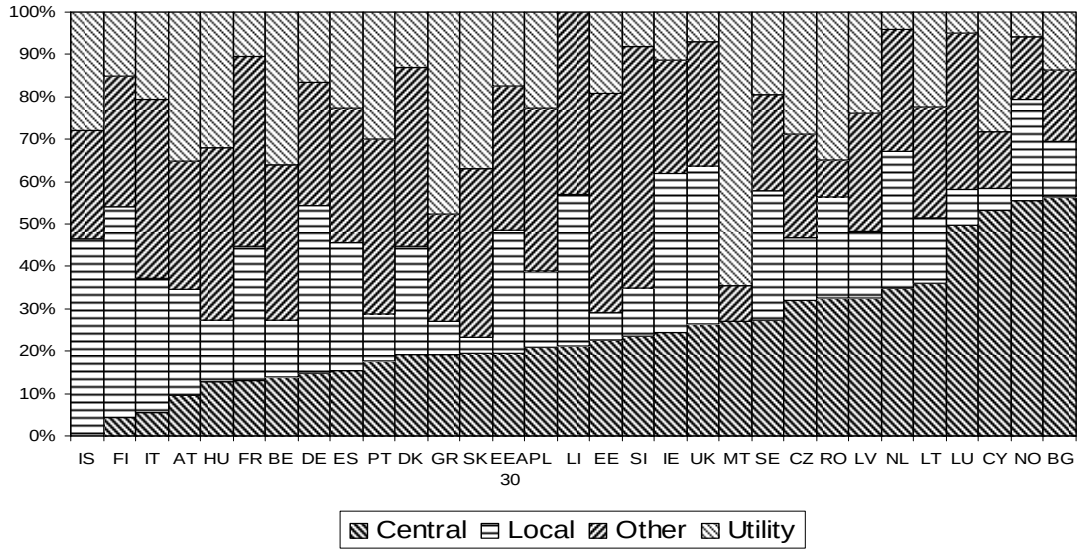
approaches to regulation of below-threshold procurement. Several Member States regulate public procurement below EU thresholds within the same act as the contracts covered by the EU Directives and also require the use of open, fair and competitive procedures, which have similar features to those laid down in the Directives. There are areas where national rules and procedures are often similar for contracts above and below the EU thresholds, such as rules for qualitative selection, evaluation of tenders, award criteria, abnormally low tenders, technical specifications, framework agreements and electronic procurement.

Other Member States may provide a lighter regime for contracts below the EU thresholds, which may take the form of administrative guidance rather than formal legislation. There may be shorter time limits for submission of applications and tenders and less demanding rules for publication and for selection of tenders.

3.2. National structures and rules for public procurement

Of the 250 000 different contracting authorities and entities involved in public procurement in the EU, only about 35 000 publish a notice in the OJEU in any one year. Most of the smaller authorities may never make a purchase large enough to fall within the scope of the Directives. The degree of centralisation also varies enormously across Member States and there is a significant amount of procurement carried out by bodies providing specific public services which are neither central nor local government administrations. The following chart illustrates the different share of EU regulated procurement that is accounted for by central, local, utility or other authorities across the Member States.

Figure 2: Breakdown of total value of contracts awarded by type of Authority (2006-2009)



In terms of national administrative capacity to implement and enforce procurement rules and policy, we observe the emergence of a general tendency towards better/more complete reporting (helped by greater traceability and automation of procurement data); the development of structures and organisations to

assist with guidance and support; use of e-procurement and related infrastructures (which potentially bring together large numbers of purchasers and suppliers).

3.3. Procurement subject to EU Directives

Only 1/5 of total public expenditure on goods and services is covered by the EU Directives. In 2009 over 150 000 invitations to tender were published (by 35 000 authorities) in conformity with EU Directives. The estimated value for these contracts was €420 billion. This represents approximately 20% of total public expenditure on goods, works and services.

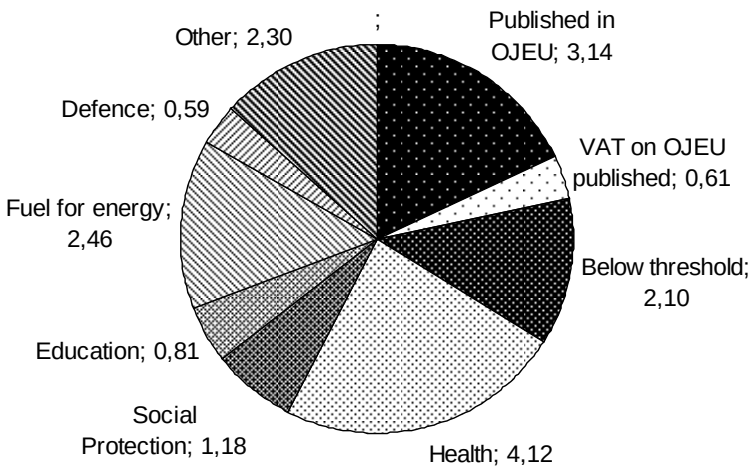
Consequently, the bulk of total public expenditure on goods, services, and works is not organised in accordance with EU procurement legislation. This public expenditure may take the following forms:

– Large amounts of public expenditure on goods and services to provide health, education and social services (over 6% of EU GDP) are spent in ways which are not covered by the EU public procurement Directives.

– Public contracts below the EU thresholds fall outside the scope of the EU public procurement Directives but they are of significant importance. Below-threshold procurement was estimated at around €250 billion in 2008 or around 2% of EU GDP.

– EU procurement Directives provide certain explicit exemptions for expenditure on fuel, water and defence equipment (now covered by a separate Directive).

Figure 3: Total expenditure on works, goods and services as % GDP (2008)



Three quarters of the value of procurement advertised in accordance with EU rules is for construction work and services. Supplies make up only a quarter of all procurement. However this EU wide pattern issues from a great variety across Member States.

3.4. Structural changes in public procurement markets

The evaluation highlights certain structural changes toward increased sophistication and aggregation of demand through framework contracts and central purchasing often combined with development of e-procurement platforms. There has been a sharp increase in the use of framework agreements, and centralisation/joint procurement as well as e-procurement. Between 2006 and 2009 the number of framework contracts has increased by almost a factor of four. In 2009 over 25 000 framework contracts amounted to 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 through framework agreement contracts.

There are however concerns in some Member States that framework agreements may close particular markets to competition for significant periods of time and that the size of the contracts may put them well beyond the ability of small and medium sized enterprises (SME) to bid for them.

The use of electronic communications, and the automation of procurement procedures, is also becoming more common-place. Although the enabling technology is now widely available, initial take-up of e-Procurement has been slow. The Commission Services estimate that, on average, less than 5% of procurement is conducted electronically today. However, momentum is building and the adoption rate is increasing. According to Eurostat, the percentage of enterprises using the Internet for submitting a

proposal in a public electronic tender system to public authorities has risen from 11 to 13% between 2009 and 2010.

Across Europe, the picture is mixed. Countries such as Lithuania, Cyprus and Portugal are leading the way with use rates as high as 60-90%. Portugal has made the use of e-procurement mandatory across all procurement procedures. Many of the bigger countries are lagging behind, despite strong efforts on the part of Italy and France.

All Member States have enabled the use of e-procurement in their national legislation. Furthermore, infrastructure is largely in place and it is possible to advertise on-line, access procurement documents and submit bids in 24 Member States. In 2010 nearly 93% of forms for procurement notices sent to Tenders Electronic Daily (TED) were received electronically. In short, the use of e-procurement has been enabled legally and technically and actual use, although low, is starting to increase.

The 2010 e-Government benchmark survey identified over 230 active e-procurement platforms and portals. The average number of registered contracting authorities (for a sample of 67 platforms) was 3 500, while the average number of registered suppliers was 11 000. Around 5% of the latter were non-domestic suppliers.

3.5. Use of public procurement to support the achievement of other objectives

There has been growing policy interest in re-orienting public expenditure towards solutions that are more compatible with environmental sustainability, promote social policy considerations, or support innovation.

Almost all Member States have adopted National Action Plans for Green public procurement. Many have adopted targets for priority product groups identified by the Commission in areas such as construction, transport or office and IT equipment.

It is difficult to tell whether these plans are having a significant impact as there is, as yet, little organised monitoring or measurement in place. However it seems clear, from recent studies and surveys, that the majority of contracting authorities do attempt to ensure that they are buying green, when this is feasible. There are differing levels of ambition between and also within Member States. Other sustainable procurement policies, such as encouraging more socially responsible procurement and more innovation, are also being adopted although fewer contracting authorities have extensive experience of integrating these policy objectives within their procurement practice. Contracting authorities face the challenges of setting appropriate requirements that do not unduly reduce the number of potential suppliers and in determining how to evaluate life cycle costs and the weightings applicable for different levels of compliance with sustainable criteria. Suppliers are faced with a range of different levels of requirement for environmental or social standards together with the proliferation of different certificates and labels with which they may demonstrate that their products meet certain standards.

ORGANISATION OF EU REGULATED PROCUREMENT PROCEDURES

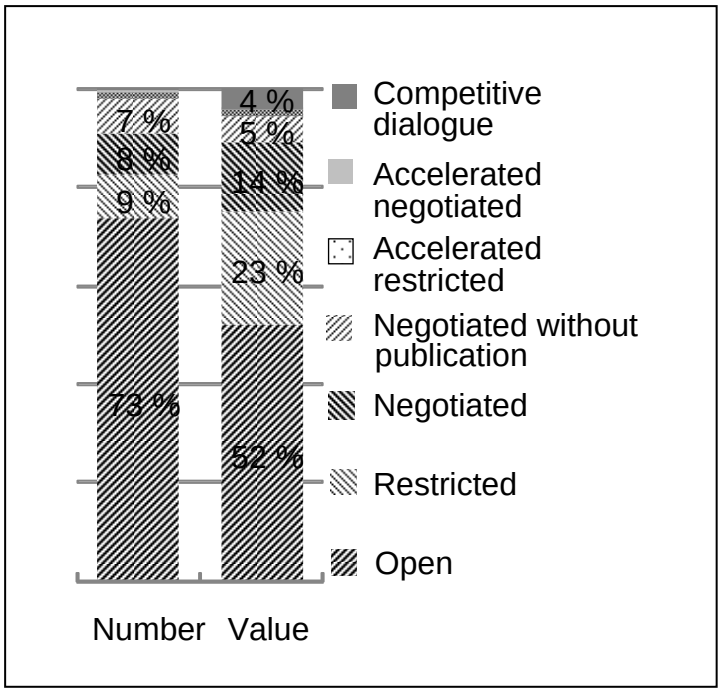
The EU Directives provide a wide menu of procedures and techniques for contracting authorities who are organising tenders in accordance with the Directives. This set of procedural options was enlarged in 2004

to allow contracting authorities to tailor the purchasing procedure to the circumstances of the market/purchase, and to introduce innovative techniques (e-auctions, Dynamic Purchasing Systems).

Around 18% of all contracts published in TED have values below the €125 000 threshold while 30% of sub-central contracts are below €193 000. Most significantly, 70% of all works contracts are below the threshold for works (i.e. €4.85 million). These findings may suggest that purchasers are following EU procedures voluntarily or that they may be aggregating contracts, in particular works contracts, for which the combined value exceeds the thresholds.

The traditional open call for tenders remains the most commonly used procedure. Over the last five years, about 73% of all contract award notices published in the OJEU followed an open procedure. However, this equals only 52% of the published total value, as the open procedure is mainly used for contracts of smaller value. The second most popular is the restricted procedure, used in contracts of much higher value. The restricted procedure accounts for 9% of award notices, but 23% of the value of all contracts awarded. The difference between the two procedures is demonstrated by the average contract size - €8.2 million for the restricted compared to €2.1 million for the open procedure. The negotiated procedure with publication, which can be freely used only by entities operating in the utilities sectors, accounts for 8% of contract award notices and 14% of the value. Data from the last five years show growing use of the competitive dialogue since it was introduced during the last revision of the Directives in 2004.

Figure 4: Use of procedures (2006-2010)



Although this procedure is the least frequently used, amounting to less than 1%, the total values involved are significantly higher – up to 8.6% of total value of contracts awarded in 2010 (5.2% in 2009), with a mean contract value of €40 million.

This overall pattern is, however, marked by wide variation across Member States. Three Member States (France, Poland and Germany) awarded half of all the contracts advertised in 2006-2010 while half of the value of all contracts was awarded by the UK, France and Spain.

80% of all works contracts were awarded on the basis of open procedure compared with 78% of supplies and 68% of service contracts.

The restricted procedure seems to be used for more expensive works contracts. While only 15% of restricted procedures are for works contracts, they make up nearly half of the value of the contracts for which it is employed.

The negotiated procedure is used much less overall for all categories measured both in terms of value and frequency (the number of contract award notices ranges from 14% in works to 57% in services while the value ranges from 26% in supplies to 43% in services).

Competitive dialogue appears to be mainly used for services (67% by value), and to a lesser extent for works (29% by value of all contracts awarded on the basis of competitive dialogue).

By 2010, 27 countries had implemented legal provisions to enable to use of a dynamic purchasing system (DPS). However the fact that 10 Member States have added further provisions, clarifying the conceptual framework, the different stages and scope of a DPS, may show that there was some lack of clarity in the original provisions on DPS. So far the actual use of the procedure has been marginal, and in most cases seems to demonstrate a misunderstanding of the provisions.

COMPETITION AND PARTICIPATION IN EU PUBLIC PROCUREMENT MARKETS

It was expected that more transparency would encourage greater competition for public contracts. Contract award notices published in TED record the number of bids submitted. These numbers can be interpreted as indicators of the strength of competition. And when competition is stronger, we would expect procurement outcomes to be superior.

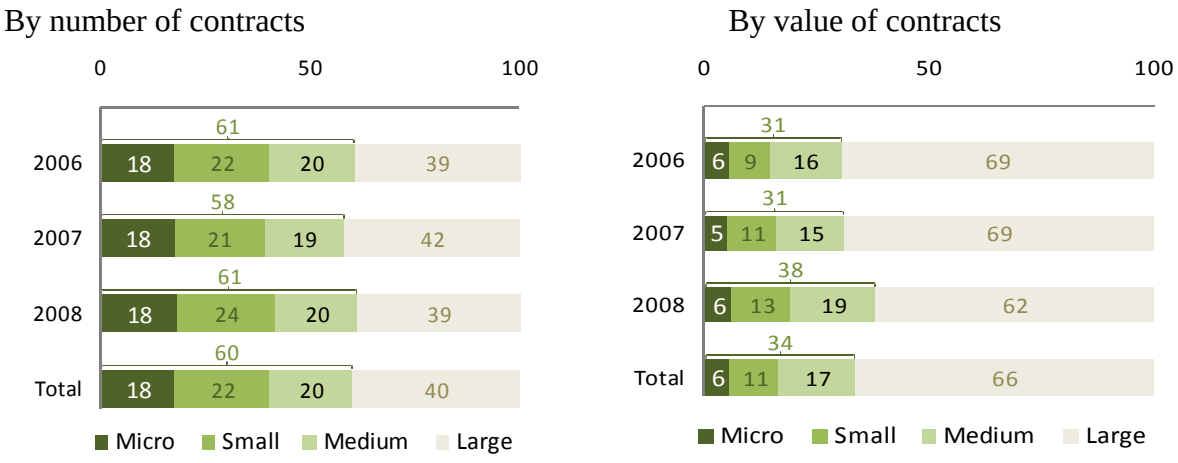
Most EU advertised tenders receive between 4 and 6 with an average of 5.4 bids. One in five tenders receives only one bid. The averages for the open and for the restricted procedures are higher, indicating that these procedures attract more competition than negotiated procedures. We also find that framework agreements and joint purchasing attract more bids.

There are also large differences between Member States. The number of bids received varies dramatically between groups of countries. While the top group receives an average of eight or more bids for each invitation to tender, the bottom group only receives three or less. Such large differences in degree of competition could significantly affect the outcomes of public procurement procedures.

5.1. SME participation and success

Between 2006 and 2008, small and medium enterprises among companies won around 60% of contracts covered by the Directives. The total value of public contracts awarded to SME was for around 34% of the total over these three years. These figures only take into account the contracts directly awarded to SME and do not include the value of subcontracts which could be considerable. Available data suggest that subcontracting is involved in around 8% of published contracts.

Figure 5: SME success in above threshold procurement



The median value of contract award notices published on TED was just below €400 000, while the typical value of the individual lot or contract was around €85 000. Contracts of this size would seem to be readily accessible for SME.

Breaking down tenders into lots is commonly seen by stakeholders as one of the most important tools that helps SME accessing public tenders. Many contracting authorities and entities use this possibility: between 2006 and 2008, 27% of the contract award notices contained two or more awards. The number of lots published between 2006 and 2008 increased by close to 47%, and has significantly surpassed the growth of the number of contract award notices (42%). On average 2.7 contract awards were listed in each contract award notice published over the 2006-2008 period.

5.2. Utilities

Around one-fifth of the procurement advertised at EU level originates from utility operators. Utility operators were brought under the public procurement regime on the grounds that, because they enjoy monopoly or special and exclusive rights, they could not be presumed to have the incentives to procure efficiently. Consequently, they run the risk of engaging in preferential procurement and failing to offer foreign suppliers the opportunity to compete for their custom.

As the rationale for Utilities procurement Directive stems from the absence of competition-induced discipline to procure efficiently and competitively, the evaluation examined whether the utilities sectors are now more exposed to competition than they were. On the occasion of the 2004 legislative modification, EU authorities concluded that the liberalisation of the telecommunication sector and introduction of competition in that sector were sufficient to warrant its exclusion from the scope of Directive 2004/17/EC.

A number of factors are relevant to evaluating changing circumstances: the degree of liberalisation and privatisation, the extent of competition and the effectiveness of regulation. Competition in a sector is assessed in very broad terms, taking into account the number of competitors, the degree of concentration and barriers to entry in the markets concerned, and the degree of switching amongst operators.

Significant EU legislation has been adopted to liberalise market access in four sectors covered by the Directive: electricity, gas, postal services and exploration for oil and (natural) gas. There has been less EU legislative activity to liberalise access in the rail, ‘other land transport’ (bus transport) or port sectors and little or no direct action in the area of water, heat industry or airports. The liberalisation of air transport and ground-handling services has intensified competitive pressure on undertaking of some airport operations. In certain sectors competition is based on public tendering under specific EU transport legislation.

Progress on the legal or regulatory front has not translated into sustained or effective competitive pressure on incumbent operators in markets where access is unrestricted. In many utility sectors, high levels of market concentration or anaemic competition continue to be observed. Conditions have not evolved to the extent that competition can be deemed to be sufficiently strong on a sector wide basis to permit the exclusion of sectors from the scope of the Utilities procurement Directive. One possible exception is the market for oil exploration where markets are global.

Moreover, there is such wide variation in the degree of liberalisation and effective competition across Member States as to preclude any EU wide conclusions. The rationale for the Directive would seem to continue to apply in general, while specific exemptions from the application of the Directive may be justified on the basis of an in-depth, case by case analysis of each sector, broken down by relevant activities/product markets and relevant geographical markets.

Article 30 of the Utilities Directive provides a way of exempting market sectors from the EU public procurement rules where there has been both a regulatory liberalisation and the emergence of meaningful competition. To date twenty four applications have been received for ten Member States concerning either the postal or energy sectors. Two applications are still under examination, three have been withdrawn and sixteen Decisions have been adopted (ten positive, two negative and four mixed).

CROSS-BORDER PROCUREMENT

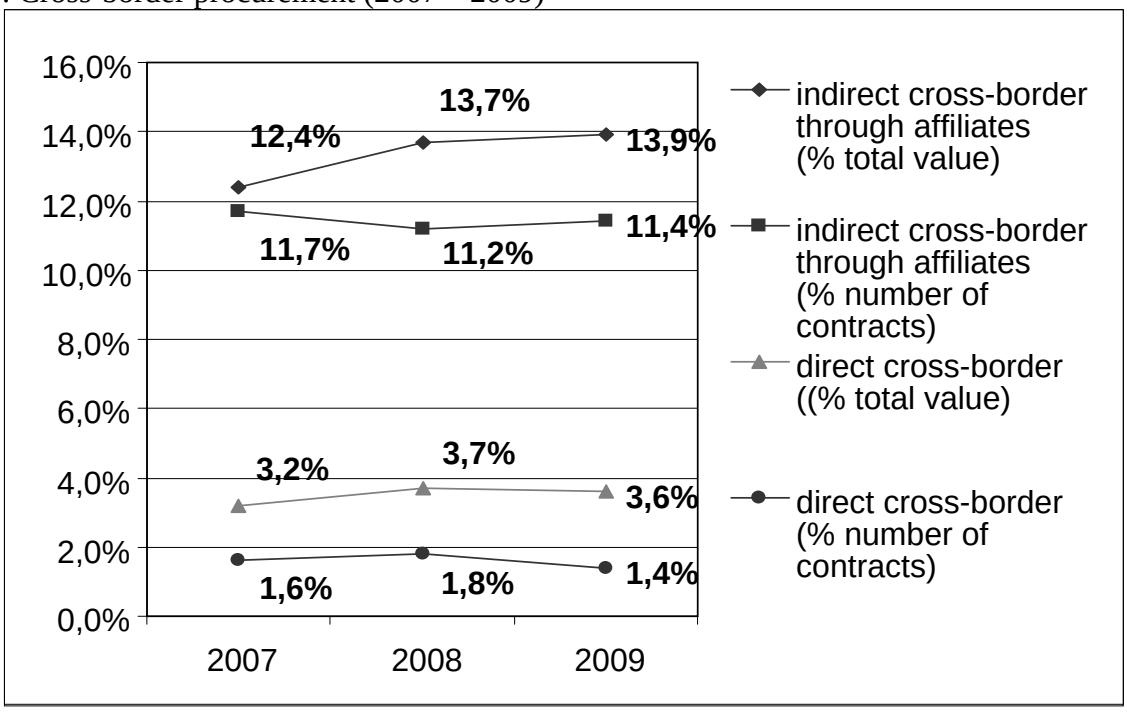
Import penetration in the public sector remains significantly lower than in the private sector. In 2005 public sector import penetration stood at 7.5%, compared to private sector import penetration of 19.1%. The gap between public and private sector import penetration has narrowed slightly in the period 1995-2005.

The low level of public sector import penetration can be explained in large part by the nature of the goods and services that the public sector consumes. Public administration, education, health and social services make up more than 60% of public sector expenditure (25.3%, 14.3% and 21.2% respectively in 2005). These sectors have import penetration close to zero (0.1%).

In markets for public contracts which are the specific focus of EU public procurement legislation, only a small proportion of contracts are awarded for firms from another Member State. Direct cross-border procurement accounts for 1.6% of awards or roughly 3.5% of the total value of contract awards published in TED during 2006-9.

In addition to direct cross-border procurement however, there is a considerable volume of indirect cross-border procurement. For example firms can bid for contracts through their foreign affiliates or subsidiaries. This channel accounted for 11.4% of awards published in TED and 13.4% by value during 2006-9.

Figure 6: Cross-border procurement (2007 – 2009)



Local distributors or agents may also import goods in order to supply them to a contracting authority or entity. This form of wholesale distribution amounts to 13% of procurement in both the number and value of contracts awarded. Finally, foreign bidders can submit offers in consortia with local firms or through subcontractors. This form of cross-border procurement appears to be little practised.

While the share of direct cross-border procurement over 2007-2009 in terms of value amounts to 7% for supplies but only 2% for works or services, indirect cross-border procurement through affiliates makes up 25% of the total value of supplies contracts, 6% of works and 14% of services. It seems clear that supplies have the highest propensity to be traded cross-border.

Analysis of average distances between buyers and sellers confirms that relatively small geographical distances are typical in public procurement. The average distance between purchaser and supplier is 102 km for works contracts, 123 km for services and 232 km for supplies. These distances also seem to be related to the size of national markets: the smaller the country the shorter the distance between contracting authority and successful bidder. The average distance between buyer and seller, for example, is 60 km for Belgium, 170 km for Poland and 190 km for France.

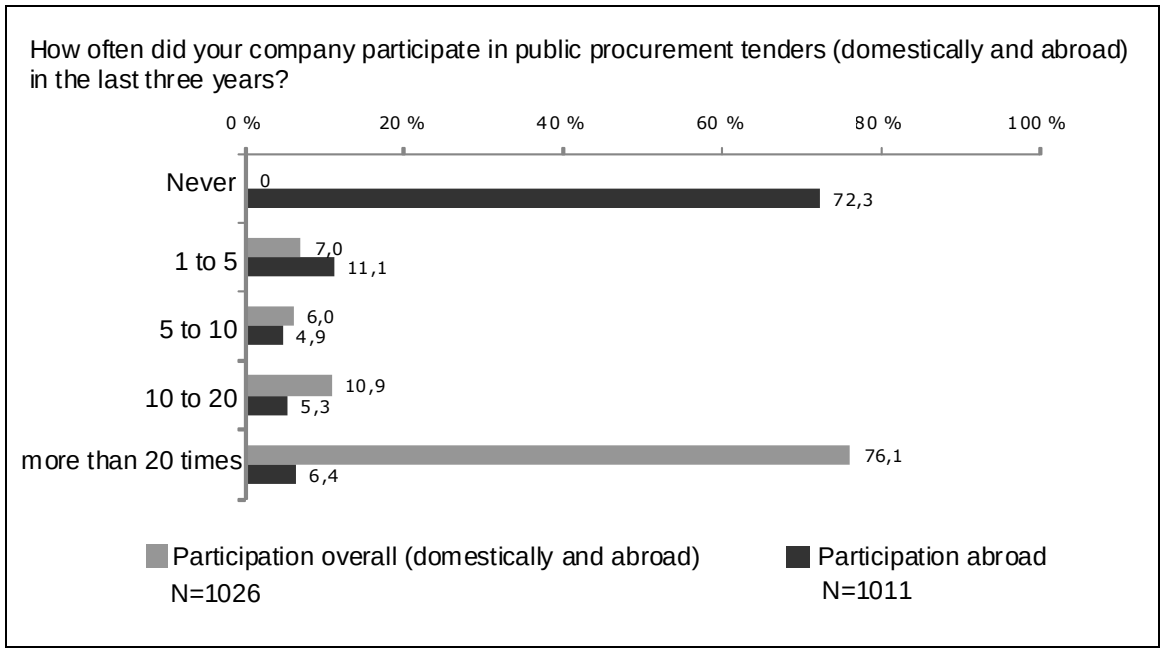
Both public procurement Directives divided services into two categories (A and B) on the basis of their perceived tradability. The 16 category A services, assumed to be better suited for cross-border procurement, are subject to the full procedures like works or supply contracts, while the eleven category B services, assumed to be less tradable, are subject to a lighter regime. Since contract award notices must be submitted for both categories it is possible to test whether cross-border procurement (both direct and indirect through affiliates) is significantly higher for A services than for B services. Despite certain limitations in the data, it appears that category A contracts may have a higher share of cross-border procurement (2.8% direct and 16.2% indirect in value), than category B contracts (1.2% and 12.1% respectively). However some category B services perform better than average when compared to category A services. For example 21.2% of the total value of contracts for legal services was awarded

directly cross-border, compared to the average of 2.8% for category A services. The value of contracts awarded indirectly cross-border is 39.1% of the total for hotel and restaurant services compared to the average indirect cross-border of 16.2% for category A services. These findings suggest that, as far as some sectors are concerned, the distinction between tradable and non-tradable sectors is somewhat arbitrary.

There are important differences between Member States in the level of cross-border procurement. The majority of countries have a share of cross-border procurement close to the average, but some Member States (above all the smaller ones) have an average share of direct cross-border procurement between of 5 and 15%, while Cyprus, Luxembourg, Malta and Slovakia have a share of value of direct cross-border procurement of over 15%. In some Member States the share of value of indirect cross-border is higher than 25% (e.g. Belgium, the Czech Republic and Sweden).

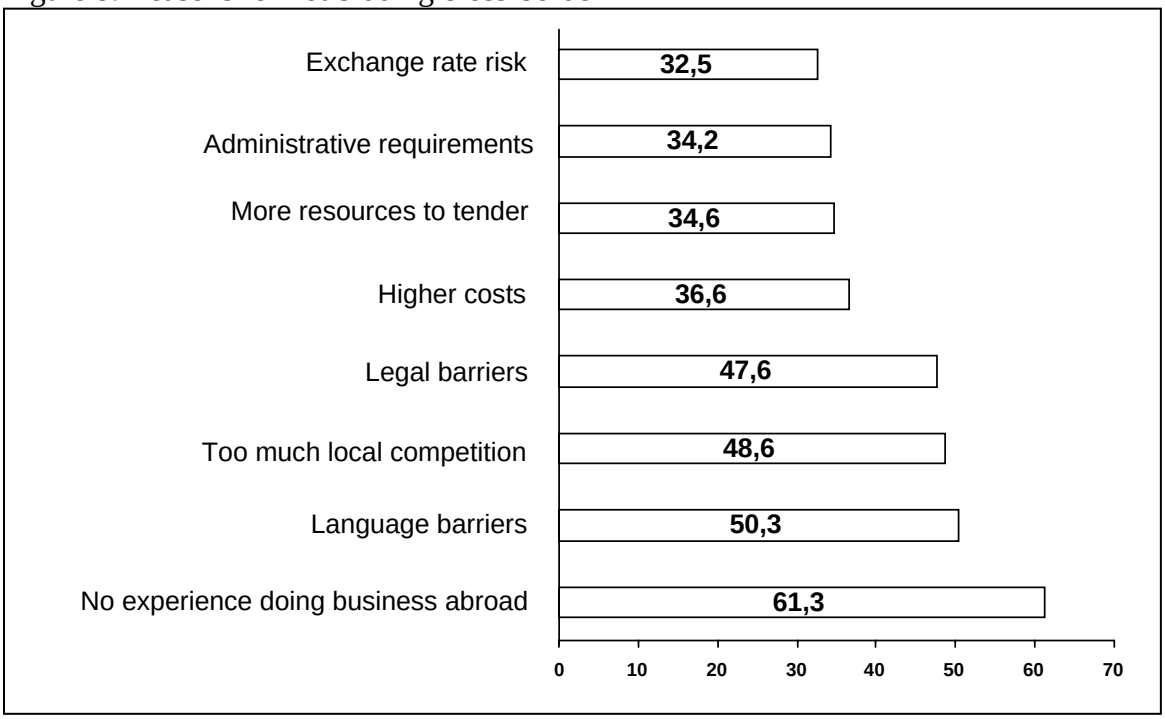
Companies are clearly reluctant to tender cross-border. In a recent large scale survey around 73% of firms, otherwise active in public procurement, say that they have not made cross-border tenders in the last three years. Language barriers and unfamiliar or complicated formal requirements are among the most important reasons given.

Figure 7: Participation in cross-border tenders



While these import penetration figures for above threshold procurement contracts are an improvement on the situation as seen in 1987 and 1996 they are also evidence that the full potential for cross-border public procurement has still not been realised in many sectors.

Figure 8: Reasons for not bidding cross-border



TIME- AND COST-EFFICIENCY OF PROCEDURES

A recurrent concern in the design of public procurement procedures is the cost, complexity and delay. The typical time from the dispatch of an invitation to tender to an award across all procedures is 108 days, but the difference between the top performers and the slowest is approximately 180 days. This is a hugely significant difference that will inevitably impact on the efficiency and cost procurement procedures.

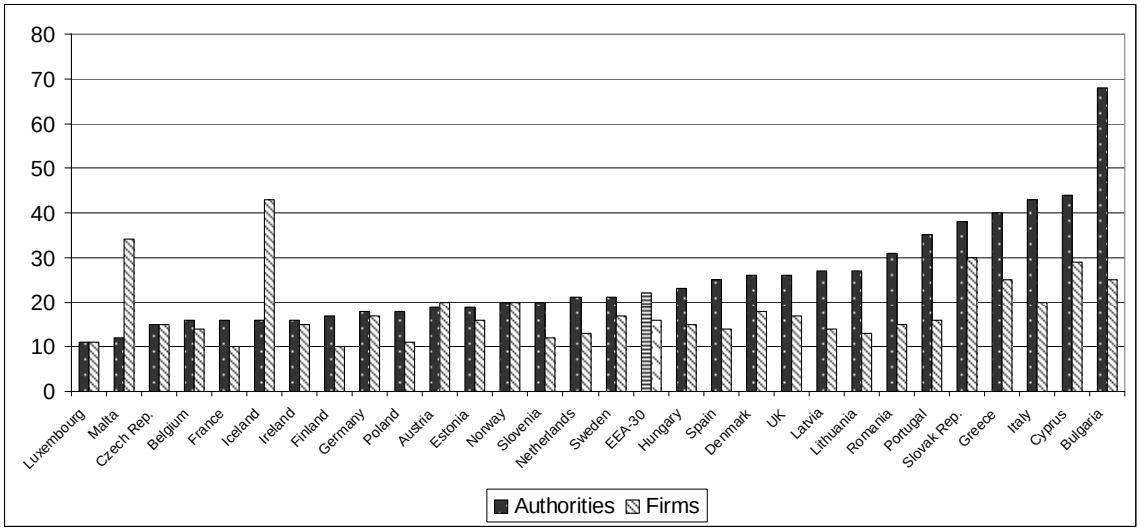
While the time required for publication of contract notices is prescribed by EU law and subject to limited flexibility, the time taken by contracting authorities to award contract is subject to their control. The time taken to complete these processes varies significantly across procedures, techniques and countries. The average time necessary to award a contract is around 58 days, ranging from 45 days in case of simple lowest price contracts, up to 245 days in case of complex competitive dialogue procedures. The length of the competitive dialogue procedure can be explained, to a large extent, by the complex nature of the projects for which this procedure is meant to be used.

The restricted procedure, the second most popular after the open procedure, takes usually 160 days to award, which is much more than the typical timing of the open procedure (53 days to award). The length of restricted procedure may be explained by the fact that it too is mainly used for high value and more complex contracts.

A significant variation in terms of person-day costs (i.e. time effectively spent on carrying out the procedure, as opposed to the above mentioned duration of procedures) can be observed across Member States and procedures or techniques. While for Member States, the overall average stands at 38 days,

including both the time invested by authorities and by the winning firm, the difference between the top and the bottom performing countries is approximately 71 person-days.

Figure 9: Average costs of procedures by country (in person days for authorities and firms)



Restricted procedures are the most expensive for contracting authorities, followed by negotiated procedures. As far as 'techniques' are concerned, framework contracts have relatively low costs per contract compared to other forms of procurement. There are savings in frameworks for both authorities and for firms. This has probably contributed to their popularity.

The evaluation finds that the average cost of running each procedure is approximately €28 000. To a large extent, this cost can be viewed as the costs of sustaining competition for public contracts. 75% of the total figure is incurred by suppliers as the cost of preparing tenders. This will be shared out among the average 5.4 bidders for each tender. It can be assumed that these costs will be incorporated in the long run into the prices of tenders or built into the margins the successful tenders.

The cost of the procurement process may represent quite a high percentage of the total value of a contract, particularly at the lower end. At the lowest threshold in the Directives, €125 000, total costs can amount to between 18 and 29 % of the contract value. At €390 000, the median contract value, costs reach between 6 and 9 %. Although the cost for each participant is lower than this total (about 1/6), these shares are significant. However these findings are influenced by the fact that many of the contracts published are well below the thresholds.

The total cost to society of procuring the goods and services covered by the Directives is estimated at around €5.26 billion per year (for the EEA-30 in 2009), which is less than 1.3% of the value of invitations to tender published (by the EU-27) in the same period (i.e. €420 billion). This estimate covers the whole cost incurred during the entire procurement process i.e. from the pre-award phase, through the preparation of offers by all participating bidders, the selection of a successful bidder, and including any costs of litigation.

Much of this cost would be incurred whether the Directives were in place or not. As a result, this global figure would not reduce to zero if the Directives were repealed. Procurement carried out below EU thresholds, as well as private procurement, has associated costs. In fact, the additional cost imposed by provisions of the Directives is likely to be relatively limited, as has been pointed out in an earlier

evaluation of the public procurement Directives carried out in 2006. That evaluation put the additional cost of the compliance with the EU Directives compared to national/below-threshold procurement at 0.2% of total contract value for public purchasers, and a further 0.2% for suppliers – or approximately €1.68 billion in 2009.

When it comes to comparing public procurement against private sector procurement, firms find the latter less time-consuming and cheaper. The efficiency of the private sector procurement is also rated higher than for public procurement. However, private sector purchasing is seen as less competitive and less fair or transparent, and is based more on relationship trading. 40% of companies say that public procurement run on the basis of the open procedure is more or much more transparent than private purchasing, with 35% saying the same for the restricted procedure. Similarly, firms say that public procurement is fairer than private purchasing (33% in the open procedure and 34% in the restricted one).

The evaluation reveals very wide variation across Member States in terms of time and cost involved in running a procedure. The worst performers take several times as long as the best performers. This suggests that the Directives support relatively efficient procurement practice but that some Member States have considerable scope for improving the efficiency of their procurement administration.

IMPACT ON OUTCOMES

The economic logic informing the Directives was that transparency would generate competition, which would lead to savings or lower prices. The evaluation finds that the procurement Directives have boosted openness and transparency, that this has triggered increased competition, and that this in turn translates into savings.

New econometric analysis carried out in the context of the evaluation finds that even incremental increases in transparency or openness can yield tangible savings. Publication of a contract notice results in a saving of 1.2% compared to contracts where neither contract nor prior information notice was published. Using an open procedure is associated with further 2.6 % savings. Based on these findings, a contracting authority that publishes an invitation to tender and uses an open procedure may expect total benefits equivalent to savings of 3.8 % on the final contract value. For restricted procedures, the corresponding saving appears smaller at around 2.5%.

Savings linked to higher competition tend to be higher in services and works. The more successful the procedures are in mobilising competition in these markets, the greater the savings that can be reaped.

The identified savings are consistent with previous estimates of savings from the procurement Directives. The Commission has previously estimated that overall prices for EU advertised procedures are 2.5-10% lower than contracting authorities initially expected. Budget savings on this scale can aggregate to significant amounts. Based on an estimate of savings of 5% realised for the €420 billion of public contracts which are published at EU level would translate into savings or higher public investment of over €20 billion. This could generate increases in employment and GDP of between 0.08 and 0.12% after one decade (160-240 000 jobs). If these savings were realised for all public procurement, the gains would be correspondingly greater (0.5% GDP and employment).[3]

Public procurement is not only about obtaining the lowest price per contract. Qualitative and other performance considerations – including contribution to other policy objectives – may be integral to the procurement outcome. In general, contracting authorities do not focus on the lowest price but look for the

economically most advantageous offer overall, taking into account quality or life cycle cost. Indeed 70% of all contract notices (and nearly 80% in terms of value) use the economically most advantageous tender criteria rather than lowest price. Lowest price is used more frequently for smaller contracts and less complicated procedures. The evaluation also finds that the integration of green or socially responsible requirements in tender specifications is effective in ensuring that procurement outcomes (i.e. the successful tenders) embody these features.

CONCLUSIONS

This evaluation set out to answer a number of key questions about the extent to which the public procurement Directives had achieved their objectives: whether those objectives remain relevant in the light of evolving market conditions and political preferences and to identify potential improvements in the cost-benefit trade-off.

9.1. Effectiveness

The evaluation finds that the Directives have resulted in greater transparency. This has been accompanied by greater levels of competition. The Directives have achieved measurable savings through lower prices as well as probable improvements in quality which are not easily measurable.

Direct cross-border procurement has not increased as much as was anticipated, although it is commonplace in smaller Member States. Many economic operators still appear to be deterred from competing for tenders in other Member States by a combination of competitive, structural and legal or administrative factors. The regulatory guarantees established by the Directives may be a necessary but not a sufficient condition to break down the barriers to cross-border participation in public procurement markets.

The evaluation has also found that differences in implementation and application of the Directives have led to different outcomes in different Member States. The time taken to complete procedures and the cost to public purchasers vary widely across Member States.

9.2. Relevance

Are the objectives of the Directives still pertinent? Budgetary pressure and continued emphasis on value for money argue for the continued appropriateness of the objectives. Increased aggregation, both through central purchasing and wide use of framework contracts, has led to an increasingly sophisticated and professional procurement. None of the evaluation findings suggest that the original objectives of removing legal and administrative barriers to participation in cross-border tenders, of ensuring equal treatment and removing scope for discriminatory purchasing by ensuring transparency are no longer relevant. While progress has been made, there still appear to be some factors which prevent the full impact of the single market being extended to all public contracts.

9.3. Efficiency

The evaluation finds that the savings generated by EU public procurement Directives far exceed the costs, for public purchasers and suppliers, of running those procedures. The positive cost-benefit analysis is almost certainly even more favourable if qualitative improvements are taken into account.

However, this generally positive assessment must be tempered by concerns about specific aspects of the functioning of the EU public procurement regime. The evaluation suggests that there may be circumstances where the costs of running regulated procedures may be disproportionate to the expected benefits. There may also be situations when aspects of the regulation give rise to unintended consequences for the wider economy – notably, the risk of market closure and concentration where long term or framework agreements are used.

The disparity between Member States in the time taken to complete procedures, and cost to public purchasers suggests that there is considerable scope, within the Directives, for reducing the cost of procurement administration in many Member States by aligning practice on the most efficient Member States.

9.4. Consistency with other policies

EU public procurement Directives permit contracting authorities to take into account a range of other policy considerations when defining their desired procurement outcome, subject to some safeguards to avoid arbitrary or unjustified restrictions on potential suppliers. Contracting authorities must design award criteria, for example, which comply with EU State aid rules.

In order to avail themselves of these possibilities, most Member States have adopted National Action Plans for Green or sustainable public procurement, often including targets for priority product groups as identified by the Commission. The focus has been on environmental procurement (for example by including the EU GPP criteria and by taking a life-cycle costing approach), and fewer Member States have been active in defining policies for socially responsible public procurement or innovation.

There is little organised monitoring or measurement in place, and this makes it difficult to draw firm conclusions on the effectiveness of these policies in re-orienting public expenditure towards more sustainable solutions. However, it appears that the majority of contracting authorities seeks to buy green, when this is feasible. Contracting authorities also encourage more socially responsible procurement and more innovative solutions although they have less experience of integrating these policy objectives within their procurement practice.

Respondents to surveys expressed concerns that different national requirements for environmental or social standards across the EU, or demands for different certificates and labels may constitute barriers to cross-border participation in public procurement procedures.

TABLE OF CONTENTS

TABLES

FIGURES

GLOSSARY OF TERMS

ACPC (Advisory Committee on Public Contracts)

CAE (Contracting Authority and/or Contracting Entity): The term of CA is used in the context of the Classic Directive to designate state, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law. The terms CE is used the context of the Utilities Directive to designate contracting authorities as just defined, public undertakings, and private undertakings, provided these latter exercise one of the relevant activities on the basis of an exclusive or special right.

CAN (Contract Award Notice): A document completed by the Contracting Authority or Contracting Entity and made public after award of a contract.

CEN (Comité Européen de Normalisation – European Committee for Standardization): The European Committee for Standardization (ISO's counterpart and the European entry point to UN/CEFACT). CEN Workshops are open consensus building platforms for contributing to standards, especially in the ICT area, and their product is a CEN Workshop Agreement.

Classic Directive (Directive 2004/18/EC): Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134, 30.4.2004, p. 114

CN (Contract Notice): A document completed by the Contracting Authority or the Contracting Entity inviting companies to tender or to request participation.

CPB (Central Purchasing Body): A contracting authority which acquires supplies and/or services intended for contracting authorities or contracting entities, or which awards public contracts or concludes framework agreements for works, supplies or services intended for other contracting authorities or contracting entities.

CPV (Common Procurement Vocabulary): The CPV establishes a single classification system for public procurement aimed at standardising the references used by contracting authorities and entities to describe the subject of procurement contracts.

COM (European Commission)

DG MARKT (Internal Market and Services Directorate General): Internal Market and Services Directorate General of the European Commission

DG ENTR (Enterprise and Industry Directorate General)

Directive: A Directive is a legislative act of the European Union which requires Member States to achieve a particular result without dictating the means of achieving that result. Although obligatory to implement, Directives normally leave Member States with a certain amount of leeway as to the exact rules to be adopted.

Defence and Security 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.

DPS (Dynamic purchasing system): A completely electronic process for making commonly used purchases, the characteristics of which, as generally available on the market, meet the requirements of the contracting authority or the contracting entity, which is limited in duration and open throughout its validity to any economic operator which satisfies the selection criteria and has submitted an indicative tender that complies with the specification.

EBTP (European Business Test Panel): A panel of individual companies regularly consulted on European Commission policy initiatives

ECA (European Court of Audit):

e-Catalogue: On line applications designed to meet a variety of needs (everything that the public sector may want to buy)

ECB (European Central Bank)

ECJ (European Court of Justice)

EEA (European Economic Area): The Agreement creating the European Economic Area entered into force on 1 January 1994. It allows the EFTA (European Free Trade Agreement) States (Norway, Iceland and Liechtenstein) that are part of EEA to participate in the Internal Market on the basis of their application of Internal Market relevant acquits.

Electronic auction / e-Auction: A repetitive process involving an electronic device for the presentation of new prices, revised downwards, and/or new values concerning certain elements of tenders, which occurs after an initial full evaluation of the tenders, enabling them to be ranked using automatic evaluation methods.

EMAT (Economically Most Advantageous Tender): One of the contract award criteria on which the award of a (public) contract shall be based

EO (Economic Operator)

EP (European Parliament)

e-Procurement: A public procurement procedure initiated, conducted and/or concluded using electronic means, i.e. using electronic equipment for the processing and storage of data, in particular through the Internet.

ESWG (Economic and Statistical Working Group): Economical and Statistical Working Group of the Advisory Committee for Public contracts

EU (European Union)

Eurobarometer: Large surveys based on in-depth thematical studies carried out for various services of the European Commission or other EU Institutions.

FRA (Framework Agreement): An agreement between one or more contracting authorities (or contracting entities) 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.

GATT (General Agreement on Tariffs and Trade): GATT was signed in 1947 in Geneva and lasted until 1993.It was replaced by the World Trade Organization in 1995

GPA (Government Procurement Agreement): The GPA is the main international agreement relating to public procurement. The current version, which was negotiated in the in parallel with the Uruguay Round in 1994 and entered into force on 1 January 1996, The GPA establishes a set of rules which (a) govern the procurement activities of its Parties and (b) enable the Agreement to function as an international one.

GPC (Global Products Classification): GPC is the products classification of GS1, an organisation that works for the design and implementation of global standards

GDP (Gross Domestic Product): A measure of a country's overall economic output. It is the market value of all final goods and services made within the borders of a country in a year.

MS (Member State): Member State of the European Union

OECD (Organisation for Economic Co-operation and Development)

OJEU (Official Journal of the European Union): The Official Journal of the European Union is the gazette of record for the European Union.

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.

PIN (Prior Information Notice)

PP (Public procurement): A procedure initiated by a contracting authority or contracting entity with a view of acquiring goods, services or works for the fulfilment of its tasks.

PPN (Public Procurement Network): PPN is an informal European-wide co-operation network in the field of public procurement established in 2003 .The objective of the network is to strengthen the application and the enforcement of the procurement rules through mutual exchange of experience and benchmarking, and to create a reliable and effective informal co-operation.

Remedies Directive (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

SME (Small and Medium-sized Enterprise): The category of micro, small and medium-sized enterprises is made up of enterprises which employ fewer than 250 persons and have an annual turnover not exceeding 50 million euro, and/or an annual balance sheet total not exceeding 43 million EUR.

TFEU (The Treaty on the Functioning of the European Union)

URL (Uniform Resource Locator): Link to a website

Utilities Directive (Directive 2004/17/EC): 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

VAT (Value added tax)

WTO (World Trade Organisation): WTO is an organization that intends to supervise and liberalize international trade. The organization officially commenced on January 1, 1995 under the Marrakech Agreement, replacing the General Agreement on Tariffs and Trade (GATT)

LIST OF COUNTRY ABBREVIATIONS

AT	Austria
BE	Belgium
BG	Bulgaria
CY	Cyprus
CZ	Czech Republic
DE	Germany
DK	Denmark
EE	Estonia
EL	Greece
ES	Spain
FI	Finland
FR	France
HU	Hungary
IE	Ireland
IS	Iceland
IT	Italy
LI	Liechtenstein
LT	Lithuania
LU	Luxembourg
LV	Latvia
MT	Malta
NL	Netherlands
NO	Norway
PL	Poland
PT	Portugal
RO	Romania
SE	Sweden
SI	Slovenia
SK	Slovakia
UK	United Kingdom

CHAPTER 1: METHODOLOGY

This chapter outlines the methodology used in the evaluation, the questions asked, the way in which the answers were arrived at and the various sources of data and evidence for the conclusions. This evaluation examines the evidence available and makes an assessment of whether EU procurement policy is achieving its objectives in a proportionate way. The evaluation is retrospective in nature – and reviews the experience and impact of EU public procurement policy with a particular focus on most recent years.

The evaluation is not confined to an assessment of the new provisions and features introduced by the Directives 2004/17/EC and 2004/18/EC but attempts to analyse the impact of the core disciplines of EU procurement legislation as they crystallised in the early 1990s. However, it does devote some special consideration to the use being made of new provision and procedures introduced in 2004.

The evaluation has gathered together the evidence from a range of sources in order i) to give a broad description of the structures and policies put in place at national level to implement EU procurement policy; ii) to shed light on general trends and patterns in the application of procurement law; and iii) to draw conclusions about the effectiveness of current policy.

In particular, the evaluation provides a detailed and accurate description of the objectives of EU procurement policy and its scope in terms of economic coverage: the proportion of government expenditure on works, goods, and services that is subject to EU procurement law. The evaluation has also sought to identify any systemic issues or patterns in national implementation that might influence the impact of EU procurement legislation.

A major part of the evaluation is an analysis of the experience of contracting authorities and tenderers with the different procurement procedures or techniques available. Through this analysis, it provides a meaningful insight into the costs and benefits of these different provisions in order to place concerns about the administrative burdens associated with procedures in context.

The evaluation also examined the import penetration of Member States' respective public procurement markets and attempted to measure the extent to which procurement legislation has been effective in fostering competition and cross-border trade. This was intended to help to answer questions as to whether the transparency introduced by EU procurement legislation has boosted competition and trade, or changed market structures and economic outcomes as predicted, as well as helping to understand factors that may explain the volumes of cross-border tendering and contract awards observed in particular sectors.

Given the increasing political emphasis on the use of procurement expenditure to support other policy objectives, the evaluation has also devoted particular attention to an examination of national experiences with such policy driven procurement in order to understand how far Member States have been successful in supporting these additional policies within the context of the overall

objectives of procurement policy. It could also determine the scope for replication of effective policy measures at EU level in areas such as environmental sustainability, social considerations or innovation.

The macro-economic impact of EU procurement legislation is hard to isolate with any great confidence or precision. The evaluation has nevertheless brought together data on the budgetary savings and price impacts of procurement legislation, and used this to derive some estimates of macro-impacts.

Public procurement is a relatively poorly researched area. The evaluation was faced with severe constraints in terms of availability of reliable data to support cross-country comparisons or time-series analysis. In several instances, the evaluation was forced to supplement data analysis with qualitative analysis and opinion surveys.

The evaluation draws upon the following main sources:

- existing research and studies at European or national level;
- intensive exploitation of notices published in the Official Journal of the European Union via the Tenders Electronic Daily database (OJEU/TED) and other databases; and
- specifically commissioned external studies on cross-border procurement and the cost-effectiveness of procedures, and (under preparation) a review of Member State experience with initiatives to use public procurement to support the realisation of other policy objectives (environmental sustainability, social considerations, innovation).

In compliance with Commission standards, an inter-service steering committee was convened to assist and follow the progress of the evaluation and regular meetings were held to discuss the progress of the work.

1.1. Key questions and the intervention logic behind the Directives

The evaluation began by researching the objectives and rationale for the Directives. Given the considerable influence of previous legislation and practice on the most recent modifications to the EU public procurement regime in the 2004 Directives it proved necessary to look into the wider historical context to determine what procurement legislation was initially intended to achieve at EU level and how those objectives were expected to be reached through the specific provisions of the Directives as successively developed and modified leading to the 2004 legislation.

The detailed analysis of this historical development of the legislation, its objectives and evidence relating to the political and economic assumptions and context in which it was proposed and adopted is laid out in the "History of public procurement legislation" in Annex 2 of this evaluation report.

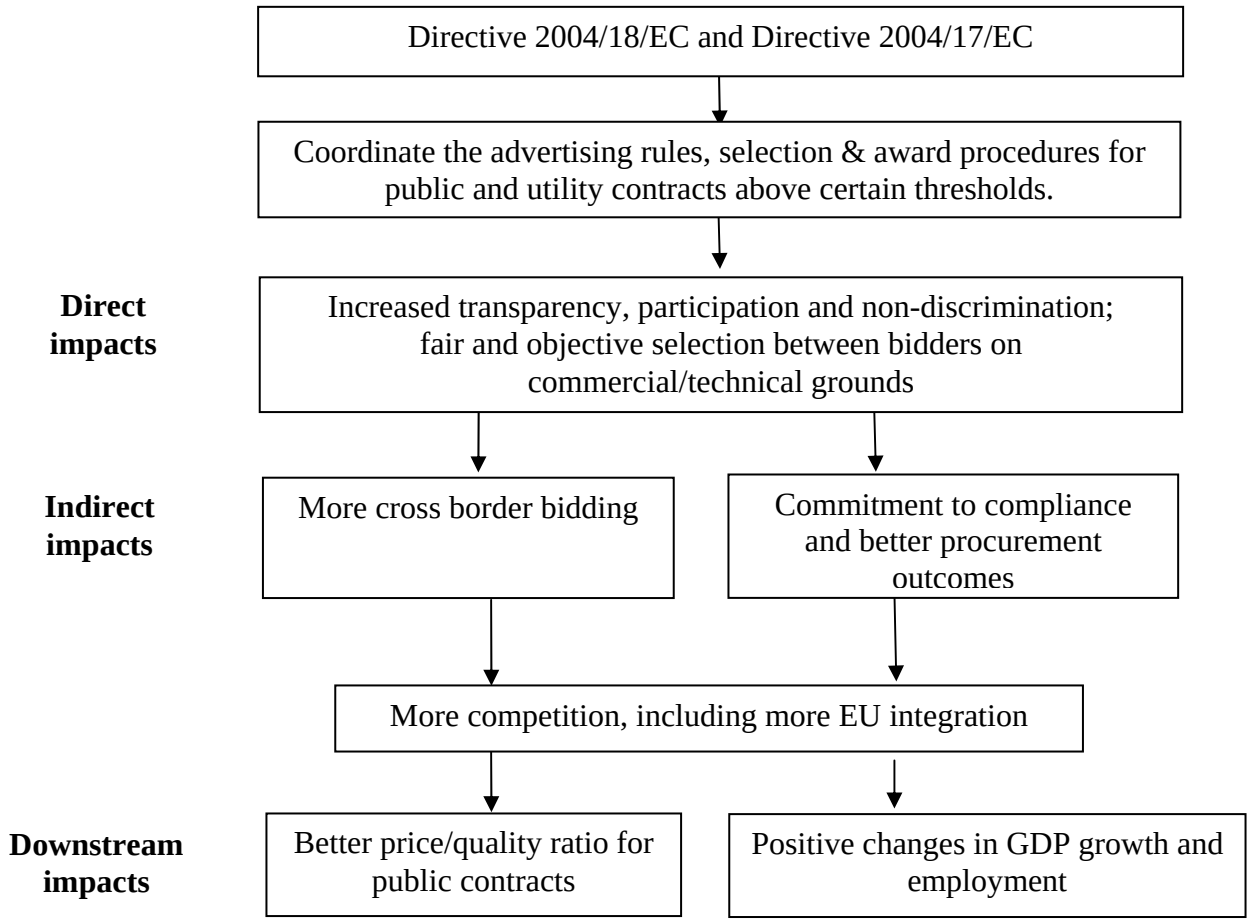
A diagram of the intervention logic showing the underlying assumptions of cause and effect behind the Directives was then distilled from this research, and a series of key questions elaborated which would focus the evaluation on the main issues to be addressed.

These questions were organised under the criteria of effectiveness, relevance, efficiency, distributional effects, consistency with other policies and EU added value (or subsidiarity).

1.1.1. Intervention Logic for evaluating the impact of the Public Procurement Directives

The intervention logic assumed that coordinating Member States' procurement procedures and rules for advertising, involving the principles of transparency, non discrimination leading to the selection of bidders and award of contracts according to objective criteria would lead to increased participation and competition for public contracts which would result in better value for money or better public services at lower cost to the EU taxpayer. In addition it was considered that the increase in intra EU competition would ensure that the general level of productivity EU companies would increase, allowing them to compete more effectively internationally. Better public services at lower cost to taxpayers and the increased productivity of EU companies would lead to positive macro economic impacts and the overall improvement in economic welfare.

The intervention logic, or the way in which it was assumed that the provisions of the Directives would influence the behaviour of those parties or economic operators involved in public procurement, is captured succinctly in the following diagram. A more complete picture of the intervention logic, which informed the progress of the evaluation, is presented in Annex 1.



1.2. Key Questions of the evaluation

Six key questions were formulated, and organised under specific evaluation criteria of effectiveness, relevance, efficiency, distributional effects, consistency with other policies and EU value added, as follows:

- *Effectiveness*: How far have the Public Procurement Directives achieved their objectives? How have differences in implementation and application by the Member States resulted in different outcomes?
- *Relevance*: To what extent are those objectives still appropriate today?
- *Efficiency*: What have been the costs of compliance compared to the benefits obtained?
- *Distributional Effects*: How are these costs and benefits distributed across different stakeholders?
- *Consistency with other policies*: How have the Public Procurement directives contributed in practice to meeting other EU policy objectives. In particular, what environmental and social effects have the Public Procurement Directives had?
- *EU added value*: To what extent could the changes bought about by the Directives have been achieved by national measures only?

1.3. Sources of data and analysis

The evaluation was based upon a broad and varied set of sources of evidence and opinion. The following sections outline the main sources used during the evaluation.

1.3.1. Existing research and studies at European or national level

The evaluation has made use of a wide range of existing research and studies. Member States were invited to make available to the Commission Services research material and studies which they themselves had commissioned or were aware of and which they considered could be helpful to the evaluation process. The steering committee, chaired by the Directorate General for Internal Market and Services and made up of services from other interested Directorates General within the Commission were also invited to contribute studies, data or other useful material. These studies and reports are included in the bibliography listed in Annex 8 and in endnotes where they have been cited or quoted directly.

1.3.2. OJEU/TED database, other databases and data sources

The evaluation has made extensive use of the archive of procurement notices published in the OJEU and TED. Data from several years have been imported into a relational database to enable and facilitate statistical analysis. This data, it should be noted, requires extensive cleaning, checking and correcting before it can be exploited. This cleaning process has partly been carried out by the services of the Commission and partly by the contractors to whom the data were supplied for particular studies and analyses. At times different approaches to this cleaning process have been adopted by the services of the Commission and by the different contractors, because of the different questions under consideration, or hypotheses they were attempting to test, and this has naturally led to variations in the results and interpretation of the statistical data. It is also clear that the contracting authorities and entities who submit these notices may also have a variety of interpretations (and sometimes misunderstandings) of the nature of the information they are submitting.

The statistical reports, submitted to the Commission by Member States in accordance with their reporting obligations under the Directives have also been exploited, wherever feasible.

Commercial databases have also been used to provide additional evidence for some parts of the evaluation, for example to provide additional geographical or company specific information.

Two surveys have also been prepared by the Commission services to look into specific issues. One questionnaire, to the members of the European Business Test Panel, was used to investigate further the reasons why companies did not actively participate in cross border procurement and what problems or barriers they had encountered when they did. The other, a Eurobarometer survey carried out in early 2011, including several procurement specific questions directed at the general public to measure the extent of their understanding and opinion of the EU public procurement rules.

1.3.3. Specially commissioned external studies

Several external studies were specifically commissioned for the evaluation. Theses studies each chose their own methodology for the sector of interest in the light of the data sources available and their own capacities and skills. In general the studies have relied on a mix of sources, from the statistical data mentioned above, desk research and from specific surveys, or a series of interviews or specific case studies.

- A study on *cross-border procurement, above the EU thresholds* was carried out by Rambøll Management Consulting and the University of Applied Sciences HTW Chur.

- A study on the cost and effectiveness of procurement procedures, *Public Procurement in Europe, procedures and techniques* was carried out by PricewaterhouseCoopers, London Economics and Ecorys.

- A review of Member State experience with integrating other policy considerations into procurement policy and practice, *Strategic Use of Public Procurement in Europe*, was undertaken by Adelphi, in cooperation with Belmont and the Universität der Bundeswehr München in order to study the use of public procurement to support the realisation of other

policy objectives (in particular environmental sustainability, social considerations and innovation).

- Two more studies were carried out under a framework contract with Europe Economics, which looked into the size and degree of regulatory changes and competition in the utility sectors covered by The Utilities Directiveand an econometric analysis of the effects or increased transparency and increased competition on contracts advertised in the OJEU including analysis of relative savings based on the final prices of contracts awarded compared with prices estimated at the time of inviting tenders.

Two informal workshops were held between the Commission services, the external contractors and a group of procurement experts. The first, in early December 2010, provided some external feedback on the methodology and approaches chosen and the second, in mid April 2011, allowed an independent critical assessment of the early findings from the various studies and work streams. These workshops have provided the contractors and the Commission services with valuable feedback on the robustness or reliability of the findings as well as a judgement of the value of the evidence available.

The final reports for these external studies will be made available on the European Commission website for public procurement[4]

This evaluation report has been drafted by the services of the Directorate General for the Internal Market and Services, on the basis of findings from all the identified data sources. The report has been discussed with the inter-service steering committee whose comments or suggestions have been duly taken into account and through a wider inter-service consultation.

CHAPTER 2: THE PUBLIC PROCUREMENT LEGISLATION: FRAMEWORK AND SCOPE

This chapter looks at how the EU public procurement regime has developed over time, identifies the explicit or implicit objectives of the various legislative measures and quantifies, as far as is possible, the actual current scope of application of Directives 2004/17/EC and 2004/18/EC. Identifying the objectives and the scope of the Directives is an essential step in the evaluation. It will allow the actual outcome to be compared with the intended outcomes, having regard to the actual coverage of the Directives.

The rise of public procurement as a specific subject for European regulation has been gradual. Initially covering public works, the scope of EU legislation was broadened to cover goods and services, and to include the water, energy, transport and telecommunications sectors. The basic rules of the Treaty of Rome and its successors were given a more specific content in Council Directive 71/305/EEC (public works contracts), Council Directive 77/62/EEC (public supply contracts), Council Directive 90/531/EEC (works and supplies contracts awarded by utilities) and Council Directive 92/50/EEC (public service contracts). The works, supplies and utilities Directives were subsequently replaced by Council Directive 93/36/EEC, 93/37/EEC and 93/38/EEC of 14 June 1993. In turn, Directives 2004/17/EC ("the Utilities Directive") and 2004/18/EC ("the Classic Directive") replaced all the previous directives. For a detailed description of the evolution of public procurement legislation please see "History of public procurement legislation" in Annex 2.

These Directives, or their successors, have now been in force for close to forty years. And yet we still struggle to measure the extent to which they have affected supply and demand within the Single Market. The analysis presented here should allow an evaluation of how far the introduction of European legislation has changed the way in which the private sector provides works, goods and services to public sector.

2.1. Evolving objectives and expectations of EU legislation

The present section will present the objectives of the EU public procurement Directives as they have informed the subsequent iterations and adjustments of the legislation.

2.1.1. Initial EU Directives (1970s)

The (stated) objectives of the first Directive (71/305/EEC) were inscribed in the logic of the gradual abolition of restrictions to the fundamental freedoms (free establishment and freedom to provide services). They aimed to address trade barriers in the markets for public contracts for works and

supplies by coordinating national procedures and, insofar as possible, taking into account existing procedures and practices (i. e. not harmonising procedures, but coordinating them in accordance with subsidiarity). The following basic principles were announced:

- prohibition of technical specifications that could have a discriminatory effect;
- adequate advertising of contracts;
- fixing of objective criteria for participation; and
- introduction of a procedure of joint supervision to ensure the observation of these principles."[5]

The principle of adequate advertising was directly linked to the aim of ensuring the "development of effective competition" for public works contracts. The second Directive, 77/62/EEC, confirmed these objectives and also brought into play the second freedom- that of free movement for goods. The concept of "introducing equal conditions of competition", in this case for supplies contracts, was also added. It also stated explicitly that contracts with a value below predetermined thresholds could be exempted from the coordination "inasmuch as their impact on competition is limited".

2.1.2. Deepening and extending the rules to utilities – 1988-1992

A further objective, progressive realization of the internal market, informed the 1988 and 1989 Directives (88/295/EEC and 89/440/EEC). A contemporary of the "Cecchini" report, the 1988 Directive also introduced the concept that it is "necessary to develop the conditions of effective competition for public supply contracts and the economic, budgetary and industrial benefits which result from it". In this context, it was for instance specified that "time limits for the receipt of requests for participation and tenders in the framework of public supply contracts should be extended in order to improve access and participation by a greater number of suppliers".

The previously stated objectives were re-confirmed and clarified; "to eliminate practices that restrict competition in general and participation in contracts by other Member States' nationals in particular, it is necessary to improve the access of contractors to procedures for the award of contracts". This would "create the necessary conditions for efficient Community-wide competition for contracts so that firms from other Member States can bid on comparable terms to domestic firms". Works concessions were included in Directive 89/440/EEC in view of their "increasing importance".

The first Utilities Directive, 90/531/EEC, was based on the same Treaty provisions and principles as the preceding Directives. It recognized that "the need to ensure a real opening-up of the market and a fair balance in the application of procurement rules in these sectors requires that the entities to be covered must be identified on a different basis than by reference to their legal status", given that "entities providing such services are in some cases governed by public law, in others by private law". It also introduced the idea that, in these sectors, the rules should not "extend to activities of those entities … which fall within those sectors but nevertheless are directly exposed to competitive forces in markets to which entry is unrestricted". For oil, gas, coal or other solid fuels, it envisaged the possibility of "alternative arrangements which will enable the same objective of opening up contracts to be achieved". Finally, it took the approach that "…the rules to be applied by the entities

concerned should establish a framework for sound commercial practice and should leave a maximum of flexibility".

2.1.3. Extending the legislation to contracts for public services

The 'Classic Directives' (i.e. the directives applicable to the public sector) were completed with the Services Directive, 92/50/EEC, which based itself on the same considerations, including the realisation of the Internal market, with the particularity that "full application of this Directive must be limited, for a transitional period, to contracts for those services where its provisions will enable the full potential for increased cross-frontier trade to be realized".

The subsequent Utilities Directive, 93/38/EC extended the scope of EU public procurement legislation to service contracts awarded by utilities. Directive 93/38/EC was also a consolidation Directive insofar as it replaced the previous Utilities Directive, 90/531/EC, incorporated its provisions. Thus Directive 93/38/EC covered works, supplies and services contracts awarded by utilities.

2.1.4. Objective of the 2004 modifications

The recitals of the 2004 Directives still refer to the opening-up of public procurement to competition. The second recital of the Directive 2004/18/EC[6] reads as follows:

> *The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency. However, for public contracts above a certain value, it is advisable to draw up provisions of Community coordination of national procedures for the award of such contracts which are based on these principles so as to ensure the effects of them and to guarantee the opening-up of public procurement to competition…*

However, the new Directives were also seen as being "necessary to meet requests for simplification and modernisation made by contracting authorities and economic operators alike in their responses to the Green Paper adopted by the Commission on 27 November 1996"[7]. Thus, the recitals refer to new phenomena, such as e-procurement[8], electronic means of communication[9] as a tool for simplification and increased efficiency and transparency. The Directives also refer to the possibility to "help increase competition and streamline public purchasing"[10]. In keeping with the aim of allowing a flexible framework that will best adapt to national characteristics, the 16th Recital of the Classic Directive provides that "in order to take account of the different circumstances obtaining in Member States, Member States should be allowed to choose whether contracting authorities may use framework agreements, central purchasing bodies, dynamic purchasing systems, electronic auctions or the competitive dialogue procedure, as defined and regulated by this Directive."[11].

The fifth recital of the Classic Directive[12] introduces special concern for environmental aspects:

> *This Directive therefore clarifies how the contracting authorities may contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring the possibility of obtaining the best value for money for their contracts."*

This is further clarified in the general recital[13] concerning award criteria:

> *"Contracts should be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which guarantee that tenders are assessed in conditions of effective competition. … In order to guarantee equal treatment, the criteria for the award of the contract should enable tenders to be compared and assessed objectively. If these conditions are fulfilled, economic and qualitative criteria for the award of the contract, such as meeting environmental requirements, may enable the contracting authority to meet the needs of the public concerned …. Under the same conditions, a contracting authority may use criteria aiming to meet social requirements ….*

The Directives were also expected to contribute to the fight against corruption and other forms of serious crimes, cf. Recital 43 of the Classic Directive[14].

The Utilities Directive, 2004/17/EC, states that it should not apply to contracts awarded for the pursuit of a relevant activity "if, in the Member State in which this activity is carried out, it is directly exposed to competition on markets to which access is not limited." It adds that there is consequently a need "to introduce a procedure, applicable to all sectors covered by this Directive, that will enable the effects of current or future opening up to competition to be taken into account. Such a procedure should provide legal certainty for the entities concerned, as well as an appropriate decision-making process, ensuring, within short time limits, uniform application of Community law in this area. "[15]

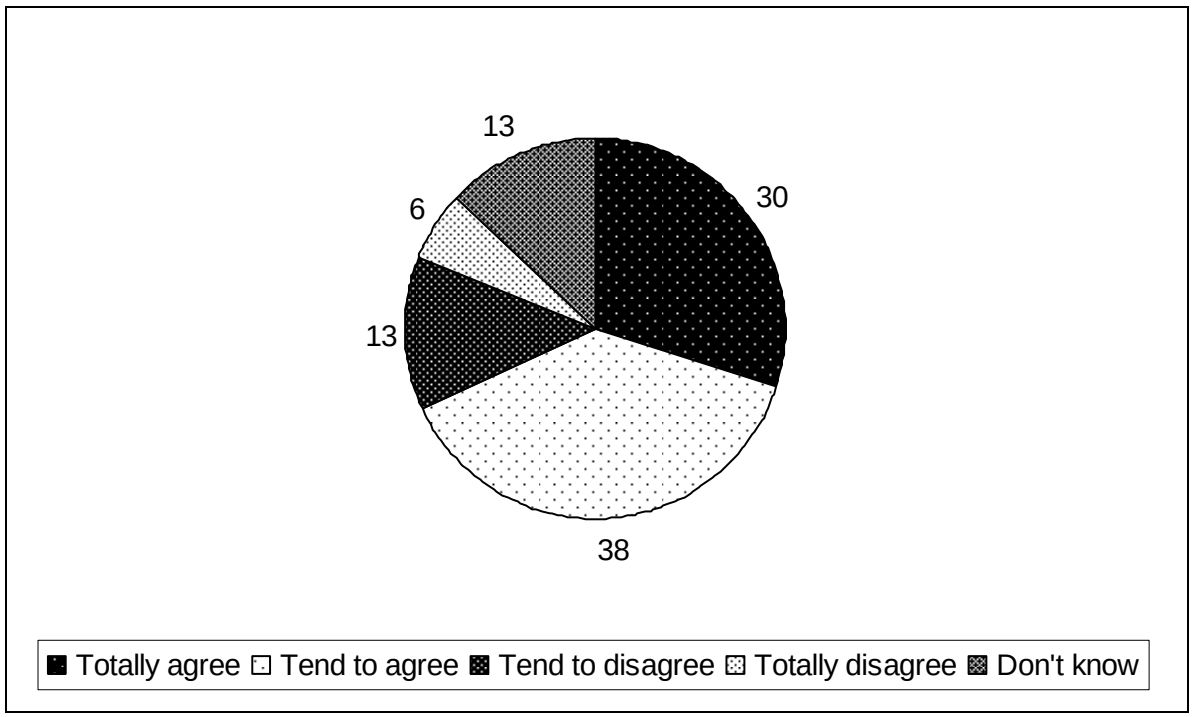
2.1.5. Public support for objectives of EU public procurement legislation

The objectives of EU procurement legislation appear to be well-understood and widely supported by EU citizens. A recent Eurobarometer (2011) survey shows a large understanding/support for the role of procurement in the fight against favouritism and corruption. Two thirds of those surveyed agree that EU-wide rules help improve public procurement process (Question 17). It also demonstrates widespread understanding for the importance of opening procurement markets to competition (Question 19) see figure 1.Two thirds of those responding to the survey questionnaire believe EU-wide policy improves public procurement practices in reducing corruption

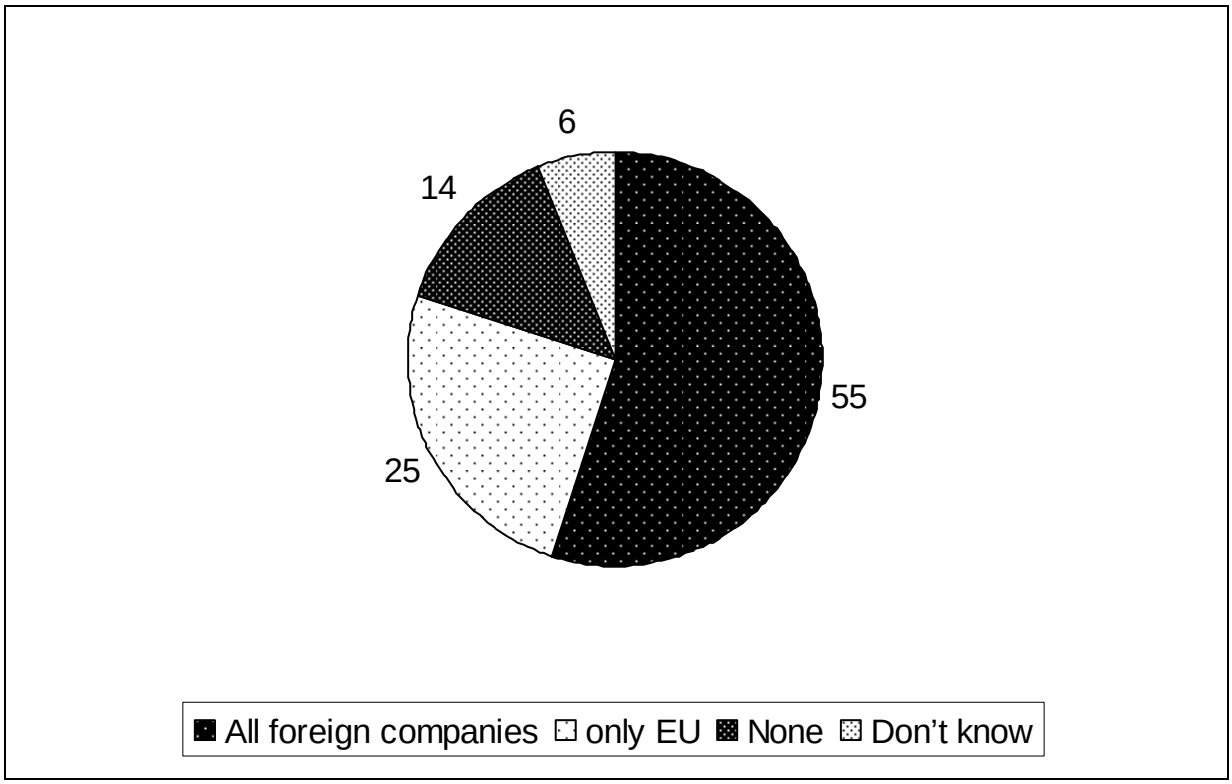
Nearly all are in favour of competition, including foreign companies competing for contracts in their own country. National interest is not seen to be the main consideration in awarding contracts. Social and environmental impacts are seen as more important.

Figure 1. Public perceptions of EU procurement policy (2011)

Question 17 "To what extent do you agree or disagree with the fact that common EU-wide rules for public authorities on how they have to award contracts help to combat favouritism and corruption"



Question 19 "Do you think that foreign companies should be able to compete for public contracts in your country?"



Source: Eurobarmoter/TNS Sofres 2011

2.2. The scope of EU public procurement legislation

The procedures to be applied for the award of contracts by contracting authorities, that is, the public entities which are subject to the provisions of the Classic Directive, and contracting entities (entities which are subject to the provisions of Directive 2004/17/EC) are currently set out in three Directives, namely, the two already mentioned Utilities Directive and the Classic Directive, and the recently adopted Defence and Security Procurement Directive[16], applicable to certain contracts awarded both by contracting authorities and contracting entities.

Box: Defence and Security Procurement Directive 2009/81/EC:

The scope of Directive 2009/81/EC is defined as covering "contracts awarded in the fields of defence and security for:

a) the supply of military equipment, including any parts, components and/or subassemblies thereof;

b) the supply of sensitive equipment, including any parts, components and/or subassemblies thereof;

c) works, supplies and services directly related to the equipment referred to in points (a) and (b) for any and all elements of its life cycle;

d) works and services for specifically military purposes or sensitive works and sensitive services."

The situation in the field of defence and security procurement is thus that some procurement will continue to be excluded from the scope of all public procurement legislation pursuant to (the narrowly construed) Article 346 TFEU[17], much will fall within the scope of the Defence and Security Procurement Directive with the remainder, that is contracts awarded in the field of defence not involving military or sensitive equipment, being subject to the Classic Directive[18]. As the Defence Procurement Directive is too recent to be evaluated[19], it will not be dealt with further in this evaluation.

The principles which, as set out in point 2.1 above, were at the heart of previous public procurement directives continue to underlie the current generation of public procurement directives. As set out in the second recital to the Classic Directive[20], these should, however be seen in a larger context, namely as a EU coordination of national procedures aimed at ensuring the effect of central Treaty principles[21] and to guarantee the opening-up of public procurement to competition.

In fact, as coordination measures, EU legislation on public procurement does not harmonise - i.e. impose uniformity. Instead it establishes a common framework within which the nationally defined procedure must be kept. Furthermore, it should also be kept in mind that the Directives only regulate certain aspects of public procurement, leaving large areas to be regulated or completed by national legislation (and sometimes even regional legislation or local rules); this is not always optimal from the point of view of better legislation or administrative simplification etc.

This section will outline the scope of the Directives by first looking at the entities which are subject to the Directives. With very few exceptions[22], the first condition for the applicability of the

Directives is that the procurement is carried out by a relevant body (or on its behalf and for its account).

2.2.1. Contracting authorities and contracting entities

In the Classic Directive, the relevant body means a "contracting authority", defined as the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law[23]. In other words, the Classic Directive applies to the public sector in a broad sense (to the exclusion however of "commercial or industrial" public entities[24]).

The Utilities Directive, on the other hand, applies three groups of bodies, collectively covered by the term "contracting entity". In fact, The Utilities Directive applies not only to "contracting authorities" as just mentioned but also to two further categories of entities, public undertakings, defined as defined as "any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it"[25], and private undertakings, provided these latter exercise one of the relevant activities on the basis of an exclusive or special right. Exclusive or special rights are currently[26] defined as rights "the effect of which is to limit the exercise [of one the relevant activities] to one or more entities, and which substantially affects the ability of other undertakings to carry out such activity on the same territory under substantially equivalent conditions." To constitute special or exclusive rights within the meaning of the Directive and for the purpose of determining its scope, it is a further condition that such rights have been granted otherwise than through a transparent mechanism based on objective, non-discriminatory criteria which are open to everybody meeting them. . The relevant activities or sectors concerned by The Utilities Directive are the *water*[27], *energy*[28], *transport*[29] and, as a new feature compared to the earlier Utilities Directives, the *postal*[30] sectors. It can be noted that, unlike the previous Utilities Directives, the current one, Directive 2004/17/EC, no longer lists telecommunication as one of the relevant activities, following the above-mentioned findings of 1999 and 2004 that the sector was directly exposed to competition[31].

It is a further condition that the contracting entity carries out one of the relevant activities and that the procurement concerned is made for the pursuit of that activity. In the electricity sector, this would for instance mean that the directive would apply to above-threshold procurement of not only turbines for the production of electricity or pylons for a transmission network, but also to the procurement of other items such as, e.g., protective clothing for the contracting entity's workers, office furniture for its headquarters, paperclips, coffee to be served at meetings, petrol for company vehicles, insurance coverage of company property or its employees etc. etc.[32].

2.2.2. In house relations and cases of public cooperation

Another precondition for the applicability of the Directives is that the envisaged arrangement constitutes a "public contract" within the meaning of the Directives[33], that is, "contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services…". Based on an interpretation of this notion, which i. a. presupposes that

"there is a concordance of wills between two different persons"[34], the Court of Justice has concluded that, as a starting point, contracts for above-threshold procurement of works, goods or services between two legally distinct persons are subject to the Directives, even if both of them are public. However, under certain conditions, the Court considered that the relations between the two bodies may be so close that there is not, in reality, a contractual relationship between two different parties. Such is the case where the involved contracting authority (or contracting authorities) "exercises over the person concerned a control which is similar to that which it exercises over its own departments and, at the same time, that person carries out the essential part of its activities with the controlling … authority or authorities"[35]. This so-called "in-house" or Teckal-jurisprudence has subsequently been further developed in a series of judgments, which have established 1) that any private participation prevents the applicability of the in-house exclusion, and 2) that the controlling influence may be exercised collectively by several contracting authorities.

The recent judgment in the so-called "Hamburg"-case[36] rules that the directives do not apply to certain cases, where a number of contracting authorities[37] cooperate in jointly ensuring the execution of a public task which all the cooperation partners have to perform. Further requirements are that the cooperation is governed solely by considerations and requirements relating to the pursuit of objectives in the public interest, and that it is not carried out by one or more of the partners for pecuniary interest[38].[39]

2.2.3. Thresholds[40]

The current Directives apply to the award of (public) works contracts, (public) supplies contracts and (public) service contracts, whose estimated value, net of V.A.T. is at least equal to the relevant threshold values which are revised every two years. The current thresholds, applicable until 31.12.2012 and established through Commission Regulation (EC) N°1177/2009[41], are:

- EUR 4 845 000 for works contracts, including, in the case of the Classic Directive, subsidised works contracts[42];

- the threshold for supplies and services contracts varies between EUR 125 000 and EUR 387 000, depending of the nature of the body awarding the contract and, for service contracts, the type of services involved, given that only some priority-services are covered by the GPA (the 1994 World Trade Organisation Government Procurement Agreement)[43]. For subsidised services[44], which are also subject to the Classic Directive, the applicable threshold is the one for GPA-covered priority services, awarded by the same type of contracting authority as the subsidising authority.

The Directives also apply to design contests, that is, procedures which enable the contracting authority or contracting entity to acquire a plan or design selected by a jury after being put out to competition. For example a contest to obtain ideas as to the design of a community centre of a quarter that is scheduled for urban regeneration. Design contest can also be used in other fields, for instance to obtain plans for the possible future structure of a communications network between administrations at different levels. The Classic Directive also applies to works concessions contracts[45], which are contracts of the same type as a public works contract except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the work or in this right together with payment. A typical example of a works concessions contract could be a

contract for the construction of a motorway that will be financed by toll payments.[46]. Works concessions contracts are subject to the above-mentioned threshold for works contracts, as are works contracts awarded by concessionaires who are *not* themselves contracting authorities[47], whereas design contests are covered by the Directives as of the threshold that would have applied to a service contract awarded by the same entity and concerning the same service.

2.2.4. Two-tier regime and specific exclusions for certain services

Two-tier regime:

For services contracts, both Directives (and the new Defence and Security Procurement Directive[48], for that matter) apply a special, two-tier approach according to which the full set of rules only applies to 16 categories of priority services, specified exhaustively in an annex (II A for the Classic Directive and XVII A in the case of the Utilities Directive[49]). These annexes, which have stayed substantially unchanged since they were first introduced through Directive 92/50/EC[50], list services which, at the time, were deemed to "enable the full potential for increased cross-frontier trade to be realized"[51]. Priority services include services such as accounting, auditing and bookkeeping services, land transport services (except railway transport services) and engineering and architectural services. For all other services[52], the Directives provide a limited set of obligations[53].

Specific exclusions for certain services:

Whereas the applicability of the Directives does not depend on the precise subject-matter in the case of works and supplies contracts, such is not the case for services: both directives exclude contracts for certain specific services. More precisely, these exclusions concern:

- rights (e. g. purchase or rental) over land or existing buildings[54];
- arbitration and conciliation services[55];
- certain financial services centred on securities[56];
- employment contracts[57];
- certain research and development (R&D) services (mainly those involving some form of co-financing by private parties[58])[59];

and, for the Classic Directive only:

- certain audio-visual services and contracts for broadcasting time.[60]

Many of these services are excluded because they have specific characteristics rendering the award procedures set out in the Directives unsuitable.[61] For other services, the motivations are due to other policy considerations, such as the cultural and social importance of audiovisual services[62] or the promotion of R&D in cooperation with industry.[63]

2.2.5. Other specific exclusions, common to both Directives

- *"International" contracts:* Both Directives contain exclusions for what could be labelled "international contracts", that is, contracts whose award is governed by "different procedural rules" and which concern either the joint realisation of a common project between a Member State and one or more third countries or are related to the stationing of troops or, third case, contracts awarded pursuant to the specific procedure of an international organisation.[64]

- *Service concessions contracts:* As already mentioned, both Directives also exclude service concessions contracts, that is, contracts of the same type as "ordinary" service contracts except for the fact that the consideration for the services to be carried out consists either solely in the right to exploit the service or in this right together with payment.[65] An example might be the operation of an (existing) parking lot.

- *Service contracts linked to an exclusive right:* Furthermore, both Directives exclude service contracts (without distinctions according to their subject-matter) that are awarded to a contracting authority "on the basis of an exclusive right which they enjoy pursuant to a published law, regulation or administrative provision which is compatible with the Treaty."[66] As technical control of vehicles is a part A service, an example might be if national legislation prescribed that performance of this se4rvice would be reserved for a given authority. In that case, contracts awarded by, e. g. a municipality to have its vehicles controlled could be exempted under this provision.

- *Telecommunications networks or the provision of a telecommunications service:* Article 13 of the Classic Directive excludes contracts that are awarded in order that the contracting authority concerned may itself provide or exploit a public telecommunications network or may itself provide to the public one or more telecommunications services. In other words, the exclusions concern contracts that are awarded by contracting authorities when they themselves act as telecommunications operators. The Directive does apply, on the other hand, to contracts awarded by contracting authorities wishing to procure a telecommunications service from a telecommunications operator (whether public or private).
  Even though such an exclusion is present only in the Classic Directive, it can nevertheless be considered as an exclusion that is common to *both* directives: The Utilities Directive exclusively applies to entities operating one of the explicitly listed activities, therefore, as telecommunications activities are no longer listed among the relevant activities in the Utilities Directive, that Directive also does not apply to contracts awarded by telecommunications operators in order to pursue such an activity. Again, the Utilities Directive is fully applicable to contracts awarded by contracting entities for the purchase of telecommunications services from a telecommunications operator (whether public or private).

- *Central Purchasing bodies*[67]*:* Finally, mention should also be made of a *partial* exclusion that is common to both Directives: the Directives do not apply to contracts awarded *by* a contracting authority or a contracting entity *to* a central purchasing body[68], provided that the central purchasing body has itself complied with Classic or the Utilities Directives as the case may be.

- *Contracts awarded to sheltered workshops*[69]: In a somewhat different category, we find provisions in both Directives[70] which stipulate that Member States may reserve the right of participation in award procedures to sheltered workshops (or corresponding sheltered employment programmes). Use of these possibilities does not exclude the contracts concerned

from the scope of the Directive, as the obligation to conduct an award procedure at the European level continues to apply, albeit by means of an award procedure in which competition takes place exclusively among sheltered workshops in any of the Member States.

- *"Secret" contracts:* Both Directives contain another exclusion in respect of contracts that have been "declared secret, when their performance must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Member State concerned, or when the protection of the essential interests of that Member State so requires", cf. Art. 14 of the Classic Directive and Art. 21 of Directive 2004/17/EC. However, following the adoption of Directive 2009/81/EC, whose provisions prevail over the other two, it can be expected that these provisions will lose their practical importance.

2.2.6. Other exclusions or exemptions specific to the Utilities Directive

- *Contracts for the pursuit of other activities than those covered: A*ccording to Article 20 of Directive 2004/17/EC, the Directive does not apply to contracts that are awarded "for purposes[71] other than the pursuit of "one of the relevant activities or for the pursuit of such an activity in a third country[72]. It should be noted that Article 12 of the Classic Directive, which excludes contracts from the scope of the Classic Directive that are subject to the Utilities Directive or excluded from the latter, does *not* refer to contracts that are excluded pursuant to Article 20 of the Utilities Directive. This, combined with the fact that Article 12 of the Classic Directive only excludes public contracts which are awarded by "contracting authorities exercising" [one of the relevant activities] "and are awarded for the pursuit of those activities …" means that, for instance, a municipality should apply the Utilities Directive to contracts awarded for its own operation of a bus line, and the Classic Directive to contracts awarded in the context of its "ordinary" role as a local authority (e. g. for the construction of a municipal school)[73].

- *Contracts for resale:* In a similar logic, Article 19 of the Utilities Directive excludes contracts that are awarded for purposes of resale or lease to third parties, provided that such resale or lease take place in a competitive environment (and, where awarded by a contracting authority, the award of such contracts would not be subject to the Classic Directive either, cf. its Article 12 and its reference to contracts excluded pursuant to Article 19 of the Utilities Directive). An example might be where a contracting entity, which distributes electricity, buys electric kitchen appliances - whose sale normally does not require any special or exclusive rights - for resale to customers.

- *Incidental activities:* The initial proposals for what eventually became the first Utilities Directive, Directive 90/531/EC, applied to entities whose *principal* activity was one of the relevant activities. The adopted Directive and the current Utilities Directive no longer contain any such condition; the definition of "contracting entities" simply requires that the entity concerned "pursue one of the activities". This change[74], however, rendered correctives necessary for certain situations in the water, electricity, gas and heat sectors, in which the *only* relevant activity of the entity in question is incidental to the pursuit of another, non-relevant activity and where the supply of water, electricity, gas or heat is limited essentially to a rational use of resources. Under certain conditions, set out in Article 4(3) for the water sector, Article 3(2) concerning gas or heat and Article 3(4) for the electricity sectors, the Directive therefore provides that such an activity should not, after all, be considered relevant; consequently the entities concerned are not covered by the scope of the Directive. Examples could be a brewery, which produces (and sells) drinking

water because it needs it for its own production of beer; a steel mill which sells off the heat that is anyway generated during the steel making process or an aluminium plant which produces electricity to use in its main production and which sells surplus power.

- *Intra-group contracts:* Further, provided certain conditions concerning the closeness of their mutual relations[75] are met, the Utilities Directive does not apply to contracts awarded within the context of an economic group[76]. For this exclusion to be applicable the "selling" company must be an "affiliated undertaking", that is, its accounts must be consolidated with those of the contracting entity pursuant to the applicable EU-legislation in the field, Directive 83/349/EC. Alternatively, and exclusively in case that Directive is not applicable to the entities concerned, there must be a relationship of direct or indirect dominant influence between those entities. Article 23 allows the exclusion of services, supplies or works contracts that are awarded to a company which is either affiliated to the contracting entity or to a contracting entity which is member of the same joint venture as the awarding contracting entity. The same provision also exempts contracts awarded within the context of a joint venture that is formed exclusively by a number of contracting entities for the purpose of carrying out one or more of the relevant activities. For instance a joint venture of local water companies, in which the other contracting entities entrust metering operations in the entire area to one of the contracting entities that is a part of the joint venture.

- *Drinking water, fuel and energy:* Contracting entities in the water sector[77] need not apply the Directive when purchasing drinking water themselves, as the procedures of the Directive are inappropriate "given the need to procure water from sources near the area in which it will be used."[78] A similar exclusion applies to procurement of "raw materials" in the wider energy sector[79], for which the Directive does not apply to contracts for the supply of energy nor to contracts for the supply of fuels for the production of energy[80]. When introduced through Directive 90/531/EC, the corresponding exclusion[81] was in part motivated by the persistence of obstacles to cross-border exchanges of electricity[82]. Substantial efforts and ensuing progress have since been accomplished towards the development of an internal market for energy, which may have reduced the relevance of that justification. However, procurement of energy and fuels continue to be carried out under conditions that render the Directive's award procedures less suitable; for instance, the need to balance electricity network (through the so-called balancing markets) frequently means that electricity must be bought and sold within half-hourly periods.

- *Exemptions under Article 30 for liberalised activities exposed to competition[83]:* Mention should also be made of a particular feature of the current Utilities Directive, namely, the possibility to exclude certain activities from the scope of the Directive under the conditions set out in its Article 30. Article 30 stipulates that the rules of the Directive do not apply if two conditions are met, namely, 1) that *access* to the activity concerned is not restricted and 2) that the activity *is fully exposed to competition* on the market in question. The purpose is to establish whether the services concerned by the request are exposed to such a level of competition (on markets to which access is free) that this will ensure that, even in the absence of the discipline brought about by the detailed procurement rules set out in Directive 2004/17/EC, procurement for the pursuit of the activities concerned will be carried out in a transparent, non-discriminatory manner based on criteria allowing purchasers to identify the solution which overall is the economically most advantageous one. To June 2011, 18 Decisions - 11 positive, three mixed and four negative[84] - have been adopted concerning the wider energy sector and the postal sector and concerning nine Member States.[85]

- *Article 27: The oil, gas and coal sectors (the Netherlands, the United Kingdom, Austria and Germany):* Even though it does not provide for a complete exclusion from the Directive's field of application, Article 27 should nevertheless be considered in this context. It safeguards the effects of certain Decisions, adopted pursuant to Article 3 of the previous Utilities Directive,[86] Directive 93/38/EEC[87]. Such Decisions had been adopted in respect of the Netherlands, U.K., Austria and Germany concerning the exploration for and exploitation of oil and gas as well as, in the Decision concerning Germany, coal or other solid fuels.[88]

2.3. Procedural requirements of the Directives

2.3.1. Transparency

As already mentioned the principles of transparency and equal treatment lie at the very heart of public procurement rules. It is therefore hardly surprising that the clear starting point is that all procurement, which is subject to the detailed provisions of the Directive, must begin with the publication of some form of notice in the Official Journal of the European Union, supplement S[89]. These calls for competition take the form of a contract notice[90] for all procurement that follows the provisions of the Classic Directive (and, for that matter, Directive 2009/81/EC). Contract notices are "ad-hoc"-notices, i. e. notices that have to be published specifically in connection with one particular procurement procedure (whether this aims at awarding one single contract, a framework agreement, including multiple ones, or at establishing a dynamic purchasing system). In the case of dynamic purchasing systems, a simplified contract notice needs furthermore be published before the award of each specific contract based on the system. Contract notices may be used in connection with all types of award procedures, be they open, restricted, negotiated (obviously, with prior publication) or competitive dialogues.

For procurements falling within the scope of the Utilities Directive, calls for competition may take three different forms, namely, contract notices, periodic indicative notices and notices on the existence of a qualification system.

Periodic indicative notices can be used as a means of calling for competition in respect of procurements of any given type of works, supplies or services that will be procured over a twelve-month period, irrespective of the number of individual procurement procedures that will be used for the purpose. When a periodic indicative notice is the chosen means of calling for competition, then the specific contract(s) concerned may not be awarded by open procedures, only by restricted or negotiated procedures in which participants are chosen among those - and only those - having manifested their interest in response to the periodic indicative notice. Periodic indicative notices are often used as a means of calling for competition in respect of repetitive purchases of homogenous goods, services or works.

Notices on the existence of a qualification system can be used as a means of calling for competition in respect of procurements of any given type of works, supplies or services that will be procured over the duration of the qualification system, irrespective of the number of individual procurement procedures that will be used for the purpose. Where the duration of the system is less than three years, the initial notice will be the only call for competition published; where the system has a

validity of more than three year, a reminder of its existence must be published yearly. Where a notice on the existence of a qualification system is the chosen means of calling for competition, then the specific contract(s) concerned may not be awarded by open procedures, only by restricted or negotiated procedures in which participants are chosen among those - and only those - already qualified in accordance with the rules governing the system concerned. Qualification systems are often used in connection with procurement of technically exacting works, supplies or services (e. g. railway rolling stock, high pressure gas pipes etc.) for which qualifying the economic operators involve such a lengthy procedure - it may in some cases take longer than six months, cf. Art. 49(3) second sub-paragraph of the Utilities Directive - that it is advantageous for all involved to use the same qualification in respect of a number of individual procurement procedures, rather than having to repeat the qualification process for each procurement procedure.

Transparency is further enhanced by the requirement to publish[91] a contract award notice after the award of a contract or the conclusion of a framework agreement[92], and it is noteworthy that this obligation also applies where the contracts has been awarded without a call for competition (i. e. without prior publication). Besides strengthening the effectiveness and availability of remedies through a requirement for a minimum of 10 days stand-still period between the communication of the decision to award and the conclusion of the contract, the latest modification[93] of the existing remedies directives also introduces a strong incentive for contracting authorities and entities to be transparent about the cases in which they award a contract without a call for competition. In fact, where they publish a notice explaining the reasons why they consider it to be legitimate to award the contract without a call for competition, then the contract may not be declared ineffective, also in case a subsequent review body should find that the chosen award procedure was not, after all, in conformity with the directives. However, although the stand-still period would not normally have applied to this type of contract awards, it is a further condition in order to avoid ineffectiveness of the contract that the contracting authority or entity voluntarily postpones the conclusion of the contract until at least ten days after the publication of the notice.

It should finally be mentioned that the Directives provide for a sort of "early warning" system by foreseeing the possibility of prior information notices[94] which give some information of planned, future procurement (over the next twelve months). Such non-binding notices may be published either in the OJ or on the procurer's own website, called a "buyer's profile" in the Directives. In the latter case, a very short notice (essentially a reference to the publication on the buyer's profile) must also be published in the OJ[95]. When the level of information given is sufficient, it may be possible to shorten deadlines applying to the subsequent award procedures for the announced works, supplies or services.

2.3.2. Award procedures, exclusion, selection and award criteria

Directives 2004/17/EC and 2004/18/EC both contain provisions setting out various procedures to be used when awarding contracts falling within the scope of the Directives and subject to the full set of rules. As set out in the third Recital to the Classic Directive, the Directives limit themselves to setting a common framework, they do not harmonise each and every aspect of the various award procedures that are used at the national level. The procedures are the open procedure, the restricted procedure, the negotiated procedure (with and without prior publication of a contract notice[96]) and, in the case of the Classic Directive[97], the competitive dialogue.

Choice of award procedure:

Directives 2004/17/EC and 2004/18/EC both give contracting authorities and entities a free choice between the open and the restricted procedure. Such is, however, not the case for the negotiated procedure with prior publication of a contract notice: as one of the major examples of the additional flexibility that the Utilities Directive provide for, contracting entities may freely choose to award their contracts by negotiated procedures, provided they have carried out a call for competition. Under the Classic Directive, on the other hand, negotiated procedures with prior publications may be used exclusively under the exhaustively listed circumstances set out in its Art. 30[98]. Pursuant to longstanding jurisprudence, these cases are to be construed strictly and it is incumbent on those who invoke them to prove that this was actually justified. It should finally be mentioned that use of the competitive dialogue is also limited to particularly complex contracts, cf. Art. 29 of the Classic Directive.

The open procedure:

The open procedure is the only one-stage procedure provided for under the Directives: the response to the contract notice is the submission of a full and complete tender, without any intermediary stages such as a selection of the economic operators who are authorised to tender. That is not to say that the suitability of tenderers, i.e. their technical and economic/financial capacity based on the already stated exclusion and selection criteria, cf. below, is not verified in an open procedure; the verification simply takes place after the tenders have been presented, not prior to that stage[99]. Following the verification of the tenderers' suitability, the tenders are then assessed in the light of the previously stated award criteria. Open procedures can be of use where a manageable number of tenders is expected, whose evaluation will not require excessive resources.

Concerning award criteria in particular, it should be noted that, whichever award procedure is chosen, contracting authorities and entities have a completely free choice between the two *award criteria* that are allowed, namely the lowest price only or the most economically advantageous tender. While the lowest price only is self-explanatory, it may be appropriate to add some comments on the "most economically advantageous tender". When this award criterion is chosen - and in 2009 this was the case in slightly under two thirds of all award procedures published in the OJ - contracting authorities and entities may use various other criteria, which must, however, be linked to the subject-matter of the contract. These other criteria may include factors such as technical merit, cost-effectiveness, after-sales service etc. They may also include environmental criteria - e. g. the level of pollution produced by the busses to be procured - or social criteria, such as, for instance, a criterion relating to the accessibility for persons with reduced mobility to an administrative building to be constructed etc.[100]

The restricted procedure:

The restricted procedure is a two-stage procedure, in which economic operators respond to the contract notice by asking to participate and submitting the requested documentation to prove their suitability. This is verified by the contracting authorities and entities who evaluate the evidence presented with the previously stated exclusion[101] and selection criteria[102]. All the economic operators who meet the minimum requirements are then invited to tender, unless - as happens frequently - contracting authorities have stated their intention to limit that number and presented the objective and non-discriminatory criteria or rules they intend to apply for that purpose. In restricted procedures under the Classic Directive[103], the minimum number of economic operators to be invited

is set at 5, cf. Art. 44(3), always assuming that a sufficient number of candidates qualify[104]. Restricted procedures are typically useful where there is "a need to maintain a balance between contract value and procedural costs"[105].

The so-called accelerated, restricted procedure is not a separate and different procedure; it is simply a "normal" restricted procedure in which the normally applicable deadlines may be shortened where "where urgency renders impracticable" the normal time limits[106]. There is no corresponding provision under the Utilities Directive, because the "normal" provisions on time limits allow contracting entities to apply similarly short deadlines without having to meet similar conditions. As can be seen, both Directives contain detailed provisions on the minimum deadlines that apply to the different stages of an award procedure (requests for participation, requests for the specifications or additional contractual documents, deadlines for the presentation of tenders) so as to ensure equal treatment of economic operators and a real opening-up of public procurement markets.

The negotiated procedure with prior publication:[107]

This procedure involves a first stage in which the economic operators, who have requested to participate in the procedure[108], are selected in the same way as described above for restricted procedures. Just as is the case for restricted procedures, it is also possible to limit the number of candidates that contracting authorities intend to invite to participate in the negotiations; however, here the minimum number has been set at three, not five. And unlike the situation for restricted procedures, the Classic Directive offers contracting authorities the possibility to announce in the tender notice that they intend to gradually reduce the number of tenders to be negotiated. This further reduction during the negotiations is carried out by application of the award criteria, bearing in mind that, "in the final stage, the number arrived at shall make for genuine competition insofar as there are enough solutions or suitable candidates", cf. Art. 44(4). The main characteristic of a negotiated procedure is of course that, unlike the open and restricted procedures[109], substantial negotiations may take place (in the words of Article 30(2) "contracting authorities shall negotiate with tenderers the tenders submitted by them in order to adapt them to [their] requirements … and to seek out the best tender").

The so-called accelerated, negotiated procedure is not a separate and different procedure; it is simply a "normal" negotiated procedure with prior publication in which the normally applicable deadlines may be shortened where "where urgency renders impracticable" the normal time limits[110]. There is no corresponding provision under the Utilities Directive, because the "normal" provisions on time limits allow contracting entities to apply similarly short deadlines without having to meet similar conditions.

The negotiated procedure without prior publication:

In certain, quite exceptional cases, exhaustively listed[111] and restrictively interpreted, both Directives allow contracts to be awarded by *a negotiated procedure without prior publication*. The Directives contain no provisions on the conduct of these procedures, although it should be noted that the obligation to publish a contract award notice does apply. Since this is the least transparent procedure, it is hardly surprising that the recently changed remedies directives provide, as a starting point, that contracts awarded in breach of these provisions shall be ineffective[112].

The competitive dialogue:[113]

The competitive dialogue was introduced in the Classic Directive only, in response to the finding that the previous Classic Directives[114] did not offer sufficient flexibility in connection with certain particularly complex projects[115] due to the limited access to negotiated procedures with prior publication[116]. The competitive dialogue involves a first stage in which the economic operators, who have requested to participate in the procedure, are selected in the same way as described above for restricted procedures. Just as is the case for the other multiple stage procedures (restricted and negotiated procedures with prior publication), it is also possible to limit the number of candidates that contracting authorities intend to invite to participate in the dialogue. As under the negotiated procedure, the minimum number has been set at three. As in the negotiated procedure, contracting authorities can announce in the tender notice that they intend to gradually reduce the number of solutions to be discussed during the dialogue stage. Further reduction during the dialogue is carried out by application of the award criteria, bearing in mind that, "in the final stage, the number arrived at shall make for genuine competition insofar as there are enough solutions or suitable candidates", cf. Art. 44(4). The main characteristic of a competitive dialogue is of course that it includes a dialogue stage the "aim of which shall be to identify and define the means best suited to satisfying their needs. They may discuss all aspects of the contract with the chosen candidates during this dialogue", cf. Article 29(3). The main difference compared to a negotiated procedure with prior publication is that no further substantial negotiations may take place once the dialogue stage has been formally declared closed and the participants invited to submit their final tenders. In accordance with Art. 29(6) these tenders may be "clarified, specified and fine-tuned",[117] whereas the "tenderer identified as having submitted the most economically advantageous tender may be asked to clarify aspects of the tender or confirm commitments contained in the tender[118]".

Special provisions applicable to works contracts relating to social housing schemes:

Given that these contracts were considered to be complex and relate to special projects, the first Public Procurement Directive, 71/305/EEC, introduced the possibility to apply a "special procedure" in the case of "public contracts relating to the design and construction of a subsidised housing scheme".[119] The corresponding provision in the Classic Directive, Article 34, is substantially unchanged and it does not specify the "special procedure" in any great detail, limiting itself to render a series of the "normal" provisions applicable, in particular those concerning transparency, deadlines and exclusion, selection and award criteria. This procedure/option is rarely used.

2.3.3. Procurement techniques[120]: framework agreements, dynamic purchasing systems and electronic auctions

Framework agreements, dynamic purchasing systems (in the following referred to as DPS) and electronic auctions are *not* further, independent award procedures; rather, they should be seen as specific tools that may be used in the context of one (and sometimes several) of the already described award procedures.

Framework agreements:[121]

Framework agreements are a contractual tool typically used to set the conditions for a series of individual purchases, often from more than one economic operator. According to the type of framework agreement, the conditions which apply to the individual procurements pursuant to the agreement are set out either in the framework agreement itself or in the contracts that are based on it[122]. From the procedural point of view, framework agreements may be set up using any of the freely available award procedures (the open and the restricted procedures under both Directives, under the Utilities also a negotiated procedure with prior call for competition) or, where this is allowed pursuant to Articles 29 and 30 of the Classic Directive, a negotiated procedure with prior publication or a competitive dialogue. Where (all) the conditions governing the individual procurements pursuant to the agreement have *not* been set in the framework agreement itself and the framework agreement has been concluded with more than one economic operator, contracts based on it are concluded through a mini-competition amongst all those who are parties to it, cf. for more details Art. 32(4), second sub-paragraph, second indent, of the Classic Directive[123]. Framework agreements constitute a "closed system", available only to those who were parties to it from the outset[124]. Their duration is normally limited to four years. Where a framework agreement is concluded with several economic operators, the latter must be at least three in number, insofar as there is a sufficient number of economic operators to satisfy the selection criteria and/or of admissible tenders which meet the award criteria[125].

Dynamic Purchasing Systems (DPS):[126]

DPS are an entirely electronic system that may be used in connection with repetitive purchases of "off-the-shelf" goods or services[127]. They are used to set up a - continuously open and accessible - list of qualified suppliers among whom the contracts for the specific deliveries will be awarded over the system's duration. Procedurally, three different stages can be distinguished, namely, setting up the system, maintaining/updating it and making the specific purchases. To set up a DPS, the only available procedure is the open procedure, which is conducted as described above, except for the fact that the tenders are indicative only (i. e. non-binding) and that the procedure is concluded, not by the award of a contract[128], but by enrolment (or rejection) into the system. The system must be open for access (through the submission of an indicative tender) at any moment, at the initiative of interested economic operators who (happen to) know of its existence. However, in order to ensure that the system is genuinely transparent and accessible, the Directives prescribe that a simplified contract notice - essentially a reminder of the existence of the system - must be published prior to each specific procurement under the system. The purpose is to allow interested economic operators to enter the system before the award of the specific procurement about to be purchased. Concretely, what happens is that the interested economic operators present an indicative tender which is then evaluated to find those who meet the criteria for being admitted[129]. As long as this evaluation has not been ended and the system updated in consequence, the specific procurement may not take place. Once the system is updated, the contracting authorities and entities proceed with the specific procurement by inviting all the economic operators, who *at this point in time* have been enrolled in the system, to present a - this time binding - offer for the specific goods or services to be delivered. The specific contract is awarded to the economic operator whose binding offer is the best when evaluated against the previously stated award criteria.

Electronic auctions:[130]

Electronic auctions are an electronic process for receiving and automatically evaluating new prices or other elements[131] of a tender; it may be used for contracts for works, supplies or services wherever the specifications can be determined with sufficient precision[132]. Contracting authorities and entities may chose to use electronic auctions in the context of open, restricted or negotiated procedures with prior publication (where use of the latter is allowed). They may also be used in connection with mini-competitions under a framework agreement or the award of a specific contract under a DPS. When an electronic auction is used, an additional stage is inserted in the chosen procedure, namely the conduct of the auction between the evaluation of the tenders and the award of the contract. Having mentioned their intention to hold an electronic auction in the notice, contracting authorities and entities conduct the chosen award procedure completely as usual up to and including the (complete) evaluation of the tenders. All the tenderers, who have submitted admissible tenders[133], are then invited to participate in the auction that will take place two working days later. Depending on the chosen award criterion, the electronic auction will function either exclusively on the price(s)[134] when the lowest price has been chosen as award criterion or, where the chosen award criterion is the most economically advantageous tender, (also) on other elements which are quantifiable and capable of being evaluated electronically[135]. At the end of the auction, which may be determined in different, pre-announced ways[136], the contract is awarded in accordance with the chosen award criterion. Thus:

- if the award criterion was the lowest price, then the contract will be awarded to the tenderer whose price was the lowest at the end of the auction;

- If, on the other hand, the award criterion is the economically most advantageous offer, then the award decision will often have to rely on a "combined" ranking based both on the elements that were the subject of the electronic auction as well as other, typically more qualitative, aspects that were set out in the tenders[137].

This, and the need for participants in the auction to know their ranking at the outset of the auction[138], is the reason for the requirement to carry out a full evaluation of the tenders before the auction is launched.

2.3.4. Technical specifications

An important place in the Directives is given to the - practically identical - provisions on technical specifications[139], that is, the requirements of technical nature[140] that must be met by the works, goods or services which are the subject-matter of the contract. This is hardly surprising; as set out above, the very first Directives on public procurement were very much aware that, unless adequately regulated, technical specification could be a major obstacle to a properly functioning internal market. One of the major changes brought about by the 2004 reform of the rules is that it now gives contracting authorities and entities a completely free choice between two main methods of defining their technical specifications, namely, either by reference to European standards (as implemented through national standards) or other technical references, such as European technical approvals, that are issued by European standardisation bodies (e. g. CEN, CENELEC[141]) or in terms of performance or functional requirements, including environmental characteristics. It is also possible to combine these two basic methods, for instance by defining certain characteristics by

reference to a European standard and others in terms of performance, perhaps adding in the latter case that goods or services that conform to, e. g., the chosen common technical specification referred to are presumed to meet the performance or functionality requirements. Whichever method is used, the underlying principles of equal treatment and mutual recognition will apply, which has been given a concrete expression in the provisions that ensure economic operators the possibility to prove the equivalence of their solution with the specifications by "any appropriate means", such as a technical dossier of the manufacturer or a test report from a recognised body.

As already mentioned, contracting authorities and entities may also specify environmental characteristics in terms of performances or functionality, and they may, under certain conditions, in particular concerning their accessibility and impartiality[142], define the specifications on the basis of existing eco-labels. The contracting authorities and entities do so by including the underlying technical requirement[143] in their specifications, adding that products or services bearing the eco-label concerned are presumed to be in conformity with the requirement, whereas economic operators offering to supply goods or services, which do not possess the eco-label, must prove their equivalence, again by any appropriate means.

2.3.5. Flanking measures: Short description of the Remedies Directives

The experience acquired with the first Public Procurement Directives showed that the Directives could not stand alone, that it would not be possible to realise their objectives if economic operators would be unable to effectively ensure that the rights given them by the EU-rules were observed everywhere in the EU, both in countries with a long-standing tradition for special administrative courts or tribunals dealing with public procurement as well as in those Member States in which judicial control with public procurement was less well developed or applied in practice. Consequently, Directives 89/665/EEC[144] and Directive 92/13/EC[145], as recently amended through Directive 2007/66/EC[146], were adopted as flanking measures aimed at ensuring that economic operators everywhere in the EU would have access to clear and effective procedures for seeking redress in cases where they consider contracts had been unfairly awarded. This was, and is, crucial to making sure contracts ultimately go to the company which has made the best offer, and therefore to building confidence among businesses and the public that public procurement procedures are fair.

These Remedies Directives require that Member States make review procedures available "at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement". Member States designate which body (or bodies[147]) is responsible for review procedures and must see to it that these dispose of the powers[148] necessary to ensure rapid and efficient review procedures. The latest changes to the Remedies Directives, which entered into force at the latest at the end of the deadline for implementing Directive 2007/66/EC in national law[149], further strengthened the accessibility of remedies, in particular through measures such as the obligatory stand-still period, the voluntary transparency in case of awards by negotiated procedures without prior publication and the possibility to declare contracts ineffective where they were entered into illegally.

The two Remedies Directives (as only recently amended) will not, as such, be the subject of an ex-post evaluation in the context of this evaluation process. Their existence is, however, a fact that must - and will - be taken into account when evaluating the effects of Directives 2004/17/EC and 2004/18/EC as there is an obvious link between the Remedies Directives and, for instance, the cost

of compliance (and non-compliance), just as the presence of effective legal remedies (including possible ineffectiveness of illegally awarded contracts) may enhance the correct application of the procedures provided for under the two "procedural" directives, which should strengthen their potential for attaining their objectives.

2.4. Economic coverage of the Directives

The total expenditure on works, goods and services by the public and utility sectors and the amount advertised in the Official Journal of the EU are not the same.[150] Only about 20% of all expenditure is through public procurement contracts. This section provides an estimation of the economic scope of the Directives, attempts to quantify the specific exemptions or exclusions provided for in directives 2004/17/EC and 2004/18/EC and identify other sources of difference between the two figures.

In 2009 the total expenditure on works, goods and services by the public and utility sectors is estimated at EUR 2 288 billion while the amount advertised in the Official Journal of the EU is estimated at around EUR 420 billion.[151]

2.4.1. Below threshold

Contracts below the thresholds are outside the scope of the full obligations of the directives and thus in general not advertised in the OJEU. An investigation and analysis of the available evidence for the number and value of procurement contracts for values below the thresholds of the directives has been undertaken, by the Commission services, based on the information available for 13 Member States.[152] The estimated value of these contracts appears to vary widely across the EU but in total amount to around EUR 250 billion (in 2008) equivalent to 2% of EU GDP.

2.4.2. Health and education spending

A comparison of the total expenditure on works, goods and services by the public sector with data published in the OJEU has also been carried out by the Commission services, by comparing advertised procurement by sector of main activity with national accounts data for public expenditure by functions of government.[153] This has highlighted the extent to which some sectors appear to advertise a high proportion of their contracts in the OJEU while others do not. There are three sectors, in particular, health, social services and education where there are high levels of expenditure but low levels of publication. Procurement of education, health and social services are exempt from the full provisions of the directives, in so far as they are services covered by Annex II B of the Classic Directive. However the way in which education and health care is delivered appears more important in effectively placing most expenditure on goods and services in these sectors outside the scope of the provisions of the Directives.

The comparison of public expenditure by functions of government with contracts advertised reveals that around 94% of expenditure in the health or social services sector is not spent through contracts advertised in the OJEU. A similar issue arises in the education sector, where 84% of expenditure seems not to be advertised in the OJEU.[154] Most expenditure on goods and services, by these government functions is classified under national accounts as social transfers in kind or intermediate consumption. In general, for example, most expenditure on health services or pharmaceuticals are incurred by households and reimbursed by the state or statutory sickness insurance funds.

In Germany statutory sickness insurance funds are considered to be contracting authorities.[155] In the Netherlands most health expenditure is now in principle made by statutory private health insurance bodies which do not consider themselves to be subject to the directives (although there is still public funding for children, the elderly and unemployed) and who provide services through public or private providers of primary and secondary health care. In the UK, for example, payments to general practice doctors are included as procurement in government accounting (and presumably as intermediate consumption in the statistics submitted to Eurostat) as is hospital procurement, but much less is competitively advertised. The situation in other Member States is not necessarily clear.

These findings deserve careful analysis and consideration: the net result is that, of the 5% of GDP spent by governments on health social security and education, only a marginal amount is subject to publication in the OJEU. It should be noted that there may also be some double counting with the below threshold figures as some contracts for health and education may be included within the below threshold estimate.

2.4.3. Exemptions

The size or scope of the various exemptions to the provisions of the directives has been estimated from a variety of sources and to different degrees of precision and reliability, as is explained in the following sections. The exemptions are grouped in this section in priority order so that the big exemptions, which can be quantified, are dealt with first, followed by those that may be big, but are less easily quantified, and, finally, those that are estimated to be small, whether they can be quantified or not.

Significant exemptions:

- *Supply of energy or of fuels for the production of energy:* A major exemption is the supply of energy or of fuels for the production of energy, when procured by entities themselves active in the energy sector. This very large exemption can be estimated from input/output tables. Extrapolating on this basis from the latest figures available, the EU 27 electricity, gas, steam and hot water supply sector may have procured energy or fuels for the production of energy to the value of EUR 307 billion in 2008, or almost 2.5% of GDP.[156]

Table 1. Supply of energy or of fuels for the production of energy in EUR millions

	2002	2003	2004	2005	2006
Belgium	1 556	1 200	1 482	2 007	2 370
Bulgaria	693	716	745	769	795
Czech Republic	5 115	4 945	5 054	4 144	4 925
Denmark	1 449	1 630	1 627	1 971	2 764
Germany	14 554	15 428	18 768	20 829	27 068
Estonia	220	249	247	239	288
Ireland	1 013	1 428	1 885	2 261	2 398
Greece	1 503	1 240	1 532	1 872	1 942
Spain	12 391	12 764	14 042	19 336	24 050
France	15 944	17 856	18 392	26 246	32 195
Italy	21 867	23 985	23 617	29 139	36 647
Latvia			408		
Lithuania	266	390	266	381	403
Luxembourg	209	215	254	381	512
Hungary	1 964	2 224	2 614	3 221	3 870
Netherlands	11 792	11 927	12 589	14 891	18 118
Austria	5 425	8 918	8 894	11 042	14 773
Poland	3 952	3 344	3 286	3 631	3 975
Portugal	3 801	3 774	4 197	5 597	5 680
Romania		4 884	4 946	5 770	6 595
Slovenia	328	362	464	490	543
Slovakia	4 392	5 322	4 857	4 389	4 954
Finland	1 340	1 454	1 449	1 287	1 699
Sweden	1 441	1 584	1 450	1 456	1 600
United Kingdom	40 165	36 978	37 704	38 430	39 157
EU 27	149 825	162 818	170 768	199 779	237 320

Source: Eurostat and Commission estimates

- *Defence procurement:* Defence procurement is also significant. Not all Defence procurement is exempt from the scope of the Classic Directive but only "arms, munitions and war material". The estimated total expenditure on defence procurement in the EU in 2008 was about EUR 80 billion (approximately 0.6% of GDP) according to Eurostat data, of which about EUR 6 billion (approximately 0.05% of GDP) was awarded after competitive tendering following publication in the OJEU.[157] This exemption therefore probably amounts to around EUR 75 billion.[158]

- *Purchase of water for supply of drinking water:* The exemption for the purchase of water for supply of drinking water is available from input output tables in the same way as fuel for the production of energy. For example in Germany in 2006 the water industry consumed water to the value of EUR 57 million (at purchasers' prices). Extrapolating on this basis from the available data the EU 27 water industry consumed EUR 2 billion worth of water in 2008.[159]

Exemptions which may be significant, but are less easily quantified:

- *Works and service concessions (2004/17/EC):*Works and service concessions for carrying out the relevant activities for the sectors covered by 2004/17/EC may be published in accordance with relevant national provisions, where applicable. Notices may be published under Regulation (EC) 1370/2007 in respect of service concessions relating to urban transport. It has not been possible at this stage to identify or quantify these procedures. This is probably a large exemption, but there is no obvious source of data from which it could be quantified.

- *Service concessions:* Service concessions are a major exemption from the Classic Directive although apart from individual anecdotal evidence for particular cases there seem to be no easily available statistical sources for the value of this expenditure. An impact assessment has been carried out in view of a possible legislative framework on service concessions.

- *Annexe II B and XVII B services:* Details of service contracts awarded for services listed in Annex II B of the Classic Directive and Annex XVII B of the Utilities Directive should be submitted to the Commission. Some are routinely published and thus available for analysis, if a Contracting Authority agrees. Compliance across the EU may not be consistent or coherent. In addition one should expect considerable underreporting as well as errors in the data. Analysis of the available data shows that around EUR 6.5 billion non priority services contracts were published by contracting authorities in 2008 (mainly from Poland, the UK and France). The main categories are health, social services and business services. There is frequent ambiguity in the treatment of category 27 "other services", many contracts for which are routinely advertised competitively. For the utilities about EUR 1.5 billion non priority services contracts were published in 2008 (mainly from Poland, the UK and France).

- *Financial services:* Figures for financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments, in particular transactions by the contracting authorities to raise money or capital, and central bank services are not readily available. There are also considerable differences in the volumes of publication of financial services (treasury management or loans for example) published by different Member States.

- *Contracts awarded to an affiliated undertaking or joint venture:* While the value of these contracts may be quite considerable there is no obvious source for estimating their extent.

- *Telecommunications activity:* Contracts awarded by contracting authorities in order to allow them to exercise a telecommunications activity may constitute a significant exemption. There may be significant investment in broadband provision (for example the plan for France numérique 2012 envisages investing some EUR 2 billion over several years). It has not been possible to investigate in detail but the annual telecom implementation reports[160] may be a source of further information about the possible size of this exemption.

- *Employment contracts:* Contracts directly between employer and employee could potentially be a large exemption. However employment contracts for government employees will normally already be excluded from the National Accounts figures used here. It is at times not always easy to distinguish between such - exempted - contracts and service contracts for the personnel placement and supply services, which are covered under category 22 of part B of Annex II of the Classic Directive[161]. Some (and sometimes very large) contracts for temporary employment are observed which are either published competitively or as Annex IIB services contract award notices in the OJEU. While contract award notices are obligatory for Annex IIB services, the cases of competitive publications may be interpreted as voluntary publications in the OJ.

- *Research and development services:* Total expenditure on research and development services can be estimated from Input/output (Use) tables. For example the research and development, public administration and defence, compulsory social security, education, health and social work, sewage and refuse disposal, sanitation and similar services sectors together consumed EUR 1 167 million worth of R&D as intermediate consumption for Germany in 2006. However not all of R&D consumption by the education and health sectors should be deemed to be covered by this exemption since part of those industry sectors are private, and thus not within the scope of the directive, rather than public.

Smaller exemptions:

- *Sheltered workshops:* Contracts reserved for sheltered workshops or sheltered employment programmes are not exempted from the provisions of the directives, but may be reserved for contractors operating sheltered workshops or under sheltered employment programmes. According to the data published in OJEU procurement notices the estimated number and value of contracts reserved for sheltered workshops was as follows for 2008 and 2009. Not all contract notices indicate an estimate for the value. Six Member States do not appear to have made use of this provision (Estonia, Cyprus, Luxembourg, Malta, Portugal and Finland).

Table 2. Estimated number and value of contracts reserved for sheltered workshops

	2008		2009	
	Number	**EUR Value**	**Number**	**EUR Value**
Belgium	17	14 848 490	12	3 238 099
Bulgaria	13	1 629 379	5	1 063 503
Czech Republic	3	1 082 338	17	18 772 045
Denmark	1	3 353 004		
Germany	19	29 307 160	10	14 540 000
Ireland	1		2	
Greece			1	343 295
Spain	4	1 124 800	17	10 311 826
France	101	9 103 406	104	2 658 523
Italy	18	18 279 780	12	37 773 760
Latvia	2	355 771		
Lithuania	3		1	
Hungary	3		2	42 807
Netherlands	26	420 000	14	1 400 000
Austria	2		5	850 000
Poland			2	412 680
Romania	3	1 593 431	1	382 084
Slovenia			1	8 800 000
Slovakia	1	7 996 929		
Sweden	2		1	
United Kingdom	7	20 192 646	6	21 662 514
EU- 27	226	109 287 133	213	122 251 137

Source: TED

- *Secret contracts:* For secret contracts and contracts requiring special security measures there is not a source of comprehensive data and obtaining such information might be problematic.

- *Contracts awarded pursuant to international rules:* While contracts awarded pursuant to international rules, for the joint implementation or exploitation of a project may be quite large individually, they are probably not significant on an annual basis.

Exclusive rights:

Under Article 18 of the Classic Directive the provisions of that directive do not apply to public service contracts awarded by a contracting authority to another contracting authority or to an

association of contracting authorities on the basis of an exclusive right which they enjoy pursuant to a published law, regulation or administrative provision which is compatible with the Treaty. Again there is no obvious source for comparable statistics on the value of these contract expenditures. On the other hand the procurement to support the provision of those services by the contracting authorities which are awarded such contracts should be published. So this exemption may be relatively limited in effect.

- *Stationing of troops or of an international organisation:* For most Member States, in most years, the stationing of troops or of an international organisation will not be a significant exemption.

- *Immovable property:* Land, buildings and other immovable property is included in gross fixed capital formation and so is included in the national account figures, although the figure is net of disposals. It is not clear how this could be disaggregated. This may not be feasible even at national level. It may be, however, that sales roughly equal purchases over time so one could consider the significance of this item to be limited.

- *Broadcasting:* Programme material intended for broadcasting by broadcasters and contracts for broadcasting time are unlikely to be very significant. For example the BBC spent £435 million (EUR 546 million) on external television, radio and new media production in 2008/9 all of which will probably have been exempt from the obligation to be advertised in the OJEU.[162]

- *Pursuit of other than relevant activities:* We need not be interested in the value of the exemptions for the pursuit by contracting entities who are not also contracting authorities subject to the Classic Directive of other activities than those covered by the Utilities Directive(the "relevant activities") or for the pursuit of relevant activities outside the EU per se. They are only relevant in so far as the estimate of total expenditure of a sector is made from company annual accounts and one or more companies have consolidated accounts including other activities than the "relevant activities". The sectors potentially most likely to be involved would be rail, urban transport, ports and airports. The retail activities of an airport, for example, should be exempt.

- *Exploring for oil and gas:* Contracts awarded for the purpose of exploring for or extracting oil and gas in the U.K., Austria and Germany and contracts awarded for the purpose of exploring for or extracting coal or other solid fuels in Germany are exempt under Article 27 and not subject to the detailed procedural rules of the Utilities Directive. From 8 July 2009 the Netherlands and, from 29 March 2010, the United Kingdom have a complete exclusion for the oil and gas sector. It is likely that contracts for the coal sector should be considerably less than the total output of the sector: for example EUR 3 960 million in Germany in 2006.

2.4.4. Arbitration and conciliation services and contracts for resale

Expenditure on arbitration and conciliation services and contracts for purposes of resale or lease to third parties (when not subject to special or exclusive rights and exposed to competition) is unlikely to be very significant.

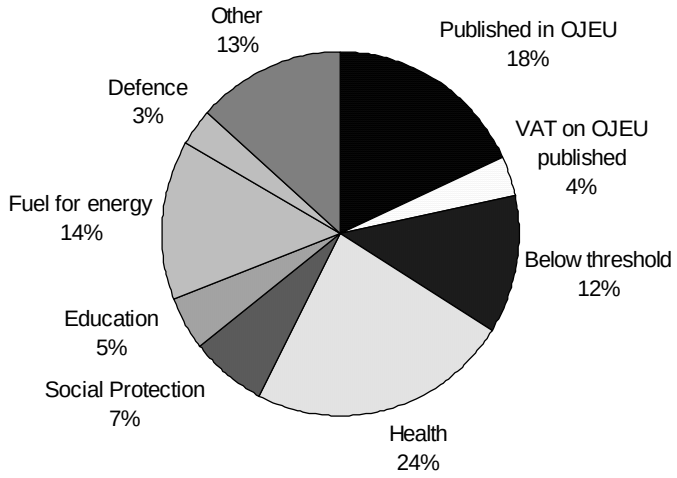
2.5. Conclusion

This chapter has brought out the essential objectives which have been explicitly or implicitly stated in the successive public procurement Directives up to and including 2004/17/EC and 2004/18/EC. These objectives provide the overall context for evaluating the extent to which the Directives have achieved their purpose. The scope of the Directives as a proportion of overall public expenditure on goods, works or services has also been estimated and compared with the value of those contracts which are advertised in the OJEU.

It appears that roughly one fifth of all expenditure on goods, works or services is covered by the full procedural obligations of the Directives. The six largest areas beyond or outside the scope of the directives so far identified and quantified (health, social protection, education, fuel, below threshold and defence) amount to more than EUR 1 407 billion or around 11% of EU GDP. These, together with the value of contracts advertised in the OJEU (including VAT) account for some 87% of total government and utility expenditure on works, goods and services. This leaves just under EUR 287 billion to be accounted for (by other exemptions, non compliance and other errors and omissions).

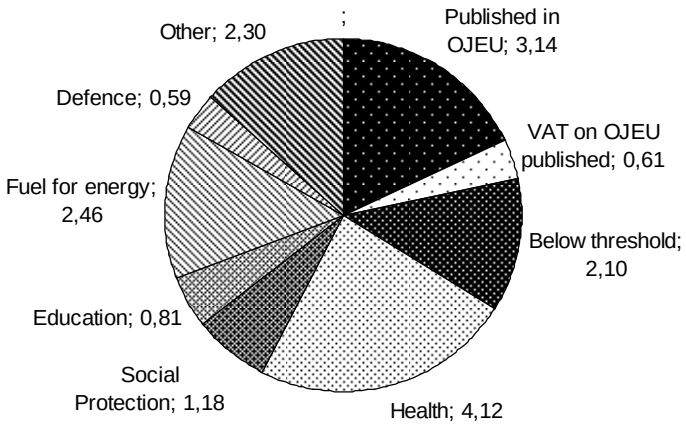
Together these findings provide the context and expectations against which the expected impact of the legislation should be compared to its actual or observed impact. The evidence for these comparative analyses, much of which has been collected through independent and external studies, is laid out in Chapters 6 and 7. The next chapter deals with the way in which Member States have implemented the various provisions of the Directives, how they organise and administer their procurement functions and what options they have chosen.

Figure 2. Breakdown of total government and utility expenditure on works, goods and services



Source Eurostat and Commission estimates

Figure 3. Breakdown of total expenditure as percentage of GDP



Source Eurostat and Commission estimates

Insert: Coverage of the WTO Government Procurement Agreement (GPA)

The GPA is the main international agreement relating to public procurement. The current version, which was negotiated in the in parallel with the Uruguay Round in 1994 and entered into force on 1 January 1996, is under revision in the Doha Rounds of negotiations in the WTO context. At Community level, the GPA was approved by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the Agreements reached in the Uruguay Round multilateral negotiations (1986 to 1994)[163]. The then applicable Public Procurement Directives were adapted through Directives 97/52/EC[164] and Directive 98/4/EC[165] to ensure that contracting authorities and entities would act in conformity with the GPA when following the (thus modified) Directives and applying these to economic operators from third countries which are signatories to the GPA[166].

Currently, signatories of the GPA are: Canada; the EU with regards to its 27 Member States; Hong Kong, China; Iceland; Israel; Japan; (South) Korea; Lichtenstein; Aruba; Norway; Singapore; Switzerland; Chinese Taipei and the United States.

The scope of the GPA varies in function of the offers of each signatory; it is thus an agreement with "variable geometry", i. e. the rights and obligations of (economic operators of) a given signatory country in relation to (economic operators of) another signatory depend on reciprocity. Also, the coverage offered by the EU externally in the Utilities sector is different from the scope of the Utilities Directive, Directive 2004/17/EC, in respect of intra-EU relations. See below.

Procurement in the Public Sector

The GPA applies to procurement carried out by: i) all regional or local contracting authorities and bodies governed by public law[167] as defined in the Directive, and ii) almost all central government authorities. The list of central government authorities which the EU offered as part of its coverage under the GPA is exhaustive; consequently, some important central government authorities that were not listed are currently not covered by GPA.

- *Works:* In principle, the GPA applies to all types of works contracts, irrespective of their subject-matter[168], awarded by contracting authorities[169] as of a threshold of 5 000 000 Special Drawing Rights (SDR[170]). Currently[171], this corresponds to EUR 4 845 000. However, because of reciprocity concerns, certain types of works may not be offered to specific third countries - for instance, works contracts awarded by sub-central contracting authorities[172] have not been offered to the U.S.A. Similarly, all contracts[173] awarded by sub-central contracting authorities have not been offered to Canada. The GPA does not apply to works concessions contracts.

- *Supplies*: With the exception of "warlike material", the GPA applies in principle to all supplies contracts, irrespective of their subject-matter, that are awarded by contracting authorities. However, its provisions apply to supplies contracts as of different thresholds, depending on the nature of the contracting authority awarding the contract and its subject-matter. Thus, if the contracting authority is a Central Government Authority (listed in Annex IV of the Classic Directive) then a threshold of 130 000 SDR, currently corresponding to 125 000 EUR, applies to most supplies contracts.[174] The exception concerns supplies contracts, awarded by contracting

authorities in the field of defence (Defence Ministries), whose subject-matter is *not* one of the products explicitly listed in Annex V of the Classic Directive[175].

- *For all other contacting authorities supplies contracts are covered by the GPA as of a threshold of SDR 200 000, currently corresponding to EUR 193 000.* Again, because of reciprocity concerns, certain types of supplies may not be offered to specific third countries - for instance, contracts concerning special industry machinery are not offered in relation to Canada; similarly, contracts concerning air traffic control equipment have not been offered to the U.S.A.

- *Services:* The GPA only applies to service contracts for (most of) the services listed in part A of Annex II of the Classic Directive. It does not apply to any services listed in part B of that Annex, nor, of course, to service concessions contracts. The services of part A of Annex II to which the GPA does *not* apply are all Research and Development (R&D) services as well as certain telecommunications services[176]. The thresholds from which the GPA is applicable to service contracts are the same as for supplies contracts, that is, SDR 130 000 (currently EUR 125 000) for contracts awarded by Central Government Authorities and SDR 200 000 (currently EUR 193 000*)* for all other contracting authorities.

- *Reciprocity* also plays a large role in respect of service contracts, where specific third countries might have limited access or no access at all to some of the services within the categories of part A of Annex II to the Classic Directive. Thus, for example, out of the range of services that are covered under category 2 ("land-transport services"), only "transportation of containerized freight, excluding cabotage" is offered to Korea and none of the services listed under category 9 ("Accounting, auditing and bookkeeping services") are offered to Japan. Furthermore, as recalled above, no service (or works) contracts awarded by sub-central contracting authorities, whatever their subject-matter, are offered to Canada or the U. S. A.

It should also be noted that the GPA is not *directly* applicable to design contests. However, if contracting authorities wish to avail themselves of the possibility to use a negotiated procedure without a prior publication to award a service contract (for one of the covered services) to the successful candidate or to one of the successful candidates in a previous design contest[177], then the contest must have "been organized in a manner which is consistent with the principles of [the GPA], notably as regards the publication …"[178].

Procurement in Utilities Sectors

- *Which entities:* There are two fundamental differences between the respective fields of applications of the GPA and the Utilities Directive: the first is that where the Utilities Directive applies to *three* different categories of entities (contracting authorities, public undertakings and private entities with special or exclusive rights[179]), the GPA applies to only *two* categories of entities, namely contracting authorities and public undertakings**.** In other words, the GPA is <u>not</u> applicable to procurement carried out by private undertakings even where they carry out one of the activities covered by the Utilities Directive on the basis of special or exclusive rights.

- *Which sectors***:** The second fundamental difference concerns which activities or sectors are covered by the two sets of rules: here again, the scope of the Utilities is larger than that of the GPA, as the Directive covers the following sectors: water[180]; gas, heat and electricity[181];

exploration for and extraction of oil, gas, coal or other solid fuels; rail transport and urban transport[182], ports, airports and postal services. The GPA, on the other hand, only applies to procurement carried out by *public bodies* operating in the following sectors: *water, electricity, urban transport, ports and airports*. In other words, it does *not* apply to any procurement - whether made by private or public contracting entities - in the following sectors*:* gas, heat, exploration for and extraction of oil, gas, coal or other solid fuels and rail transport.

- *Reciprocity issues* play a larger role in respect of Utilities procurement than in respect of procurement in the public sector. Thus, all contracts[183] awarded by public entities in some of the sectors normally offered under the GPA may not, after all, be offered to specific third countries. For instance, the water sector is not offered to the U.S.A, the electricity sector is not offered to Japan, urban transport is not offered to Korea, the port sector is not offered to Canada (nor are any of the other, preceding sectors offered to Canada), the airport sector is not offered to Korea and the same reciprocity based restrictions apply to the postal sector that apply to the public sector (contracts that are awarded by postal operators that can be considered as sub-central contracting authorities are thus not offered to Canada, nor are works contracts awarded by such postal operators offered to the U.S.A.

Within the thus defined field of application, the scope is further specified as follows:

- *Works:*In principle, the GPA applies to all types of works contracts, irrespective of their subject-matter[184], as of a threshold of SDR 5 000 000 (currently corresponding to EUR 4 845 000).

- *Supplies:* In principle, the GPA applies to all supplies contracts, irrespective of their subject-matter, as of a threshold of SDR 400 000 (currently corresponding to EUR 387 000). However, besides the above-mentioned reciprocity based restrictions concerning entire sectors, such restrictions may also apply depending on the subject-matter of a given supplies contract. For example, contracts concerning electrical transformers, plugs, switches and insulated cables, which are awarded by contracting entities operating in the electricity sector, have not been offered to Israel. Similarly, procurement related to shipbuilding awarded by contracting entities in the ports sector is not offered to the U. S. A.

- *Services:* In principle, the GPA applies to the same types of service contracts in the field of utilities procurement as in the public sector (i. e. to the services covered under Annex XVII A of the Classic Directive, with the exception of R & D services and certain telecommunications services[185]) as of the same 400 000 SDR threshold that applies to supplies contracts in the utilities sectors covered by the GPA. As is the case for service contracts under the Classic Directive, there are reciprocity based restrictions in respect also of some of the otherwise offered services of part A of Annex XVII of Directive 2004/17/EC. Thus, for example, no telecommunications services awarded by entities in the water sector are offered to Israel; no contracts for land transport services[186] are offered to the U. S. A.; contracts for accounting, auditing and bookkeeping services in the ports sector are not accessible to Japan nor are contracts for management consultancy services in the airports sector accessible to that third country. Finally, in respect of service contracts awarded in the postal sector, one may mention that out of the range of services that are covered under category 2 ("land-transport services"), only "transportation of containerized freight, excluding cabotage" is offered in respect of Korea.

CHAPTER 3: IMPLEMENTATION OF THE EU DIRECTIVES

As described previously, EU public procurement legislation establishes minimum coordination rules for public procurement procedures falling with its scope. While EU procurement legislation establishes a common corpus of rules and procedures for high-value procurements, Member States have considerable discretion in implementing the obligations stemming from EU public procurement Directives – in particular as regards the mechanisms and administrative arrangements that are put in place to support compliance with the provisions of EU law. While the grounds for exclusion relating to the professional capacity are exhaustively listed in the Directives, Member States (and individual contracting authorities) are in principle free to impose exclusionary measures based on other considerations provided that they comply with the principles of proportionality and non-discrimination[187].

In terms of coverage of procurement activity, the bulk of public purchasing is not subject to the EU public procurement Directives. In terms of the number of procedures, DG MARKT estimates that less than 10% of public procurement procedures are subject to the provisions of EU public procurement Directives. Over 90% of the procedures recorded in national statistics are for amounts following below the thresholds laid down in EU legislation. In value terms, procurement subject to EU legislation is estimated to be greater than procurement below EU thresholds. In addition, a significant part of public expenditure on the acquisition of goods, works and services is disbursed in ways other than via the award of public contracts (e.g. other payment structures in health, education) or involves procurement which is exempt from the provisions of EU procurement legislation (e.g. services concessions).

The legal and administrative arrangements that MS, regions and individual authorities have taken to implement public procurement legislation are therefore:

- directly relevant in determining the concrete legal, procedural and administrative processes that must be complied with for procedures that fall within the scope of EU public procurement;

- primarily responsible for the legal and administrative provisions applying to out of-scope public procurement; and

- proportionately greater in terms of the number of procedures/proportion of public purchasing to which they apply.

Any attempt to analyse EU public procurement legislation must therefore also include consideration of the relevant national legal and administrative arrangements.

This chapter aims to provide a high-level description of the legal and institutional arrangements that Member States (and regions) have put in place to implement EU public procurement legislation, and to regulate public procurement which is not covered by this legislation. It examines national implementation under the following headings:

1. Implementation of EU directives: This includes identification or description of

- national measures transposing the 2004 Directives including the date of adoption of national measures and their date of entry into effect;

- scope and coverage of national legislation: this section will describe steps taken by Member States when exercising options available to them under EU Directives;

- significant instances where Member States have gone beyond the requirements of EU directives when implementing provisions;

- national arrangements for meeting transparency obligations; and

- provisions of EU law that give rise to difficulties in national implementation;

2. Legal provisions at national level on the procurement not covered or not fully covered by the EU legislation.

3. National procurement administration. This section includes a description of:

- national structures for the definition of national procurement policy and guidance, oversight of procurement;

- high-level breakdown of contracting authorities by category (national/federal/regional/local);

- existence of important central purchasing bodies or structures to facilitate contracting authorities in undertaking public procurement procedures; and

- national (legal and administrative) arrangements for review and appeal against procurement procedures (and information on the number of procedures where possible).

It is beyond the scope of this review analysing other aspects of national policy (labour law, tax, business regulation) which also affect the organisation of and competition for public procurement contracts.

3.1. Implementation of EU Directives

3.1.1. National measures transposing EU Directives

Directives 2004/17/EC[188] and 2004/18/EC were adopted on 31 March 2004, with a deadline for transposition into national legislation of 31 January 2006 for all Member States. Romania and Bulgaria were required to implement the Directives as of 01 January 2007 - the date of their accession to the EU.

Transposition was delayed in several Member States with transposition, resulting in the launch of 18 infringement procedures for non-transposition. All were opened in March 2006, nine were

closed by the end of that year, and further five cases were closed by the end of 2007. Of the remaining four cases, two were closed in 2008, one in 2009 and the last one in 2010. At this stage, the Classic Directive has been fully transposed by the all Member States - the last country to transpose being Belgium.

A total of six infringement procedures, at different procedural stages, are currently (April 2011) ongoing concerning the non-conformity of national implementations of certain, specific provisions of the Classic Directive in four Member States[189].

In the case of the Utilities Directive the transposition was delayed in several Member States which resulted in the launch of 16 infringement procedures for non-transposition, All were opened in March 2006, six were closed by the end of 2006 and a further six by the end of 2007. Of the remaining four, two were closed in 2008, one in 2009 and the last one in 2010. At this point in time, The Utilities Directive has been fully transposed by the all Member States - the last country to transpose being Belgium. It should also be mentioned that a total of two infringement procedures, both before the Court, are currently (April 2011) ongoing, concerning non-conformity of national implementations of certain, specific provisions of the Utilities Directive in two Member States[190].

A list of national measures transposing EU public procurement Directives in each Member State, their respective date of adoption and entry into force is presented in Annex 4 – Overview of national legislation implementing the public procurement directives.

An overview showing the date of entry into force of the (first) national legislative measures implementing the Directives and, where applicable the duration of any infringement procedures for absence of timely implementation is set out below.

Table 3. Overview of national implementation – timeliness- 2004/18/EC

2004/18/EC				
Member State	**Proced. opened**	**Closed**	**Comments**	**Implemented by**
BE	03.2006	03.2010	Judgment	09.2009
BG	-			01.2007
CZ	03.2006	10.2006		07.2006
DK	-			01.2005
DE	03.2006	12.2006		11.2006
EE	03.2006	03.2007		05.2007
IE	03.2006	10.2006		06.2006
EL	03.2006	06.2007	referral decided	03.2007
ES	03.2006	12.2007	referral executed	10.2007
FR	03.2006	10.2006		08.2006
IT	03.2006	10.2006		07.2006
CY	-			02.2006
LV	03.2006	12.2006		05.2006
LT	03.2006	10.2006		07.2006
LU	03.2006	10.2009	Judgment	08.2009
HU	03.2006	12.2006		10.2006
MT	-			06.2006
NL	-			01.2006
AT	-			01.2007
PL	03.2006	10.2006		05.2006
PT	03.2006	09.2008.	referral decided	07.2008
RO	-			02.2007
SL	03.2006	06.2007		03.2007
SK	-			02.2006
FI	03.2006	06.2007	referral decided	06.2007
SE	03.2006	04.2008	Judgment	01.2008
UK	-			01.2006

Source: Commission services

Table 4. Overview of national implementation – timeliness- 2004/17/EC

2004/17/EC				
Member State	**Proced. opened**	**Closed**	**Comments**	**Implemented by**
BE	03.2006	03.2010	Judgment	02.2010
BG	-			01.2007
CZ	03.2006	10.2006		07.2006
DK	-			01.2005
DE	03.2006	12.2006		11.2006
EE	03.2006	03.2007		05.2007
IE	03.2006	03.2007		03.2007
EL	03.2006	06.2007	referral decided	03.2007
ES	03.2006	12.2007	referral executed	10.2007
FR	03.2006	12.2006		08.2006
IT	03.2006	10.2006		07.2006
CY	-			02.2006
LV	-			12.2004
LT	03.2006	10.2006		07.2006
LU	03.2006	10.2009	Judgment	08.2009
HU	-			05.2004
MT	-			06.2005
NL	-			01.2006
AT	-			02.2006
PL	03.2006	10.2006		05.2006
PT	03.2006	09.2008	Judgment	07.2008
RO	-			02.2007
SL	03.2006	06.2007		03.2007
SK	-			02.2006
FI	03.2006	06.2007	referral decided	06.2007
SE	03.2006	04.2008	Judgment	01.2008
UK	-			01.2006

Source: Commission services

Overall the situation can be summarised as follows:

- *for Classic Directive,* 7 Member States implemented on time (the first measures entered into force more than a year before the deadline expired), a further 9 Member States had implemented with up to 6 months of delay. With up to 12 and 18 months of delay, respectively two and four further Member States had implemented. In other words, by the end of January 2007, 18 Member States (two thirds) had implemented and by the end of July 2007 at the latest, that number had risen to a total of 22 Member States (i.e. over 80 %).

- *in the case of the Utilities Directive,* 10 Member States implemented on time (the first measures had entered into force by the end of May 2004, a mere two months after the adoption of the Directive and more than one and half years before the deadline expired), a further 6 Member States had implemented with up to 6 months of delay. With up to 12 and 18 months of delay, respectively one and five further Member States had implemented. In other words, by the end of

January 2007, 17 Member States (slightly under two thirds) had implemented and by the end of July 2007 at the latest, that number had risen to a total of 22 Member States (i.e. over 80 %).

3.1.2. Scope and coverage of national legislation

The majority of Member States regulate Public Procurement above EU threshold by law or regulation. The exceptions are Denmark, and Belgium. In Denmark EU Directives on public procurement Directives were incorporated directly by Government orders to which the Directives were annexed. In Belgium, the binding elements of the Directives have been implemented via several acts, including two Royal Decrees while the rest of the provisions were pending another Royal Decree to be put in place.

Most of the Member States, namely Austria, Bulgaria, Czech Republic, Estonia, France, Germany, Hungary, Italy, Lithuania, Luxembourg, Poland, Portugal, Romania, Slovak Republic and Sweden use the same legal instrument for the classical and utilities sectors in the regulation of procurement above EU thresholds. The remaining Member States have separate regulatory instruments for rules for the classical and utilities sector. For further information please refer to Annex 4 'Overview of national legislation implementing EU procurement Directives'.

With the exception of Germany and Greece, all Member States have the same regulatory instrument covering the supply, services and works contracts.

Some Member States, namely Austria, Cyprus, Finland, Latvia, Lithuania, Poland, Romania, and Sweden, regulate procurement above and below EU threshold in the same act. These Member States apply different rules to public procurement depending on whether the procedure is above or below the thresholds laid down in EU legislation. A more detailed discussion of below threshold procurement is provided in Chapter 3.2.1 'Below EU threshold procurement'.

Some Member States have opted for extending the Directives to areas not covered by or only partially covered by these Directives. For example some Member States have extended the Directives to concessions[191], to annex B services, to social services or to contracts below the thresholds of the Directives. The provisions governing areas not regulated by EU Directives are discussed extensively in Chapter 3.2 'Legal provisions at national level on the procurement not covered or not fully covered by EU legislation'.

The 2004 Directives introduced a series of new features; however, in order to take account of the different circumstances in each Member States, they were made optional.

Member States have exercised these options as per table below.

Table 5. Implementation options

Options – unless specified, options are available under both Directives.	**Member States who have *not* implemented the option in their legislation**
Central Purchasing Bodies	BE, DE, EE, SE
Dynamic Purchasing Systems	BE, FI, SE
Electronic Auctions	BE, FI, SE
Sheltered workshops	BE, DE[192], EE, LV, PT, SE
Framework agreements (2004/18/EC only)	BE
Competitive dialogue (2004/18/EC only)	BE, LV, FI, SE
Art. 30 requests from contracting entities (2004/17/EC only)	BE, DK, EE, FR, LV, PL.

Source: Commission services.

To be noted that, except for the choice concerning Art. 30, these options will eventually all be implemented in Belgium with the entry into force of the Public Procurement Act of 2006. The date of entry into force is currently (April 2011) not known.

In general the vast majority of Member States have elected to make use of the new options provided under the Directives. Very few have decided not to do so.
Member States have issued additional guidance to assist public authorities in implementing these provisions. These have attempted to clarify detailed operational points linked to some of the more novel or technical aspects of procedures, for examples DPS, e-auctions and competitive dialogues. In some Member States there seems to have been a deliberate effort to encourage the use of certain procedures. While Member States have legislated to provide for these options, their actual use varies considerably.

More in detail:

- *Electronic auctions (both Directives):* Electronic auctions have been implemented in the majority of Member States; only Belgium, Germany, Luxembourg, Sweden and Finland have not implemented this option (or not done so completely);

- *Dynamic Purchasing Systems (both Directives):* DPS are available to contracting authorities and entities in the majority of Member States; only Belgium, Luxembourg, Hungary, Finland and Sweden have not implemented this option (or not done so completely);

- *The new regime* applicable to framework agreements and contracts based thereon (Classic Directive only). This procurement tool has been implemented in all Member States with the exception of Belgium (which will also implement this option at a later, not yet determined stage);

- *The competitive dialogue (Classic Directive only):* This new award procedure has been implemented in most Member States, only Belgium, Latvia, Finland and Sweden have chosen not to implement this option.

Other optional provisions:

- *Central Purchasing Bodies (both Directives):* Only Belgium, Germany, Estonia, Luxembourg and Sweden have chosen to *not* to implement the provisions on central purchasing bodies. For further details on Central Purchasing Bodies, please see Annex 7 and section 5.2.2 'Status and significance of central procurement bodies'.

- *The possibility to reserve participation in certain procurements for sheltered workshops (both Directives):* This possibility has been offered to contracting authorities and entities in most Member States, only Belgium, Estonia, Latvia, Portugal and Sweden do not avail themselves of that option at all. Germany *has* availed itself of this option, but only in respect of supplies and services contracts falling within the scope of the Classic Directive, such reservations not being possible in respect of works contracts or contracts subject to the Utilities Directive. Finally, the Slovak Republic offers this possibility, but limits its application to contracts below EU-thresholds.

The actual amount of above-threshold procurement which is undertaken under these headings is small.

Table 6. Estimated number and value of contracts reserved for sheltered workshops

	2008		2009	
	Number	**EUR Value**	**Number**	**EUR Value**
Belgium	17	14 848 490	12	3 238 099
Bulgaria	13	1 629 379	5	1 063 503
Czech Republic	3	1 082 338	17	18 772 045
Denmark	1	3 353 004		
Germany	19	29 307 160	10	14 540 000
Ireland	1		2	
Greece			1	343 295
Spain	4	1 124 800	17	10 311 826
France	101	9 103 406	104	2 658 523
Italy	18	18 279 780	12	37 773 760
Latvia	2	355 771		
Lithuania	3		1	
Hungary	3		2	42 807
Netherlands	26	420 000	14	1 400 000
Austria	2		5	850 000
Poland			2	412 680
Romania	3	1 593 431	1	382 084
Slovenia			1	8 800 000
Slovakia	1	7 996 929		
Sweden	2		1	
United Kingdom	7	20 192 646	6	21 662 514
EU- 27	226	109 287 133	213	122 251 137

Source: OJEU

- *The possibility for individual contracting entities to introduce requests for exemptions for pursuant to Article 30 (the Utilities Directive only):* This possibility has been provided for in the

(implementing) legislation of the majority of Member States, to the exclusion of Belgium, Denmark, Estonia, France, Latvia and Poland. To date (June 2011) 25 applications have been received for 10 Member States[193] concerning either the postal or energy sectors in a broad sense. One application is still under examination, three have been withdrawn and 18 Decisions have been adopted (one of which takes a position on four requests). The majority of the requests (17 out of 24) were introduced directly by the Member State concerned, while seven requests were made by contracting entities. The 18 adopted Decisions concern nine different Member States[194] and 11 of these Decisions are positive, four are mixed and three negative[195].

3.1.3. National measures going beyond EU public procurement legislation

Directives 2004/18 and 2004/17 are "coordination" directives and do not harmonize the rules on public procurement in detail. As such they explicitly allow each Member State to go beyond the minimum requirements set in the Directives. In other words, some aspects remain within the remit of national measures organising the conclusion and execution of public contracts. Many Member States have availed themselves of the possibility to supplement the minimum requirements of the procurement Directives in national legislation.

The way in which these provisions are transposed into national law, and supplemented by additional guidance or ordinances at the level of different levels of government or in the purchasing rules of the individual public purchasers is critical in shaping the legal and administrative environment in which procurement officers and suppliers operate on a daily basis.

- *Multiple sources of procurement rules:* There is a progressive accumulation and deepening of rules at different stages in the procurement procedure. Requirements increase in degree of prescriptiveness, the closer to the actual purchasing decision one gets. This is understandable as ultimate responsibility for ensuring the correctness of the procurement procedure lies with the individual contracting authority. The detailed rules may vary across contracting authorities in the same region or sector creating further complexity.

Legislation on public procurement may be fragmented according to:

- *sectors*[196]*:* (for example on healthcare there is different legislation "on top" of the general transposition, or special rules may exist for liberal professions as compared to other service contracts);

- *levels of governance*[197]*:* (for example federal and regional laws complementing each other); and

- a number of *different acts* applicable to public procurement [198]

The structure of rules, and the number of different actors involved in promulgating procurement legislation may create difficulties for both contracting authorities and bidders in identifying the correct rules applicable.

Many Member States have a mixture of laws and decrees that a contracting authority must take into account when awarding a contract. Sometimes, even if the legislation on public procurement is concentrated in one law, there are numerous cross-references to other horizontal legislation.

Many Member States have introduced additional provisions in their national law to supplement EU public procurement legislation with a view to clarifying how EU provisions, reducing legal uncertainty, and maintaining open and non-discriminatory competition.

In this sense, a number of examples (non-exhaustive) can be identified:

- transparency requirements for contracts below the thresholds of the Directives (Austria and Italy)*;*
- strict interpretation of the "in-house" concept (Sweden);
- more legal protection of third parties than provided for in the Remedies Directives (Poland and Greece)*;* and
- additional obligations for publicity (Italy) or for reasons other than internal market policy (such as social – or the obligation for contracting authorities to reserve contracts to sheltered workshops in Germany).

In many cases, the additional provisions are motivated by and represent a considered choice to strengthen procedural or legal guarantees in order to preserve some public 'good'.

An area which is frequently commented relates to the imposition of stringent conditions for participation in tenders or contract award through the tender specifications imposed by individual contracting authorities. These conditions concern for example:

- the requirement to supply extensive proof on possible grounds of exclusion, such as criminal records, respect of social security obligations etc;
- the modalities of handling guarantees for participating in a tender procedure[199];
- particular complex procedure for works concessions;[200]
- administrative instructions on a regional level going beyond legal requirements and including detailed requirements for the organization of sessions for the opening of bids;[201] and
- rules on how prices should be calculated.[202]

Articles 44-51 of Directive 2004/18 establish conditions that must be met (some optional) before participants can be admitted to procedure or contracts awarded to them. These provisions allow contracting authorities to determine the requirements to be satisfied. These provisions have been implemented in a wide variety of ways by different authorities. Rules governing the eligibility of tender participants or contract award winners give rise to frequent concerns relating to exclusion of possible participants.

The Commission has recommended that documents attesting to compliance with requirements be submitted and verified only at the stage of contract award. Some of Member States have implemented this recommendation.

3.1.4. National arrangements for meeting transparency obligations

In addition to the publication of above-threshold notices in the OJEU, most Member States also require the publication in national media of their procurement notices. Of the remaining seven countries (Denmark, Ireland, the Netherlands, Poland, Sweden, and United Kingdom), two of them (the Netherlands and the United Kingdom) do not have a National Official Journal, whereas the other remaining five do not require the submission of procurement notices to their National Official Journal. The procurement mechanism in countries where a double publication of procurement notices is mandatory, requires further regulatory activities and constraints than in those that require only a single OJEU publication. Additionally, at national level, apart from the National Official Journal publication may be mandatory in other media.[203]

Publication in the National Official Journal of the procurement notices is subject to payment of a publication fee in most of the countries.[204]

However, in certain countries, the publication of procurement notices can follow a simple process of single publication. This approach is followed by Sweden, Poland, the Netherlands and the United Kingdom, which are not obliged to publish procurement notices in a dedicated National Official Journal, as well as Finland where the National Official Journal plays also the role of the national e-Notification system.

The increasing use of harmonized forms for the publication of notices both at European and national level is seen as an important development[205]. In Belgium and Estonia additional information is required when submitting a notice for publication at national level but this information is only collected for monitoring purpose of procurement, and does not become public[206].

Below-threshold contracts are governed by the national legislation of each Member State. Hence, the choice between the use of standard forms or different forms for the publication of notices belongs to the discretionary power of each country in question. Commission Regulation (No 1564/2005) on standard forms[207] introduced a shorter streamlined procedure with one single set of online notice forms, which save valuable time in the procurement process. In combination with the use of the CPV nomenclature (Common Procurement Vocabulary) translations and search operations are also rendered easier and more accurate. The greatest advantage of the new forms further comes with the online use. If submitted electronically, notices can be published on TED within five days of being sent instead of the former twelve days[208]. In addition, this reduced significantly paper-handling costs for administrations and to facilitate the processing of tender information.

In a few Member States[209], there are also requirements for mandatory publication of the contract award notices at national level.

Advertisement of out-of scope procurement procedures:

In many Member States, publication of contract notices at national level is mandatory for other procurements not or not fully covered by EU-legislation[210] such as part B services[211], service concessions[212]. The media used for such publication vary between Member States, and could be the National Official Journal, dedicated websites or just national newspapers. Additionally in some

Member States there is a requirement for publication at national level of the contract award notice for such procurements not or not fully covered by EU-legislation.

Moreover, in Estonia, Hungary and Spain the failure to comply with the publication requirements for such procurements may entail pecuniary sanctions and even the nullity of the contract (in Spain).

3.1.5. Provisions of EU law that give rise to difficulties in national implementation

The infringement procedures that are opened by the Commission in its role as "guardian of the Treaty" are one possible source of information on provisions that give rise to difficulties at the stage of implementation (whether in legislative acts or in connection with individual award procedures). As an indicator of the issues that have at the very least given rise to doubts as to the conformity of measures taken at the national level, cases have been taken into account irrespective of the outcome of the individual cases.[213]

Two "filters" were applied when selecting the cases to be examined. The first was to limit the examination to cases in which a reasoned opinion[214] was sent. The reason for this is to limit the examination to cases in which the doubts concerning conformity continued to exist also after the second examination of the case, normally[215] based on the first explanations given by the Member State concerned. The second limitation consisted in not taking looking at infringements concerning on the absence of (notifications of) national measures implementing the Directives within the deadlines set for so doing.[216]

A search of such cases from 2005 onwards gives a total of 78 cases concerning 19 Member States.[217] Before looking at the issues raised in these cases it should be borne in mind that each case has its own specificities, that they may involve more than one issue and may concern more than one legal basis.[218] At a fairly high level of abstraction it is nevertheless possible to reduce the questions raised by these cases so as to identify a certain number of broad issues that occur with some frequency.

The first finding is that the overwhelming majority of the 78 cases concerned the Classic Directive.[219] The Utilities Directive,[220] was concerned in just 9 cases, and 6 other cases concerned both Directives. One exclusively raised questions in respect of the two Remedies Directives, whereas the remainder, 62, cases concerns the Classic Directive.

Not surprisingly, the single most common issue concerns cases - all in all 48 - where a contract[221] had been awarded without there having been an award procedure with prior publication at the EU level or, in some cases, at least adequate publicity in respect of contracts not or not fully subject to the detailed provisions of the Directives. More in detail, of these 48 cases:

- 16 cases (involving 6 Member States) concerned cases where publication had been omitted because either the chosen contractor was considered to be controlled by the procurer ("In-House") or the arrangement was considered to be a case of public-public cooperation[222];

- 9 cases (in four different Member States) concerned substantial changes to already awarded contracts and two more (in one Member State) concerned the same issue in relation to already awarded works concessions contracts;

- 6 cases can be summarised as involving land sale (or other transferral of rights to land) comprising arrangements which could amount to a works (concessions) contracts;[223] and

- 14 cases in which the absence of publicity was due to the contract being considered to fall outside the scope of the Directive(s). The arrangements concerned were considered to be below thresholds (two cases); to involve B- services (two cases) to involve excluded defence procurement or procurement needing secrecy[224] (four cases); to be justified because of the existence of exclusive rights[225] (two cases); the body concerned was not considered to be a "body governed by public law" (two cases). None of these categories occurred in one single Member State.

In three different cases in different Member States use of a negotiated procedure without prior publication was considered to be justified under the provisions of the Directive (because of (perceived) extreme urgency, absence of suitable tenders or technical reasons). In a final case, the reasons leading the contracting authority to omit publication at EU level[226] are not directly apparent.

Please not that the number of cases listed above amount to more than 48, simply because more than one category may apply to any given case.[227]

Other problems arose in relation to negotiations in four cases (all in different Member States), namely, in relation to the choice of a negotiated procedure with prior publication in three cases and one instance of negotiations being conducted in the context of an open procedure.

The distinction between selection and award criteria posed problems in seven cases concerning four different countries with no more than two cases in each country.

Issues relating to regional and/or national preferences[228] arose in seven cases (involving five different Member States), while a preference was accorded to an incumbent as a "tie-breaker" criterion in yet another case (concerning a 6th Member State). Yet another case raised issues concerning preferences of a different type (relating to "socially acceptable operation", "social"-labelled products). Finally, a case involving preference for legal persons compared to physical persons in relation to certain (forms of) service contracts might also be mentioned here.

Issues relating to the consequences to draw from judgments of the Court of Justice finding that EU law on public procurement had been breached were raised in seven cases involving four Member States.[229]

Issues relating to limitations of the possibilities to subcontract and/or otherwise rely on the capacities of other economic operators arose in two cases (in different Member States).

Finally, for the sake of completeness, five cases were identified, concerning four Member States, for which the issues raised are so diverse[230] that they can not meaningfully be reduced/classified into the above categories.

As already mentioned, summing the number of cases listed for the various categories will yield a total amounting to more than the total number of cases examined given that cases may raise issues commented on under more than one category.

An analysis of information concerning implementation problems that DG REGIO and the European Court of Accounts (ECA) has come across during its audits of national procurement in relation to programmes and projects (co)financed by European Regional Development Fund (ERDF) and Cohesion Fund (CF) has been also carried out.

The analysis was made on the basis of the findings of the audit missions (which led or not to financial corrections decisions) for both programming periods: 2000–2006 and 2007-2013 and eliminating cases in which the reasons for so deciding were not related to public procurement.[231] It should be noted that, as the findings were cumulated for both programming periods, some of the procurement examined will have been carried out before the deadline for implementing the Classic and the Utilities Directives. However, broadly speaking the issues raised in these cases would to a large extent seem to confirm and complement the findings of the analysis of infringement cases set out above. Additional issues were raised, related mainly to abnormally low tenders and/or insufficient transparency in connection with the definition or application of the award criteria used to identify the economically most advantageous tender, the splitting of contracts, negotiations during award procedure, and issues related to incorrect specification of the predominant elements in "mixed" contracts".

3.2. Legal provisions at national level on the procurement not covered or not fully covered by the EU legislation

The EU Public Procurement Directives do not apply to all public contracts. There remains a wide range of contracts that are not or only partially covered by them, such as below thresholds contracts and contracts for services listed in Annex II B to the Classic Directive and in Annex XVII B to the Utilities Directive that exceed the thresholds for application of these Directives, hereinafter called Annex B services.

However, the European Court of Justice (ECJ) has confirmed in its case-law that the Internal Market rules of the Treaty apply also to contracts outside the scope of the Public Procurement Directives, to the extent that these present a certain cross-border interest.

These principles include the free movement of goods, the right of establishment, the freedom to provide services, non-discrimination and equal treatment, transparency, proportionality and mutual recognition. The principles of equal treatment and non discrimination on grounds of nationality imply an obligation of transparency which, according to the ECJ case-law[232], *'consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of the procedures to be reviewed*.'[233]

3.2.1. Below EU threshold procurement

The public contracts below EU threshold are falling outside the scope of the EU Public Procurement Directives but they are of significant importance with an estimated value of around EUR 250 billion (in 2008). Furthermore, the below EU threshold procurement represent important business opportunities for SMEs across EU. Most Member States refer to EU Treaty principles whether explicitly or implicitly, with the exception of Luxembourg and the Netherlands. The Czech Republic includes Treaty obligations for contracting authorities only. The principles most commonly referred to by Member States in their laws are those of equal treatment, non-discrimination and transparency to in their regulations for below EU threshold procurement.

The majority of Member States regulate public procurement below EU thresholds within the same act as the contracts covered by the EU Directives and require the use of open, fair and competitive procedures. These procedures have virtually the same features as those applicable under the EU Directives. Member States with no regulation, like the Netherlands, Ireland and the United Kingdom[234], still promote the use of competitive tendering in areas not covered by the EU Directives.

For the purpose of simplification, Member States provide a more lenient regime in respect of public contracts below the EU thresholds. The simplification normally refers to the shortening of the time limits for submission of applications (i. e. requests for participation) and tenders and less demanding rules for publication and for selection of tenders.

National legislation covering the award of contracts below EU threshold:

The majority of Member States regulate Public Procurement below EU threshold by law or regulation at least in the classical sector. The exceptions are United Kingdom and Ireland where the contracting authorities are instructed by means of a guidance document. The Netherlands have voluntary regulation and guidance. Otherwise, Member States set out the below EU threshold regime either through the law also covering above EU threshold procurement, through other national legislation or through a combination of the two.

Austria, Bulgaria, Estonia, France, Greece, Hungary, Italy, Lithuania, Luxembourg, Portugal and Romania use the same legislative instrument for the classical and utilities sectors in their regulation of procurement below the EU thresholds. Belgium, Slovenia, Spain and Sweden have separate rules for the utilities sectors.

The Czech Republic, Cyprus, Denmark, Finland, Latvia, Poland, Malta and Slovak Republic do not have detailed below threshold rules for the utilities sector. Those contracts are covered in separate acts. Although Denmark does not have a specific law for below threshold procurement in the utilities sector, contracting entities are obliged to have internal procedures for this. In the Netherlands, the utilities sector for below EU threshold is voluntary.

Common rules and procedures with public procurement above EU threshold:[235]

There are a number of areas where the rules and procedures are more or less the same as for contracts above the EU thresholds:

- the means of submission of applications and of tenders;

- the applications or tenders are normally submitted by mail, fax or electronic means; and

- rules for qualitative selection;

Austria, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Hungary, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Slovak Republic and Sweden have the same approach for below EU threshold procurement as for above EU threshold. The main difference compared to the provisions of EU Directives is that proof of meeting qualification requirements can be done by a simple declaration from the economic operators themselves, instead of having to provide a range of specified documents issued by various authorities.

- *evaluation of tenders and award criteria, including abnormally low tenders*: choice of award criteria (most economically advantageous tender or the lowest price) in case of Austria, Bulgaria, Cyprus, Estonia, Finland, Hungary, Italy, Latvia, Lithuania, Poland, Romania, Slovenia, Slovak Republic and Sweden. For abnormally low tenders majority of Member States either follows the rules of the directives or omits any specific rules with regard to this issue

- *structure of technical specifications;*

- *framework agreements*: Austria, Cyprus, Estonia, Finland, Italy, Latvia, Luxembourg, Bulgaria, Poland, Spain, Romania, Slovak Republic and Sweden apply the same approach for awarding the framework agreements for contracts below EU thresholds as for those above. In Hungary, the procedure for the award of framework agreements below EU thresholds is at the discretion of the contracting authority. France, Lithuania and Denmark do not have any special provision for this type of contract.

- *electronic procurement:* Austria, Cyprus, Czech Republic, Finland, Luxembourg, Latvia, Romania, Slovenia, Slovak Republic, and Sweden have same rules for electronic procurement for above and below EU threshold.

National thresholds and procurement procedures below EU thresholds:

The Member States, which do regulate procurements below EU-thresholds, can have from one level national threshold, as is the case of Czech Republic, Denmark, Estonia, Hungary, Poland and Portugal, up to four levels of national thresholds below EU threshold as is the case in Bulgaria and Malta. These thresholds can be further differentiated by the type of contracts concerned –they are generally lower for supply and services and higher for works contracts- and by the Classic and Utilities Directives.

Normally the contracts with a value on the lowest band are not subject to any regulation and direct award (award without publication and without competition) is allowed. The level of this first threshold which is usually referred to as "*de minimis*" threshold varies considerably between Member States and sometimes varies also between procurement of goods and services and procurement of supplies. The first national threshold can be as low as EUR 1 700 as is the case in Cyprus or much higher (e.g. in the Czech Republic the first national threshold is EUR 70 000 for supplies and services and EUR 210 000 for works). For detailed information, please see Annex 5 'Below threshold –national thresholds'.

The contracts on the next band of national thresholds (above the *de minimis* threshold up to the next national threshold, are generally subject to simplified procedures (request for quotations or direct invitations for tenders). For contracts above the second national threshold, and for countries with one single national threshold, it can be observed that many Member States use more or less the same rules and procedures as above EU thresholds, except for national publication rules and shortening of the deadlines for submission of tenders.

Publication requirements for below-threshold procurement:

The majority of regulations require contracts below EU thresholds to be published through the central web portals, special bulletins, databases and websites of the contracting entities. The publication requirements apply to contract notices and in some cases to award notices as well.

Furthermore, the use of national forms for the publication of notices at national level, in particular for below threshold contracts vary across Member States. Differences in the templates used for above threshold contracts and the ones used for below threshold contracts are usually related to the specific national specificity of each country. Almost all countries Member States maintain two different sets of forms for above and below threshold contracts, usually with minor (e.g. Belgium, Czech Republic, Hungary, Portugal, Slovak Republic, Malta) or significant differences from the EC standard forms. Countries obliged by law to submit their procurement notices to their national e-Notification system are also responsible for enforcing, maintaining and making available a common set of forms (usually for both above and below threshold contracts) to all contracting authorities. In general, national forms for below EU threshold contracts are simpler in terms of content and more straight-forward in their completion and understanding.

Time limits:

The shortening of the time limits for submission of applications and tenders is a common simplification in the majority of Member States. In Slovenia and France the period is not at all specified but left at the discretion of the contracting authorities. Finland and Netherlands do not have rules on time limits. When a minimum time limit is laid down, which is usually the case, it tends to be between 10 to 15 days for the application and 10 to 25 days for the submission of tenders (i.e. roughly equivalent to the deadlines applicable under accelerated restricted procedures as provided for in the Classic Directive). These time limits may often be shortened in case of electronic submission.

- *Review and remedies:* Some Member States (e.g Czech Republic, Denmark, Estonia, Finland, France, Hungary, Portugal, Slovak Republic, and Sweden apply the same rules for complaints, review and remedies as for contracts above the EU thresholds. .

3.2.2. Annex B Services

National legislation covering the award of Annex B services:

Besides the reduced obligations imposed by the Directives (to apply the provisions on technical specification and an obligation to inform the Commission of the outcome of award procedures, see below), Member States are required only to adhere to the fundamental principles of the EU Treaty,

when designing and implementing legislation regarding Annex B services, and most of the member States do so either explicitly or implicitly.

The national rules covering Annex B services vary from Member State to Member State. In Cyprus, Czech Republic, Greece, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Slovak Republic and United Kingdom it is only necessary to comply with the Treaty principles of transparency, equal treatment and non-discrimination, while in other Member States, such as Austria, Belgium, Bulgaria, Denmark, Estonia, Slovenia, Portugal, Slovenia and Spain Annex B services are simply covered by the general rules applicable to public procurement. In Finland and Hungary, the use of a simplified procedure is provided for.

According to a recent study[236], the same rules and practices apply to both above and below threshold procurement of Annex B services. Italy provides for award by negotiated procedure without publication, although minimum 5 quotations shall be requested. A simplified below threshold approach is provided by Austria, France, Poland, Czech Republic and by Denmark. Member States which provide a more structured approach include Sweden which require either a simplified open procedure or a simplified two stage procedure including the possibility of negotiation under either of the procedures and Estonia where a public procedure has to be carried out for contracts above the national threshold. Finland, Lithuania and Slovenia apply the same rules for all contracts above national threshold, although Finland allows flexibility concerning the use of the negotiated procedure. Cyprus requires the above EU threshold rules to be followed irrespective of the contract value.

Publication Requirements:

In most of the Member States (e.g. Belgium, Czech Republic, Denmark, Estonia, Finland, Greece, Hungary, Slovak Republic, Spain and Sweden) the legislation requires publication in respect of the award of contracts for Annex B services. The media for such publication can vary across Member States from the Official Journal[237], central web portals[238] and special bulletins[239], to databases and websites of the contracting entities[240] and newspapers[241]. In some of the Member States the publication requirements apply also to contract award notices[242], and the publication is made usually in the same media as the contract notice. Concerning contract award notices for Annex B-services, it is recalled that the Directives require a contract award notice to be transmitted, indicating whether it may be published in the OJEU or shall be used for statistical purposes only.

3.2.3. Service Concessions

National legislation covering the award of service concessions:

Both Directives define concessions contracts[243], however, only works concessions are subject to detailed provisions under the Classic Directive. Works concessions awarded by contracting entities for the pursuit of one the activities covered under The Utilities Directive are excluded from the scope of that Directive and service concessions are excluded from the scope of either Directive. The award of public service concessions[244] is only subject to compliance with Treaty principles. This has resulted in a very heterogeneous treatment of the service concessions across Member States legislation.

It is to be noted that the definition of concession is different in most Member States which leads to different national juridical framework and ultimately to different regimes of tendering and awarding such service concessions. The award of service concessions of cross border interest is consequently subject to different national rules which might lead to a danger of fragmentation or even closure of the national or sector markets.

In certain cases, where Member States have introduced detailed rules for the award of service concessions, such legislation is often accompanied and completed by abundant national jurisprudence (France, Portugal, Spain).

In other cases, very broad and general national rules impose minimum obligations, on the contracting authorities, which have large margins for the selection of tendering procedures and award.

Finally, in some Member States there are no legal provisions at all for the award of service concessions; consequently, contracting authorities have absolute freedom to decide on the tender procedure to be used, with the only obligation to respect the Treaty principles.

Publication Requirements for service concessions:

The legislation in some Member States requires the publication of a notice prior to a tender procedure. In France, Portugal and Spain, such notices are published in the National Official Journal, in the Czech Republic and in Finland the publication takes place on central web platform, in Hungary and Slovak Republic it is done in the Public Procurement Bulletin, and in Greece in newspapers.

However, in Germany, UK, Netherlands and Belgium, the publication of a notice is not mandatory and, in the absence of a centralised publication media, it is generally very difficult to find opportunities about the procurement of service concessions.

3.3. National Procurement Administration – Institutions and System

Procurement administration is a multi-layer process in the EU comprising the EU authorities, national and regional governments, administrative bodies who may issue guidance and oversee procurement in different sectors or geographical areas, and a large number (over 260 000) public purchasers.

3.3.1. National Structures for the definition of procurement policy and guidance, oversight of procurement

Most of the Member States have set up a National Central Procurement Body which oversees the public procurement on the national territory. The national legal basis for these bodies, the hierarchical lines of subordination and the functions that such bodies are empowered with vary considerable across Member States.

The main functions related to public procurement as identified by a recent study[245] are related to drafting legislation (both implementing the relevant EU Directives and for areas outside the scope of the EU legislation), monitoring and control, international relations, guidance and support and publication and information. These functions may overlap, given the specificity of each Member State.

In some Member States (e.g.: Czech Republic, Denmark, Hungary, Romania, and Slovak Republic), the same bodies are competent for below EU threshold procurement and /or other procurement not covered by the EU legislations.

- *Drafting legislation:* Legislative and policy functions are held by the central procurement body. This is the case in Bulgaria, Latvia, Poland, Romania, the Slovak Republic, and the United Kingdom. The drafting of primary legislation and sometimes also secondary legislation is at times organised independently within the government structure (the Ministry of Finance, Ministry of Economy or Ministry of Justice). In Estonia and Hungary the function of drafting policies and legislation is clearly separated from the main central procurement bodies.

- *Monitoring and control functions:* The areas of monitoring and control of public procurement in Member States are regulated by national law and by obligations under the EU Directives. With a few exceptions, Member States have organised these functions within the main central public procurement body. In addition to the obligations to provide annual statistics to the European Commission and the normal duty to prepare an annual report to the government on the functioning of the national public procurement system, a number of Member States (Bulgaria, Cyprus, Estonia, France, Hungary, Latvia, Malta, Poland and Romania) operate systems of control on an *ex ante* basis in public procurement. The central public procurement body or a special designated unit may have the power to grant prior approvals to contracting entities related to certain decisions in the procurement process or to issue opinions during the process on compliance with the applicable regulatory framework.

- *International co-ordination function:* This international co-ordination function includes, for example, responsibility for the national contribution to the EU Advisory Committee for Public Contracts and its working groups dealing with public procurement and acting as national contact point for the European Commission. In most Member States this function is the responsibility of the central public procurement body or the body responsible for drafting legislation.

- *Guidance and support:* The guidance and support functions within the central public procurement structures relates to provision on a daily basis of legal as well as professional advice and support to not only to contracting authorities and entities but also to also to economic operators. The development of guidance systems and operational tools for managing all phases of the procurement process, (e.g. methodologies for preparation of tender documents; tender evaluation) is also a relevant activity. Legal advice functions are more commonly in place than typical professional support functions. The scope of this function include promoting sound procurement practice and capacity strengthening of procurement operations, i.e. training programmes, facilitation of independent teaching and research in universities, participation in national and international events, organisation of conferences, seminars and workshops, etc.

- *Publication and information functions:* Most central procurement institutions provide information on public procurement by various means, most frequently through their own websites. In terms of publication functions in Bulgaria, Estonia, Latvia, Poland and the Slovak

Republic, the respective institutions have a publication function, mainly to ensure that contracts outside the application of the EC Directives are subject to central publication services. In Hungary and the Slovak Republic, for example, the procurement offices also check draft notices before they are forwarded to the Official Journal of the EU. In Slovenia and the United Kingdom, the central procurement institutions have no so such function.

For further detailed information on the functions of the institutions responsible for public procurement in each Member State please refer to Table 'Implementation institutions' in Annex 6. An overview of the same is presented below.

Box: Overview of national bodies responsible for procurement policy and legislation:

In **Belgium**, the relevant body in charge of public procurement is Procurement Section of the Federal Public Service Chancellery of the Prime Minister which is in charge of preparation, coordination and monitoring of the legislation on public procurement, and, in particular with the transposition of the EU legislation.

In **Bulgaria**, the Public Procurement Agency was established in 2004 as an independent body under the Ministry of Economy, Energy and Tourism, with the purpose to assist the later in implementation of Public Procurement Law. Its main prerogatives are: drafting legislation, providing guidance, maintenance of the public procurement register, monitoring of the public procurement activities and international co-operation.

In the **Czech Republic**, the responsibilities in the field of public procurement are split between the central government (Ministry of Regional Development) and the Office for Protection of Competition. The first is charged with drafting of legislation, international relations, monitoring and control and with advisory functions, while the latter is, among other things, responsible for supervising the award of public procurement contracts.

In **Denmark** the body responsible for public procurement matters is the Competition Authority which is an Agency under the Danish Ministry of Economic and Business Affairs. When compared to the majority of Member States, this organism has essentially the function of providing guidance on public procurement issues and also of dealing with complaints before a contract is awarded.

In **Germany** at the federal level, the primary policy making body is the Federal Ministry of Economics and Technology (BMWi), which drafts legislation and provides guidance and information related to public procurement procedures.

In **Estonia**, the Ministry of Finance is the responsible institution for the public procurement policy. It is charged with drafting of legislation, international relations, publication and information, etc.

In **Ireland** the National Public Procurement Policy Unit is responsible for public procurement policy, regulation and general guidance. The recently established National Procurement Service within the Office of Public Works is responsible for co-ordinating the national strategy for procurement and also manages the national procurement website.

In **Greece** there is no over-arching public procurement body, but the creation of such organism is envisaged for the end of 2011, following the commitments of the Greek authorities contained in the

Memorandum of Understanding agreed with the European Commission. Currently the policy making and rule making competences with respect to public procurement are shared between the Ministry of Economy, Competitiveness and Shipping (supplies), the Ministry of Finance (services) and the Ministry of Infrastructures, Transport and Networks (works).

In **Spain** the Ministry of Trade, Industry and Tourism is responsible for drafting legislation and for international representation, while the Directorate General of State Patrimony is responsible for monitoring and control.

In **France** – the Public Procurement sub Directorate within the Directorate for Legal Affaires within the Ministry of Economy, Finance and Industry is the body responsible for drafting legislation, international relations, monitoring and control and publication and information.

In **Italy**, the responsibility for transposing the EU law into national law is shared by the Department for the Co-ordination of EU policies subordinated to the Prime Minister's Office and the Ministry of Infrastructure. In addition, regions also have some competences in respect of transposition.

In **Cyprus**, the competent authority on Public Procurement matters is the Cypriot Public Procurement directorate within the State Treasury. The main responsibilities are drafting legislation, monitoring and control, advisory functions and international representation.

In **Latvia** the Procurement Monitoring Bureau of the Ministry of Finance plays a central role with respect to public procurement policy, as it prepares all the draft Regulations relating to public procurement matters (although final responsibility belongs to the Ministry of Finance). It also organises educational workshops to raise awareness on public procurement legislation.

The Public Procurement Office of the Government of the Republic of **Lithuania** coordinates and supervises the compliance of procurement activities with the Law on Public Procurement and the implementing legislation. The regulations themselves are drafted by the Ministry of Economy, which is also responsible for the international relations. The Public Procurement Office also administers the central public procurement portal and forwards notices of contracting authorities for publication.

In **Luxembourg**, the Department of Public Works within the Ministry of Public Works is responsible for drafting legislation, advisory functions, monitoring and publication.

In **Hungary**, the Public Procurement Council is responsible for monitoring and advisory activities, management of publications and official register and preparation of guidance documents. The drafting of legislation, coordination and supervision of the legal framework and international co-ordination is the responsibility of Ministry of National Development.

Malta has a single centralized public procurement institution –the Department of Contracts, which is a dependent and integrated part of the Ministry of Finance. It is responsible for all procurement functions apart from drafting legislation, which is a function retained within the Ministry of Finance.

In the **Netherlands**, the Department for Competition and Consumer Policy within the Ministry of Economic Affairs is responsible for drafting the relevant legislation on public procurement.

In **Austria**, the Federal Chancellery, subordinated to the Prime Minister, is responsible for drafting legislation (is the body responsible for public procurement policy making and implementation of all EU Directives into national legislation), guidance on public procurement issues, monitoring and control.

Poland has set up a central government body – the Public Procurement Office which is in charge of all public procurement related functions: drafting legislation, advisory functions, publication and information, monitoring and control international relations and training.

In **Portugal**, the responsibilities for drafting legislation and international co-ordination functions are held by the Ministry of Finance and Public Administration with the support of Ministry of Public Works, Transport and Communication and the National Agency for Public Procurement.

The body specially set up to oversee the public procurement in **Romania** is the National Authority for Regulating and Monitoring Public Procurement. The Authority is responsible for drafting legislation, advisory functions, monitoring and control, information function and international representation.

In **Slovenia** the public procurement functions (drafting legislation, advisory functions, monitoring and control and international representation) are carried out by the Ministry of Finance within its Department for Public Private Partnership and Public Procurement System. The Public Procurement Agency was planned to become operative from January 2011. The Agency is supposed to act as Central Purchasing Body for the central government, to have monitoring and guidance functions, and to be responsible for the implementation of green public procurement and e-procurement.

The **Slovak** Office for Public Procurement is an independent body charged with overall responsibility of the public procurement policy including drafting legislation, advisory functions, monitoring and control, information function, review and remedies and international representation.

In **Finland,** the competences in the field of public procurement are split among different government authorities. The Ministry of Finance has overall steering responsibility in the area of public procurement in the State government, and is responsible for setting general principles and rules, management and development of the central government procurement system. The Ministry of Employment and the Economy is responsible for drafting national legislation governing public procurement and for providing guidance.

In **Sweden,** the Competition Authority is responsible for information on and supervision of public procurement and review and remedies.

In the **United Kingdom**, the Office for Government Commerce has until recently been in charge of drafting legislation, advisory functions, monitoring and control, information function, review and remedies and international representation for England, Wales and Northern Ireland. In Scotland the same functions are carried out by the Scottish Executive. Recently, responsibility for public procurement policy and strategy has been assumed by the Efficiency and Reform Group of the UK Cabinet Office.

Guidance bodies and knowledge centres:

Support bodies have been established in some Member States to provide guidance on public procurement policies and processes. Generally this attribution is in the portfolio of activities of the National Public Procurement Body, but sometimes such function is separated and held by a dedicated organisation/body.

Box: Examples of national procurement guidance and expertise bodies:

In **Belgium**,- the Purchasing Advice and Policy Unit is part of the Federal Public Service and it provides advice to the purchasing departments of the federal authorities.

In **Germany**, the Chamber of Industry and Commerce and the Chamber of Crafts maintain consulting centres in support of public procurement activities. Furthermore, some of the states provide advice centres in procurement matters.

In **France,** there are a number of support bodies: the Advisory Commission on Public Procurement is responsible for providing the central government, the state owned public bodies and the local authorities with advice. The Supporting Mission for the achievement of Public Private Partnership, the Public Accounting General Directorate and also the Directorate of Legal Affaires also provide support in relation to public procurement contracts.

In the **Netherlands**, the advisory functions and the training functions are undertaken by PIANOo (Public Network for Professionals in Contracting and Procurement).

In **Austria**, the contracting authorities can ask for legal advice from the *Verfassungsdienst* of the *Bundeskanzleramt* (at federal level) and to the state administration (at the state and local level)

In **Portugal,** the monitoring and control and guidance function is held by the National Agency for Public Procurement, under the Ministry of Finance and Public Administration.

In **Spain**, there is one central body – the State Consultative Board of Administrative Procurement and a number of supporting bodies at regional level.

In **Finland**, the Public Procurement Advisory Unit set up by the Association of the Finnish local and Regional Authorities and the Ministry of Employment and Economy focuses on providing Contracting Authorities but also businesses with information and advice on procurement. The Strategic Group on Government Procurement under the Ministry of Finance supports and develops the strategic steering of central government procurement as well as the implementation of the state procurement strategy.

Supervision Bodies:

Some Member States have put in place structures for the supervision and or control of the public procurement system. These can be internal or external audit offices responsible for the supervision of the procurement procedures, in particular from the point of view of legality, accounting rules, economic efficiency and efficacy.

Generally, in most of the Member States (e.g.:Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Finland, France, Germany, Greece, Hungary, Ireland, Latvia, Malta, Romania, Slovenia, Spain) the Court of Auditors or the State Audit Office is empowered to control the public procurement procedures, in terms of budget, accounting, and financial operations. Sometimes this function is shared with other bodies (e.g. with the Agency for the State Financial Inspection in Bulgaria, Belgium, with the Office for Protection of Competition in the Czech Republic, France, Germany, Latvia, Malta, Romania, with the Budget Supervision Office in Slovenia).

In the new Member States the role of supervision and control on public procurement under EU rules is played by specialized bodies- Public Procurement Offices which are not independent but under the structures of the Government (e.g.: Estonia, Lithuania, Poland, Romania, Slovak Republic and Malta). In the Slovak Republic and Malta the supervision body can also impose sanctions if the EU rules are infringed, while in Latvia the Procurement Monitoring Bureau acts as first instance review body.

Article 81 of the Classic Directive and Article 72 of the Utilities Directive provide for the possibility of the Member States to appoint or establish an independent body in order to ensure implementation of such directive by effective, available and transparent mechanisms. The only Member State which has established such a specifically dedicated body is Italy. The Italian Authority for the Supervision of Public contracts is an independent and autonomous body supervising the national public procurement both at central and sub-central level.

Box: overview of national supervisory bodies

In **Belgium**, the Court of Auditors performs external audits of the budget of the Federal State, the communities and the Regions. The General Inspectorate of Finances under the Federal Public Service and the Regional and community ministries supervises contracts over certain thresholds. Moreover, the Regions supervise the local authorities and have to approve the implemented procurement procedures.

In the **Czech Republic**, the Office for the Protection of Competition is the central authority of state administration which has, inter alia, the function of supervising the award of public contracts and can also impose sanctions for non compliance.

In **Germany**, most of the Federal States have institutionalized bodies (VOB –Stellen) in charge of supervising tenders and providing support in relation to public procurement issues. There is also monitoring by the Federal Court of Auditors and the state auditing institutions.

In **Estonia,** the supervisory authority in the field of public procurement is the Public Procurement Office (PPO) which supervises the implementation of the Public Procurement Act

In **France**, the supervision of Public Procurement is carried out by a number of bodies: the Service of State Control, the General Directorate for Competition Policy, Consumer Affaires and Fraud Control, the Public Accounting General Directorate, ex-ante control of contracts by Government Representatives at local level (*préfets de region, préfets de department or sous-préfets*), State audit Control and the regional audit offices, the Courts of auditors, etc

In **Greece**, the Court of Auditors have an mandate for ex-ante control of contracts above EUR 1 million and for ex-post control of legality of all payments carried out by the contracting authorities during execution of contracts. The award decisions by local authorities are checked for legality by the Government Representative at Regional Level. Finally, in case of reported irregularities during the contract execution, the body of Inspectors of Public Works are in charge of control.

In **Spain**, the supervision and control is subject to an internal control by the General Intervention of the Public Administration –at central level , and to an external and independent control performed by the Court of Accounts(at central level but also at regional level by specific regional courts of Accounts).

In **Latvia**, there are a number of supervision bodies: the Procurement Monitoring Bureau which carries out ex-ante controls for projects under Structural Funds and acts also as first instance review body. The Corruption Prevention and Combating Bureau, the State Audit Office and the Administrative Court share the responsibility for the supervision of public procurement.

In **Austria**, the Court of Auditors is responsible for the supervision of public procurement activities on federal, state and municipal level. The *Renchnungshof* is a body responsible for control of conduct of public procurement procedures at federal, state and municipal level.

In **Poland**, along with the Public Procurement Office, the supervision function is carried out by the Supreme Chamber of Control. The Supreme Chamber of Control is an independent body which is the country's supreme supervisory body, empowered to exercise wide-ranging control of the revenue and expenditure of the state and all institutions and corporations that make use of public funds. It is entitled to audit all state institutions, government and local government administrative units, together with those corporate bodies and non-governmental organisations which perform public contracts or receive government grants and guarantees.

In **Portugal**, the Tribunal of Public Accounts supervises the activities of all contracting authorities as well as the control of public expenditure.

In **Romania**, the Court of Accounts holds the function of control and external public audit. The Audit Authority which is an operationally independent body, is in charge of the management and implementation of EU funds.

The **Slovenian** Court of Audit is the highest body for supervising state accounts and public spending.

In the **Slovak Republic**, besides the Office for Public Procurement which controls the compliance with the Public Procurement act, the Supreme Control Office, and the Ministry of Finance can also control the public procurement procedures.

In **Sweden**, the Competition Authority is responsible for providing guidance on public procurement issues and also for the supervision of the public procurement processes. It is also entitled to impose fines for non-compliance with the public procurement rules.

3.3.2. High level break-down of contracting authorities by category (national/federal, regional/local)

A recent study[246] conducted by SIGMA grouped 23 Member States into three categories according to how their central public procurement structures are organised:

- Member States with a centralised procurement structure are characterised by a high concentration of procurement functions allocated to a few centrally placed institutions (normally one or two institutions);
- Member States with a semi-centralised procurement structure are characterised by a mixed concentration of procurement functions allocated to a limited range of institutions placed at various levels within the public administration (normally three or four institutions);
- Member States with a decentralised procurement structure are characterised by a dispersed concentration of procurement functions allocated to several institutions placed at various levels within the public administration, and often including private and public companies (usually more than five institutions involved).

Most Member States, including those with a largely decentralised structure, have organised their core procurement functions (mainly policy and legislative functions, but also international co-ordination and monitoring) within their central public procurement structures. The majority has a structure where a few institutions responsible for the main procurement functions.

Based on the classification model used, the majority of Member States studied have, within their government administration, centrally placed institutions in charge of most or many of the procurement functions outlined above. As a result these institutions have a dominant position within the procurement structure.

Table 7. Features of the Public Procurement Structures in Summary

Centralized	**Semi-centralised**	**Decentralized**
BG,CY, CZ, EE, HU, LV, LT, MT, PL, RO, SK	AT, FR, DE, IE, IT, LU, SL, SV, SE, UK	FI, PT

Source: Sigma Paper no 40.

3.3.3. National legal and administrative arrangements for review and remedies

The review and remedies framework is meant to provide aggrieved bidders with rapid and effective means of redress.

Member States set out their review and remedies system on the basis of the specific requirements of EU Public Procurement Directives, the general provisions of the Treaty on the Functioning of the European Union (TFEU) and the relevant jurisprudence of the Court of Justice of the European Union.

The jurisprudence of the Court of Justice is of utmost importance since it establishes the authentic and binding interpretation of the EU public procurement directives. The Court generally follows its previous rulings, and makes reference to those rulings in their future proceedings.

The relevant EU Public Procurement Remedies Directives are the following:

- 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[247];

- 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[248]

- 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[249].

Certain features are in general common to all national review procedures:

- *the prescription*: under the national review and remedies system, there is normally a period of legal prescription;

- *the outcome of the process*: under the review and remedies system at national level, a claimant can seek and obtain, (in case of a favourable ruling of the competent court) the setting aside of any individual public procurement decision including the award decision, interim measures, the annulment of an awarded contract, damages and, in the Utilities sector, periodic penalty payments ;

- *the legal standing of claimants*: under the review and remedies system in most Member States, in order to be able to submit a complaint, the complainant has to demonstrate that he has or would have had an interest in obtaining a contract and has been, or risk being harmed by the alleged infringement; and

- *costs – fees and deposits*: in most Member States the review and remedies implies costs and sometimes deposits.

Thus, the remedies system under EU public procurement law is decentralised and Member States are responsible for ensuring that rapid and effective means of redress, as set out in the Remedies Directive, are available at national level.

Furthermore, anybody may submit a complaint to the European Commission, which, acting in its role as "guardian of the Treaty", can then decide in a discretionary manner whether or not to launch

infringement procedures against the Member State concerned under Article 258 TFEU. Such a procedure does not aim to protect individual rights (of e.g. tenderers concerned), but to correct infringements of EU law. Thus, Commission-led infringements differ in aim and scope from national review mechanisms.

The associated procedure is designed accordingly and a complaint can be submitted free of charge by anybody (e.g. NGOs, private citizens), not just by those persons who are entitled to launch national review procedures (i.e. persons having or having had an interest in obtaining a contract). However, the Commission decides if, with regard to the general Community interest, it is appropriate to launch proceedings or not[250]. Accordingly, the complainant is in no way party to the infringement procedure, which takes place between the Commission and the Member State. There is no prescription period for the Commission to launch an infringement procedure, but the action will not be admissible before the Court if, at the time of the expiry of the Reasoned Opinion, the contract is already completely performed and has thus ceased to produce legal effects. In case the Court finds that the Member State has failed to respect its obligations under EU law, the latter would need to take all appropriate measures to comply with the judgment, which however would as such have no direct consequence for the complainant.

Legal framework (scope of the review and remedies system):

The legal framework relates first to the scope of the review and remedies and second to the procedural law for review, namely who may bring proceedings, within which time limits, at what cost, how can experts be involved, whether confidentiality can be taken into account, and how applicants learn about the outcome of proceedings, publication of the judgements, appeals.

Scope of the review and remedies system:

In the Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Hungary, Italy, Lithuania, Portugal, Poland, Romania Slovak Republic, and Sweden the system applies equally to contracts above and below the EU thresholds. In Germany, Ireland and United Kingdom the review and remedies system applies only to contracts above the EU thresholds. In the others there are different remedies, review bodies and procedural requirements for contracts below these thresholds.

Similarly, in some Member States (e.g. Bulgaria, Estonia, Lithuania and Netherlands), the review and remedies system applies equally to all contracting authorities and entities, while in some other Member Stated there are different legal bases and different review bodies depending on whether the contract was awarded by a public entity or a utility, or on whether the contracting entity is public or private.

Admissibility requirements:

Directive 2007/66/EC sets out that review procedures should be made available by the Member States at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement. Before seeking review before the courts, Member States may require that the Contracting Authority concerned is notified by the claimant, or even that the claimant seeks review first with the Contracting Authority.

Time limits for applying for review:

As a general rule, Directive 2007/66/EC sets out a minimum of 10 calendar days which shall be allowed for the submission of an application for review in the context of, or in relation to, a contract award procedure falling within the scope of the EU public procurement Directives. This period shall be counted from the day following the date on which the contracting authority informed the tenderers of its decision, in case this communication is made by fax or electronic means. Where other means being used the period shall be at least 15 calendar days with effect from the day following the date on which the decision is sent by the contracting authority to the tenderers, or at least 10 days counted form the day following the date of receipt of the contracting authorities decision by the tenderer.

In respect of applications to establish the ineffectiveness of contracts, Directive 2007/66/EC provides that Member States may require that the application for review must be made before the expiry of at least 30 days from the date on which the contracting authority published the contract award notice (in case of contracts award without publication of a notice) or from the date the contracting authority informed the tenderers of the conclusion of a contract. Member States may also provide that, in any case, the submission of an application for ineffectiveness must be done before the expiry of at least 6 months counted from the following day of the conclusion of the contract. The fixed deadlines for appeal set by Directive 2007/66/EC are a novelty compared to the previous directives which did not specify time-limits.

With regards to remedies, other than compensation for damages, the time limits serve to achieve a balance between the private interest of tenderers on the one hand and the public interest in legal certainty needed to commence the execution of the contract on the other.

The time associated with the review and remedies procedures varies across Member States. Generally, the first instance review bodies deliver their rulings much quicker than the second and last instance review bodies. The first instance review body can take form 10 days (for a contracting authority in the Czech Republic and in Poland) up to 18 months (in Italy before the Regional Administrative courts). Second and/or last instance review bodies can take from two to three months (Supreme Court of Cyprus, Lithuania, Poland), up to several years to deliver a ruling (Belgium, Greece, Portugal). In some Member States there is no time limit for the proceedings before the courts (Hungary, Luxembourg, United Kingdom), and generally it is to be noted that even where such time limits exist, they are not necessarily complied with.

Deposits, Fees associated to the review procedure:

The costs associated with the review and remedies procedures are sometimes quite significant and may constitute a disincentive for tenderers to submit complaints.

Apart from the representation fees in most of the Member States,[251] tenderers have to pay deposits when submitting a file to the review and remedies bodies. In other Member States the complainant only pays court fees. With the exception of Cyprus, such deposits are refunded to the winning party. The deposits can be calculated as a percentage of the value of the contract which is the subject of the complaint as in Bulgaria, Czech Republic and Malta, or are fixed and differentiated by type of contract (works, services, supplies), as in the case of Austria, and Slovenia, or by value of the contract (Cyprus). The value of the deposits can vary from very small/symbolic to very large sums (e.g. the Czech Republic, Germany).

Generally, submission for review by the contracting authorities are free of charge and the deposits paid to the first instance review bodies are sometimes non existent or in any case less costly than those paid to the appeal or the last instance bodies (e.g. Germany, Hungary, Latvia).

Public Procurement review bodies:

Member States use ordinary courts, administrative courts and specialized public procurement bodies as review institutions. Directive 2007/66/EC stipulates that first instance review procedures can be conducted by bodies which are not judicial in character. Generally, the first instance review through a specialised review body can be appealed in an ordinary or administrative court. In some Member States the second instance is the last instance, but there is a group of Member States which have third instances of judicial review. Many Member States have set up alternative dispute settlement bodies, such as arbitration panels, or even the Ombudsman. Some Member States have non-judicial advisory bodies composed of representatives of both parties, but the decisions of such bodies are normally not legally binding.

Complaints to Contracting Authorities:

In most of the Member States the review and remedies system provides the possibility to complain directly to the respective contracting authority or entity awarding the contract or to their superior institutions about the alleged violation of public procurement law.

A prior complaint to the contracting entity itself is sometimes a precondition for judicial review and it is therefore an obligatory first stage of review in some countries, such as Cyprus, Czech Republic, Germany, Greece, Lithuania, Malta, Poland, Slovak Republic, and Slovenia. In Portugal and Ireland such stage is not a prerequisite, but is nevertheless frequently used. In Finland and Hungary those seeking judicial review are required to submit a copy of their complaint to the relevant contracting authority. The advantages offered by complaining first to the contracting authority are generally the low costs involved, and the time limits for review which are normally shorter. On the other hand the submission of the complaint to the contracting authority may be seen as a prolongation of the overall review procedure. Also, the contracting authority, being the one taking the decision in the first place, might not always be able to take a completely impartial view on the issues.

Specialized Review Bodies, appeals and last instance review bodies:[252]

Most of the Member States have a specialised public procurement review body in charge of the review procedures. These bodies are of non-judicial or of quasi-judicial nature and have the function of first instance review: Austria (Federal Award Control Office - at federal level), Bulgaria (Commission on the Protection of Competition), Cyprus (Office for the Protection of Competition), Czech Republic (Office for the Protection of Competition), Denmark (Complaints Board for Public Procurement), Estonia (Public Procurement Commission), Germany (17 Public Procurement Chambers), Hungary (Public Procurement Council - Arbitration Committee), Latvia (Procurement Monitoring Bureau), Malta (Appeals Board of the Department of Contracts), Poland (Public Procurement Office), Romania (National Council for Solving Legal Disputes), Slovak Republic (Office of Public Procurement), Slovenia (National Review Commission for the Review of Public Procurement Award Procedures).

With some exceptions, the decisions of the specialized review body are binding, subject to appeal in ordinary or administrative courts that may annul or change the decision.

A number of Member States have no specialised public procurement review body at all, but rely on administrative or civil courts. In Belgium, France, Ireland, Lithuania, the Netherlands, Portugal, Sweden and the United Kingdom, the review of public procurement decisions is exclusively handled by regular courts. In Portugal and Italy, the administrative courts deal with public procurement disputes; in Ireland, Lithuania, the Netherlands, Sweden and the United Kingdom it is the civil courts; and in France and Luxembourg it can be both the administrative and civil courts. The Market Court in Finland is specialised in public procurement but deals with other areas of economic law as well.

In most Member States with specialised public procurement review mechanisms, administrative and civil courts still have an important role to play, since decisions of these specialised public procurement review bodies are subject to an appeal to the Supreme Administrative Court or even to the Supreme Court. In Slovakia, appeals are made to two instances of ordinary courts, in Germany and Denmark to the State High Courts, and in Hungary and Poland to lower-instance ordinary courts. In many Member States compensation for damages is excluded from the jurisdiction of the specialised public procurement review bodies and is subject to consideration by the civil or ordinary courts.

The last instance of public procurement review, both before and after the conclusion of the contract, is an administrative or ordinary court of law. With some exceptions, such as in Malta and Slovenia, specialised review boards are the last instance for disputes prior to the conclusion of the contract, whereas disputes after the conclusion of the contract are heard by ordinary courts. All of these courts have been established on the basis of the respective Constitutions and Acts of Parliament, and they fulfil the requirement for a court of law set in the *Dorsch* and *Salzmann* judgements of the European Court of Justice. All courts are independent from the executive, administration, or any other part of government, and their decisions are of a jurisdictional nature.

Data on review and remedies:

The table below gathers the available data on the numbers of review and remedies in 22 Member States. The numbers are not necessarily directly comparable as they generally refer to different years, or represent aggregated numbers - referring to the cumulated number of procedures above and bellow EU threshold (Sweden) or to all cases submitted to the administrative courts (Luxembourg). Nevertheless, this first attempt to estimate the number of review and remedies procedures it is a starting point for explaining the causality between he number of review and remedies, the legislation in force, the litigation culture and other factors such as cost of litigation, or the time taken for review and remedies proceedings.

For instance it can be observed that the introduction of deposits for submitting a claim is associated with a reduction of the number of claims introduced, or that in small countries the reputational risk is a disincentive to submit complaints. Moreover, it has been observed that the possible long time taken for proceedings, together with high costs (deposits, administrative fees and/or legal representation fees) can discourage complainants (e.g.: Portugal, Slovak Republic, United Kingdom), while, on the other hand, short proceedings associated with relatively low costs may lead to increased use of the review procedure by the aggrieved bidders (e.g.: Poland, Romania)

Table 8. Review and remedies in figures

Member State	No. of complaints	Comments
Bulgaria	1 103 complaints before the Commission for Protection of Competition (court of first instance) 799 rulings (2009 data)	Total number of public procurement contracts in the same year was of 1 6071, therefore the appeals represents only 6.86% of these contracts;
Czech Republic	459 complaints 391 (first instance rulings) and 89 preliminary rulings (2009 data)	The tenderers generally file complaints to the contracting authority, but they are reluctant to file complaints to the Office for Protection of Competition, due to high deposits (which are not refundable in case of negative decision) Another drawback for submitting complaints is the reputational risk.
Denmark	75 cases in 2009 181 cases in 2010 12% of the cases were not admissible from procedural point of view About one third of the complaints are upheld by the courts	Major drawback for submitting complaints is the reputational risk
Germany	1 158 cases before the procurement review chambers (first instance), and 227 cases before the courts of appeal (second instance) (2008 data)	
Ireland	No numbers available	Claims before the courts are used as a last resort due to a very expensive litigation system. Aggrieved bidders are more prone to exhaust dialogue with the contracting authority and/or to address the Commission concerning potential violations of the procurement rules.
Greece	No numbers available	It is quite common for the interested parties to challenge the award decisions.
France	5000 cases before Administrative Tribunals (2004 data)	
Italy		Around 40% of the cases in the administrative courts are public procurement cases
Cyprus	No numbers available	It is quite common for the interested parties to challenge the award decisions before the Tenders Review Authority and before the Supreme Court
Latvia	200 cases per year before the Procurement Monitoring Bureau	The number of applications for review decreased in the last year due to to high deposits (which re not refundable in case

Member State	No. of complaints	Comments
	10-20 decisions are appealed	of negative decision on the case)
Luxembourg	53 cases in the Administrative courts, corresponding to right of establishment, public procurement and environment.(2009 data)	
Hungary	636 procedures launched in 2008; 20%of the decisions of the first instance review body are challenged	The number of procedure has been decreasing steadily since 2005, but still remains high.
Malta	No numbers available	The aggrieved tenderers are reluctant to file complaints due to high cost associated (administrative fees plus the cost of legal representation)
Austria	106 review applications(before conclusion of contract 84 above and 22 below thresholds), 90 petitions for interim measures (75 above and 15 below thresholds) and 8 applications for declaratory procedures (2010 data)	High fees for filing applications were introduced in 2002 and thereafter the number of applications submitted decreased.
Poland	1 537 cases before the National Board of Appeals (first instance review body) and 277 cases before the courts (second instance review body) (2008 data)	The number of complaints is high due to low fees and relatively short time of the review procedure.
Portugal	No numbers available	The aggrieved tenderers are reluctant to file complaints due to high cost associated (administrative fees plus the cost of legal representation) and to the long duration of the proceedings.
Romania	6 607 in 2008 and 2009 together	Only one third of the complaints are being admissible.
Slovenia	No numbers available	The number of applications for review decreased due to high deposits.
Slovak Republic	1 089 cases in 2005 , 18 cases were appealed	The aggrieved tenderers are reluctant to file complaints due to high cost associated (administrative fees plus the cost of legal representation), to the long duration of the proceedings and the reputational risk.
Finland	600 cases brought before the Market Court (first instance) (2009 data)	
Sweden	3 154 cases (2010 data) 27% of the cases were not admissible from procedural	The figures are for both above and below threshold procedures

Member State	No. of complaints	Comments
	points of view About one third of the complaints are upheld by the courts	
United Kingdom	No numbers available	The cost of legal representation and the potentially high reputational risk discourage tenderers to apply for review

Source: Commission services based on national sources.

3.4. Conclusion

This chapter has shown how Member States have interpreted and integrated the options and provisions of the Directives within their national legal and administrative systems. It has demonstrated the considerable degree of variation across Member States in how and where they implement different provisions and how they regulate procurement which is out of scope of the provisions of the Directives.

Neither the national administrative structure nor structure of the review bodies appear to have been much affected by the provisions of the Directives, although there are certain organisational trends such as central purchasing bodies which will be examined more closely in the chapter five. Comparison of the number of complaints or cases brought to court in different Member States remains difficult. While some numbers may be available they are not comparable.

It is worth recalling that the Directives did not set out to harmonise procedures, as noted in section 2.1 'Evolving objectives and expectaions of EU legislation , but to coordinate them while respecting the existing national practice of each Member State. It would appear that this minimal or subsidiary coordination approach has been widely followed. The impact of these Member State differences may contribute to the variation in outcomes examined in Chapters 6 and 7.

CHAPTER 4: THE EVOLVING POLICY ENVIRONMENT

One of the key questions for the evaluation was to examine the contribution of procurement to other policies, and in particular what environmental and social effects the directives may have had.

Public procurement is not generally considered as a policy or an end in itself, but as a means to accomplish some other policy objective or deliver some particular public service. The prime aim of procurement policy has simply been to ensure that when the public sector purchases goods, services or works in the market place, it does so in a transparent manner, treating all potential suppliers or service providers equally and seeking the offer that provides the best, or most appropriate, quality at the best price. Contracting authorities must, of course, also respect other applicable EU legislation: for example, they must design award criteria, which comply with EU State aid rules.

However, if public authorities purchase goods, works and services that respect other policy goals, they can make an important contribution to reaching targets in other policy areas.

This chapter will look at how, and to what extent, other policy goals have been integrated into procurement policy by Member States over the past few years and try to assess how far contracting authorities have successfully used their procurement policies to support other policies, in practice. It will deal first with the environmental considerations then with social aspects and finally with other policy objectives, in particular, innovation. It will try to evaluate to what extent support for other policies has been implemented and what impacts this may have had on simplification, costs and efficiency for procurers and suppliers.

4.1. Environmental policy considerations

In some sectors, public purchasers command a large share of the market (i.e. energy efficient computers, sustainable buildings, green public transport and sustainable timber) and so their decisions have considerable impact also in influencing the market by providing the industry with real incentives for developing environmental technologies and products and for innovation.

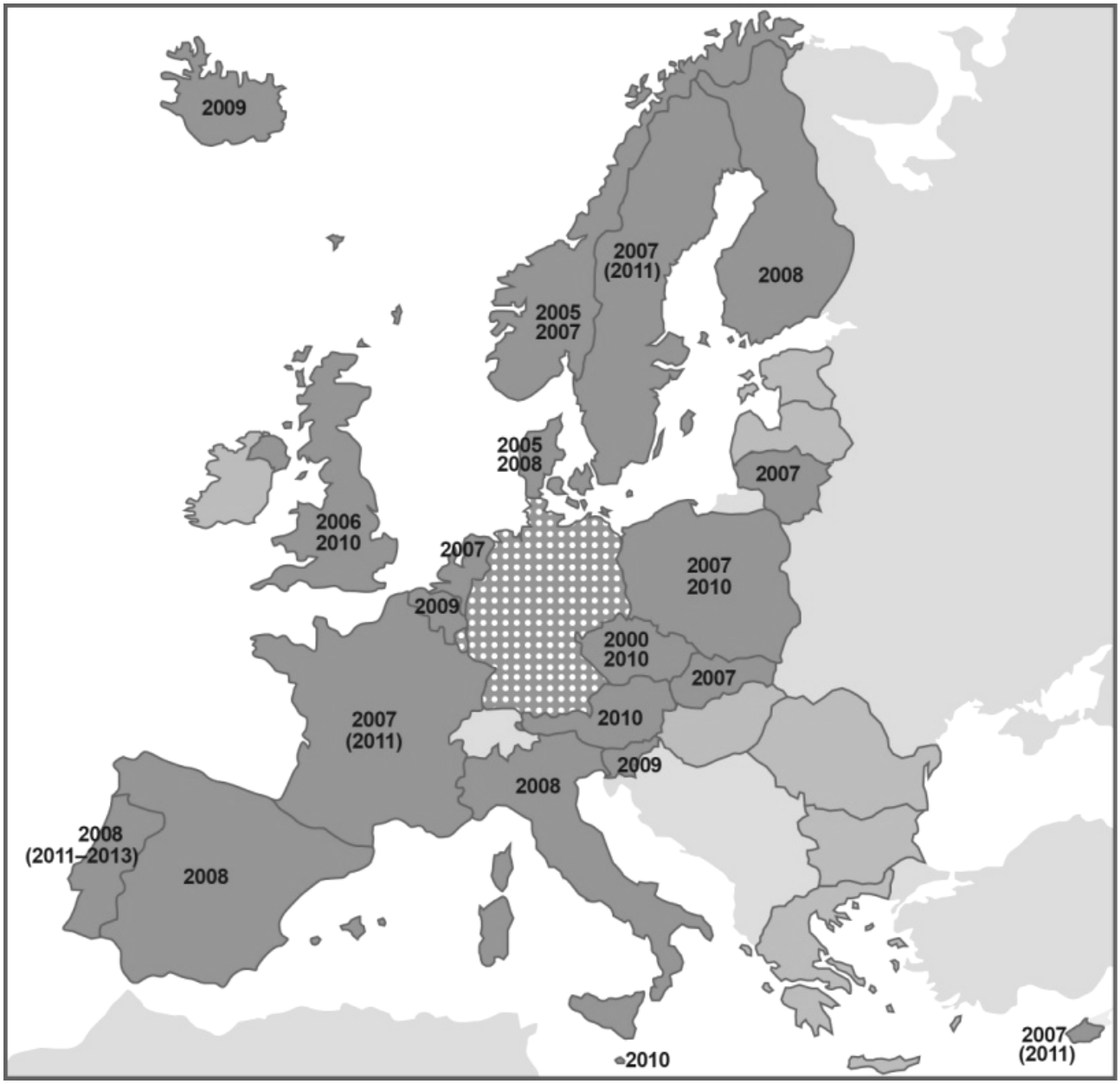
The Commission published an interpretative communication explaining how environmental considerations could be integrated within procurement practice in 2001.[253] The potential of Green Public Procurement was highlighted in the 2003 Commission Communication on Integrated Product Policy.[254] Member States were recommended to adopt national action plans for GPP by the end of 2006. The suggestion that procurement should meet any other policy objectives was included among the recitals to the 2004 directives, which evoked the aims of "sustainable and non-inflationary growth respecting the environment" as well as "a high level of employment and of

social protection". Environmental considerations were taken up more rapidly and comprehensively, at that time, than social considerations. A handbook on environmental public procurement was published in 2004.[255] More detailed recommendations were put forward in the Commission Communication "Public Procurement for a better environment" which was part of the Sustainable Consumption and Production and Sustainable Industrial Policy Action Plan.[256] In this Communications, the European commission set an indicative target that, by 2010, 50% of all public tendering procedures should be green, where 'green' means compliant with endorsed common core EU GPP criteria. Furthermore the Commission undertook to provide further guidance and tools for public authorities to "green" their procurement practices on a voluntary basis. Working together with Member States and other stakeholders the Commission have developed common criteria for an initial set of 10 product and service groups which aim to cover those products which had the greatest environmental impact over their whole life-cycle. A further eight product groups were agreed by the middle of 2010.

In 2009 a study was undertaken for the Commission to identify how to measure the environmental impact, in terms of reduction in CO_2 emissions, and the financial impact of the progress made by Member States in implementing their national action plans and in actually procuring goods and services according to the criteria established for the identified product and service groups.[257] This study found that, in 2006/7 for seven Member States (Austria, Denmark, Finland, Germany, the Netherlands, Sweden and the United Kingdom), on average 55% of contracts in the ten product groups identified were "green" and 45% of the total contract value. The study further concluded that, in respect of the products and services concerned, buying green led to an average 25% reduction in CO_2 emissions and to slightly lower costs overall when calculated according to a life cycle costing approach. On this calculation green procurement of construction, transport and cleaning services resulted in lower costs while green procurement of textiles, paper and electricity resulted in increased costs. These calculations however did not include the wider societal benefits linked with the purchase of greener products and services such as a decrease in health spending through pollution reduction; combating climate change; conservation of natural resources; improvements of air, soil and water quality; reduction of waste.

An assessment and comparison of national green and sustainable public procurement criteria and underlying schemes was subsequently undertaken for the Commission by AEA technology in ten EEA Member States (nine Member States and Norway).[258] This review found that generally all the national schemes were very similar with most focussing on the environmental rather than the social impact although some schemes had introduced, or were moving towards including, measures to mitigate the social impact of their procurement. This report made a series of recommendations: that a harmonised European Union green public procurement scheme should set out clear aims, be directly linked to EU policy and be led by an advisory group comprising services of the Commission, Member States, non-governmental organisations, trade associations and representative procurers; that the scheme should select and prioritise product groups based on scientific evidence in a transparent public process, ensure early involvement of stakeholders, continuing training and support; that the criteria, which the scheme would develop, should be based on life cycle cost and cost benefit analysis, containing relevant environmental and, where appropriate, social criteria which were easy to use by both contracting authorities/entities and suppliers.

Figure 4. Dates of adoption of National Action plans (and revisions)



Source: Adelphi, Strategic use of public procurement in Europe

By the end of 2010 most Member States had implemented some national policy framework for incorporating respect for environmental factors within public procurement practice.[259] The first such national plan was in the Czech Republic in 2005, followed by Denmark and Norway in 2005, the United Kingdom in 2006, Cyprus, France, Lithuania, the Netherlands, Poland, Sweden, Slovakia in 2007, Austria, Spain, Finland, Italy, Portugal in 2008, Belgium, Iceland, Slovenia in 2009 and Malta in 2010. Many of the earlier plans have since been updated. Germany and Luxemburg, like Liechtenstein, had no specific national plan, although Luxemburg incorporates environmental aspect within its sustainable development policy and Germany integrates procurement within broader sustainable policies as key elements of an integrated energy and climate program. In late 2010 Bulgaria, Greece, Ireland and Hungary were still developing and Estonia, Latvia and Romania were still adopting, their respective action plans.

As various studies have noted, the scope and ambition of the targets set by different Member States can vary. Most often they are below 50%, although in Finland and the Netherlands they have been set to increase progressively over time to a 100% target for central government. They may apply only to central government or to all public bodies and can be set either as a general target or for specific product groups or in terms of a target reduction in emissions or waste.

26 of the 30 EEA Member States have identified specific product groups in their action plans or other targeted measures and have adopted, in general, the product groups for which the Commission had established criteria. Hungary and Ireland are in the process of developing and adopting their product group criteria. However, in practice, the understanding of what defines a particular product group may differ significantly among the Member States. Some groups are defined much more broadly in some Member States than in others. The use of different definitions makes direct comparison rather difficult. There is a lack of common terminology when addressing particular product groups. Overall there are considerable similarities between the product groups developed.

The 18 GPP product and service groups defined by the Commission serve as a tool for a harmonized approach. Many Member States use them, in some cases slightly modified and sometimes additional groups are defined and included (such as hotel and restaurant services, medical equipment; telecommunications, civil engineering, infrastructure works; postal services, health and hygiene materials). Belgium; Denmark; the Netherlands, Sweden and the UK have prioritized more than or close to 50 products used for GPP.Construction and transport are among the most common product groups. These, together with Office IT equipment, make up a considerable proportion of the total value of contracts awarded above the thresholds amounting to more than EUR 100 billion. Construction and transport have also been identified in the 2011 European Energy Efficiency Plan as having the greatest energy saving potentials.[260]

Table 9. Number of priority product groups and type of criteria per country

Country	No.	Type of Criteria (mandatory and voluntary)
Austria	19	Core and advanced level criteria, based on EC GPP criteria and pilot phase experiences: life cycle costing, least possible environmental impact, eco-labels, supplier certification (e.g. EMS), EU energy efficiency benchmarks and guidance criteria
Belgium	18	Three levels of criteria for 18 product groups (90 products), based on EC GPP criteria, certificates, eco-labels and other standards, energy efficiency
Bulgaria	10	Energy efficiency criteria
Cyprus	12	Minimum based on EC GPP core criteria, additional criteria set by national experts
Czech Republic	23	Based on EC GPP criteria, eco-label products, and products made from recycled materials, EMS (EMAS, ISO 14001), eco-efficiency throughout the life cycle, energy performance certificates, labels guaranteeing a renewable source of energy
Denmark	12	Environmental guidelines formulated for 47 goods and services, eco-label criteria (Nordic Swan and EU Flower, Energy Star and others), life cycle costing, organic food label, 18 guidelines for electricity using products
Estonia	10	Based on EC GPP criteria Set 1, energy efficiency
Finland	20	Core and comprehensive criteria sets, partly EC GPP criteria, energy-efficiency standards, eco-labels, life cycle costing
France	30	More than 50 sustainability criteria documents and guides, partly EC GPP criteria, energy labels and energy standards, energy efficiency, thermal regulation, European and international eco-labels, EMS, GEM Guides and Etat Exemplaire
Germany	13	Guidance and basic award criteria, criteria for wood and energy efficiency, eco-labels (Blauer Engel – resource efficiency), life cycle costing, EMAS, ISO 14001
Greece	-	Several good practices
Hungary	6	Eco-labels, life-cycle costing
Iceland	3	Eco-labels, life-cycle costing
Ireland	12	Energy efficiency, local food production and seasonal menu
Italy	19	Eco-labels, self-declarations, product declarations, EMS certification, life-cycle cost evaluations and cost-benefit analysis, reduced electricity consumption
Latvia	8	Based on EC GPP criteria
Liechtenstein	-	
Lithuania	15	Eco-labels, ISO, EMAS, life-cycle costing
Luxembourg	4	Certification schemes (e.g. FSC), energy efficiency, "SuperDrecksKëscht" label for waste prevention and handling

Country	No.	Type of Criteria (mandatory and voluntary)
Malta	16	Based on EC GPP criteria
Netherlands	52	More than 50 sustainability criteria documents, based on EC GPP criteria, life-cycle assessment, eco-labels
Norway	16	Basic, comprehensive and innovative criteria, eco-labels, life-cycle costing, quality and environmental properties, energy efficiency, low content of hazardous chemicals, low pollutant emissions and low resource consumption, ISO 14001, national Eco-Lighthouse Scheme, GRIP criteria[261]
Poland	25	Based on EC GPP criteria Sets 1 and 2, certificates, technical specifications
Portugal	10	Life-cycle costing, eco-labels, energy efficiency
Romania	8	Based on EC GPP criteria, eco-efficiency standards, best available technologies (BAT), environmental protection standards
Slovakia	6	Based on EC GPP criteria, life-cycle assessment, energy efficiency, eco-innovation
Slovenia	10	Based on EC GPP criteria, life-cycle costing, energy efficiency, reduced quantity, recycling agreements with suppliers, energy recovery and eco-innovations
Spain	8	Based on EC GPP criteria, guidelines on cleaning products and services, maintenance and minor works on buildings, IT equipment, paper and publications
Sweden	10	Criteria on three ambition and stringency levels, around 60 criteria documents exist, EMS, life-cycle costing, environmental performance criteria, eco-labels, best available technologies (BAT)
United Kingdom	16	Criteria developed for around 60 products, based on EC GPP criteria, minimum technical specifications for low emission technologies

Source: Adelphi

Although in general national action plans make no specific reference to different levels of government or particular parts of the public sector, many Member States place particular emphasis on the need for joint procedures and other centralising measures in their approaches to green public procurement.[262] This suggests that many Member States either recognise that the inclusion of additional requirements and criteria may make procurement a more demanding discipline or raise costs which they try to address via economies of scale but in this way they can achieve savings through bulk buying, reduced administrative costs and pooling environmental; technical and market knowledge.

Contracting authorities and entities subject to the EU public procurement Directives are already required to take into account energy efficiency criteria in their procurement of vehicles[263] or office equipment.[264] From 2019 onwards, this will also be the case for new buildings, which will have to reach a "nearly zero-energy" performance level.[265]

As an alternative, or in addition, to the product group approach many countries also have broader sustainable development policies which, as in Germany, impose some environmental as well as social or innovation considerations on procurement at one or more level of public administration, as illustrated in the table below.

Table 10. Topics included in broader policies integrating other policy objectives with procurement

Specific topics	**Environment**	**Social**	Innovation
Anti-social dumping		x	
Biodiversity	x		
Chemical treatment	x		
Climate change, reduction of CO^2 emissions	x		
CSR (including human rights and ILO Core Labour Standards)	x	x	x
Energy efficiency and management, use of renewable energy	x		
Environmental technology	x		x
Green IT	x		x
High-tech, research and technology			x
Integration of people with disabilities		x	
Promotion of SMEs		x	x
Sustainable development	x	x	x
Sustainable economic growth and employment	x	x	x
Sustainable farming and food	x	x	
Sustainable production and consumption	x	x	x
Sustainable timber	x	x	
Sustainable transport	x		
Waste management	x		

Source: Adelphi

Monitoring is generally recognised to be an important part of any sustainable procurement policy. However in most cases it is still too early to see what the results have been. Although there are numerous studies and sources of information on the extent to which contracting authorities are integrating environmental requirements into their specifications or using green criteria there is, as yet, no common or standard method for measuring the environmental impact of the measures taken. While some Member States monitor the progress against the targets they have set for proportions of particular product groups that meet specific criteria, others measure the percentage of all contracts that have included environmental criteria.

In the absence of more specific monitoring data a survey has been carried out as part of the study of Member States experience of integrating other policies.[266] This showed that most (56%) contracting authorities or entities were aware of their national action plans for green public procurement. The level of awareness in the UK, Norway and the Netherlands is above 80%. In Sweden, Slovenia, Denmark, Cyprus, France, Belgium and Lithuania awareness ranges from 72% to 60%.

The percentages of contracting authorities or entities which had implemented environmental policy objectives in their individual procurement strategy, procedures or purchase conditions were very similar. The percentage of those who included environmental requirements in their tenders was even higher: 24% of the contracting authorities or entities surveyed indicate that they sometimes included such requirements in their tender documents; 21% did so regularly and 19% did so as often as possible.

It would seem therefore, from these figures, that a majority of contracting authorities and entities can and do include green requirements in their tender documents. One fifth of the contracting authorities indicated that over 50% of their contracts included GPP requirements. On the country level the differences between the Member States were considerable. In Norway, Sweden and the Netherlands over 40% of contracting authorities include GPP requirements in over 50% of contracts. The result for many other Member States was, by comparison, below 20%.

Another question concerned the level of competition when environmental requirements were stipulated. The responses show that in many cases contracting authorities received a limited number of offers, with local and regional government experiencing more difficulties than central government.

Table 11. Survey responses

Question: Do you receive a sufficient amount of offers when you want to purchase products or services? - using environmental requirements				
N = 1548	Level of government			
% of all respondents	Central	Regional	Local	Other
Plenty of offers	33.7	25.2	27.6	25.1
Limited offers	32.6	40.2	42.4	43.1
Difficult to receive offers	8.4	10.3	8.9	9.1
No opinion	25.3	24.3	21.1	22.7

Source: Adelphi

A clear trend towards an increase in complexity can be detected: 54.8% of the survey respondents believe the procurement procedure becomes more complex if environmental requirements are included in calls for tenders. Those contracting authorities who were interviewed explained that complexity increases both because of the need to monitor suppliers' compliance with environmental standards and on account of the specialist expertise involved in dealing with environmental requirements.

The main problem would seem to be whether contracting authorities or entities have sufficient knowledge of what is available in the market to be able to specify their requirements so as to ensure the optimal result.

In addition it seems that many, if not most, contacting authorities do not carry out monitoring after the contract has been awarded to check if contractors actually comply with the requirements established in their specifications. Three Member States with relatively high rates of monitoring environmental performance were the UK (49.5%), Denmark (38%) and Finland (26%). In many cases contracting authorities or entities will simply not have the technical capacity to carry out such checks. Some authorities perceived this as increasing the risk of legal liability, since they were unable to verify whether tenders met their requirements.

Suppliers interviewed for the same study had noted an increase in the requirements for environmental performance criteria from the public sector. They had concerns that the requirements were changing regularly and that there was no homogeneous set of national or international standards or requirements. As a result individual contracting authorities would set their own level of requirements, making it difficult for the suppliers to meet demand with a standard product.

4.2. Social policy considerations

The Commission has recently issued guidelines on how social consideration can be taken into account in public procurement.[267] Contracting authorities or entities have been able procure things with consideration for particular socially responsible qualities, if this requirement is clearly stated in the technical specification and is not used in order to favour particular local or national producers. Social considerations such as accessibility can also be included in technical specifications and consideration of employment or labour conditions, such as compliance with the provisions of International Labour Organisation (ILO) conventions can be included in contract performance clauses if these have been stated clearly in the tender documents.

Socially responsible public procurement (SRPP): a definition from Buying Social[268]

SRPP' means procurement operations that take into account one or more of the following social considerations: employment opportunities, decent work, compliance with social and labour rights, social inclusion (including persons with disabilities), equal opportunities, accessibility design for all, taking account of sustainability criteria, including ethical trade issues and wider voluntary compliance with corporate social responsibility (CSR), while observing the principles enshrined in the Treaty for the European Union (TFEU) and the Procurement Directives. SRPP can be a powerful tool both for advancing sustainable development and for achieving the EU's (and Member States') social objectives. SRPP covers a wide spectrum of social considerations, which may be taken into account by contracting authorities at the appropriate stage of the procurement procedure. Social considerations can be combined with green considerations in an integrated approach to sustainability in public procurement.

Criteria for excluding tenders have been interpreted in a more restricted manner.[269] There has been general agreement on the need to exclude contractors convicted of participation in organised crime and the need for contractors to pay their taxes and social security contributions. Child labour and fair trade conditions are also considered as high profile issues in many Member States.

There are no national action plans for socially responsible public procurement. However a little more than half, 17 of the EEA MS, refer to social responsibility objectives in procurement in some way.[270] The survey found that 45% of all contracting authorities or entities do include social considerations within the procurement policies.[271] 26% sometimes include social considerations in their tender documentation, 14% regularly and 9% as often as possible.

The most common requirements were for the promotion of decent working conditions and promoting employment opportunities (each with 32% of respondents). Measures to promote social inclusion, accessibility for all and SME were also common as was taking into account ethical and fair trade issues all of which were mentioned by around one fifth of respondents.

As in the case of green procurement it appears that there is also a positive correlation between central procurement bodies, framework contracts and the share of contracts which respected socially responsible considerations. This suggests again that a professional dedicated procurement function is better placed to take proper account of social considerations.

The inclusion of socially responsible requirements was considered likely to increase complexity and risk to a similar extent to the inclusion of environmental requirements. A larger proportion of respondents noted difficulty in attracting offers, although a larger proportion of respondents had no opinion, possibly because they had no experience.

4.3. Innovation

Innovation can raise the quality and improve the efficiency of public services. There has been increasing political support, in many Member States, for the use of public demand to spur innovation and the introduction of initiatives related to pre-commercial procurement and procurement of innovative goods and solutions. Despite the opportunities offered by the EU legal framework, a range of factors including lack of incentives, risk-aversion and insufficient knowledge and capability appear to lead contracting authorities to be cautious in encouraging innovative solutions. The Commission has issued guidance on dealing with innovative solutions in public procurement, in 2007[272] followed, in 2009, with a guide on managing risks associated with innovative public procurement[273]. Similar guides have been produced by Member States. Due to the horizontal nature of innovation policy, it may at the same time contribute to achieving green, resource-efficient targets and to strengthening the capacities of SME.

Development of goods and services not yet available on the market can also be stimulated through pre-commercial procurement. The Commission adopted, in 2007, a communication which outlined an approach to pre-commercial procurement consisting of procuring research and development services, involving a multistage competitive process, and leading to new solutions addressing public sector challenges.

The Europe 2020 Flagship Initiative "Innovation Union", published on 6 October 2010, sets out concrete proposals to increase the amount spent on innovation procurement, including both the procurement of commercially available innovative goods and services and pre-commercial procurement. It is too early to attempt measure what impact this may have had on public procurement practice."

The encouragement of innovative procurement is more recent and therefore much less well understood than the inclusion of environmental or social considerations. Several EEA Member States have adopted or are currently in the process of adopting so-called demand driven innovation policies, calling for public demand to encourage innovation through public procurement.[274] A prescriptive approach has been chosen in Portugal, which requires 1% of the public procurement budget to be spent on R&D, 19% on the procurement of innovative goods and services. With regards to R&D procurement, according to a recent survey on the status of implementation of pre-commercial procurement (PCP) across Europe[275], sixteen Member States report to be in the process of piloting or preparing PCP type initiatives. Among those, a few Member States (BE, UK, NL) are already experimenting with PCP-like projects. A second set of Member States (FI, DK, HU, SE) have identified a framework that can support and encourage public procurers in their country to undertake PCPs. A third set (IT, IRL, ES, AT, LT, PL, NO) have explicit plans to start PCP pilots and/or has started working on identifying national or regional support schemes for PCP. The rest of the Member States are still exploring the possibilities and/or are involved in some first awareness raising activities on PCP.

Due to the pervasive nature of innovation interconnected with other policy domains public procurement as a driver for innovation is often also introduced linked to other distinct policies, such as for example the promotion of innovative companies. Some Member States explicitly mention innovation within their sustainable procurement action plans: in Austria, Belgium, Finland, Norway and Poland. Portugal and Sweden include innovation objectives with their plans for green procurement.

Germany has identified cost-effectiveness, user-friendliness and resource-efficiency as requirements that can promote innovative solutions in procurement and has undertaken to consider life cycle costing, technical risk assessments and active sourcing of innovation, using for example, functional specifications and competitive dialogue, where appropriate.[276] The sectors which seemed most receptive to an innovative approach were security technology, energy (renewable energies and environmental technology), communication (including ICT), transport (vehicles, train or railway technologies) and health (medical equipment). Iceland also encourages the use of functional specifications to encourage innovative solutions. Norway, in a 2008 White Paper for an innovative and sustainable Norway, encouraged a risk-averse public administration to consider being more open to managing risk and looking for innovation in health care, defence, construction and public transport as well as environmental technology. Finland and Sweden have also encouraged their public sectors to look into models of sharing financial risks and devising incentives for innovation, identifying infrastructure, health and environment as key sectors. In Denmark a certain amount of money is set aside for pilot projects on the procurement of eco-efficient technology innovations, including a pre-commercial procurement pilot in this domain.. The United Kingdom has highlighted a number of individual cases where radical thinking about how to provide a solution to a particular procurement problem has brought innovative results under the forward commitment procurement approach.

These approaches focus on guidance and best practice, the promotion of cooperation and public private partnerships and attempts to foster dialogue with different innovative enterprises. They call for more research and development with a view to encouraging closer co-operation between the public and private sector on environmental technologies.

Given the diffuse and diverse approaches to innovation it is not surprising that the proportion of the contracting authorities and entities surveyed who were aware of a national innovation policy was low at 18%. However a higher percentage, 22% claimed that they included innovation within their procurement strategy or procedures and more, over 48%, included some form of innovative requirement in their tender documentation. It is possible, however, that along with acceptance of alternatives or variants and the use of functional requirements they may have been interpreting the use of "most economically advantageous" criteria as itself encouraging innovation.[277]

4.4. Conclusion

In general Member States have adopted National Action Plans for Green or sustainable public procurement and many have established targets for some or all of those priority product groups identified by the Commission. A summary of these plans and policies is given in Table 12. While there are no similar plans for socially responsible procurement, more than half of all Member States

do have some measures in place which address working conditions (such as respect for ILO core labour standards), the need to ensure accessibility for all and for the provision for sheltered workshops.

At Member State level there is still very little in the way of organised monitoring or measurement. However it appears that the majority of contracting authorities surveyed (in 2010) do seek to buy green, when this is feasible. In general, where they do so, they do obtain a greener outcome in the final contract award. One fifth of these contracting authorities indicated that more than half of their contracts included environmental requirements. In Norway, Sweden and the Netherlands over 40% of contracting authorities indicated that they included GPP requirements in more than half of their contracts. It has not yet been possible to estimate the extent to which these environmental requirements have had an actual measurable or differential impact on the environment in practice.

Contracting authorities also seek to encourage more socially responsible procurement and more innovative solutions although they have considerably less experience of integrating these policy objectives within their procurement practice.

Incorporating these other policy objectives is generally perceived to increase the complexity of the procurement process and can require procurement staff to learn new skills and competences.

Suppliers expressed concern that, where requirements and standards are not harmonised, they are faced with a range of different levels of requirement for environmental or social standards across the EU for which different certificates and labels can be required and which reduce the potential for them to generate economies of scale through improving the environmental performance characteristics of their products and services.

Table 12. Country Overview

Country	NAP (procurement-specific policies)	Broader/sector policies (including SPP)	Targets	Priority product groups	Mandatory criteria	Dissemina tive initiatives	Monitoring
			* based on EU 50% target		* based on EU GPP Sets 1 and 2 criteria		* based on EU monitoring approach (monetary value & number of contracts)
Austria	SPP NAP (2010)	Energy Efficiency NAP; Environmental Technology	General government	19	Mandatory criteria*	Moderate	Monitoring system in place
Belgium	SPP NAP (2009)	Biodiversity	Central government*	18	Mandatory criteria*	Moderate	Limited monitoring in place (use of criteria in tenders); monitoring system planned
Bulgaria	GPP NAP under development	Environmental Strategy	No targets	10	Recommen ded criteria (planned)	Limited	Monitoring system planned
Cyprus	GPP NAP I (2007-2010); GPP NAP II (2011-2013)	Energy Efficiency NAP	No targets	12	Mandatory criteria*	Basic	Monitoring system in place
Czech Republic	Gov. Regulation (2000), GPP Rules (2010)	Environmental Policy; Sustainable Consumption and Production; Waste Management; Energy Management	Specific product groups	23	Mandatory criteria*	Basic	Limited monitoring in place (reporting on GPP levels); monitoring system planned*

Country	NAP (procurement-specific policies)	Broader/sector policies (including SPP)	Targets	Priority product groups	Mandatory criteria	Disseminative initiatives	Monitoring
Denmark	SPP NAP (1994); GPP NAP last update in 2008	Energy Efficiency; Chemicals; Green IT; Sustainable Transport; Eco-efficient Technology; CSR; Timber	General Government*; Specific product groups	12	Mandatory criteria	Extensive	Limited monitoring in place (reporting on GPP levels)
Estonia	Draft GPP NAP 2006-2009; Draft GPP NAP 2010-2013	"Knowledge-based Estonia"; Growth & Jobs	Specific product groups	10	Planned*	Limited	Limited monitoring in place (use of criteria in tenders)
Finland	SPP NAP (2008), updated in 2009	Sustainable Economic Growth and Employment	Central government; Specific product groups	20	Recommended criteria*	Moderate	Monitoring system planned
France	SPP NAP (2007-2009), planned update in 2011	Greening Public Administration; Sustainable Development; Tropical Forests NAP	Specific product groups	30	Recommended criteria*	Moderate	Monitoring system in place (use of criteria in tenders; specific product groups; reporting on GPP levels)
Germany	-	Energy & Climate NAP; Biodiversity; Renewable Resources NAP; CSR; Energy	Specific product groups	13	Mandatory criteria	Moderate	Monitoring system in place
Greece	GPP NAP under development	-	No targets	-	Planned	Limited	No monitoring system
Hungary	Draft GPP NAP (2007); 2nd Draft (2010)	Environmental Policy	Specific product groups*	6	Planned	Limited	No monitoring system

Country	NAP (procurement-specific policies)	Broader/sector policies (including SPP)	Targets	Priority product groups	Mandatory criteria	Dissemina tive initiatives	Monitoring
Iceland	Government Policy for Eco-Procurement, Action Plan (2009)	-	General government	3	Planned	Basic	Monitoring system planned
Ireland	GPP NAP under development	Renewed Programme for Gov; Energy Efficiency; Green Economy; Climate Change; Waste Resources; Transport; Smart Economy	Specific product groups	12	Planned	Limited	Monitoring system planned
Italy	GPP NAP (2008)	Environmental Strategy; Recycled material	General government	19	Recommen ded criteria	Basic	Monitoring system planned
Latvia	Draft GPP NAP 2009-2011	Environmental Policy NAP	General government*	8	Recommen ded criteria*	Limited	Monitoring system planned
Liechten-stein	-	-	No targets	-	-	-	-
Lithuania	GPP NAP (2007-2011)	CSR NAP	General government	15	Mandatory criteria	Basic	Monitoring system in place (reporting on GPP levels)
Luxembourg	-	Sustainable Development NAP; Climate Change NAP; ETAP; Waste Management; Sustainability NAP (draft)	No targets	4	Recommen ded criteria (planned)	Basic	Monitoring system in place (reporting on GPP levels)

Country	NAP (procurement-specific policies)	Broader/sector policies (including SPP)	Targets	Priority product groups	Mandatory criteria	Disseminative initiatives	Monitoring
Malta	GPP NAP (2010)	Reform Programme, Env. Theme; Sustainable Development (draft)	Specific product groups	16	Recommended criteria*	Basic	Limited monitoring in place (use of criteria in tenders)
Netherlands	SPP Programme (1997); SPP NAP (2007)	Reform Programme, Env. Theme; Sustainable Development (draft)	Central government*; Regional/local government; Specific sectors	52	Recommended criteria*	Extensive	Monitoring system in place (use of criteria in tenders; specific product groups)
Norway	GPP Programme (2005-2008); SPP NAP (2007-2010)	CSR	No targets	16	Mandatory criteria	Extensive	Limited monitoring in place; monitoring system planned
Poland	GPP NAP (2007-2009); SPP NAP (2010-2012)	CSR	General government	25	Recommended criteria*	Basic	Limited monitoring in place (reporting on GPP levels); monitoring system planned*
Portugal	GPP NAP 2008-2010 (2007), planned update for 2011-2013	Sustainable Development; Energy Efficiency NAP; Climate Change	General government*	10	Mandatory criteria	Basic	Monitoring system in place (use of criteria in tenders; reporting on GPP levels)
Romania	Draft GPP NAP (2007)	Sustainable Development	Draft: specific product groups	8	Recommended criteria*	Basic	Monitoring system planned

Country	NAP (procurement-specific policies)	Broader/sector policies (including SPP)	Targets	Priority product groups	Mandatory criteria	Disseminative initiatives	Monitoring
Slovakia	GPP NAP (2007-2010)	CSR	Central government*	6	Recommended criteria*	Basic	Limited monitoring in place (use of criteria in tenders); monitoring system planned*
Slovenia	GPP NAP (2009)	Development Strategy; Reform Programme (Lisbon Strategy) ; Energy Efficiency NAP; GHG Emissions Reduction; Environmental Protection	Specific product groups*	10	Recommended criteria*	Limited	Limited monitoring in place; monitoring system planned*
Spain	GPP NAP (2008-2010)	Sustainable Development; Waste; Sustainable Economy Law (draft); Reform Programme	Specific product groups	8	Mandatory criteria*	Basic	Monitoring system in place (specific product groups)
Sweden	GPP NAP (2007-2009), planned update for 2011-2013	-	General government	10	Recommended criteria	Extensive	Monitoring system in place
UK	Sustainable Procurement Action Plan (2006); SPP NAP (2010)	Sustainable Development; Greening Gov ICT; Timber; Sustainable Farming and Food	Specific product groups	16	Mandatory criteria*	Extensive	Monitoring system in place (use of criteria in tenders)

Source: Adelphi Strategic use of Public procurement in Europe (pages 41-44).

CHAPTER 5: STRUCTURAL CHANGES IN PUBLIC PROCUREMENT MARKETS

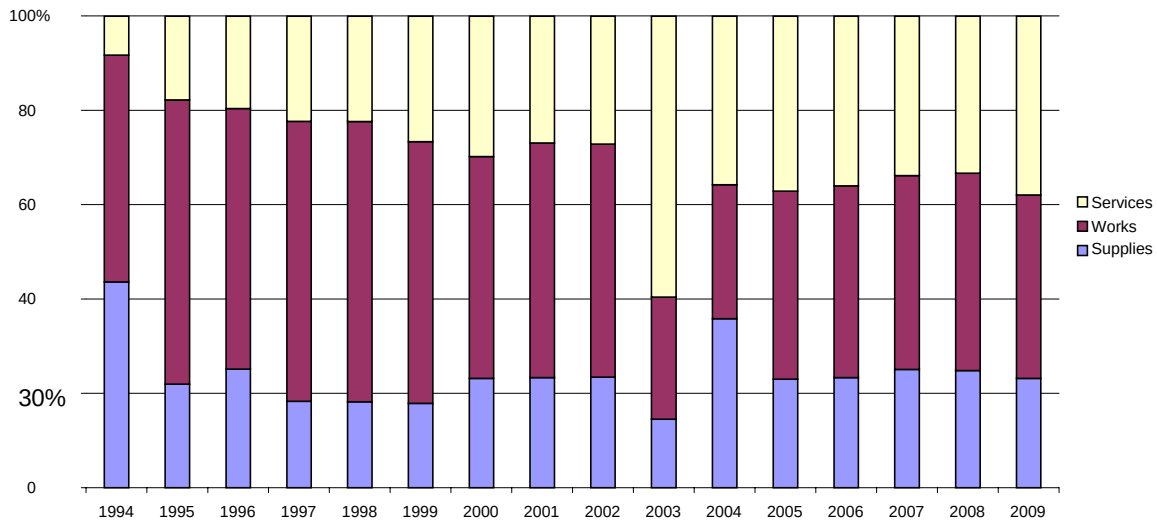
This part of the report aims to give a general description of public procurement activity and practice. It looks at changes in the organisation of public procurement activity and the procurement chain, in terms of the organisation and behaviour of contracting authorities.

5.1. Who is purchasing what?

To start with it is useful to look at the overall breakdown in terms of the type of goods or services purchased and the type of purchaser.

Based on the notices published in TED, the average distribution of contracts awarded across the EU by value is on average approximately 25% goods, 40% works and 35% services.[278] These proportions have not changed significantly over the last few years although in the longer term, over the last 15 years, there has been a distinct trend away from works contracts in favour of services.

Figure 5. Breakdown of total contract value awarded by service, works or supplies 1994 to 2009[279]

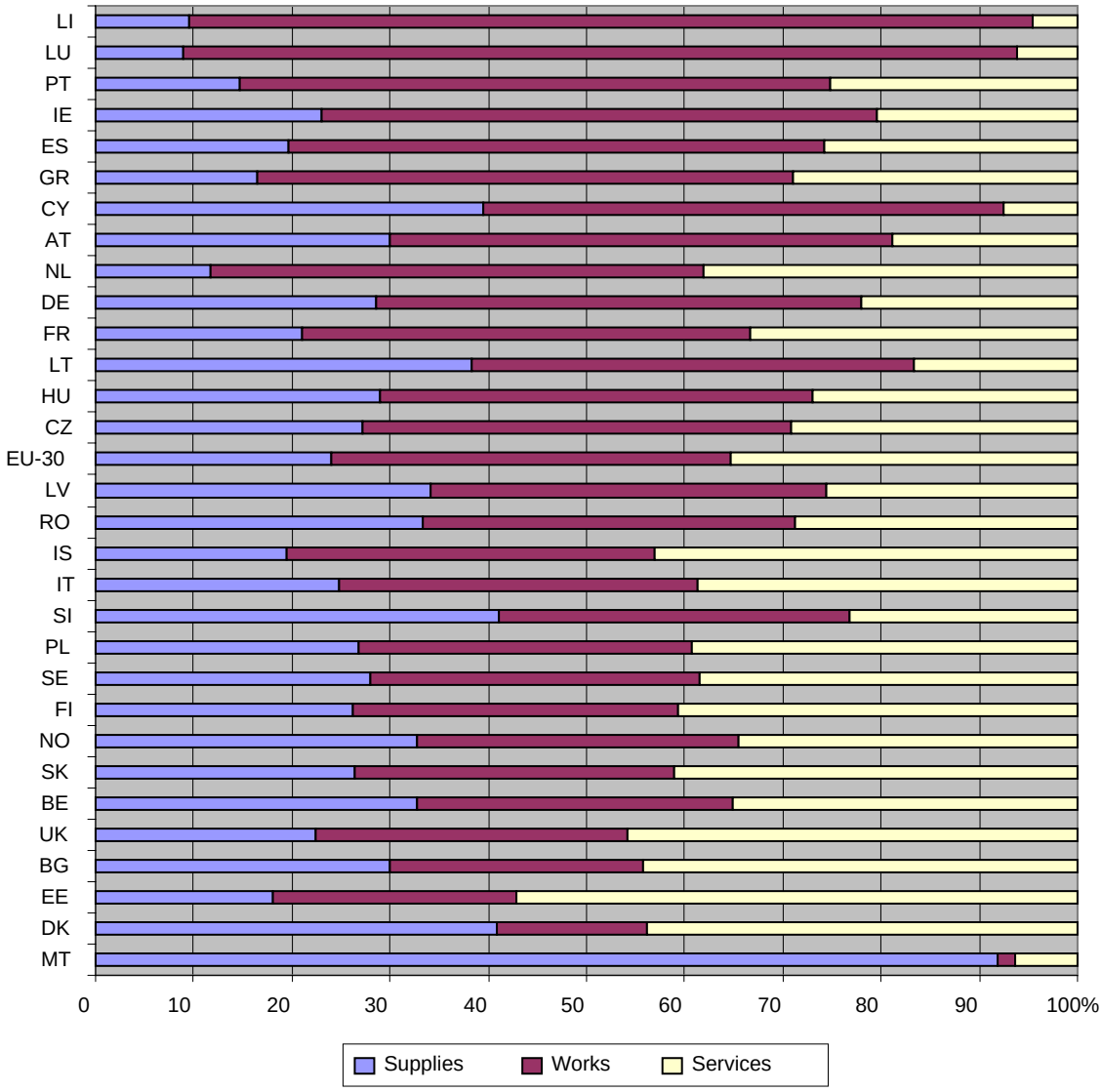


Source OJEU

The relatively stable breakdown over the last four or five years for the EU as a whole looks more varied when viewed at Member State level.

Taking the last few years data (see Figure below) the share of public works contracts in the total value of above-threshold procurement is strikingly high in Liechtenstein (86%), Luxembourg (85%), Portugal (60%), Ireland (57%), Spain and Greece (55%), but very low in Malta (2%) and Denmark (15%). The share of supply contracts on the other hand is much above average in Malta (92%), Slovenia, Denmark (41%), and Cyprus (39%). Service contracts are more important in Estonia (57%) in the United Kingdom (46%), Bulgaria and Denmark (44%).

Figure 6. Breakdown of total contract value awarded by service, works or supplies by Member State and EEA Country (2006 – 2009)280



Source OJEU

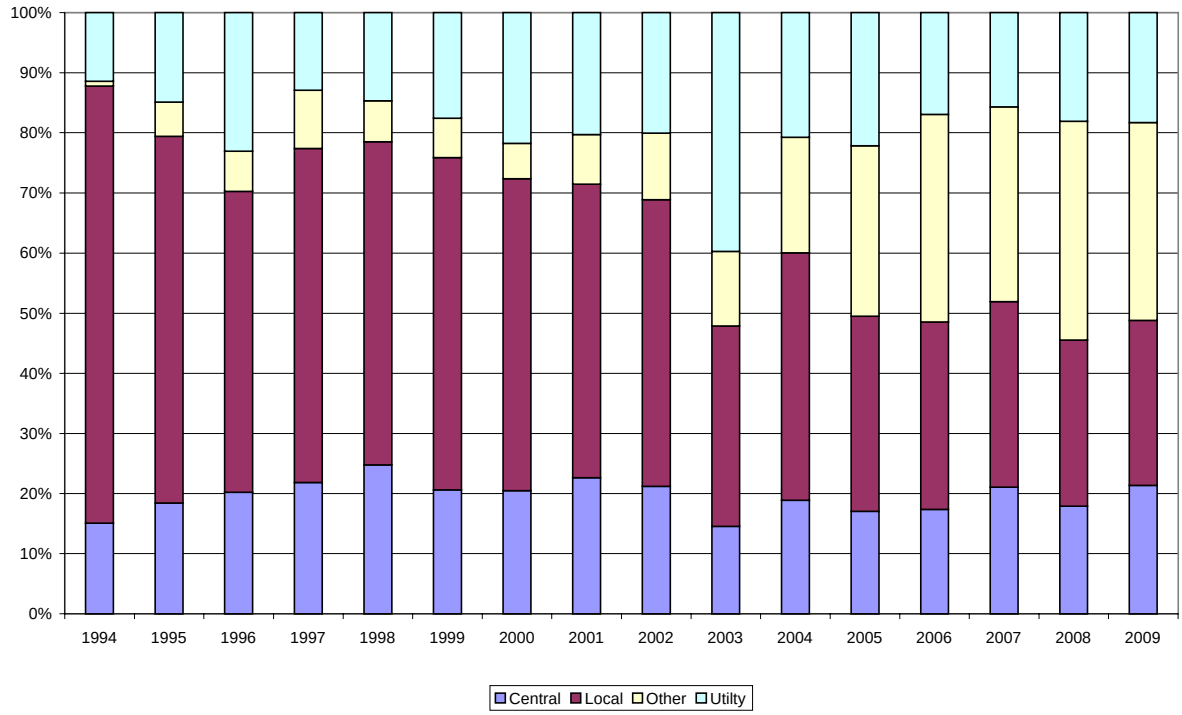
More detailed analysis of the data by type of product or service is also possible by reference to the CPV code. Use of these codes was made mandatory in the European Union for contracting authority

notices as from 1 February 2006[281] although in practice it took some time for all contracting authorities to comply with this obligation; the number of notices without CPV coding was still above 5 000 in 2007, 1 000 in 2008 and still over 500 in 2009.

The importance of different types of purchaser varies greatly across the Member States. In some countries the majority of procurement is carried out through central government authorities, while in others the degree of procurement by local authorities is more important.

Although there are distinct patterns by Member State there has also been a clear long term trend away from local authorities towards other bodies such as bodies governed by public law or other shared service organisation. However this trend appears to have played itself out in the last few years (see Figure below), and may also be affected by the accession of new Member States.

Figure 7. Breakdown of total value of contracts awarded by type of Authority 1994 to 2009



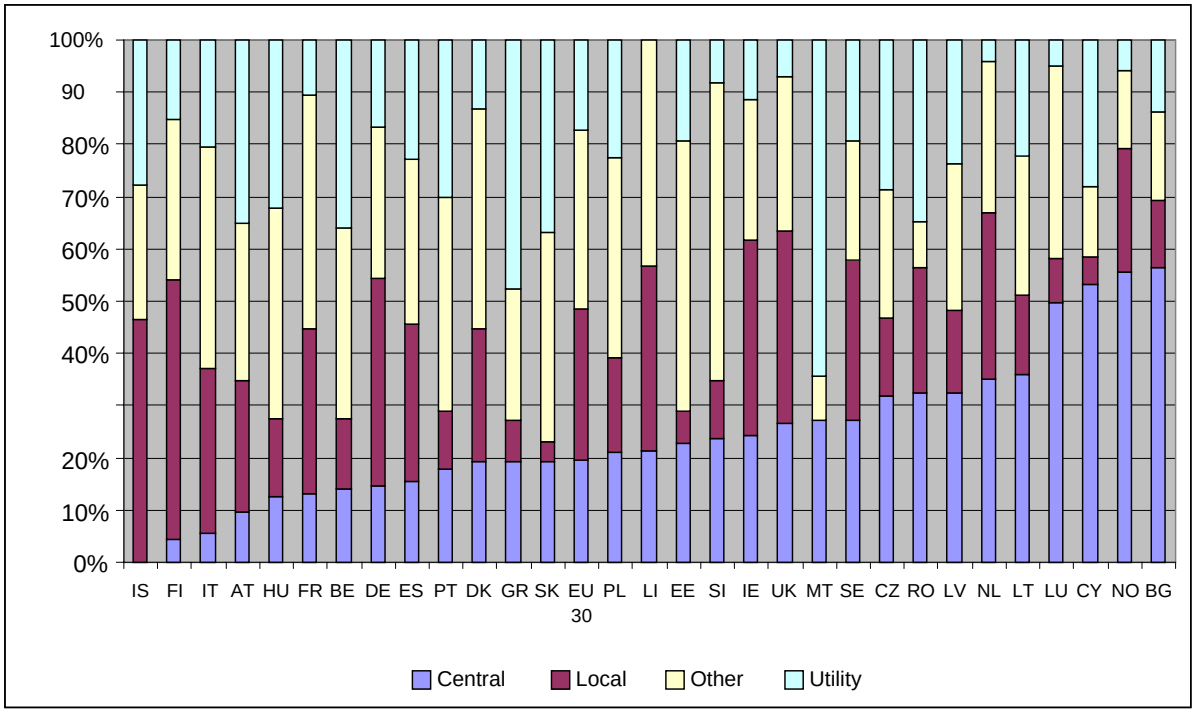
Source OJEU.

Looking at combined data for the last few years (see Figure 7) on the value of contracts awarded broken down by type of contracting authority or entity, we see a wide degree of variation in the volumes contracted by the different types of body.

These variations may reflect structural differences in the organisation of government at a territorial as well as functional level. Thus central authorities tend to contract less and local authorities more in federal States such as Austria, Belgium or Germany compared with other Member States. However, this is not always the case, since a policy of decentralisation or centralisation can be pursued in procurement irrespective of the political, constitutional or administrative arrangements. The variation may also reflect distribution of powers or allocation of responsibilities. The category

"other" includes bodies governed by public law as well as bodies not covered by that or any other category and may be exercising some public function on behalf of, or in conjunction with, local or central government bodies.

Figure 8. Breakdown of total value of contracts awarded by type of Authority and Member State (2006-2009)

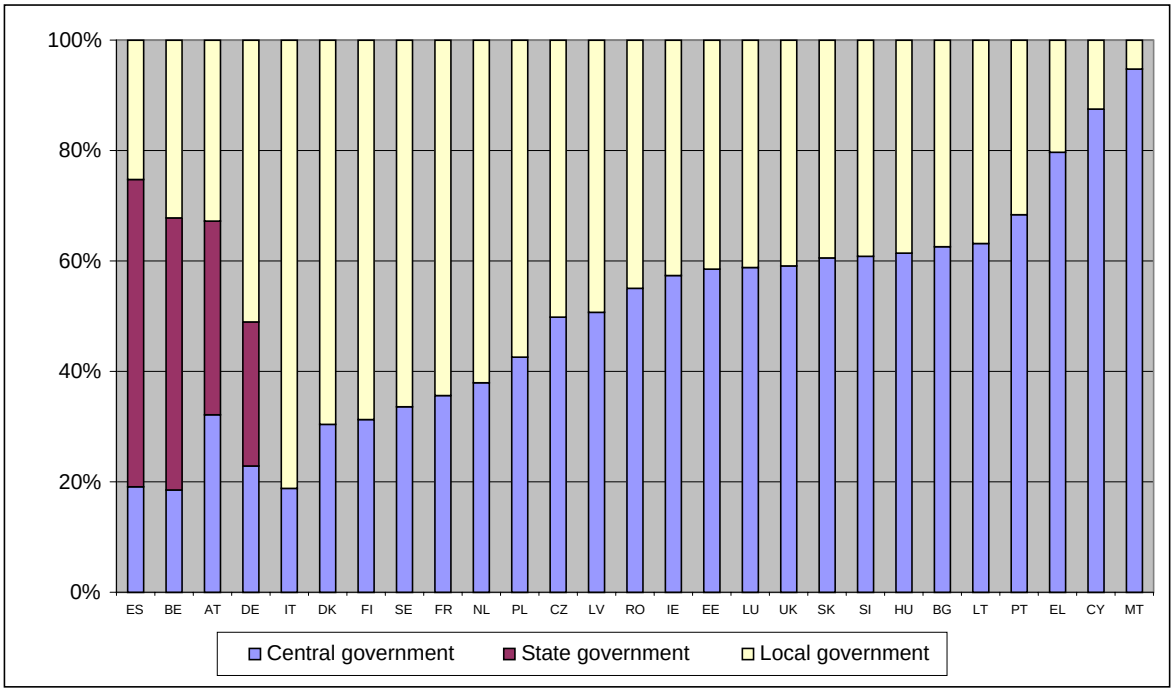


Source OJEU.

This breakdown can be compared with total expenditure on goods and services by central and local government, ignoring for the moment, utility and social security expenditures. Some federal Member States also have a considerable expenditure at state or regional level

It is obvious from this comparison that it is not a simple matter to categorise Member States. The significant role played by a differently defined third category (bodies governed by public law or other), blurs the boundary between central and local administration expenditure and the value of published contracts.

Figure 9. Breakdown of central and local government total expenditure on goods, services and works, EU-27, 2008



Source: Eurostat

5.2. Changes in the organisation and behaviour of contracting authorities: centralised purchasing bodies and framework arrangements

Two main trends have become evident in the way in which procurement is carried out in recent years: towards the use of centralised purchasing bodies and framework arrangements. Both possibilities have existed long before the provisions of the 2004 Directives codified and regulated their use. Framework contracts or call off contracts as well as centralised procurement have been common in public administrations for many years. However the expansion and professionalisation of central purchasing bodies and the more flexible framework arrangements, which allow specific contracts to be concluded without the need to re-advertise and re-apply selection and award criteria, have led more contracting authorities to make use of these techniques.

5.2.1. Growth in the use of central procurement bodies

The number of contract notices published by contracting authorities buying on behalf of other authorities rose from 4.1% to 6.8% between 2006 and 2009.[282] In some Member States (Denmark, Estonia, Greece, Latvia, Sweden, the United Kingdom, Iceland and Norway) more than 10% of all contracts are awarded by contracting authorities purchasing on behalf of other authorities.

Table 13. Percentage of contract notices published by authorities purchasing on behalf of others

	2006	2007	2008	2009
Belgium	3	8	7	8
Bulgaria	-	1	1	1
Czech Republic	1	1	3	2
Denmark	14	12	11	13
Germany	6	7	7	6
Estonia	0	6	10	14
Ireland	5	4	5	7
Greece	6	9	11	10
Spain	0	2	4	3
France	2	4	4	5
Italy	4	7	8	8
Cyprus	4	3	10	8
Latvia	17	22	17	15
Lithuania	3	3	4	3
Luxembourg	0	5	8	2
Hungary	2	3	4	4
Malta	0	0	0	0
Netherlands	6	8	8	8
Austria	9	5	9	7
Poland	2	2	2	2
Portugal	0	1	1	1
Romania	-	1	1	1
Slovenia	3	3	4	9
Slovakia	6	8	10	8
Finland	0	5	10	9
Sweden	0	5	10	12
United Kingdom	14	18	19	20
Iceland	0	24	26	21
Liechtenstein	0	0	0	0
Norway	0	14	12	13
EEA-30 average	4,1	6,1	6,7	6,8

Source: OJEU

What is also interesting is that most of the growth in the number of these contracts does not appear to be through central government bodies but through local authorities or bodies governed by public law. However it is likely that the main increase in value will have been due to centralised purchasing bodies, and it is probable that they may increasingly take the form of a body governed by public law as the Danish, Italian or Norwegian examples may show.

5.2.2. Status and significance of central procurement bodies

The status and significance of the central purchasing body is not uniform throughout the EU. Such bodies existed before they were recognised by the 2004 Directives. Whether an integral part of central government or established at arms length, either through incorporation as a company or by granting them some measure of independence within existing administrative structures, many such bodies have come and gone over the years. A venerable example is the Rijksinkoopbureau, founded in the Netherlands on 1 August 1921, with the task of providing a central buying office for government office supplies, cleaners and other household supplies. It continued until 1990, when it was privatised as the N.V. Nederlands Inkoopbureau (NIC),[283] in which form it continues to advertise tenders on behalf of the Dutch public sector.

Annex 7 briefly describes the situation in Member States. This annex draws extensively on the national contributions to the comparative survey on the National public procurement systems across the Public Procurement Network carried out in 2010.[284]

Some Member States have not established central purchasing bodies and only some of these still intend to.[285] In cases such as Luxembourg, the Netherlands and Norway, there may none the less be a considerable amount of central purchasing carried out through specific authorities. In other cases there may be some reluctance to centralise responsibilities which have only relatively recently been decentralised.

While most Member States have at least one central purchasing body, it is frequently only central government administrations which are obliged to use it. Other bodies may be encouraged to do so but are also often permitted to establish their own group purchasing arrangements. This often depends on the level of devolved or decentralised public administration and responsibility for the provision of public services. Some purchasing of common services is based on a functional requirement. In a number of Member States the health sector, for example, or police authorities often carry out central procurement at national level.

As shown in the Table 14 below it is seems that the implementation of the legal option to establish central purchasing bodies does not always mean that such a body has, or will be, established. It appears that there are also many different arrangements for buying on behalf of other contracting entities which are not necessarily considered as central purchasing bodies, in the sense of the Directives.

Table 14. Central Purchasing Bodies

Country	CPB legislation option	CPB established	CPB planned	More than 5% of Contract Notices are purchasing on behalf of others
Belgium				x
Bulgaria	x	x		
Czech Republic	x			
Denmark	x	x		x
Germany		x		x
Estonia		x		x
Ireland	x	x		x
Greece	x			x
Spain	x	x		
France	x	x		x
Italy	x	x		x
Cyprus	x			x
Latvia	x	x		x
Lithuania	x			
Luxembourg				x
Hungary	x	x		
Malta	x	x		
Netherlands	x			x
Austria	x	x		x
Poland	x			
Portugal	x	x		
Romania	x		x	
Slovenia	x		x	x
Slovakia	x			
Finland	x			
Sweden	x	x		x
United Kingdom	x	x		x
Iceland	?			
Liechtenstein	?			
Norway	?			x

Source: Commission services based on OJEU and national sources.

The increasing importance of centralized procurement has been noticed and emphasised in several studies.[286] It has also been noted that the criteria by which they may be asked to evaluate bids can be much broader than simply improving the quality price ratio, through economies of scale, and include other policy objectives, such as sustainable development or encouragement of innovation, aimed more generally at increasing welfare.[287]

Table 15. Percentage of contracts awarded on behalf of others, by type of Authority

	2006	2007	2008	2009
Central Government	21,6	22,4	20,3	15,0
Local Government	39,0	33,5	30,1	30,7
Bodies governed by	19,8	16,9	20,1	26,6
Other	14,0	16,2	19,3	17,7
National Agency	3,4	5,2	3,5	2,8
Regional Agency	2,2	5,9	6,6	7,2

Source: OJEU.

Meeting some of these objectives may increasingly involve a rather sophisticated evaluation of the relative importance of best value for money in terms of quality, environmental and social and innovative criteria. This makes the objective specification of requirements and analysis of bids a more complex affair, which requires the expertise only usually available at a central procurement body. For smaller contracting entities there is therefore a potential emerging danger that, in the absence of objective measurements and agreed discount rates, the choice of bidder will become more subjective.

5.3. Framework agreements

A framework agreement differs from an ordinary contract in that it does not commit the authority or authorities to actually buy anything. It sets in place the agreed terms and conditions, including price, under which future contracts may be concluded with one or more suppliers. Use of this procurement technique, recognised by the 2004 Directives, has been recorded since the introduction and general use of the standard forms in 2006.

Since then, the number of contracts advertised involving framework agreements has risen steeply, from 6 837 in 2006 to 25 563 in 2009. They do not seem to be associated with any particular procedure. The majority are open procedures as with contract notices as a whole, but the restricted, negotiated and competitive dialogue procedures are also represented. Across the EU as a whole, frameworks are most popular with the utility sectors and national or federal agencies and already in 2009 they made up more than a quarter of all contract notices in Norway, Denmark, Netherlands, France, Iceland, Romania, Slovakia, Slovenia and the United Kingdom.

In terms of value, however, the contracts involving framework agreements in the United Kingdom, France, Germany and Denmark together appear to make up 70% of the value of all contracts awarded in 2009. The United Kingdom alone accounts for over 40% of this: roughly EUR 25 billion out of EUR 60 billion.

If we look at the combined use of central purchasing and framework contracts over 2008 and 2009 frameworks represent only a fraction of all central purchasing contracts (27%) by number but a larger share of the value (42%)

Given this apparently significant level of use of framework agreements in is worth noting the findings of a recent review of collaborative procurement by the United Kingdom National Audit

Office.[288] This review found that 93% of the public bodies it surveyed in summer 2009 had used a framework agreement during 2008-09. Further analysis of a sample of public sector contract notices advertised in TED, however, suggested that an existing framework agreement could have covered 20% of them, leading to an estimate that in the United Kingdom 2 500 public tendering exercises in 2008 were unnecessary. It also found that many framework agreements covered similar products or services but with widely different prices. Further "almost three quarters of major suppliers surveyed also stated that, if public bodies coordinated procurement more effectively, it would reduce their tendering costs. Most of these suppliers thought that they would be able to pass on savings to the public bodies."

Table 16. Percentages of contract notices which involve framework agreements: by type of authority, 2009, in decreasing order of frequency

	Central	Local	Utility	Public	Other	Nationa	Regional	All
Norway	36	38	46	38	27	34	30	35
Denmark	32	29	39	41	17	0	12	32
Netherlands	28	26	32	37	37	56	47	30
France	34	31	40	34	25	30	30	30
Iceland	-	32	0	32	-	-	0	29
Romania	34	16	23	48	20	20	25	26
Slovakia	41	13	43	20	12	19	0	25
Slovenia	7	9	8	39	29	50	100	25
United Kingdom	24	26	51	22	14	45	27	25
Ireland	12	12	30	18	16	20	17	18
Sweden	15	15	21	31	23	9	18	17
average EEA-30	16	16	21	17	14	21	10	16
Czech Republic	14	5	17	9	9	12	14	11
Estonia	16	9	3	14	0	15	0	11
Belgium	2	8	32	5	6	6	3	9
Germany	11	4	19	13	6	3	3	8
Latvia	8	7	5	1	15	9	0	7
Austria	25	3	14	5	4	12	2	6
Spain	0	5	5	3	3	0	2	3
Bulgaria	4	2	5	4	2	0	0	3
Finland	2	1	6	2	4	2	3	3
Portugal	1	1	0	1	6	0	0	2
Italy	1	0	12	1	1	0	1	2
Greece	1	1	3	3	1	0	0	1
Lithuania	1	1	1	2	0	5	0	1
Poland	0	1	4	0	1	0	0	1
Cyprus	1	0	0	0	0	0	-	1
Hungary	0	0	0	0	2	0	0	1
Malta	0	11	0	0	0	0	-	0
Liechtenstein	0	0	0	0	0	0	-	0
Luxembourg	0	0	0	0	0		0	0

Sources: OJEU

However there are around a dozen Member States which do not seem to have taken advantage of this provision.

The combination of central purchasing with framework agreements can lead to a large degree of uncertainty as to the actual value of expenditure on contracts finally awarded, since at the time when the framework agreements are established the value of the contracts that will be concluded will not yet be known.

Nevertheless, despite the difficulty in establishing the real value of the degree of central purchasing through framework contracts, and also the extent of use of e-catalogues (see below section 5.8 "e-Catalogues"), there would seem to be an inexorable logic in combining the three elements to provide a broad range of goods and services to central and local government and other public sector bodies.

Centralising procurement offers suppliers more scope for achieving economies of scale which, given suitably competitive conditions, can potentially be passed on as reduced prices to the administration. The initial costs of determining requirements, market research, preparing specifications and conducting the tendering process can be reduced through the use of professional, specialised staff and expertise within a central purchasing body, which may not be available to individual contracting authorities. Such a body of expertise can also ensure that negotiating experience, technical or legal knowledge can be built up and put to best use over time.

There appears to be a tension between the perceived advantages of central purchasing and local autonomy. The client authorities may worry that they may lose their own local expertise to the central body, with a risk that they will not be in a position to judge to what extent that body continues to offer them better procurement outcomes than they could realise themselves or indeed resume their own procurement if they perceived that the central body was underperforming. This is likely to be a reason why regional or functional purchasing consortia are frequently to be found alongside national procurement bodies. There is probably also a strong economic argument for this in terms of preserving competition in particular geographical or product markets. The way in which any central body or common services are funded and how to ensure that there are strong incentives to provide continued value are complicated issues, which have led to a variety of models of ownership, financing and management.

5.4. Sub dividing procurement into lots

Another frequently observed structural trend is the use of sub division into lots, although the data can be interpreted in more than one way.[289] In many cases, subdivision into lots is due to the nature of the products and procurement operation. For example many hospitals issue periodical invitations to tender with many lots to procure medical supplies and pharmaceuticals. However in some Member States the average or median size of contract awarded is much smaller than others, suggesting that in some cases individual contract notices may be being advertised which, in another Member State, would be advertised together in one contract notice but as separate lots.

Table 17. Percentage of all contracts advertised which were sub divided into lots (2008)

Country	Divided into lots as % of total contract notices	Total contract notices	Contract notices divided into lots	Average number of lots, when divided
Belgium	26	4 737	1 242	5
Bulgaria	38	1 323	505	24
Czech Republic	18	2 686	485	7
Denmark	27	1 766	482	6
Germany	19	20 559	3 881	5
Estonia	19	418	81	5
Ireland	23	1 288	298	5
Greece	12	2 674	314	8
Spain	18	11 473	2 067	7
France	42	43 058	17 956	7
Italy	20	9 288	1 828	8
Cyprus	17	496	82	5
Latvia	41	696	284	8
Lithuania	34	1 341	455	46
Luxembourg	23	487	114	3
Hungary	31	2 747	847	5
Malta	14	311	45	5
Netherlands	15	4 345	669	3
Austria	8	3 029	236	5
Poland	45	14 173	6 384	14
Portugal	15	1 551	238	7
Romania	29	3 863	1 132	31
Slovenia	44	1 310	577	10
Slovakia	14	779	112	8
Finland	14	2 966	401	3
Sweden	6	4 213	257	3
United Kingdom	18	13 141	2 311	5
Iceland	-	106	0	0
Liechtenstein	7	28	2	3
Norway	9	3 469	312	3

Source: OJEU

Poland (45%), Slovenia (44%), France (42%) and Latvia (41%) have relatively high levels of sub division into lots and in general the percentage of all contracts so sub-divided has not changed markedly over the last four years. In some cases this will reflect national legal provisions regarding the obligation to divide certain contracts into small lots wherever possible, in order to encourage participation by small or medium sized enterprises (SME).

Table 18. Percentage of all contracts advertised which were sub divided into lots 2006-2009

	2006	2007	2008	2009
Belgium	21	23	26	26
Bulgaria		45	38	38
Czech Republic	11	10	13	18
Denmark	23	27	28	27
Germany	18	19	20	19
Estonia	15	19	18	19
Ireland	2	13	17	23
Greece	9	10	12	12
Spain	9	12	17	18
France	36	40	41	42
Italy	14	17	19	20
Cyprus	6	8	10	17
Latvia	37	36	47	41
Lithuania	38	39	37	34
Luxembourg	20	23	20	23
Hungary	32	32	34	31
Malta	5	5	8	14
Netherlands	20	19	17	15
Austria	7	9	10	8
Poland	46	48	45	45
Portugal	9	9	11	15
Romania		25	26	29
Slovenia	33	46	43	44
Slovakia	15	20	24	14
Finland	3	9	12	14
Sweden	5	7	7	6
United Kingdom	10	12	16	18
Iceland	0	1	3	0
Liechtenstein	0	0	4	7
Norway	0	8	10	9

Source: OJEU

5.5. Subcontracting

Subcontracting, where the winning contractor subcontracts part of the work to another enterprise, often an SME, seems either to be relatively rare, between 7% and 9% for the EU-30 as a whole, or perhaps is not being consistently recorded by all Member States. There is a group of Member States, which includes the Czech Republic, Germany, Estonia, Spain, Italy, Hungary and Austria, where it appears to be more prevalent.

Table 19. Percentage of all contracts awarded recording subcontracting

Country	2006	2007	2008	2009
Belgium	12	8	7	8
Bulgaria	-	3	2	3
Czech Republic	8	17	17	11
Denmark	3	3	4	3
Germany	19	14	14	13
Estonia	24	19	16	15
Ireland	3	3	2	1
Greece	4	3	4	3
Spain	17	16	15	22
France	8	4	5	5
Italy	18	12	16	13
Cyprus	0	1	1	0
Latvia	4	3	3	2
Lithuania	2	3	3	2
Luxembourg	2	1	3	1
Hungary	24	22	25	25
Malta	0	0	0	0
Netherlands	13	5	3	1
Austria	16	13	12	12
Poland	6	5	5	6
Portugal	10	8	10	4
Romania	-	1	2	2
Slovenia	9	3	2	2
Slovakia	13	7	10	9
Finland	3	4	4	4
Sweden	2	1	2	2
United Kingdom	6	3	4	3
Iceland	0	1	0	1
Liechtenstein	0	0	2	1
Norway	14	4	3	3
Average EEA-30	9	6	7	7

Source: OJEU

5.6. Acceptance of variants

Contracting authorities or entities may define precisely the specifications of the goods, works or services they require or allow bidders to propose variants which provide the same level of functional performance but in a different manner to that envisaged by the authority. This can allow for innovative solutions of which the authority may have been unaware. There is a notable difference in how often variants are accepted by contracting authorities or entities in different Member States. Germany and Ireland, followed by France, the United Kingdom and Belgium are most often likely to allow variant offers to be submitted. In Germany variants are most frequently

accepted for works contracts (although the percentage has dropped from 57% to 45% between 2006 and 2009), while in Ireland they are most often accepted for supply contracts. Overall, with the sole exception of Ireland, there is a very clear trend, from 2006 to 2009, towards accepting variants less frequently. Contracting entities in the Utility sectors appear to be more open to accepting variants than other types of authority, although even here the trend is downward over time.

Table 20. Percentage of tenders accepting Variants

	2006	2007	2008	2009
Belgium	31	29	27	23
Bulgaria		2	1	1
Czech Republic	5	4	4	4
Denmark	23	17	13	8
Germany	52	43	39	39
Estonia	13	10	6	6
Ireland	36	43	40	44
Greece	8	10	6	6
Spain	16	15	14	11
France	39	36	35	33
Italy	10	8	8	7
Cyprus	7	4	5	4
Latvia	8	6	4	5
Lithuania	0	1	0	0
Luxembourg	4	9	10	6
Hungary	4	3	2	2
Malta	10	7	5	4
Netherlands	13	9	7	4
Austria	23	13	10	8
Poland	1	0	0	1
Portugal	27	23	15	8
Romania		1	2	1
Slovenia	6	3	3	2
Slovakia	1	2	1	0
Finland	21	21	15	11
Sweden	13	11	7	6
United Kingdom	35	33	33	33
Iceland	30	33	24	10
Liechtenstein	22	29	25	18
Norway	37	23	20	16

Source: OJEU

5.7. E-procurement

This section of the report relies heavily on the evaluation of the 2004 e-procurement action plan as well as more recent data from the e-Government benchmark survey.[290] It covers e-Auctions, buyer profile notices, dynamic purchasing systems, e-signatures, general infrastructure and e-catalogues.

In 2004, seven countries reported some experience with e-Auctions, while 23 countries expressed the intention to introduce e-Auctions. In 2010, 26 countries support its use. Among the six countries that had not transposed the e-Auctions provisions, only Germany and Liechtenstein did not intend to do so.

Only a very small number of "notices on a buyer profile" have been published on TED (344 published in 2006 to 2009), and most of these did not mention the URL where the buyer profile could be found, although this is a major requirement of the notice. It may be that this possibility is not as attractive to contracting entities in its current form as might be expected.

In 2004, 18 Member States expressed their intention to implement a dynamic purchasing system (DPS) provisions. By 2010, 27 countries had implemented appropriate legal provisions. The fact that 10 Member States have added further provisions, clarifying the conceptual framework, the different stages and scope of a DPS, may show that there was some lack of clarity in the provisions on DPS. So far the actual use of the procedure has been marginal, and in most cases seems to demonstrate a misunderstanding of the provisions.

By 2010, 18 countries expressly required the use of electronic signatures in e-Procurement procedures and 13 Member States required advanced e-Signatures. This regulatory choice suggests that, in this matter as in many others Member States are risk adverse and prefer to ensure security and trust rather than cross-border interoperability.

In terms of infrastructure, while the availability of portals and platforms for e-Procurement has increased dramatically since 2004, the degree of sophistication and coverage varies. One study shows that "at least rudimentary systems are now known to exist in all but two countries: Greece and Liechtenstein.[291] But by the end of 2010 at most two EU and one EEA countries were able to run a fully fledged e-procurement procedure, from e-Notification to e-payment: the United Kingdom, Finland and Norway. The report of the findings of the 2010 eGovernment benchmark survey provide some detailed analysis of 67 e-Procurement Platforms across Europe in 2010.[292]

According to the report, the majority of platforms served the national market (69% of the sample) and/or the federal/regional market (52%). Platforms tend not to be specialised by sector, unlike some of the joint purchasing bodies, but offer a broad range of services to several government sectors including education, defence and healthcare: offering generic services across a range of sectors rather than specialist services to a specific sector. Overall, the report finds over 200 000 contracting authorities registered as users and estimates an average of 3 500 per platform. In comparison the report estimates there are three times as many suppliers registered. These figures may not be reliable; there are certain to be some companies and authorities who register multiple times and on multiple platforms; but if even approximately correct this would suggest that almost all the contracting entities who are likely to come within the scope of the EU Directives are registered on one platform or another.

Most platforms deal with notices both above and below the EU threshold of contracts value; only a small number appeared to be restricted to either to contracts above or below threshold. Low value contracts are more likely to be handled since above threshold contracts may be more problematic due to signatures. Approximately a third of the sample also reported that they provided cross-border services although what that might actually mean for a single market for e-Procurement remains unclear.

Overall the report finds that the number of non-domestic suppliers is approximately 5% of total registered suppliers. Small Member States appear to be more open: Ireland (with 25% non-domestic suppliers) and Malta, Cyprus, Estonia (with more than 10%). Another group of platforms (in France, Austria, Portugal, UK) estimate they have between 4 and 6% non-domestic suppliers and other countries estimate around 1-2%. These figures are within the same range for the same groups of Member States as the cross border findings for above threshold contracts published in the OJEU (see Chapter 6) suggesting that the emergence of e-Procurement platforms has yet not altered access to the EU market in any significant way.

Based on the limited data available, the evaluation of the 2004 Action Plan concluded that there was no reason to believe that overall EU use of e-procurement was currently greater than 5% of the total procurement value. According to the more recent benchmarking study, "in Italy approximately 4% of public spending on goods and services is managed with electronic tools, while in France this is even lower (2.5%). In other countries or regions this share is substantially higher: in Scotland almost a third of public procurement is processed electronically, while the Portuguese government claims online processing of almost the totality of national authorities tenders in 2010. Other countries where e-Procurement affects a higher share of public spending are Ireland, Malta (20%), Estonia, Cyprus".[293] However, the benchmark report also notes that there is a lack of a systematic gathering of evidence and that the data gathered are difficult to compare.

5.8. e-Catalogues

The concept of electronic catalogues covers a range of different on line applications designed for meet a variety of needs. Public and academic libraries have used machine readable cataloguing standards for many years, but extending cataloguing principles from books or periodicals to everything that the public sector may want to buy is more challenging. The impact assessment on the 2004 action plan, noted that e-Catalogues appear to be used mostly by central purchasing bodies for ordering under framework agreements, using ad-hoc e-Catalogues. Mostly these catalogues appear to require the suppliers who have won a contract to upload catalogue data into the central purchasing bodies' catalogue according to that body's standard or template. There are a number of providers of such e-catalogue systems, but the underlying data or structures are not interoperable or easily interchangeable between these systems. Standardisation work has started however within CEN. In 2010, a CEN e-CAT workshop project for analysing classification and catalogue systems for public and private procurement was under way, looking in particular at the classification systems used in Europe for public procurement (CPV – Common Procurement Vocabulary) and some used in the private sector (UNSPSC, GPC and eCl@ss). This project should propose harmonization, mapping methodologies, recommendation on their use in electronic catalogues and areas of improvement in the CPV.[294]

However there are a number of problems which seem to limit the scope for such standardised catalogues. Firstly there is an evident difference between the view suppliers and purchasers have of a catalogue's purpose. Suppliers have an interest in using catalogue entries to enable purchasers to order their goods and services. This is why they will undertake to upload the necessary data. Purchasers, while they will also find on line ordering useful, as it reduces the administrative costs of ordering, are more interested in using catalogues to compare the price and features of alternative solutions to their needs. Currently this is much more difficult, as most suppliers are not keen to make it easier for purchasers to compare their goods with those of their competitors.

Electronic catalogues may well generate an ambivalent attitude to EU legislation. A central purchasing body will certainly ensure that products in their catalogues conform with all requirements laid down in the Directives and indeed will promote their services as removing the need for independent or subsequent compliance for individual purchases. They may effectively aggregate procurement: bringing within the scope of the legislation purchases which would otherwise fall below the thresholds. Some authorities will not want to lose their autonomy, as noted above, so there will always be a possibility of "maverick buying".

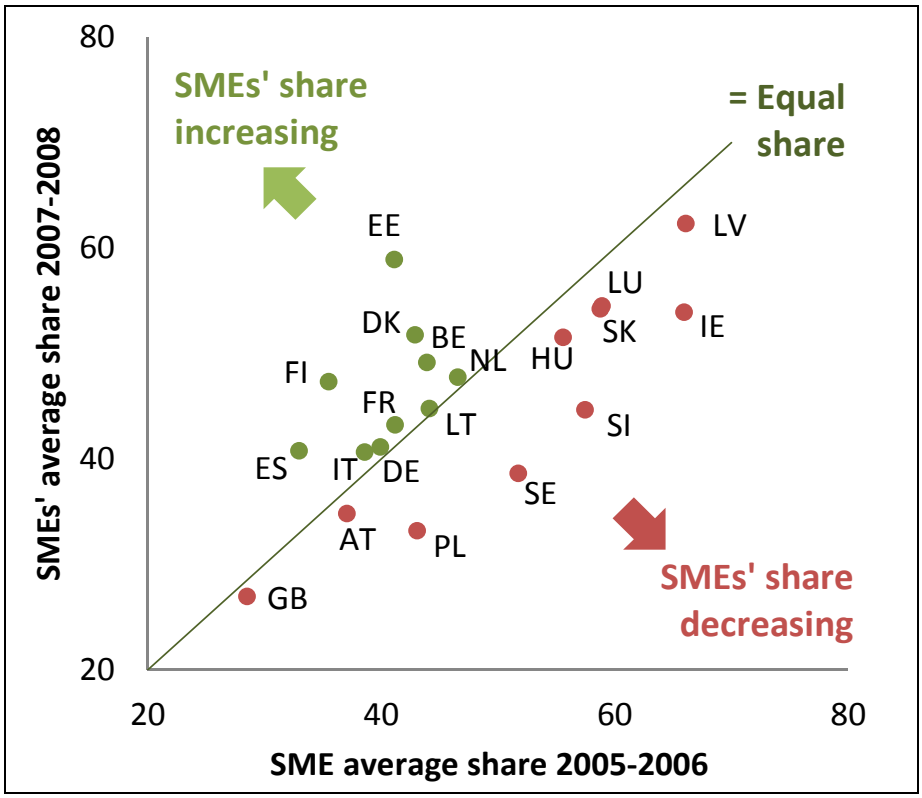
The risk that the effect of such aggregation might limit access of SMEs to their local markets has frequently been noted and it is clear that any responsible central purchaser should take note of this risk when designing and operating an e-catalogue.

Central procurement bodies, framework contracts, e-procurement platforms and e-catalogues may all appear separately, together, or in any combination. It seems difficult at this stage to say definitively what works best or how. Leaving room for experiment and innovation in how to organise and implement these aspects of procurement may seem to have been the wisest policy in the recent past.

5.9. SME participation

A recent study estimated that between 2006 and 2008, between 58% and 61% of the companies who won public contracts above the EU thresholds were SMEs.[295] In value terms SMEs won between 31% and 38% of all contracts. The size of contracts is the major barrier to SME participation: they do not have access to the resources or capacity to bid for or fulfil large public contracts. Contracts above EUR 300 000 appear to be generally beyond their capacity. However it is also clear that when larger procurement projects are subdivided into smaller lots, SMEs are more likely to win contracts for the individual lots. There was also a significant variation across sectors. SMEs do not tend to win contracts in pharmaceutical, commodity and food or machinery and equipment but are more successful in construction, business services and manufactured goods (other than machinery and equipment). The study concluded that overall the share of SMEs in winning public procurement contracts has not changed significantly, since 2002, although it noted an increase in the proportion of successful SMEs in 2008.

Figure 10. Change of SMEs' share in public procurement above thresholds



Source: GHK

Comparing SME performance between 2005-6 and 2007-8 indeed the study concluded that their success rate improved in the majority of EU-15 countries, but deteriorated in most of the new Member States.[296] SMEs in Belgium, France, Germany, Italy, Spain and the Netherlands winning public contracts won more contracts in 2007-8 than 2005-6 while SMEs from the Austria, Hungary, Poland, Sweden and the United Kingdom won less. Medium-sized enterprises share of above-threshold public procurement by value was 17% in 2008, close to their 19% share in the economy, but small and particularly micro enterprises fare worse winning 6% of total above-threshold public procurement contract value, compared with 17% share of total turnover in the EU economy.

Although there is no consistent source of data that allows detailed analysis, it is likely that SME performance and particularly for micro enterprises is better for contracts below the threshold values.

5.10. Conclusion

Traditional government administrations, at both central and local level, seem to be undertaking less public procurement for themselves and relying increasingly on specialised bodies, such as central procurement bodies. Increased use of framework contracts and the growing take up of e-procurement and e-catalogues are changing the nature of the procurement function. It is becoming more centralised and professional, partly at least, as a result of these new possibilities being officially recognised in specific provisions in the 2004 Directives, but also due to budgetary pressure due to the financial and economic crisis. There is still a wide variation in practice across

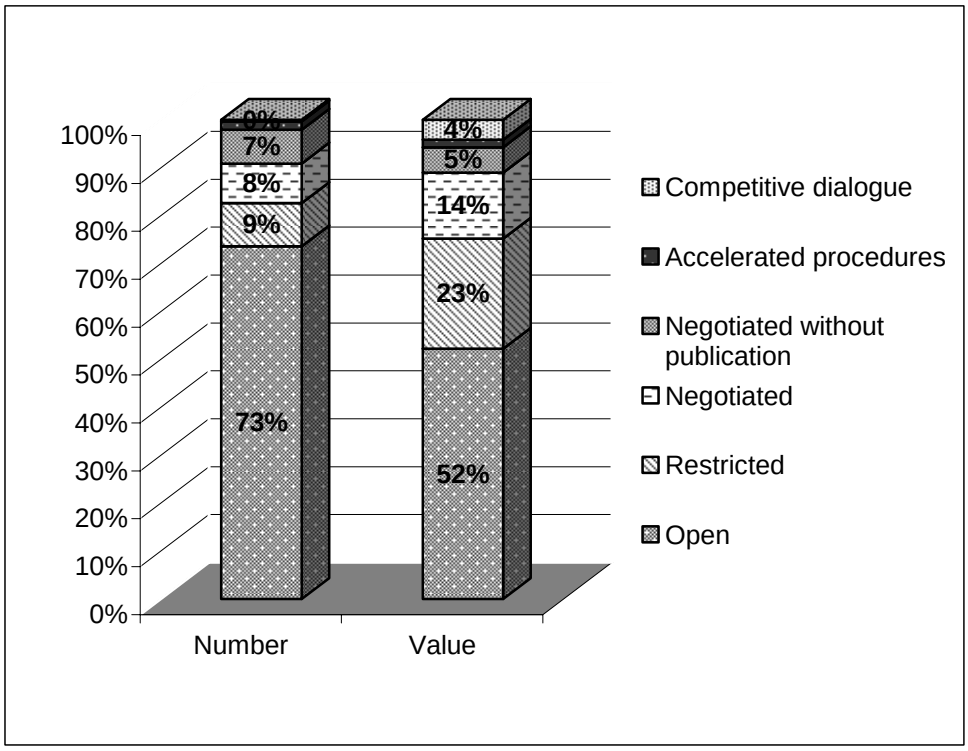
the EU. So far this does not appear to have affected either the access or participation of SME to above threshold contracts.

CHAPTER 6: THE USE OF PROCEDURES AND THEIR COST-EFFICIENCY

6.1. Patterns of use of procedures and techniques

To a large extent the public procurement Directives determine which procedures are used by contracting authorities when organising procurement. The open and restricted procedures are most frequently used and account for the highest shares in value of contracts.

Figure 11. The use of procedures in 2006-2010



Source: PwC, London Economics, Ecorys

Figure 11 demonstrates that over the last five years, about 73% of all contract award notices published in the Official involved an open procedure. However, this corresponds to only 52% of the published total value, as the open procedure is mainly used for contracts of relatively low value. The share of open procedure decreases clearly as the contract value increases. 80% of open procedure contracts are below EUR 1.3 million. The second most frequently used procedure is the restricted procedure, used in contracts of generally higher value.

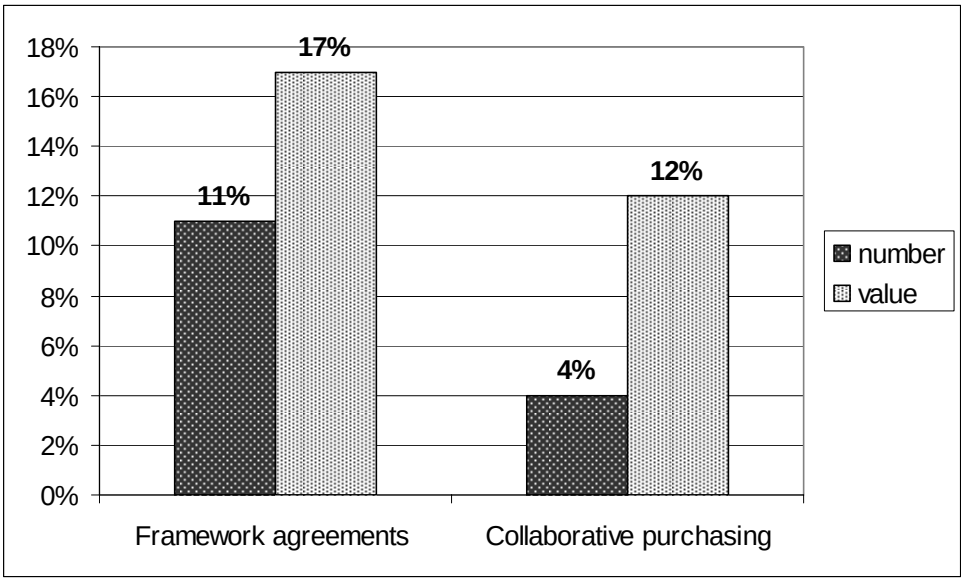
The restricted procedure accounts for 9% of award notices, but 23% of the value of all contracts awarded. The difference in what the two procedures are used for is demonstrated by the average contract size - EUR 8.2 million for the restricted compared to EUR 2.1 million for the open procedure.

The negotiated procedure with publication, which can be freely used only by entities operating in the utilities sectors, accounts for 8% of contract award notices and 14% of the value, with an average contract size of EUR 6.6 million. Data from the last five years show growing use of the competitive dialogue since it was introduced in 2004. Although this procedure is the least frequently used, amounting to less than 1% of contracts by number, the total value involved is significantly higher – up to 8.6% of total value of contracts awarded in 2010 (5.2% in 2009), with a mean contract value of EUR 40 million. The rapid adoption of the competitive dialogue procedure by contracting authorities, suggests that there was a need for a procedure that allowed for more negotiation or dialogue, than previously permitted under the Classic Directive.

This overall pattern is, however, marked by wide variation across Member States. Three Member States (France, Poland and Germany) awarded half of all the contracts advertised in 2006-2010. However, half of the value of all contracts was awarded by the UK, France and Spain. The UK is the most frequent user of the restricted procedure and of the competitive dialogue, followed by Denmark and the Netherland for the restricted and by Estonia and Slovakia for the competitive dialogue.

As well as determining the four principal procedures the Directives contain provisions concerning other aspects of the procurement process that are usually referred to as procurement techniques, in particular framework agreements and various forms of collaborative purchasing. Their use has grown significantly in the recent years (2006-2001), reaching levels that need to be taken into account in the analysis of purchasing patterns.

Figure 12. Framework agreements and collaborative purchasing as a share of total awards and values in 2006-2010.



Source: PwC, London Economics, Ecorys

As noted in Chapter 5 and as seen in Figure 12 the use of framework agreements has become very frequent. It reaches as much as 17% in terms of the total value of awarded contracts published in the OJEU. In 2010, more than 20 000 framework agreements were published.

Joint purchasing covers various forms of collaborative purchasing that may include both - purchases by formally established central purchasing bodies, as well as contracts concluded by associations of local authorities or other bodies or one authority buying on behalf of another.

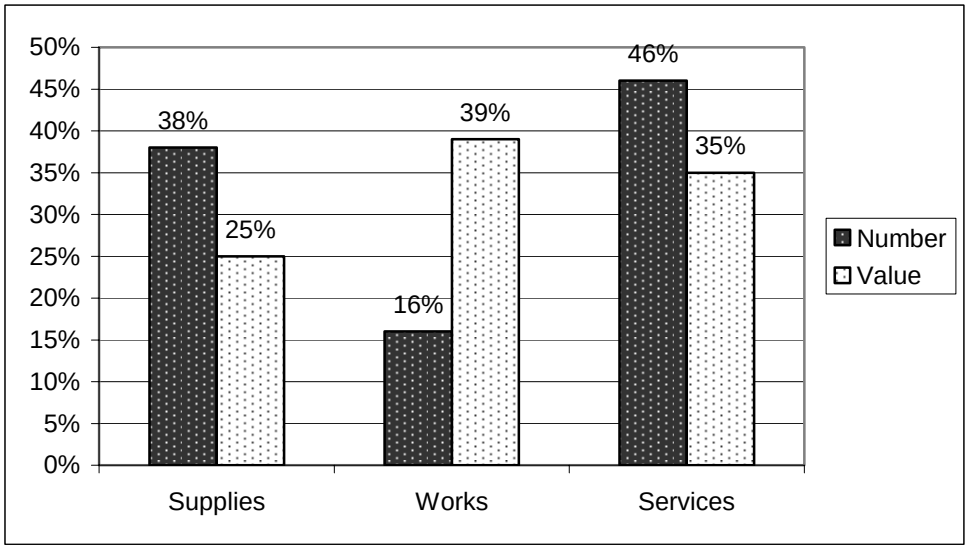
The two techniques – the framework agreements and collaborative purchasing - are frequently used together. While framework agreements are used in 11% of all awarded contracts published in the OJEU they are used for 25% of contracts published on behalf of another authority. In terms of value, half of joint or collaborative purchasing is undertaken through framework agreements.

As far as the remaining techniques are concerned, by 2010, 27 countries had implemented legal provisions to enable the use of a dynamic purchasing system (DPS). However the fact that 10 Member States have added further provisions, clarifying the conceptual framework, the different stages and scope of a DPS, show that there was some lack of clarity in the original provisions on DPS. So far the actual use of the technique has been marginal, and in most cases seems to demonstrate a misunderstanding of the provisions. The use of e-auctions is equally infrequent (less than 1% in terms of number and volume of contracts awarded).

6.1.1. Differences between the types of contracts

Whereas the differences between the types of contracts are concerned, works contracts account for almost 40% of value of all awards published in the OJ, followed by the services (35% and supplies 25%). In terms of the number of contract award notices published, the shares are significantly different (see Figure 12) as for example works contracts have usually much higher average contract value (EUR 6.9 million) that the combined average for all contract types (EUR 3.1 million) and the supplies lower (EUR 2.1 million). The average contract value for services was EUR 2.4 million.

Figure 13. Number and value of contracts published in 2006-2010 by type of contract

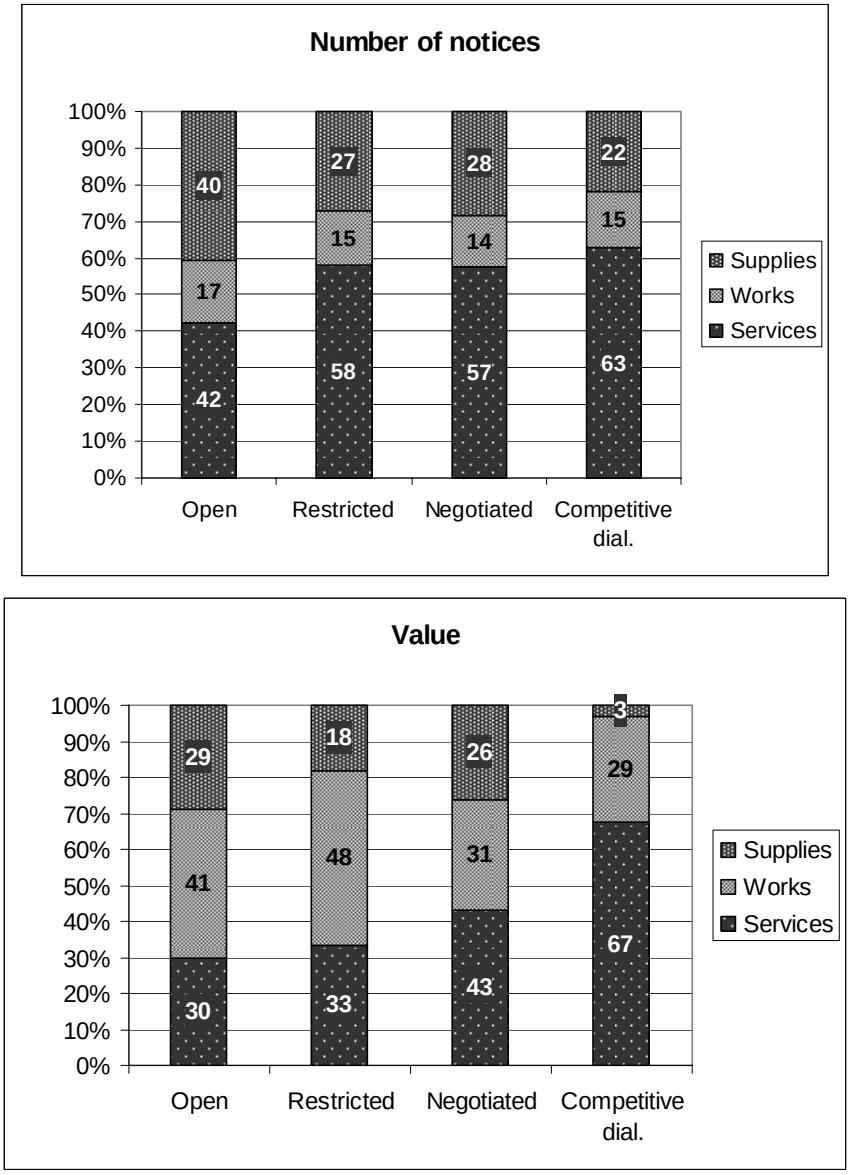


Source: PwC, London Economics, Ecorys

80% of all works contracts were awarded on the basis of open procedure compared with 78% of supplies and 68% of service contracts. In value terms, the open procedure was used for 54% of works contracts, 61% of supplies and 44% of service contracts.

The restricted procedure is used for more expensive works contracts. While only 15% of all restricted procedures are for works contracts they make up nearly half of the total value of all contracts awarded under the restricted procedure.

Figure 14. Types of contracts in most frequently used procedures in 2006-2010 [in %]



Source: PwC, London Economics, Ecorys

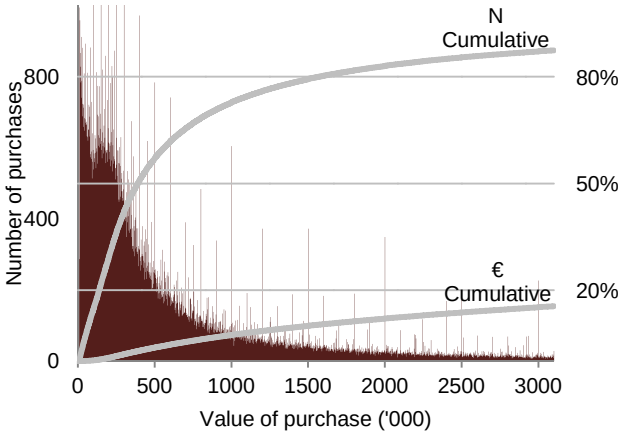
Generally, the negotiated procedure is used much less for all categories. This is true when measured both in terms of value and frequency (the number of contract award notices ranges from 14% in works to 57% in services while the value ranges from 26% in supplies to 43% in services). Supply contracts that use this procedure are usually of higher values.

Competitive dialogue appears to be mainly used for services (67% by value), and to a lesser extent for works (29% by value of all contracts awarded on the basis of competitive dialogue).

6.1.2. Patterns of use in reference to the thresholds levels

The Directives lay down thresholds for the value of contracts above which the full procedural rules apply. Recent findings show however that many contracts with values falling below the EU thresholds are still published in the OJEU and follow the full procedural provisions of the Directives.

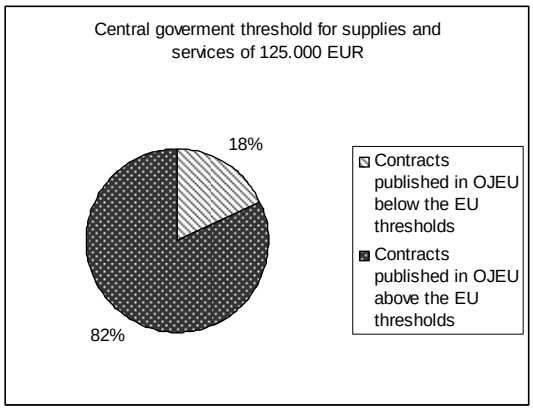
Figure 15. Frequency of contract values in 2006-2010 below EUR 3 million



Source: PwC, London Economics, Ecorys

The distribution of contract values up to EUR 3 million in thousand EUR increments (as presented in Figure 15 shows that most contracts accumulate within a fairly low value range. The same pattern can be observed if contracts are grouped by type (i.e. supplies, works and services). Each of these categories is analysed below and compared to relevant threshold levels.

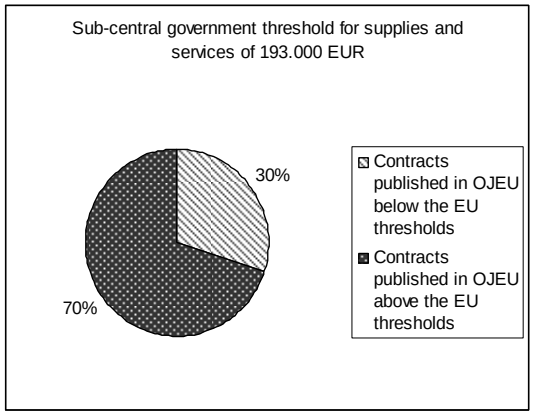
Figure 16. Percentage of central government contracts published in the OJEU with values below and above EU thresholds in 2006-2010



Source: PwC, London Economics, Ecorys.

18% of central government contracts are published below the threshold of EUR 125 000. Their value is however marginal, accounting for less than 0.5% of the total value of the central government contracts. Contracts having values lower than EUR 500 000 account for 10% of total value of procurement advertised within this category. Norway is the country with the highest proportion of contracts with values below EUR 125 000 that were published in the OJEU (77%), followed by Luxembourg (66%), Portugal (50%), Malta (35%) and Bulgaria (30%). At the other extreme is Slovakia, where 100% of central government contracts published in the OJEU had values falling above the EU threshold. 99% of Polish, 97% of Lithuanian and Latvian and 96% of Italian, Slovenian and Romanian central government contracts which were published involved contracts with values above EU thresholds.

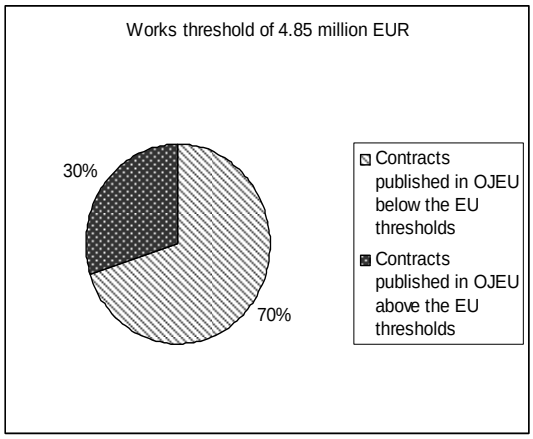
Figure 17. Percentage of sub-central contracts published in the OJEU with values below and above EU thresholds in 2006-2010



Source: PwC, London Economics, Ecorys.

As far as sub-central government contracts for supplies and services are concerned, 30% of such contracts have values falling below the relevant threshold of EUR 193 000. In terms of cumulative volume, these low-value contracts represent less than 2% of the total value of contracts in this category. Countries where many small-value sub-central contracts for supplies and services are published are: Lithuania (41%), France (39%), Romania (36%), Hungary (30%) and Poland (30%). At the other end of the spectrum, we can find Malta, Slovakia Estonia, Cyprus and Spain where more then 92% of contracts published have values exceeding EUR 193 000.

Figure 18. Percentage of works contracts published in the OJEU with values below and above EU thresholds in 2006-2010



Source: PwC, London Economics, Ecorys.

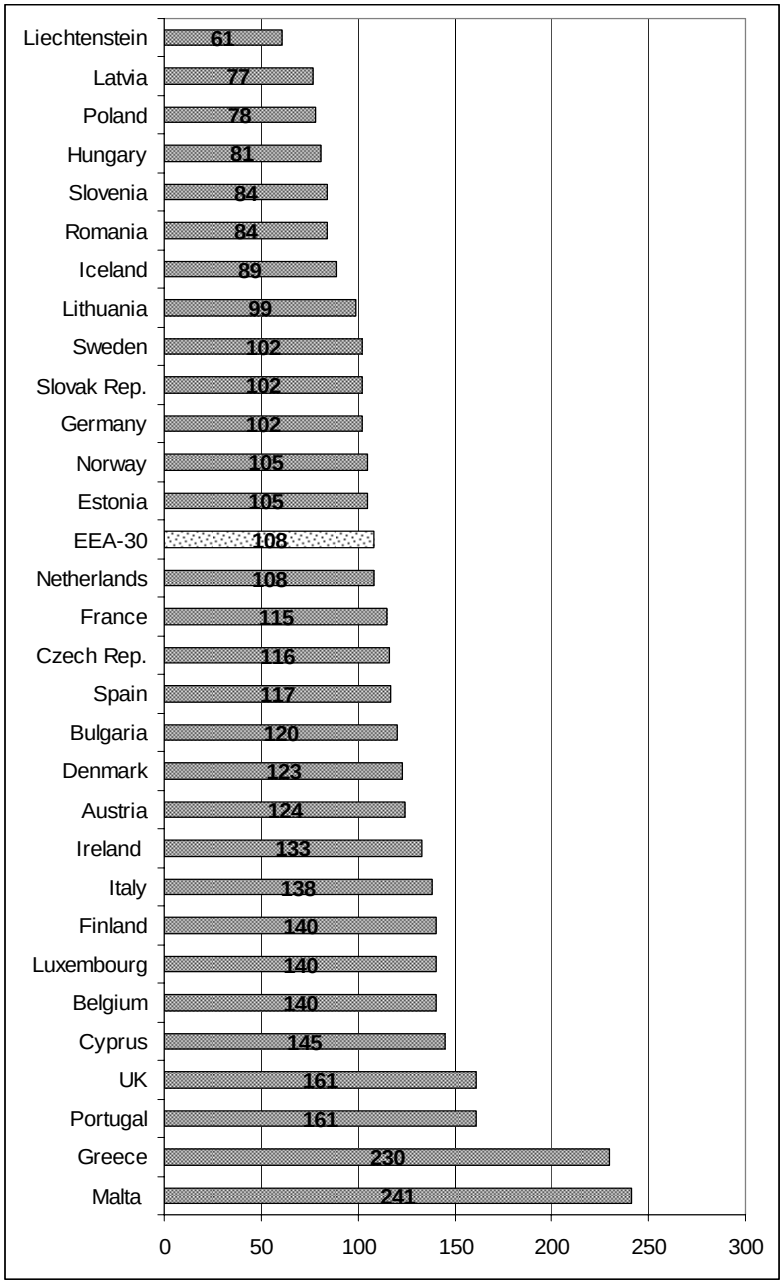
Finally, as much as 70% of works contracts which were published on the OJEU had their total final value below EUR 4.85 million. The cumulative value of these contracts is only 10% of the total works contract value. Most of these below thresholds works contracts come from Germany (where 95% of the works contract award notices are published with values falling below the relevant EU threshold), followed by Austria (92%), Luxembourg (90%), Hungary (80%) and France (78%). The opposite pattern can be observed in Cyprus, Spain, Slovakia, Italy and the UK where most of the contracts fall above the works threshold (75%, 73%, 72% 69% and 64% respectively).

These above findings may suggest that purchasers are following EU procedures either voluntarily or or that they may be aggregating contracts, in particular works contracts, for which the combined value exceeds the thresholds. This second explanation can explain only a fraction of these cases, as many of the notices fall way below the applicable EU thresholds.

6.2. Duration of procedures

One important concern for both authorities and bidders is the length of time taken by public procurement procedures[297.] The typical time from the dispatch of an invitation to tender to the award of contract across all procedures is 108 days, but the difference between the quickest Member State and the slowest is 180 days (i.e. 61 days in Liechtenstein compared to 241 in Malta[298]).

Figure 19. The typical duration of a procurement procedure from the dispatch of a contract notice to award by country in 2006-2010 (in days)

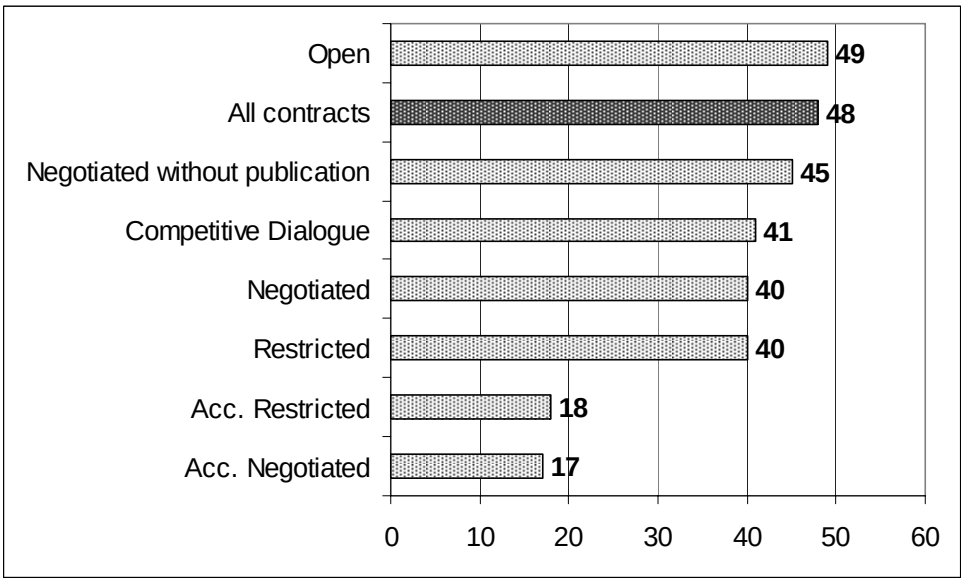


Source: PwC, London Economics, Ecorys.

This significant difference will inevitably impact on the efficiency and cost of procurement procedures. It is most probably driven by differences in the implementations of the Directives in the legal systems of each country or in organisation and administration of contracts at the level of individual purchasing authority. The frequent use of the restricted procedure has also influenced the overall duration of procedures in the countries that favour two-step procedures. As Figure 19 shows, all the Member States which are frequent users of restricted competitions typically take longer than the EEA-30 average of 108 days to carry out their procedures.[299]

The Directives lay down the minimum time for the first stage of the procurement process (understood as the time from the day on which the contract notice was dispatched to the deadline for the receipt of tenders) and the vast majority of procurers comply with these deadlines as can be seen from Figure 20. However, the legislation also permits shorter deadlines if certain conditions are met. For example, the shorter delays observed in some procedures can be explained by the frequent use of electronic submission of notices (almost 93% of notices in 2009 were submitted to the Publications Office electronically). The other possible mean for shortening the duration of the first stage of the procedure, namely the publication of PIN, was used less frequently but may still have had an impact on the overall duration of the first stage of procurement process.

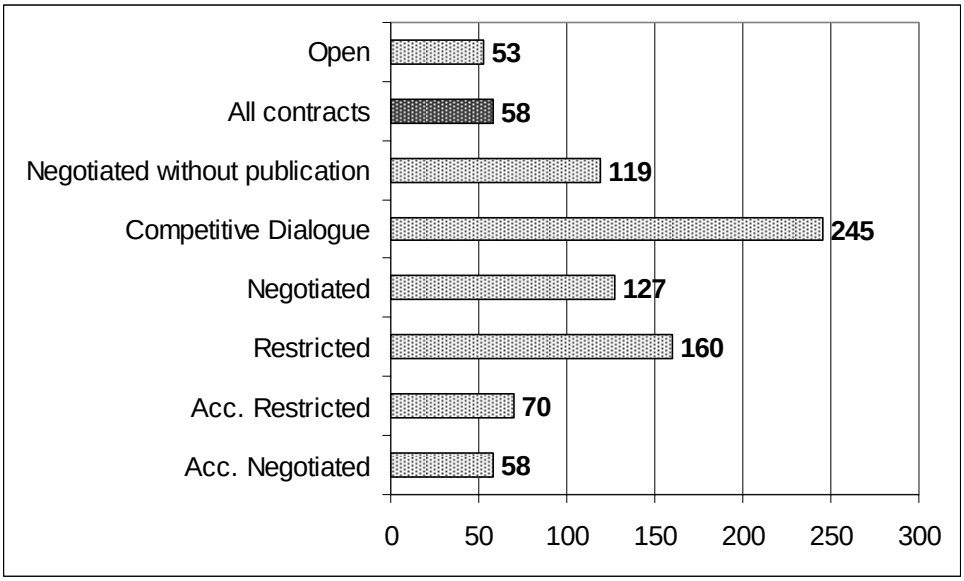
Figure 20. The typical duration of main procedures from the dispatch of a contract notice to the submission of offers or the request to participate in 2006-2010 (in days)



Source: PwC, London Economics, Ecorys.

The duration of the second stage (i.e. the time necessary to award a contract) is not laid down in the Directives and varies significantly across procedures, techniques and countries. The average time necessary to award a contract is around 58 days, ranging from 45 days in case of simplest contracts awarded on the basis of lowest price, up to an average of 245 days in case of the competitive dialogue. The length of the competitive dialogue procedure can be explained, to a large extent, by the complex nature of the projects for which this procedure is meant to be used. Figure 21 provides the details for the typical duration of the main procedures (in the order comparable with Figure 20).

Figure 21. The typical duration of main procedures from the submission of offers or request to participate to award in 2006-2010 (in days)



Source: PwC, London Economics, Ecorys.

The second most used procedure (i.e. restricted) takes on average 160 days for this stage, which is considerably longer than the average time to award a contract under the open procedure (58 days). The length of restricted procedure may also be explained by the fact that it is mainly used for higher value and more complex contracts. Note that the average total time broken down by stage and procedure does not equal the average in Figure 19 because some notices do not indicate the procedure used.

Similarly, the competitive dialogue again proves to be the most time-consuming procedure. Again, the complexity of projects for which the competitive dialogue procedure is intended explains this pattern.

6.3. Use of the accelerated procedure

In its conclusions of 12 December 2008 the European Council invited the Commission to adopt a number of measures in response to the financial crisis.

The Commission recognised that the exceptional nature of the economic situation could justify the use of the accelerated procedure reducing the overall length of the procedure from 87 days to 30 days and made clear that it would presume such a state of urgency should apply throughout 2009 and 2010 for all major public projects since speeding up procurement procedures can help Member States to stimulate their economies by starting up or accelerating major public investment projects.

Under the accelerated restricted procedure, which the Commission considered justified in the light of the financial crisis, contracting authorities could shorten the time limit for requests to participate from 37 to 10 days if the contract notice was sent by electronic means and the subsequent time limit

for the selected candidates to submit their tenders from 40 to 10 days. With the remaining standstill period of 10 days, time limits for the restricted procedure could therefore be ultimately shortened to 30 days in all.[300]

This opportunity has been taken up by certain Member States, although not all. As is clear from Table 21 only a few Member States have made extensive use of this presumed state of urgency. Germany, Ireland, Italy, Hungary, Romania and the United Kingdom have all used the accelerated restricted procedure more frequently than other Member States. In some cases this may be accounted for by the habitual more frequent use of the negotiated procedure before the crisis. Once the opportunity of accelerating the procedure was available it was quickly taken up. Other Member States appear to have continued to use the procedure at roughly the same level as before. In most Member States the low level of take may be explained by the fact that for significant investment projects reducing the time available to bidders is not an acceptable option; bidders need adequate time to put together professional tenders.

Table 21. Accelerated restricted procedures as a percentage of all contract notices

	2008	**2009**	**2010**
Belgium	1,0	0,5	0,5
Bulgaria	0,1	0,0	0,4
Czech Republic	0,1	0,2	0,1
Denmark	0,8	1,6	0,6
Germany	0,7	3,0	3,3
Ireland	1,7	5,1	8,1
Greece	0,1	0,4	0,3
Spain	0,6	0,2	0,2
France	0,1	0,1	0,0
Italy	7,3	5,9	5,8
Cyprus	0,0	0,0	0,4
Latvia	0,0	0,8	2,9
Lithuania	0,0	0,2	0,1
Luxembourg	0,3	0,0	0,0
Hungary	8,5	7,9	8,4
Netherlands	0,3	0,2	0,1
Austria	0,2	0,8	0,8
Poland	2,3	1,8	0,9
Portugal	0,1	0,0	0,0
Romania	0,5	3,0	5,0
Slovenia	0,0	0,2	0,0
Slovakia	2,2	0,9	0,6
Finland	1,7	1,1	1,8
Sweden	0,2	0,1	0,1
United Kingdom	3,1	10,6	9,6
Iceland	1,1	3,0	0,0
Norway	-	2,4	1,3

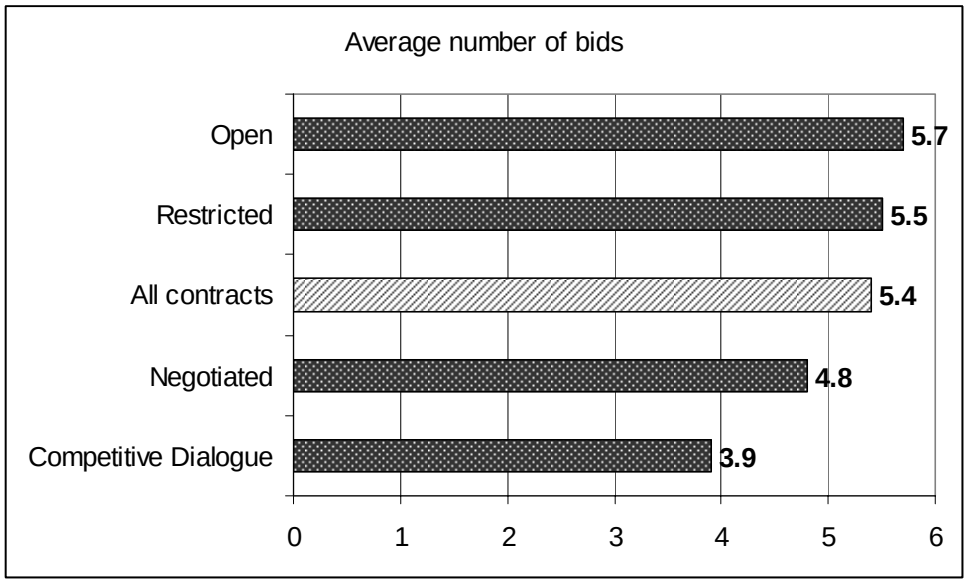
	2008	2009	2010
EEA-29 average	1,4	2,3	2,1

Source: OJEU

6.4. Competition

On average, each call for tender published in the OJEU receives between 5 and 6 offers. The open procedure attracts the highest number of tenderers (usually 5.7). The framework agreements and contracts concluded by authorities acting on behalf of other organisations are even more competitive as the average number of received in for calls involving these two techniques is 5.9. The competitive dialogue, most probably due to its complexity, attracts less bids than the EU average.

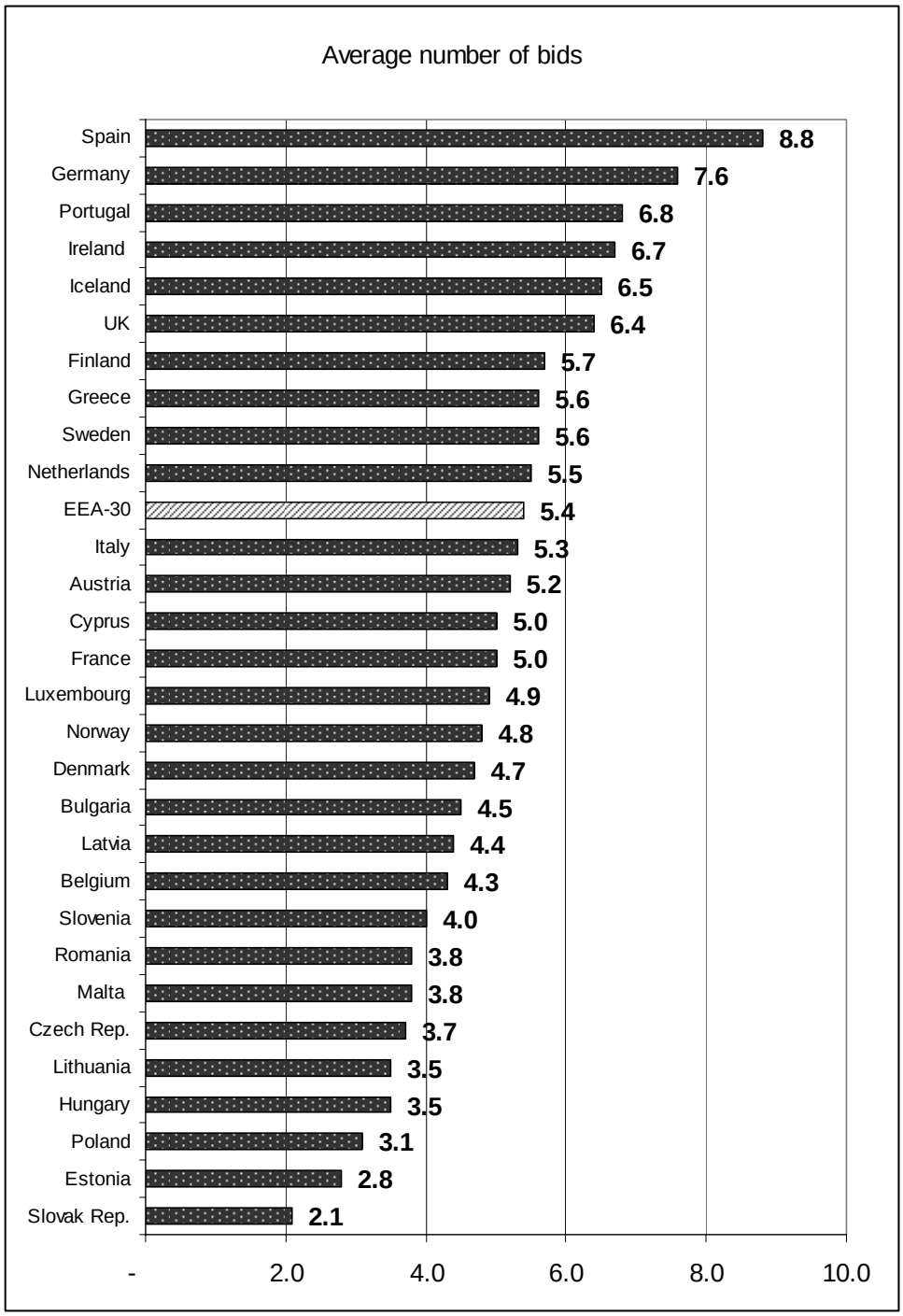
Figure 22. Average number of bids received by key procedures



Source: PwC, London Economics, Ecorys

Data extracted from notices published in the OJEU also show significant differences across Member States with regards to the competitiveness of national markets. Contracting authorities in Spain and Germany typically receive more than six bids per procedure. Much lower competition levels are observed in Estonia and Slovakia (less than three bids are usually submitted in reply to a call for competition).

Figure 23. Average number of bids received by countries



Source: PwC, London Economics, Ecorys

6.5. Cost-efficiency of procedures

6.5.1. Person-days required

In addition to the large difference in the duration of procedures, a huge variation in terms of person-days required can be observed across Member States and procedures or techniques. While for Member States, the overall typical requirement stands at 38 days, including both the time invested by authorities and by the winning firm, the difference between the top and the bottom performing countries is approximately 71 person-days.

Table 22. Person-days required for the best and worst performers

	Top performer	Bottom performer	Difference
Authorities	11	68	57
Firm	10	43	33
Duration of procedure for authorities and winning firm combined	22	93	71

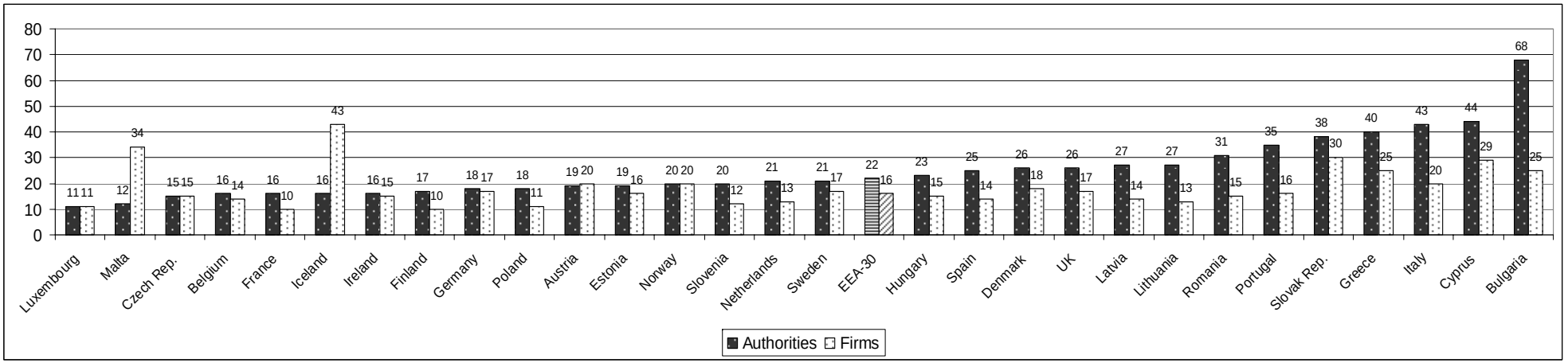
Source: PwC, London Economics, Ecorys

An important insight from the evaluation is the wide variation across Member States in terms of time and cost involved in running a procedure. The worst performers are several times slower than the best performers. This suggests that the Directives support relatively efficient procurement practice but that some Member States have considerable scope for improving the efficiency of their procurement administration. The details concerning the time spent on carrying out the procedures by country is presented in Table 22.

Works contracts require more resources (typically 27 person-days for authorities and 29 person-days for firms), than services (22 person-days for authorities and 16 person-days for firms) or supply contracts (20 person-days for authorities and 14 person-days for firms).

Using the number of person-days required is useful since it gives comparable figures without taking into account different salary or staff levels. However these person-days can be converted into Euro.

Figure 24. Person-days required by country (cost borne by authorities and firms)

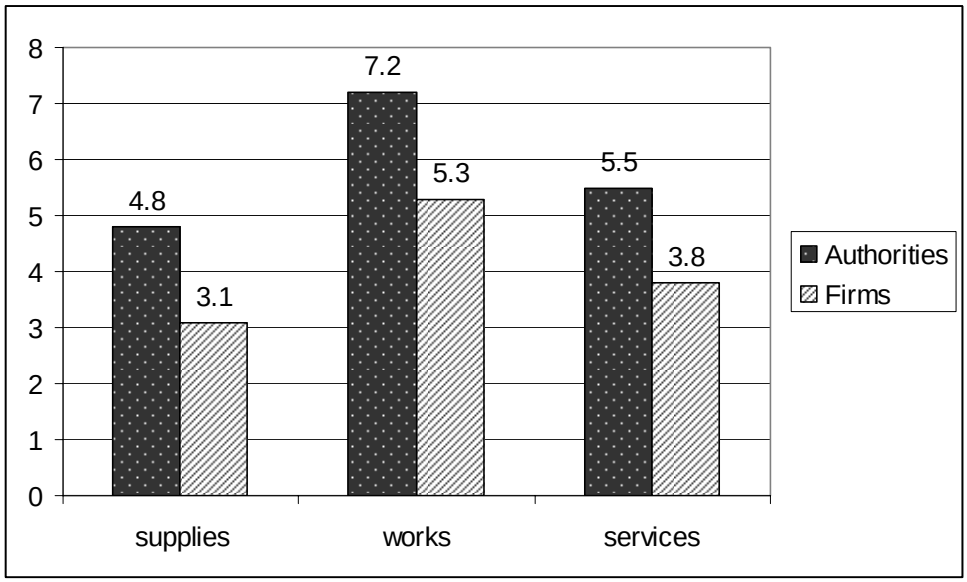


Source: PwC, London Economics, Ecorys

6.5.2. Monetising the cost

The resources used for the different procedures, measured in person days, serves as a starting point for the calculation of the equivalent monetary cost of procedures (as the time spent on carrying the procedures is multiplied by labour cost). As a result, the typical procurement procedure costs can be estimated at nearly EUR 28 000. This cost is borne by authorities (typically EUR 5.500 per call for tender launched) and firms (EUR 3 800 per offer submitted). To arrive at the above mentioned total cost, the cost borne by businesses need to be multiplied by the number of bids submitted per procedure (a weighted average of 5.9[301] bids per procedure).

Figure 25. Typical cost of competition in thousand EUR by type of contract

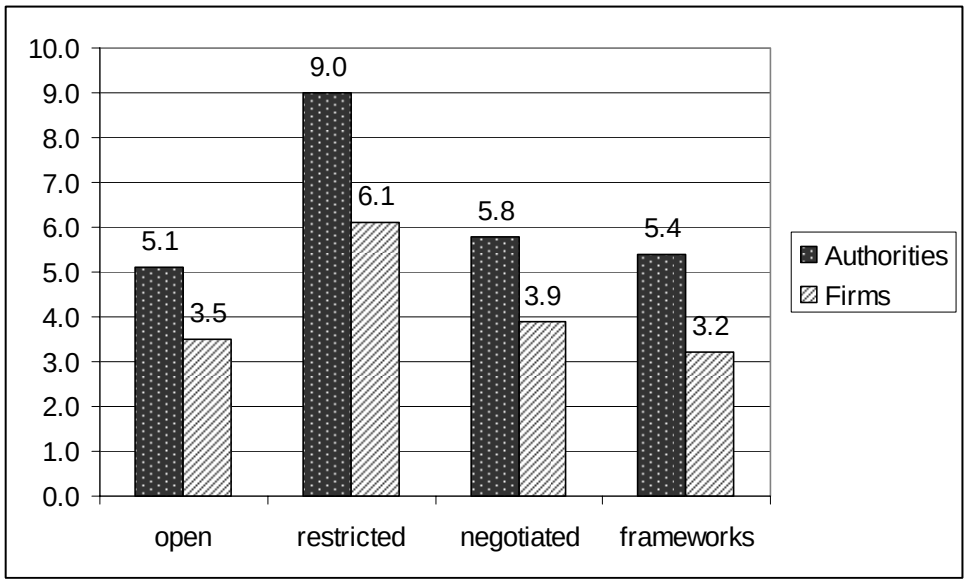


Source: PwC, London Economics, Ecorys

Works contracts are the most expensive in terms of resources. This is not only because construction contracts are usually more complex than goods or services contracts, but also due to the fact that they attract more bids (7.8 typically). As a consequence, the total cost for works contract is around EUR 48 000. Costs for services contracts are very close to the figure of all contracts combined (i.e. around EUR 28 000). Supplies contracts are less expensive – EUR 4 800 for authorities and EUR 3 100 for firms which with 5.3 bids submitted per invitation to tender result in around EUR 21 000 per procedure.

As far as the different procedures are concerned, the restricted procedure is the most resource intensive for the authorities (generating costs of around EUR 9 000 per competition). This procedure is also relatively expensive for firms - EUR 6 100 per competition). The combined costs lead to a typical cost for a negotiated procedure of around EUR 42 000 (based on a weighted average number of 5.4 bids submitted in restricted contests). The negotiated procedure is the second most resource intensive procedure.

Figure 26. Typical cost of competition in thousand EUR by type of procedure and technique



Source: PwC, London Economics, Ecorys

As far as techniques are concerned, framework contracts have relatively low costs when compared to other forms of procurement. Above all, there are significant savings in frameworks especially for firms (typical cost for firms is EUR 3 200 per procedure, which is the lowest amongst all tested options). As mentioned in the outset, the use of this technique is increasing. However, while mentioning the benefits stemming from the use of framework agreements, it should be also underlined that concerns have been raised with regards to the impact of framework agreements on competition. Some contracting authorities are concerned that use of framework agreements may tend to reduce competition over time. Given the size of these contracts, the potential impact of framework agreements on competition might adversely affect SMEs to public procurement markets.

6.5.3. The typical cost of procedure as a proportion of the contract value

Based on this information, it appears that the cost of the procurement process may also represent quite a high percentage of the total value of a contract, particularly at the lower end of the value range. As noted above around 18% of all contracts published in TED have values below the EUR 125 000 threshold while 30% of sub-central contracts are below EUR 193 000. Most significantly, 70% of all works contracts are below the threshold for works (i.e. EUR 4.85 million). The fact that significant number of contracts of relatively small values have been carried out in line with the rules set out in the Directives, means that the total cost of carrying out these procedures might constitute significant proportion of the contract value itself.

At the lowest threshold in the directives, EUR 125 000, total costs can amount to between 18 and 29 % of the contract value. At EUR 390 000, the median contract value, costs reach between 6 and 9 %. Although the cost for each participant is lower than this total (about 1/6), these shares are significant. These findings are influenced by the fact that many of the contracts published are well below the thresholds.

6.5.4. The total cost of procedures

The total cost to society of procuring the goods and services covered by the Directives is estimated at around EUR 5.26 billion per year (for the EEA-30 in 2009), which is less than 1.3% of the value of invitations to tender published (by the EU-27) in the same period (i.e. EUR 420 billion). This estimate covers the whole cost incurred during the entire procurement process i.e. from the pre-award phase, through the preparation of offers by all participating bidders, the selection of a successful bidder, and including any costs of litigation.

Of course much of this cost would be incurred whether the Directives were in place or not. This global figure would not reduce to zero if the Directives were repealed. All procurement, including procurement carried out below EU thresholds, as well as private procurement has associated costs. In fact, the additional cost imposed by the provisions of the Directives is likely to be relatively limited, as was pointed out in an earlier evaluation of public procurement Directives carried out in 2006. That evaluation put the additional cost of compliance with the EU Directives compared to the national / below-threshold procurement at 0.2 % of the total contract value for public purchasers and further 0.2% for suppliers – or approximately EUR 1.68 billion in 2009.

This relatively significant figure of EUR 5.26 billion is the result of the high level of transparency and competition generated by public procurement rules at EU level. 75% of this total figure is the cost of bidding borne by businesses. They will be shared out among the 5.4 bidders who tender for the average published contract. It can be assumed that these costs will be incorporated in the long run into the prices of tenders or built into the margins the successful tenders. These costs are mainly driven by two factors – firstly, the above mentioned high levels of competition and secondly, the person-day cost of procedures (i.e. the actual time effectively spent by authorities and firms in carrying out procurement procedures, as opposed to the duration of procedures).

6.6. Comparing public procurement above EU thresholds with other markets

When it comes to comparing public procurement with private sector procurement, firms find the latter less time-consuming and cheaper. These differences are confirmed when the duration of private procurement is compared with the findings from Section 117) above. The average length of the procurement process from the invitation to suppliers to receipt of tenders is two-three weeks and a contract is usually awarded some 4-6 weeks after the tender deadline, whereas in EU public procurement these time spans are six to seven weeks[302] (the time to tender) and between eight and nine weeks[303] (the time to award). This is also confirmed by survey results where more than 50% of respondents say that public procurement is more or much more time-consuming than private purchasing (across all procedures).

The efficiency of private sector procurement is also rated higher than public procurement. On the other hand, private sector purchasing is seen as less competitive and less fair or transparent: almost 60% of those companies who had an opinion, say that public procurement run on the basis of the open procedure is more or much more transparent than private purchasing, with 35% saying the same for the restricted procedure. Similarly, firms say that public procurement is fairer than private purchasing (33% in the open procedure and 34% in the restricted one). It might therefore be said,

that the lower efficiency of public procurement is the result of creating a system that is more transparent and competitive. The higher level of competition that the companies expect in public purchasing has been also confirmed via interviews, where firms state that on average two-three offers are submitted in a private procurement process.

6.7. Conclusions

Procurement regulation inevitably entails some compliance costs both for contracting authorities and suppliers. In particular, tendering for public contracts gives rise to costs for bidders, not all of whom can be successful. Much of the cost to individual suppliers will over time be recouped from successful bids. The findings suggest that there may nevertheless be some circumstances where the costs of running particular procedures may be disproportionate to the benefits that could be expected. Contracting authorities and entities may need to be able to adapt their procedures to the circumstances of their purchase in order to reduce disproportionate costs.

The thresholds laid down in the Directives determine which procedures are subject to the procedural requirements of the Directive, and consequently the related compliance costs and transparency benefits. While higher thresholds would reduce the coverage and thus the cost of compliance with the Directives, it would entail a countervailing reduction in transparency and EU level competition for those contracts.

The disparity between Member States in the time taken to complete procedures, and cost to public purchasers suggests that the cost of procurement administration is not uniquely determined by the Directives. Under the Directives we observe the co-existence of both efficient and very inefficient practice. By aligning practice on the most efficient Member States there is considerable scope for reducing costs in many Member States.

CHAPTER 7: TRADE, MARKET ACCESS AND CROSS-BORDER PROCUREMENT

Within the public procurement domain, opening national markets to competition from abroad was expected to be achieved mainly through the implementation of the principles of *non-discrimination* and *transparency*. Fragmented, national procurement markets were considered to be economically inefficient. Discriminatory procurement, where it occurred, would constitute a barrier to trade and reduce trade flows.

The current evaluation measures above threshold cross-border procurement in detail and in various forms - direct and indirect[304] (for example through subsidiaries or affiliates).

For many years, detailed measurement of the scale of cross-border procurement was not possible due to limitations in the data available. Earlier work has had to base itself on incomplete national reports, on data collected by national statistical institutes for other purposes or on limited survey data. Detailed analysis of cross-border procurement above the thresholds of the Directives has become feasible only when the quality of the data for notices published in the OJEU was both collected and distributed electronically through the on line version of the OJEU TED, including, most importantly, structured name and address data for successful bidders.

This chapter starts by analysing import penetration levels for total public expenditure on works goods and services. Subsequently, it presents estimated levels of cross-border procurement regulated by the Directives (i.e. direct and indirect procurement through various channels). Cross-border data is also analysed by comparing differences between sectors, types of items purchased and countries.

7.1. Import penetration

In 1988 the public sector import penetration was estimated by the Cecchini report at around 6%[305] of which 1.4% was direct. Using estimates based on the analysis of national accounts data from the five-yearly symmetric input-output tables collected by Eurostat (Table 23) it appears that total import penetration, understood as the proportion of imports to the total use (of selected sectors or total economy), has increased from 14.1% in 1995 to 17.4% in 2005. This would indicate a general trend towards more cross border trade in economy and also more cross border sourcing of inputs by public sector.

Table 23. Import penetration of public and private sectors in 1995, 2000 and 2005

Year	Import penetration of public sector	Import penetration of private sector	Import penetration of total economy	Gap between public and private (percentage points)
1995	5.1%	15.6%	14.1%	10.5
2000	6.5%	18.7%	17.1%	12.2
2005	7.5%	19.1%	17.4%	11.6

Source: Rambøll Management

The same Eurostat dataset can be used to compare import penetration in the public sector to the private sector although the latest data available is only for 2005 and is not fully comparabe. Analysing the data in this way shows that import penetration in the public sector is significantly lower than in the private sector. This would naturally suggest that the public sector is not as open and integrated in the general economy as the private sector. However, between 2000 and 2005 the propensity to import of the public sector has increased more rapidly than the in the private sector - public sector import penetration increased from 6.5% to 7.5%, while private sector import penetration rose from 18.7% to 19.1%. The gap between the two sectors has narrowed by 0.6 percentage points in five years. On the other hand, five years earlier the gap was even smaller (10.5%), but private sector import penetration rose considerably between 1995 and 2005[306].

There are both supply and demand side explanations for the difference between the public and private sector import penetration? From the demand side, the difference in import penetration can be partially explained by differences in the kinds of goods, and services purchased by government authorities, compared to those purchased by private companies. The differences in the structure of purchases by these two sectors has been pointed out in an earlier evaluation study by Europe Economics[307] as a potential reason for differences in public and private import shares.

Table 25 shows the ten product groups which are the most important for public purchasers (i.e. those which have the highest share in public sector demand). We find that the first three, namely public administration, health and social services and education, make up more than 60% of public sector demand (25.3%, 21.2% and 14.3% respectively in 2005). The product groups are defined according to the classification of products by activity (CPA).

Table 24. Top 10 products[308] by share in total public sector demand in 2005

Product group	Share of product group in total demand of public sector	Import penetration of public sector
Public administration etc	25.3%	0.1%
Health and social work services	21.2%	0.0%
Education services	14.3%	0.0%
Other business services	3.9%	8.0%
Electrical energy / gas / steam	3.6%	12.0%
Chemicals / chemical products	3.2%	50.0%
Real estate services	2.2%	0.0%
Post / Telecommunication	2.0%	12.0%
Recreational, cultural services	1.8%	1.0%
Crude petroleum / natural gas	1.7%	81.1%
Construction work	1.7%	1.0%

Source: Based on Rambøll Management calculations

These three product groups have an import penetration ratio close to zero (0.1%). Such low import penetration may be explained by the fact that all of them are locally provided services which are naturally less tradable than supplies. Secondly, these three types of services also to a large extent acquired and paid for by means which fall outside the scope of the rules established by the Directives, either because their individual value falls below thresholds or for other regulatory reasons, such as exempt services. Public administration accounted for one quarter of the total public sector demand in 2005, whereas administration, defence and social security (CPV division 75) accounted for only 0.2% of the value of contracts published in the OJEU in 2009.[309] The vast majority of public administration services are not acquired through a competitively advertised tender process. Similar sharp contrasts between expenditure volumes and publication levels can be observed in the health and education sectors.

This suggests that the low propensity to import of the public sector can to a large extent be explained by three sectors which are not fully exposed to competition either due to exclusions, exemptions or other regulatory arrangements, such as reimbursement through statutory health insurance, that place them outside of the full scope of application of EU public procurement rules (or even the rules governing the procurement of II B services). To the extent that these sectors represent locally provided or personal services they may be naturally not easily tradable and a large part of the value added would inevitably be generated locally. Whatever the regulatory regime, they might well continue to be purchased locally for entirely rational reasons.

Some of the other sectors, that make up the remaining 40% of public sector demand, are, however, subject to the full public procurement rules. Even if their share of public demand is lower, it is useful to compare their patterns of purchasing in the public and private sector. Amongst the top 10 sectors by share in total demand construction has the biggest share of procurement published in the OJEU. Around 40%, by value, of all contracts published in the OJ in 2009 were published under CPV division 45 (construction). As we will see in section 7.3, cross-border procurement for construction contracts amounts to only 2% in terms of value, which is lower than the EU-average for all sectors (3.6%). However the proportion of exports compared to total use of construction output (at around 2.0%[310] in 2005 for the whole economy) is almost exactly the same as for above

threshold contracts published in the OJEU. This finding would suggest that the level of direct cross border public sector construction or works contracts is very similar to the proportion of exports of construction industry in general.

While this may imply that the construction sector may show a similar propensity to be traded across borders, irrespective of the type of buyers (be it public or private), this may not be true for other sectors.

To permit a comparison of the purchasing patterns of the public and private sectors, an adjusted comparison across all sectors has been carried out. Reweighting the 2005 input/output data to adjust public sector consumption to represent the same types and proportions of goods and services as the private sector, and re-calculating public sector import penetration for this same mix of goods and services shows that import penetration in the public sector would increase to 18.2%, reducing the gap between the public and private sector to less than one percent.

Table 25. Recalculated import penetration of public sector in 2005

Import penetration of public sector	**Import penetration of private sector**	**Import penetration of total economy**	**Gap between public and private import penetration (percentage points)**	***Re-calculated import penetration of public sector***	***Hypothetical gap between public and private (percentage points)***
7.5%	19.1%	17.4%	11.6	*18.2%*	*0.9*

Source: Rambøll Management

The recalculated level of import penetration of 18.2% suggests that some or most of the difference between the private and private sector might be explained by the structure of their respective consumption patterns.

One explanation of the higher private sector import penetration may be the fact that the production process for tradable goods is increasingly fragmented along the value chain. As economies globalise, the different parts of the value chain are transferred to different countries. As a result of these outsourcing and off-shoring activities, different components cross national borders during the production processes. This growing intra-industrial trade increases the momentum of private sector international trade.[311]

Finally, although there seem to be reasons to explain lower levels of import penetration in terms of the structural differences between the two sectors, the scale of the gap observed may still raise concerns about the existence of discriminatory practices on the side of public purchasers. In this context, Trionfetti (2000) argues that if the import share of government is persistently and substantially lower than the import share of the private economy, it is likely that it is the result of a discriminatory procurement practice (implicit or explicit).[312]

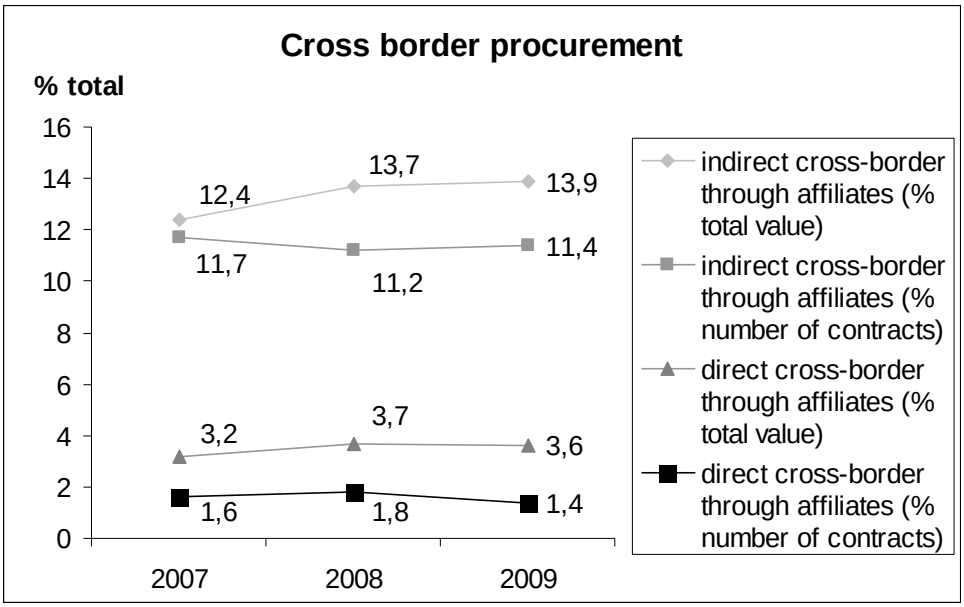
7.2. Estimates of cross-border procurement through different channels

Cross-border public procurement can occur through different channels. Direct cross-border procurement occurs when firms operating from their home market bid and win contracts for invitations to tender launched in another Member State. Indirect cross-border activities arise when firms bid for contracts through subsidiaries, i.e. when their foreign affiliates bid for tenders

launched by authorities of a country different from the home country where the firm has its headquarters or where the parent company is located. Indirect cross-border procurement can also occur when a domestic firm imports goods in order to supply them to a contracting authority or entity. Finally, foreign bidders can submit offers in consortia with local firms.

According to research conducted for this evaluation, direct cross-border procurement, namely when firms tendering from their home market win contracts in another Member State, accounts for 1.6% of awards or roughly 3.5% of the total value of contract awards published in TED during 2007-9.

Figure 27. Direct cross-border procurement and indirect cross-border through affiliates 2007-2009



Source: Rambøll Management

In addition to direct cross-border procurement however, there is a considerable volume of indirect cross-border procurement. For example firms bid for contracts through their foreign affiliates or subsidiaries. This channel accounted for 11.4% of awards published in TED and 13.4% by value during 2006-9. As the above figures suggest, the dominant role in cross-border procurement is played by purchases from local affiliates of foreign companies.

In another form of indirect cross-border procurement, domestic distributors import goods in order to supply them to a contracting authority or entity. This form of wholesale distribution appears to be significant, amounting to 13% of procurement in both the number and value of contracts awarded. This form of import may well include, or overlap with part of the indirect cross border through affiliates or subsidiaries and is thus not cumulative with other channels. This however does not constitute direct purchase from abroad as the (supply) contract is between the purchaser and a local distributor / wholesaler even if the content of purchase is sourced abroad. direct result of the provisions of European public procurement legislation. Finally, foreign bidders can submit offers in consortia with local firms or through subcontractors. According to the same study, this form of cross-border procurement seems to be statistically negligible.

7.3. Differences in cross-border procurement by type of product or service

Goods appear to be more easily tradable cross-border than works or services. The share of direct cross-border procurement over 2007-2009 amounts to 7% for supplies, in terms of value but only 2% for works or services. In terms of the number of awards, 2% of supplies contracts are awarded directly cross-border, compared with 1% of works and services contracts.

Indirect cross border procurement through affiliates makes up 25% of the total value of supplies contracts, 6% of works and 14% of services. For the number of awards, the percentages are the following: 13%, 5% and 7%.

Table 26. Cross-border procurement by type of product or service in 2007-2009

	Supplies	Works	Services
Direct cross-border	7%	2%	2%
Indirect cross-border through affiliates	25%	6%	14%

Source: Rambøll Management

Supplies have the highest propensity to be traded cross-border, either directly or indirectly, as general economic theory might predict. A separate confirmation comes from the analysis of distance between buyers and sellers, which reveals a similar pattern - the average distance is 232 km for supplies contracts, 123 km for services and only 102 km for works.

These data show that works contracts are less tradable than services. But while works contracts are covered by full procedural obligations of the Directives, services are divided into two categories (A and B) with the full regime applying only to category A services. The 16 category A services, were assumed to be better suited for cross-border procurement, and are thus subject to the full procedures like works or supply contracts, while the eleven category B services, were assumed to be less tradable, and are subject to a lighter regime. Since contract award notices must be submitted for both categories it is possible to assess whether cross-border procurement (both direct and indirect through affiliates) is significantly higher for A services than for B services. Despite certain limitations in the data, it appears that, as expected, category A contracts do appear to have a higher share of cross-border procurement (2.8% direct and 16.2% indirect by value), than category B contracts (1.2% and 12.1% respectively).

Table 27. Cross-border procurement – A and B services on the basis of contract value (2007-2009)

Service Category	Direct cross-border	Indirect cross-border through affiliates
01: Maintenance and repair services	2.8%	10.8%
02: Land transportation services, including armoured car services, and courier services, except transportation of mail	0.5%	3.8%
03: Air transport services of passenger and freight, except transport of mail	1.4%	52.8%
04: Transport of mail by land and by air	3.6%	0.6%
05: Telecommunications services	1.4%	7.7%
06: Financial services: (a) Insurances services (b) Banking and investment services	3.5%	36.4%

Service Category	Direct cross-border	Indirect cross-border through affiliates
07: Computer and related services	2.8%	41.0%
08: Research and development services	3.2%	21.8%
09: Accounting, auditing and bookkeeping services	0.6%	0.2%
10: Market research and public opinion polling services	3.2%	40.5%
11: Management consulting services and related services	10.4%	11.4%
12: Architectural services; engineering services and integrated engineering services; urban planning and landscape engineering services; related scientific and technical consulting services; technical testing and analysis services	4.8%	3.6%
13: Advertising services	3.4%	3.7%
14: Building-cleaning services and property management services	0.4%	20.3%
15: Publishing and printing services on a fee or contract basis	1.8%	10.1%
16: Sewage and refusal disposal services; sanitation and similar services	1.3%	9.8%
Subtotal IIA	2.8%	16.2%
17: Hotel and restaurant services	0.3%	39.1%
18: Rail transport services	0.1%	52.5%
19: Water transport services	9.2%	1.3%
20: Supporting and auxiliary transport services	0.6%	2.7%
21: Legal services	21.2%	2.6%
22: Personnel placement and supply services	0.0%	1.7%
23: Investigation and security services, except armoured car services	0.1%	8.4%
24: Education and vocational education services	1.7%	10.5%
25: Health and social services	0.1%	0.6%
26: Recreational, cultural and sporting services	2.9%	3.9%
27: Other services	2.1%	3.4%
Subtotal IIB	1.2%	12.1%
Total	**2.4%**	**14.6%**

Source: Rambøll Management

However, these data also suggest that not all B-type services are non-tradable. Some category B services perform better than average when compared to category A services. For example 21.2% of the total value of contracts for legal services was awarded directly cross-border, compared to the average of 2.8% for category A services. The value of contracts awarded indirectly cross-border is 39.1% of the total for hotel and restaurant services compared to the average indirect cross-border of 16.2% for category A services.

These findings suggest that if the original logic for the distinction between A and B services were applied today, some of these service categories might be classified differently. However, the interpretation of the above data should be put in the context of the dataset on which it was built. As explained in detail in the study these data were based on information contained in notices published in TED. In the case of B services, this may result in self-selection bias and important level of non-compliance. For technical reasons, it has not been possible to examine transactions including B services that did not publish a contract award notice. It is however possible that a significant number of B procedures have been conducted without such publication and that if these missing transactions were also analysed the levels of cross-border procurement of B services would be different.

7.4. Country differences

There are important differences between Member States in the level of cross-border procurement. The majority of countries have a share of cross-border procurement close to the average, but some Member States (above all the smaller ones) have an average share of direct cross-border procurement between of 5 and 15%, while Cyprus, Luxembourg, Malta and Slovakia have a share of value of direct cross-border procurement of over 15%.

Table 28. Cross-border procurement by country (2007-2009)

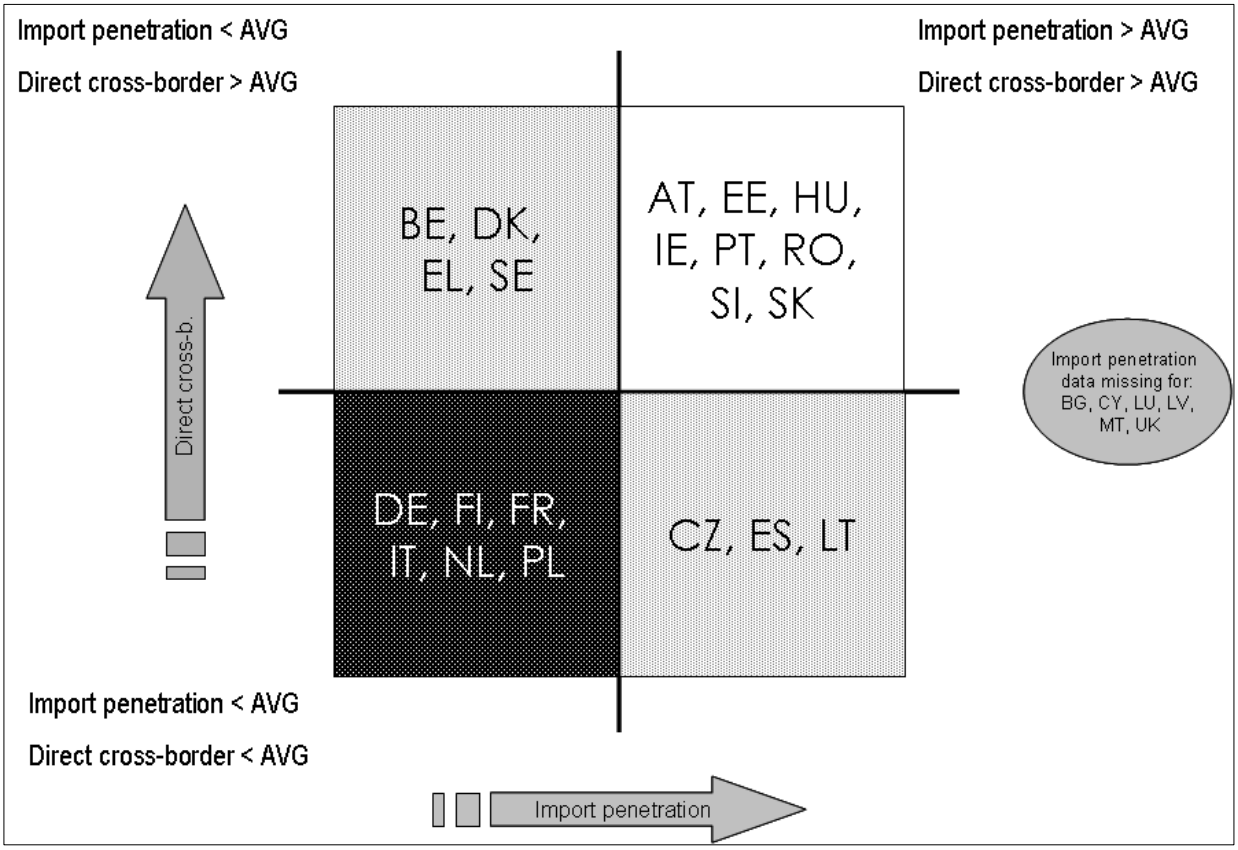
	Number of awards		Value of awards	
Country	**Direct cross-border**	**Indirect cross-border through affiliates**	**Direct cross-border**	**Indirect cross-border through affiliates**
Austria	6.0%	18.3%	11.3%	12.3%
Belgium	5.1%	24.0%	7.5%	32.7%
Bulgaria	1.2%	4.3%	13.9%	3.2%
Cyprus	8.1%	1.1%	23.9%	0.5%
Czech Republic	1.8%	19.2%	2.3%	25.0%
Germany	1.5%	8.1%	1.7%	9.6%
Denmark	3.9%	12.9%	6.8%	10.7%
Estonia	7.6%	2.1%	7.6%	1.0%
Spain	1.0%	25.1%	0.9%	9.1%
Finland	2.0%	15.3%	2.7%	22.1%
France	0.9%	14.8%	1.5%	19.3%
Greece	2.2%	1.2%	5.6%	1.5%
Hungary	1.7%	10.3%	5.8%	14.1%
Ireland	15.4%	9.0%	8.8%	0.5%
Italy	1.3%	28.6%	1.6%	20.4%
Lithuania	2.5%	3.2%	2.4%	0.2%
Luxembourg	16.2%	6.3%	16.4%	0.9%
Latvia	2.7%	0.4%	13.3%	1.0%
Malta	13.8%	0.5%	63.3%	0.0%
Netherlands	2.9%	9.8%	1.8%	11.0%
Poland	0.8%	1.7%	3.9%	4.0%
Portugal	2.7%	13.8%	7.1%	9.8%
Romania	2.0%	6.6%	10.0%	5.9%
Sweden	3.1%	21.7%	6.7%	44.1%
Slovenia	1.6%	1.4%	4.0%	0.9%
Slovakia	4.0%	10.5%	12.8%	15.6%
United Kingdom	1.5%	16.5%	3.0%	13.8%
Iceland	5.8%	0.0%	23.3%	0.0%
Liechtenstein	21.2%	11.3%	20.3%	8.8%
Norway	4.7%	22.7%	6.8%	10.7%
EEA-30	**1.6%**	**11.4%**	**3.5%**	**13.4%**

Source: Rambøll Management

In some Member States the share of value of indirect cross-border procurement is higher than 25% (e.g. Belgium, the Czech Republic and Sweden).

Countries can be grouped, according to their relative shares of direct cross-border in above threshold published procurement (data for 2007-2009) and import penetration according to the national account data (for 2005) into four types by the level of the market openness[313]. A graphic interpretation of such comparison is presented in Figure 28 below.

Figure 28. Countries grouped by public sector import penetration (2005) and direct cross-border procurement (2007-2009)

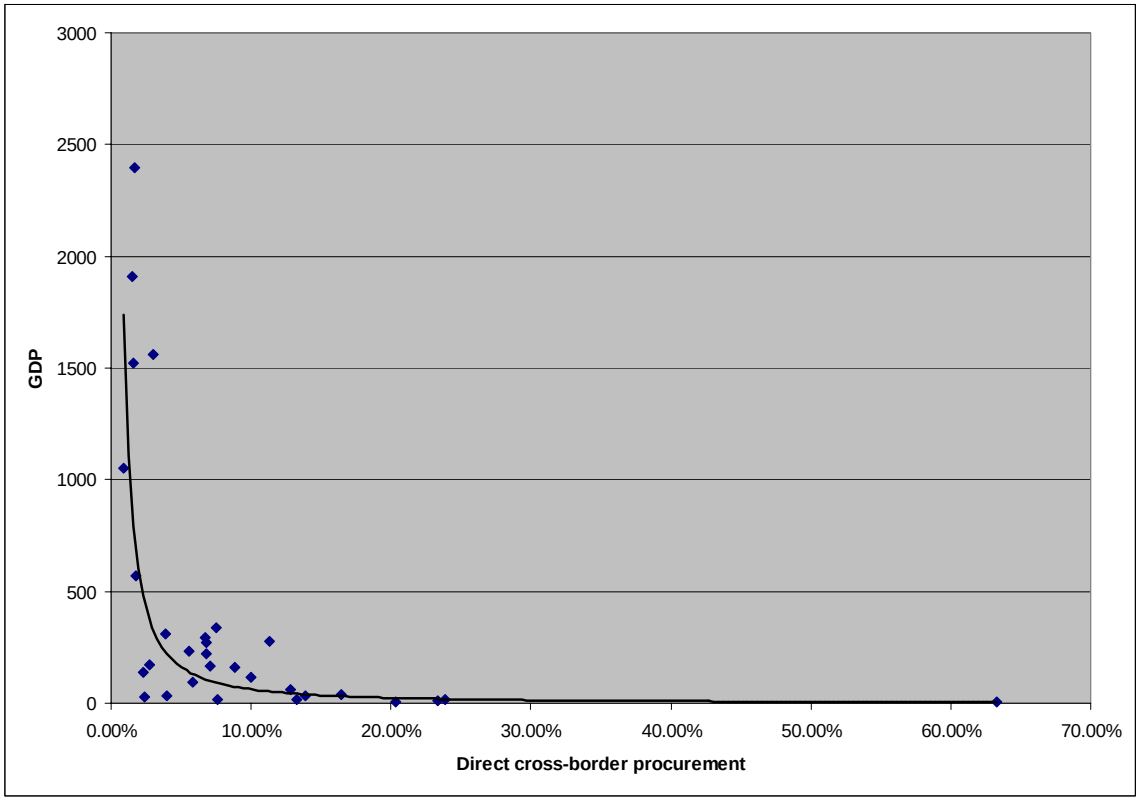


Source: Based on Rambøll Management data

Larger Member States such as Germany, France, Italy and Poland show lower levels of both import penetration and direct cross-border procurement due to existence of local supply base capable of meeting public procurement needs on competitive terms. On the other hand smaller countries or countries with a narrower national industrial base that need to source more from abroad appear as more open economies. In public procurement this mechanism means that in countries where government demand cannot be met by domestic suppliers (which is more often the case in smaller economies) and where markets are non-discriminatory, the demand will be satisfied by imports.

There also appears to be a relationship between direct cross-border and GDP. Although such relationship is not very strong for mid-size Member States (as seen in Figure 29), it is stronger in the extreme cases (i.e. small countries with high levels of direct cross-border and bigger countries showing the opposite).

Figure 29. Relationship between direct cross-border procurement (2007-2009) and GDP by countries



Source: based on Rambøll Management data

An alternative measure of the relative openness of Member States' procurement markets is the distance between contracting authority and successful bidder, as this also seem to be related to the size of national markets: the smaller the country the shorter the distance (Table 29 below).

Table 29. Awarding distance for selected Member States

Country	Average awarding distance in km	Land area in km²
Belgium	60	30,528
Austria	94	83,855
Germany	148	357,021
Poland	170	312,685
France	190	674,843
Italy	245	301,338
Average	179	293,378

Source: Rambøll Management

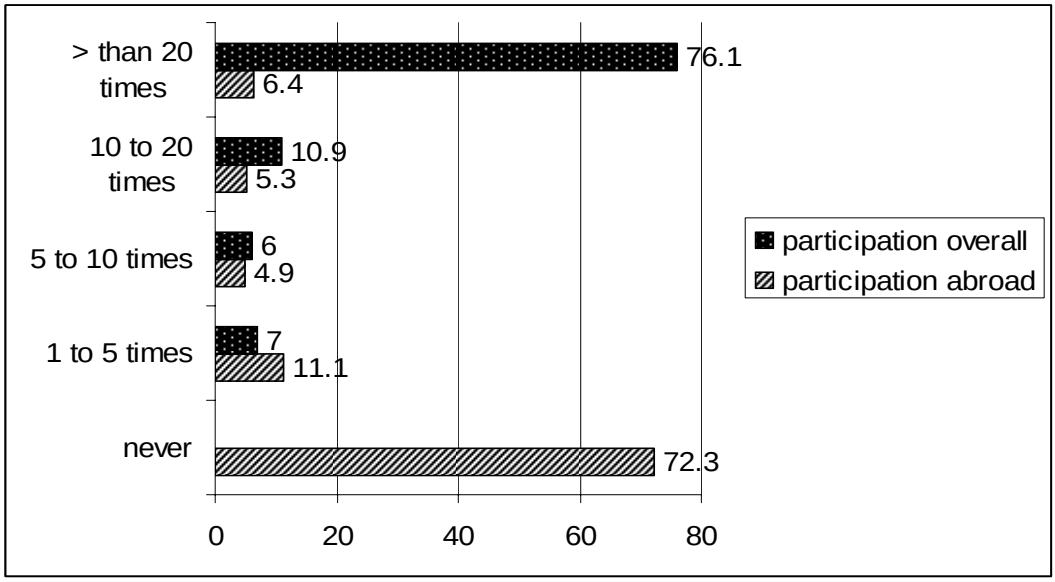
These average distances between a buyer and a seller are determined to a large extent by the fact that the vast majority of contracts are concluded between buyers and sellers from the same Member State. But even if this is taken into account, the distance seems to be correlated with the size of the country area (i.e. even if contracts are concluded locally, "locally" in a bigger country means further away than in a small county). Analysis of distances also reveals that almost 40% of above EU above thresholds contracts are awarded to suppliers located within a distance of 50 km. This sample based estimation also shows that if this distance was doubled (i.e. to a radius of 100 km) half of all

contracts published on TED would be captured. To summarise, the above findings confirm that vast majority of EU procurement contracts is still concluded locally (or regionally).

7.5. Cross-border participation – supply side perspective

Procurement contracts awarded directly across borders are still limited. This can be explained by both supply and demand factors. Low levels of import penetration may be due to the composition of public demand, which is dominated by services that are sourced locally. However, recent survey data shows that companies are also reluctant to tender cross-border. In a recent large scale survey around 73% of firms, otherwise active in public procurement, said that they have not made any cross-border tenders in the last three years (ref. Figure 30). The fact that the average success rate when bidding abroad is lower than when bidding at home may go some way to explain this behaviour.

Figure 30. Participation in cross-border tenders



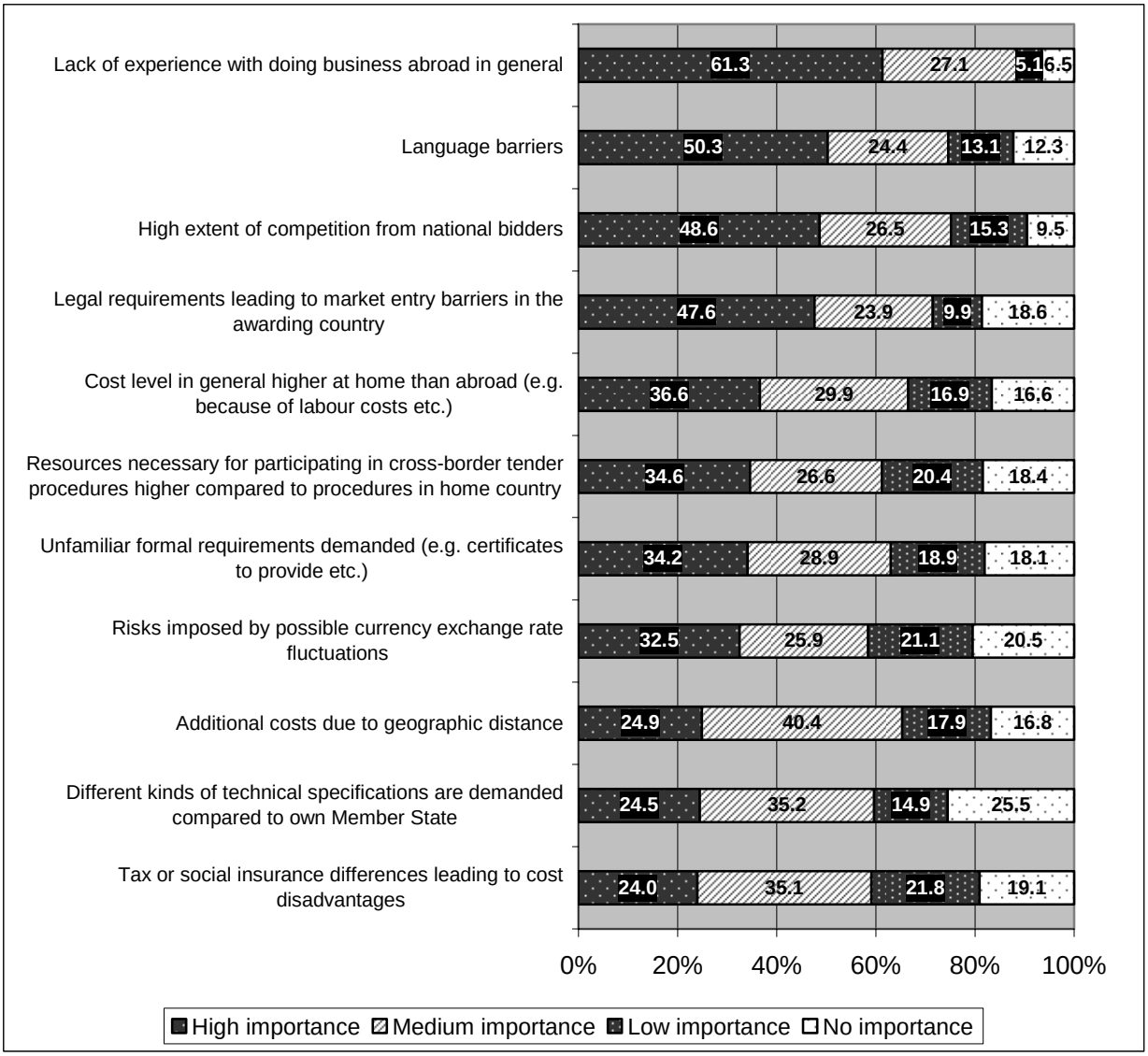
Source: Rambøll Management

When firms were asked about the reasons for their low level of participation in cross-border procurement, they identified language barriers as being one of the major obstacles. As presented in Figure 30 recent survey shows that only around 25% of firms think that language issues are not important or have low importance when bidding abroad. Further confirmation that language indeed matters, come from the analysis of contract awards by country. For example, 75% of the contracts awarded directly cross-border by Irish authorities are awarded to firms from the UK. 84% of direct cross-border awards made by Austrian authorities are concluded with businesses from Germany. To complete this picture, the analysis of contracts awarded between 2007-2009 shows non-negligible relationship between the existence of common language borders and the chance of awarding a contract to a foreign firm. In other words, the results of econometric modelling confirm that the probability of direct cross-border procurement award happening in a country that shares a language

with another Member State is significantly higher than in Member States with a different language (by 21.3%).

Legal requirements leading to market entry barriers were named as the fourth most important obstacle (only 28% of firms do not rank this problem high). However the major reason for not bidding cross border appears to be simple inertia: 61% of respondents identified their general lack of experience in doing business abroad. It would appear that most firms do not bid for cross border procurement opportunities simply because thy have not done so before.

Figure 31. Reasons for not bidding cross-border



Source: Rambøll Management

Although risks related with currency exchange rates are only ranked as the sixth most important obstacle, their general importance should not be overlooked. Participation in the Euro area has been indentified, in a separate exercise, as an important factor facilitating direct cross- border procurement (i.e. being a member of the Euro area enhances the chances of a contract being

concluded cross-border by 97.1%).[314] This suggests that a common currency matters more than a common language.

In order to investigate the issue of reluctance to bid cross border in greater detail the Commission has undertaken a separate survey with the European Business Test Panel (EBTP).[315] The results of this (smaller) complementary survey run by the Commission, which concentrated on the reasons why firms did not bid cross border, show that administrative obstacles have a major negative impact on firms (43% of firms which had competed for cross border public contracts responded that country-specific formal requirements were a major obstacle in cross-border procurement).

7.6. Cross-border procurement - is the glass half full or half empty?

These findings lead naturally to the question whether these levels of cross border procurement indicate that the EU Directives have achieved their objectives or not. The level of direct cross border purchases has been seen as the measure of whether or not, or to what extent, the Directives have achieved their objectives. The latest estimate of the share of cross-border contracts is 3.5% (in terms of average percentage of total value published in the OJEU over 2007-9). No similar or comparable data is available for the private purchases on unregulated markets, so it is hard to judge whether this level of direct cross-border procurement is higher or lower than could have been expected. Reference to the share of cross-border awards is not enough to allow clear-cut judgement to be made whether or not the Directives have achieved their objectives.

The Directives focus on the enforcement of two principles: transparency and non-discrimination. Implementation of these two principles was expected to create a level playing field and therefore establish genuinely competitive market conditions for carrying out purchases by public authorities. If the two principles are fully implemented, we may expect that the chances would be higher that level of direct cross-border activity is greater. In other words, to be able to put the level of direct cross- border procurement into the context the evaluation of the effectiveness of the Directives (i.e. in terms of their effectiveness in opening markets to competition) we also need to look at transparency levels and the existence of market discrimination.

7.6.1. Transparency

The level of transparency, understood as the provision of information about the procurement procedures, has been improving over the years and seems to reach satisfactory levels nowadays. The recent development is principally due to advances in IT technology which made the exchange of information easier and cheaper.

In the EBTP survey, companies were asked to identify obstacles in participating in cross-border procurement in the EU and outside of the EU. It was only in the case of third country markets that firms identified the lack of information about procurement opportunities as a important obstacle (49%). In case of intra EU procurement, lack of information was not identified as an obstacle. This may suggest that the role of TED as a portal that ensures transparency has been fulfilled. The number of notices published (as it has been mentioned in the previous chapters[316]) is growing each

year with around 400.000 notices published in 2010. Following automatic reminders from the Publications Office any more contract notices are now followed by information about the results award procedures (i.e. by contract award notices). The use of PINs by authorities or entities in order to enhance transparency is also more frequent (only 18% of PINs are used a call for competition, the remaining 82% are used as an additional publication channel). The number of notices or documents consulted on TED has also continued to grow reaching over 29 million in 2010. The number of licence holders for the TED data who often provide commercial information services has also risen, from 128 in 2009 to 141 in 2010, further multiplying the transparency.

Many procedures that seem to fall below EU thresholds (judging on the basis of their values, without entering into detailed analysis of the contracts) are also published on TED. For example, around 70% of works contracts published in the OJ are below the thresholds value for works. There are sometimes regulatory reasons behind this phenomenon, but there is also anecdotal evidence that authorities publish notices on TED even if they are not bound to do so, because they appreciate the greater transparency that this EU-wide tool offers them.

The Directives also require high levels of transparency with regards to individual procedural steps. For example, when contracting authorities use the most economically advantageous tender award criteria (used for around 80% of total contract value) rather than lowest price, the bids are evaluated on the basis of objective criteria such as quality, technical merit, aesthetic and functional characteristics, environmental characteristics, cost-effectiveness, time to completion, etc. and not exclusively on price. All these criteria have to be published in the contract notice, in advance of bids being submitted together with their respective weightings, providing a deeper level of transparency for all potential bidders.

If lack of transparency cannot be identified as the major potential reason for low level of direct cross-border procurement then attention should be rather directed towards the level of compliance with the non-discrimination principle.

7.6.2. Non-discrimination

Discrimination in public procurement is very difficult to detect or prove. While the number of cross-border awards can be measured relatively easily it is much more difficult to say whether the number or percentage is lower than it should be a result of discrimination by contracting authorities or entities. There is a widespread perception of discrimination against foreigners that is shared by the vast majority of firms, which frequently participate in public procurement. 46 % of such businesses think that local preferences influence the outcome of public procurement procedures to a high extent, 27 % think that such preferences influence the outcome to a medium extent and only 14.5% think that there is no discrimination against non-domestic bidders. In the EBTP survey run by the Commission, a question concerning the perceived preference of the contracting authorities for domestic bidders has shown very similar results - around 40% of participant ranked the perceived discrimination against foreigners as a very important obstacle. Both surveys lead to a conclusion that there is a perception at least that discrimination against foreigners is still present in public procurement markets.

Finally, there are many administrative barriers to market access that in practice act as discrimination against foreign bidders, such as requirements to submit additional certificates or permits which can be required from non-national bidders. These are perceived as an obstacle.

7.6.3. Contestability of the markets

When trying to evaluate the impact of market opening and cross border public procurement, it is not enough to analyse the number of awards. The number of bids is also important. Even if the foreign bids are not successful and cross-border award is still rather rare, the simple fact that markets are contestable and that foreign bids can be submitted for all procurement procedures above EU thresholds, may keep the domestic bidders under competitive pressure and induce them to lower their bids.

Recent research proves that public procurement markets are highly competitive, very often more competitive than the private equivalents. The average number of bids submitted in public procurement is 5.4 whereas most companies in private procurement receive not more than two-three offers in each tender on average. A survey has been carried out within this evaluation, where firms participating in public procurement were asked to compare selling to public authorities with the private procurement environment. For open and restricted procedures, over 60% of firms who noticed a difference said that they expect more competition in public procurement than in private sector (i.e. they expect that more bids will be submitted per call for competition). The levels of competition are examined in more detail in Chapter 6.

7.7. Conclusions

- The public sector in Europe tends to be a heavy consumer of services which are locally supplied. Much EU public sector expenditure is on services which are not the subject of published invitations to tender in accordance with the Directives. As these services have a high local content, this results in low levels of import component in public sector consumption.

- However, even for those parts of purchasing where the public sector sources its inputs through open and transparent public procurement procedures (award of contracts following call for competition), direct cross-border trade is relatively low.

- Direct cross-border has been more important in value terms than in terms of the number of cross-border awards (3.5% to 1.6% in 2007-2009) and for supplies it is significantly more advanced (7% in terms of value, 2% of awards in 2007-2009).

- For some (smaller) Member States, cross-border trade is also significant, particularly where there is shared language.

- There is now extensive transparency in EU public procurement governed by the Directives and this has led to sustained competition for public contracts.

- Suppliers are reticent about participating in cross-border tenders – language, legal and administrative barriers and continued perception of local preference is a restraint on cross-border participation.

- EU procurement markets are connected via other trade channels, such as: through the establishment of local subsidiaries, which then submit bids or by procurement from distributors of supplies sourced from abroad. Overall, these channels for integrating EU public procurement markets are gradually being deepened.

- In many markets, direct cross-border trade remains exceptional and suppliers continue to distinguish between domestic and foreign procurers.

CHAPTER 8: COST-BENEFIT ANALYSIS

This part of the evaluation seeks to bring together the various elements which can be used to evaluate the relative balance of costs and benefits of compliance with the public procurement Directives. The study of procedures surveyed 7400 contracting authorities and entities who reported the number of person days spent across a defined set of activities in the procurement process, for a specific and recent purchase for which they had been responsible. These person days, together with any other monetary costs, have then been used to analyse the constituent elements and estimate the total costs of the whole procurement process for all the contracts advertised in the OJEU during 2009.

A number of sources have been examined for evidence of the benefits which may be attributed to influence or effect of the Directives on the procurement process. The most quantifiable or tangible benefit is in monetary or price savings. This has been the focus of a number of studies and analysis by the Commission services. However price savings are only one of several dimensions which a cost benefit analysis needs to consider. Since 70% of the contracts advertised in the OJEU, or 80% of their total value, are awarded to the most economically advantageous tender rather than on the criterion of lowest price, contracting authorities are certain to have realised less tangible or quantifiable benefits such as improvements in quality. It is also clear from the findings of the study on Member States' experience in integrating other policy objectives within public procurement, that contracting entities can and do set specific requirements which take into account the environmental and social impact of different tenders in awarding their contracts

.

8.1. Savings

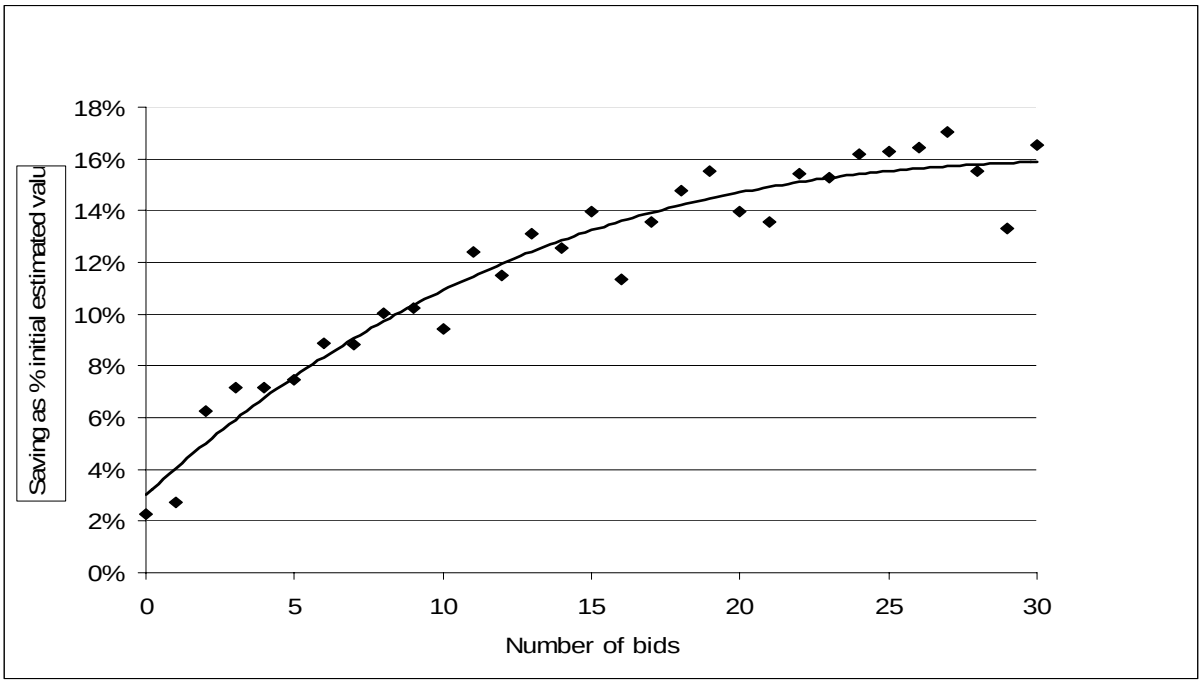
In order to quantify savings which can be attributed to the EU public procurement Directives we must first separate the effects of the Directives from the effect of other, national or international regulatory measures and other changes which would have affected public procurement markets in any event. The construction of a credible counterfactual is challenging and involves making a series of assumptions In 2006 Europe Economics concluded from a number of different sources of information that the prices were somewhat lower overall than they would otherwise have been as a result of the Directives by between 2.5 and 10% of the contract value by 2002. It concluded that that the balance of costs and benefits had been significantly positive.[317]

Europe Economics' study assumed that the price reductions mainly reflected increased efficiency rather than merely a transfer from producers to customers; and that savings by awarding authorities benefit those served by the authorities rather than being dissipated in internal inefficiencies. Overall

the study concluded that prices were lower than they would otherwise have been by more than 2.5% (EUR 6 billion) of total contract value while enforcement and compliance costs for awarding authorities were less than 0.7% (EUR 1.75 billion) of contract value. The overall welfare gain should therefore have been more than EUR 4.25 billion a year by 2002.

In 2009 the Commission services estimated that savings in the order of 5.5% were possible, based on some econometric modelling work undertaken on selected public procurement contracts awarded and published in TED in 2007. Examining the general relationship between the initial estimated total and the final total values published in contract award notices in 2007 the Commission found that there appeared to be a broad correlation between the difference between the initial and final values and the number of bidders for those contracts.[318] In general, it found that the greater the number of bids for a contract the greater the apparent savings.

Figure 32. Relationship between number of tenders received and savings (over expected expenditure)



Source: Commission services based on OJEU

In the context of this evaluation, further detailed work has been undertaken based on the TED data for 2006-2009. This work involved econometric modelling to investigate, in greater depth, the savings compared with initial estimates and their relationship with various indicators of transparency, openness and aggregation.[319]

This work involved the construction of a number of different models and hypotheses in order to test the effects of different procurement practices on the outcome of the procurement procedure. Since all the data comes from contract award notices published in the OJEU and TED this analysis was not a comparison between public contracts regulated by the Directives and contracts not so regulated. The analysis compares different degrees of compliance, transparency or openness, rather

than the difference between compliant and non compliant contracts. For the same reason it does not attempt to disentangle the effects of the Directives from those of other national regulation or indeed of other factors which are independent (although they may be related in some indirect way) of the political measures or which are not compulsory under the Directives. In addition the work makes it clear that it can only take into account the quantifiable elements of the data, excluding, for example, any benefits which are intangible or difficult to quantify such as improvements in the quality of goods or services procured.

The results of this econometric modelling indicate that publishing a contract notice is associated with statistically significant savings roughly equivalent to 1% of the final award value when compared to cases where neither an contract notice nor a prior information notice is published. Publishing a prior information notice on its own does not appear to have a significant effect. However using an open procedure is associated with benefits of a 3% lower award value when compared to cases where non-standard procedures. For restricted procedures, the corresponding effect was 1.1%. The total effect for a contract using an open procedure and publishing a contract notice is about 4%.

On the whole, these findings are consistent with what previous research has suggested – publishing contract notices and using more inclusive procedures are associated with increased benefits for procuring authorities.

Further results from the models indicate that using the open procedure is very effective in attracting more bidders. When only a contract notice is published, open procedures attract 35.2% more bidders than cases where non-standard procedures are used. When only a prior information notice is published, this effect is 38.2%, and when both a prior information notice and a contract notice are published, it is 46.4%. Restricted procedures are also associated with more bidders in conjunction with the publishing of a contract notice only (27.4%) and the publishing of both a prior information notice and a contract notice (37.8%). However, restricted procedures do not raise the number of bidders if only a prior information notice is published. Unsurprisingly, the use of non-standard procedures is associated with a lower number of bidders.

The earlier evaluation has suggested that there would appear to be a somewhat uneven distribution of costs and benefits.[320] Contracting authorities benefit from the lower prices and as a result, presumably, so do the taxpayers or those provided with public services by the contracting authority if procurement savings are passed through to the contracting authority budget. These price savings outweigh the costs of compliance but the balance is less favourable for complex requirements, and least for small contracts. For the suppliers costs and benefits are unevenly distributed. While efficient and expanding suppliers have been able to use the increased transparency and fairness in order to win additional business, other suppliers suffer from this increased competition as well as from the increased administrative costs of compliance. In the longer term, the supply side as a whole may benefit from increased efficiency.

8.2. Qualitative considerations and impacts

Less tangible or quantifiable benefits may include increase in quality and a variety of environmental and social benefits depending on the priority or weighting that the contracting authority attributes to these criteria. The evidence from analysis of a series of award procedures demonstrated that integrating environmental criteria, for example, into procurement process had a measurable and significant impact on procurement outcomes. The surveys and interviews demonstrate that contracting authorities do indeed seek to ensure that their procurement meets environmental and social objectives as well as obtaining value for money. However there is not yet sufficient comparable data from the monitoring or measurement systems put in place in Member States to be able to assess reliably the effects of integrating these policy objectives within procurement contracts across the EU.

8.3. Costs

As we have seen previously, the total cost to society of procuring the goods and services covered by the Directives is estimated at around EUR 5.26 billion per year (for the EEA-30 in 2009), which is less than 1.3% of the value of invitations to tender published (by the EU-27) in the same period (i.e. EUR 420 billion). This estimate covered the whole cost incurred during the entire procurement process i.e. from the pre-award phase, through the preparation of offers by all participating bidders, the selection of a successful bidder, and included litigation costs if any.

This total cost is based on an estimate of the typical procurement procedure costs at nearly EUR 28 000. One fifth of this cost is borne by authorities (typically EUR 5 500 per call for tender launched) and four fifths by firms (EUR 3 800 per offer submitted multiplied by the weighted average number of bids 5.9 submitted per procedure).

The average time it takes to complete a procedure is 108 days, although large or complex contracts may take considerably longer and there is considerable variation across Member States.

8.4. Macro economic impact

Based on estimates of 5% cost savings for above threshold procurement, the long-run effect of cheaper procurement on output, employment and consumption were investigated in an extended version of the QUEST III model used by the Commission for modelling the macro economic effects of policy changes. The main scenario of the modelling assumed that phased in cost savings (i.e. savings equivalent to 0.5% of contract value in the first year and 5% of contract value from the year 10 on) on procurement were transferred to the private sector via lower tax rates on labour income, and compared the results to scenarios of lower capital income taxes and higher public investment.

The *gradual* reduction of the labour income tax in response to this 5 % reduction in prices over ten years for the 20% of procurement covered by the Directives resulted in increases in real GDP, employment and private consumption by 0.1-0.2% above pre-reform values after 5 and 50 years. An *immediately* effective 5 percentage-point decline of the price mark-up amplifies the positive short-run effect, but has similar long-run implications.[321]

Savings of the order of 5% could therefore translate into increases in employment and GDP of between 0.08 and 0.12% after one decade (160-240 000 jobs). The macroeconomic gains increase in an approximately linear way with the cost savings so that if the cost savings apply to all procurement then the short-run and long run gains are roughly five times bigger than in the case where cost savings are only made in above threshold procurement. If these savings were realised for all public procurement, therefore the gains would be correspondingly greater (0.5% GDP and employment).

8.5. Overall conclusion

Based on the figures presented above, resulting from the application of the public procurement Directives, the benefits are about four times greater than the costs. Savings of 4 - 5% would represent annual savings of EUR 16.8 – EUR 21 billion in 2009, without any allowance for improvements in quality or environmental and social benefits. These benefits are tangible but probably not significant in macro-economic terms. There are certainly considerable positive environmental and social impacts, but Member States are not yet in a position to provide sufficient comparable data from their monitoring or measurement systems to allow a reliable assessment of the scale or significance of these impacts.

CHAPTER 9: CONCLUSIONS

This evaluation began by identifying the objectives which the Directives were intended to reach. This involved identifying not just the most recent modifications to the EU public procurement regime in the 2004 Directives, but also the broader historical context to determine what procurement legislation was initially intended to achieve at EU level and how those objectives were expected to be reached through the specific provisions of the Directives as successively developed and modified leading to the 2004 legislation.

The detailed analysis of this historical development of the legislation, its objectives and evidence relating to the political and economic assumptions and context in which it was proposed and adopted has been explained in Chapter 2 and in the historical annex (Annex 2 "History of public procurement legislation") to this evaluation report. The three core objectives are to:

- promote efficient EU-wide and cross-border competition for contracts (i.e. creating a fair / non-discriminatory and level playing field for all suppliers, so that EU public procurement market is accessible to companies from across the EU;
- deliver best value for money by generating the least possible transaction costs to achieve the best possible procurement outcomes (and hence, ultimately, making the best use of taxpayer's money);
- aid the fight against corruption.

The detailed intervention logic diagram showing the assumptions of cause and effect underlying the Directives which was the result of this analysis, is presented in annex 1, and a more basic version included in Chapter 1. Based on logic, five sets of evaluation questions were identified, covering the evaluation categories of effectiveness, relevance, efficiency, distributional effects, consistency and EU added value.

This section summarises the results of the previous chapters which allows answers to be formulated to these evaluation questions:

1. How far have the Public Procurement Directives achieved their objectives? How have differences in implementation and application by Member States resulted in different outcomes? (Effectiveness);

2. To what extent are these objectives still appropriate today? (Relevance);

3. What have been the costs of compliance compared to the benefits obtained? How have these costs and benefits been distributed? How cost effective are the Directives? (Efficiency and Distributional Effects);

4. How have the Public Procurement directives contributed in practice to meeting other EU policy objectives? In particular, what environmental and social effects have the Public Procurement Directives had? (Consistency); and

5. To what extent could the changes brought about by the Directives have been achieved by national measures only?[322] (EU added value).

The following sections reply to these evaluation questions, based on the results of analysis presented in earlier chapters.

9.1. Effectiveness

Key Question: How far have the Public Procurement Directives achieved their objectives? How have differences in implementation and application by the Member States resulted in different outcomes?

The intervention logic assumed that coordinating Member States' procurement procedures and rules for advertising, involving the principles of transparency, non discrimination would lead to the selection of bidders and award of contracts according to objective criteria would in turn lead to increased participation, particularly across borders and hence increase competition for public contracts. This would result in the acquisition, by contracting authorities and entities, of goods, works and services which represented better value for money than would otherwise have been the case or in the provision better public services at lower cost to the Member States' citizens.

The evaluation finds that the rules introduced by the Directives for advertising (together with the use of a limited set of procedures) have resulted in greater transparency. Both the number and value of contracts advertised in the OJEU or TED have increased over time and the information about these procurement opportunities have been widely publicised through a growing range of commercial or public bodies whose activities include disseminating procurement information. The number of TED licence holders has been growing steadily for the last few years and has risen to 141 in May 2011 from 128 at the end of 2009. The number of notices consulted on TED has continued to rise with over 29 million documents consulted in 2010.

Greater transparency has also been accompanied by greater levels of competition. On average there are now around five bids for each invitation to tender. The findings of the evaluation are that the Directives have also achieved measurable savings through lower prices as well as, almost certainly, through improvements in quality which are not easily quantifiable. To this extent the Directives can be judged as having met these objectives, at least to a large extent. On the other hand, direct cross-border procurement does not seem to have increased as much as might have been anticipated or expected. The situation varies widely across Member States and in value terms some procurement markets are more open than others. To this extent the Directives have not yet fully achieved their objectives and it may be the case that there is still discrimination against non domestic bidders by contracting authorities. Enterprises surveyed certainly still perceive discrimination to be a problem. Indirect cross-border has increased, compared with the findings in earlier studies, and is most frequently observed in smaller Member States. Many economic operators still appear to be deterred

from competing for tenders in other Member States by a combination of competitive, structural and legal or administrative factors, whether these are real or perceived.

The regulatory guarantees established by the Directives may have been a necessary but not a sufficient condition to break down the barriers to cross-border participation in public procurement markets.

The evaluation has also found that differences in implementation and application of the Directives have led to different outcomes in different Member States. One key finding is that the time taken to complete procedures and the cost to public purchasers varies widely across Member States. To this extent the finding of the evaluation is that differences in implementation and application by the Member States have definitely resulted in different outcomes in different Member States.

9.2. Relevance

Key Question: To what extent are those objectives still appropriate today?

The evaluation examined the extent to which the objectives of the Directives remain appropriate. Budgetary pressure and continued emphasis on value for money argue for the continued relevance of the objectives. Increased aggregation, both through central purchasing and framework contracts, has led to an increasingly sophisticated and professional procurement service in many Member States.

The evaluation findings suggest that the original objectives of removing legal and administrative barriers to participation in cross-border tenders, ensuring equal treatment, ensuring transparency and removing scope for discriminatory purchasing have not yet translated into fully open and integrated markets. Where openness and competition have taken hold, expected benefits have materialised. Therefore continued efforts to achieve the original objectives seem appropriate. While progress has been made there still appear to be some factors which prevent the benefits of the full impact of the single market being extended to all public contracts.

Some of the observed trends in procurement markets such as aggregation or e-procurement will render more procurement markets open and contestable. This is likely, to the extent to which foreign suppliers are able to compete for those markets, to render the objectives of policy more relevant.

This conclusion seems borne out for both the classic and the utilities Directives. The rationale for the latter, to ensure efficient competition, in the face of the absence of true competition, and effective incentives to procure efficiently continues to hold. Despite progress in creating the legal or regulatory framework for competition in some utility sectors, this has not yet been followed by the emergence of real competitive challenge to the previous incumbents. In many markets, competition in utilities sectors covered by the Directives remains limited. Where both regulatory liberalisation and the existence of effective competition have been demonstrated to exist within particular markets Member States or utility operators have been able to apply successfully for exemption under Article 30.

The evaluation suggests that there may be scope for re-assessing the need for the utilities Directive in specific circumstances where operators may have incentives to procure efficiently.

In general terms then, the findings of the evaluation support the view that the original objectives of the Directives are still appropriate today. However some modifications may be necessary or desirable.

9.3. Efficiency

Key Question: What have been the costs of compliance compared to the benefits obtained?

The evaluation finds that the savings generated by EU public procurement Directives exceed the costs (for public purchasers and suppliers) of running those procedures by a factor of four or five. The positive cost-benefit analysis is almost certainly even more favourable if qualitative improvements are taken into account. Hence, to the extent that overall costs are outweighed by benefits the answer to this key question is that there has been a net benefit for contracting authorities.

However, this generally positive assessment must be tempered by concerns about specific aspects of the functioning of the EU public procurement regime. The evaluation suggests that there may be circumstances where the costs of running the current regulated procedures may be disproportionate to the expected benefits. There may also be situations when aspects of the regulation give rise to unintended consequences for the wider economy – notably, the risk of market closure and concentration if long term or framework agreements are used without appropriate attention to unintended consequences.

The Directives increase compliance costs both for contracting authorities and suppliers. This level of cost is largely the unavoidable price to be paid for sustaining competition in markets for public contracts. This cost of public purchasing cannot be reduced to zero. However the evaluation suggests that there may be a need to review the use of procedures and reduce the disproportionate costs and help contracting authorities and entities to adapt their procedures to the circumstances of their purchase, particularly for smaller value contracts.

The key question on distributional effects namely "How are these costs and benefits distributed across different stakeholders?" is also answered by this analysis. The suppliers' costs will overall and over time be recouped from successful bids and built into the tenders to the public purchasers. As the evaluation shows, both costs and benefits are therefore apportioned to the contracting authorities and entities. This would seem to be a fair apportionment since the benefits also accrue to them. The initial intention was that the application of the Directives would be limited to procedures believed to be of the most potential interest to suppliers from other Member States. As shown in Chapter 2, EU directives apply to a small subset of the total procurement, covering less than one tenth of all procurement transactions but nonetheless accounting for 3.5% of EU GDP. The approach adopted has sought to strike an appropriate balance between the cost of compliance and the benefits of competition. Higher thresholds would reduce the coverage and cost of compliance with the Directives and entail a corresponding reduction in transparency and EU level competition

for those contracts. However as noted in Chapter 7 some services may have been excluded which would be potential interest to service providers from other Member States and viceversa.

The disparity between Member States in the time taken to complete procedures, and cost to public purchasers suggests that even without any modification of the Directives, there is considerable scope for reducing the cost of procurement administration in many Member States by aligning practice on the most efficient Member States.

9.4. Consistency with other policies

Key Question: How have the Public Procurement directives contributed in practice to meeting other EU policy objectives? In particular, what environmental and social effects have the Public Procurement Directives had?

Most Member States have adopted National Action Plans for Green or sustainable public procurement, with targets for priority product groups as identified by the Commission. While there are no similar plans for socially responsible procurement, more than half of all Member States have broad policies in place which address respect for the core labour standards of the International Labour Organisation and the need to ensure accessibility and provision for sheltered workshops.

There is still little organised monitoring or measurement in place at Member State level, but it appears that the majority of contracting authorities seek to buy green, when this is feasible. In general, where they do so, they do obtain a greener outcome in the final contract award. One fifth of the contracting authorities surveyed in 2010 indicated that more than half of their contracts included environmental requirements. In Norway, Sweden and the Netherlands over 40% of contracting authorities included GPP requirements in more than half of their contracts. Contracting authorities also seek to encourage more socially responsible procurement and more innovative solutions although they have less experience of integrating these policy objectives within their procurement practice.

Incorporating these other policy objectives increases the complexity of the procurement process and requires procurement staff to learn new skills and competences and thus has an associated cost attached.

Suppliers are concerned that, if requirements and standards are not harmonised, they may be faced with a range of different levels of requirement for environmental or social standards across the EU for which different certificates and labels may be required and which may reduce the potential for economies of scale. Based on this view, there may be a risk of potentially closing markets at national or even local level rather than enhancing the internal market.

In conclusion the evaluation has not been able to find sufficient evidence to be able to answer this question with any degree of precision. In the absence of widespread monitoring or any common measurement framework it has not been possible to quantify the actual environmental and social effects which the Public Procurement Directives may have had. However, the majority of contracting authorities in Member States do make the effort to buy more sustainable products and

services in terms of environmental and social conditions and those efforts appear to be successful overall. Differences across member states both in terms of how and to what degree they are enforcing these policies could raise concerns about consistency across Member States.

9.5. EU added Value

Key Question: To what extent could the changes bought about by the Directives have been achieved by national measures only?

The EU Directives laid the foundations for modern EU public procurement networks in all Member States and fixed the principles which are the cornerstone of the public procurement framework across the EU. Member States have put these principles and disciplines to work across the single market.

The alternative would have been the continued piecemeal and arbitrary patchwork with uneven results in terms of effective regulation and oversight of procurement markets.

The Directives also sought to create opportunities for EU suppliers in other Member State markets. The adoption of common rules and maintenance of a centrally managed system for the publication of opportunities is an efficient basis for achieving this result, but as discussed above, whilst this has provided the opportunities, it has not, as yet, resulted in particularly high levels of cross-border public procurement. The adoption of Directives imposing obligations directly on contracting authorities was instrumental in creating transparency and respect for procedural requirements.

While it is not inherently impossible that barriers to the free movement of goods, the freedom to provide services or the freedom of establishment could have been abolished by Member States by national measures, it is unlikely that this would have been achieved to the same extent or as effectively as it has been through legislative measures proposed by the Commission.

9.6. Conclusion

In conclusion this evaluation finds that the EU public procurement Directives have helped to establish a culture of transparency and outcome-driven procurement in the EU. This has triggered competition for public contracts, and generated savings and improvements in the quality of procurement outcomes. Open and competitive public procurement drives down costs by around 4-5%, generating savings of approximately EUR 20 billion. This far exceeds the costs generated by the regulatory framework which are estimated at EUR 5 billion. The evaluation reveals scope for efforts to strike a better balance between the costs of the regulatory system and the resulting benefits – particularly for lower value purchases – and the potential for still greater cross border import penetration."

NOTES

[1] Commission Communication (COM(2011)206 of 13.04.2011) to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: "a Single Market Act: 12 levers to boost growth and strengthen confidence'.

[2] Commission Communication (COM(2011)206 of 13.04.2011) to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: "a Single Market Act: 12 levers to boost growth and strengthen confidence'.

[3] See L. Vogel, "Macroeconomic effects of cost savings in public procurement". Economic Papers 389, 2009.

[4] To be found at http://ec.europa.eu/internal_market/publicprocurement

[5] Cf. the third recital to Directive 71/305/EEC.

[6] 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. Directive as last amended by Commission Regulation (EC) N°1177/2009.

[7] Cf. the first recital of both directives.

[8] See Recital 12 of the Classic Directive and, for the Utilities Directive, its corresponding Recital 20.

[9] See Recital 35 of the Classic Directive. It corresponds to Recital 46 of Directive 2004/17/EC.

[10] See Recital 15 of Directive 2004/18/EC and Recital 23 of Directive 2004/17/EC.

[11] This corresponds, mutatis mutandis, to the 24th Recital of the Utilities Directive. See for further details Table 5. Implementation options.

[12] The same concept is found in Recital 12 of Directive 2004/17/EC.

[13] Cf. Recital 46 of Directive 2004/18/EC and Recital 55 of the Utilities Directive. See section 2.3.2 "Award procedures exclusions, selection and award criteria" /The open procedure for further details.

[14] For the Utilities Directive, this corresponds, mutatis mutandis, to Recital 54. See section 2.3.2 "Award procedures exclusions, selection and award criteria" for further details.

[15] Recital 40 of Directive 2004/17/EC. See also section 2.2.6 "Other exclusions or exemptions specific to the Utilities Directive" /Exemptions under Article 30 for liberalised activities exposed to competition for further details.

[16] 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. Directive as last amended by Commission Regulation (EC) N°1177/2009.

[17] The former Article 296 EC.

[18] To be noted that contracts which are excluded from the scope of Directive 2009/81/EC pursuant to its Articles 8, 12 and 13 are equally excluded from the scope of Directives 2004/17/EC and 2004/18/EC. This concerns contracts below the thresholds provided for under Directive 2009/81/EC, contracts awarded pursuant to international rules and certain other specific exclusions, exhaustively listed in its Article 13.

[19] The deadline for its implementation in national law expires at the latest by 11.8.2011.

[20] And, mutatis mutandis, in the ninth recital to the Utilities Directive.

[21] In particular, "the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency."

[22] Certain works and services contracts that are subsidised by more than 50% and works contracts awarded by certain concessionaires, see below.

[23] A 'body governed by public law' means any body: (a) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character; (b) having legal personality; and (c) financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.", See Article 1(9) of Directive 2004/18/EC and the identical provision in Article 2(1)(a) of Directive

2004/17/EC. According to long- standing jurisprudence these notions must be interpreted functionally, see e.g. the judgment of the Court of 20 September 1988 in case 31/87, Gebroeders Beentjes BV v State of the Netherlands, European Court reports 1988 Page 04635.

[24] That is, bodies which meet the definition of "bodies governed by public law", with the exception that they have been "established for the specific purpose of meeting needs in the general interest, *having* an industrial or commercial character". See also endnote 23 below.

[25] This definition is completed by a list of circumstances under which there is a legal presumption of a direct or indirect dominant influence. In some ways, the definition of public undertakings can be likened to that of "body governed by public law" except for the distinguishing fact that public undertakings are meeting needs in the general interest, which *do have an industrial or commercial character*.

[26] One of the major changes introduced in Directive 2004/17/EC compared to the earlier legislation, cf. Annex 2 "History of public procurement legislation", was a refocusing of this notion, following i. a. the judgment of 12 December 1996 in case C-302/94, *The Queen* v *Secretary of State for Trade and Industry, ex parte British Telecommunications plc*., [1996] ECR I-6417.

[27] Provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of drinking water or the supply thereof to such networks.

[28] This covers provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of electricity, gas or heat or the supply thereof to such networks. In this context, the "energy" sector is taken as also comprising "exploitation of a geographical area for the purpose of exploring for or extracting oil, gas, coal or other solid fuels".

[29] Defined as covering the provision or operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable; In the transport sector in a broad sense the Utilities Directive also covers the exploitation of a geographical area for the purpose of the provision of airport, maritime or inland port or other terminal facilities to carriers by air, sea or inland waterway.

[30] The postal sector is considered as comprising "activities relating to the provision of postal services" and, where provided by an entity which also offers postal services (such as typically distribution of letters), the provision of certain "other services than postal services", such as financial services or logistic services. See Art. 6 of Directive 2004/17/EC. The postal sector, which had previously been subject to the Classic Directives (to the extent that the postal services were provided by a body having the statute of a "contracting authority"), was transferred to the Utilities Directive because it can be considered as a "network" activity as many of the other relevant activities, it is subject to a gradual process of liberalisation and it is characterised by being provided by public authorities in some Member States, by public undertakings in some and by private undertakings in yet other Member States. The fact that postal operators either faced a change from the procurement rules under the Classic Directives to the more flexible ones under the Utilities Directive or else a transition from not being subject to the EU legislation on procurement at all, explains why this sector had up to 35 months longer (i. e. until 31.12.2008) to implement the provisions of Directive 2004/17/EC, cf. its Article 71(1), second subparagraph.

[31] The general principle that, unless otherwise provided, contracts awarded by contracting authorities will be subject to the Classic Directive, rendered it necessary to insert a specific provision, Article 13, in Directive 2004/18/EC to exclude from its scope "public contracts for the principal purpose of permitting the contracting authorities to provide or exploit public telecommunications networks or to provide to the public one or more telecommunications services". See section 2.2.5 "Other specific exclusions, common to both Directives" /Telecommunications networks or the provision of a telecommunications service" for further details.

[32] See section 2.2.6 "Other exclusions or exemptions specific to the Utilities Directive" /Contracts for the pursuit of other activities than those covered for further details on this condition.

[33] Cf. Art. 1(2)(a) of Directive and, mutatis mutandis, Article 1(2)(a) of Directive 2004/17/EC.

[34] Cf. Point 52 of the Advocate-General's Opinion of 1 July 1999 in case C-107/98, Teckal Srl v Comune di Viano and Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia, European Court reports 1999 Page I-08121.

[35] Cf. Point 50 of the Court of Justice's judgment of 18.11.1999 in Case C-1998/107, Teckal Srl v Comune di Viano and Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia, European Court reports 1999 Page I-08121.

[36] Judgment of the Court of 9 June 2009, Commission of the European Communities v Federal Republic of Germany. Case C-480/06, not yet published in European Court reports.

[37] Without any participation by bodies that are not themselves contracting authorities.

[38] i. e. that the cooperation involves no financial transfers between the public cooperation partners, other than those corresponding to the reimbursement of actual costs of the works/services/supplies (service provision for profit excludes that the cooperation is governed solely by considerations in the public interest). For further details, see the "Discussion Document: Public-Public Relations in the light of EU Public Procurement Law", that was distributed to members of the Advisory Committee for Public Contracts under the reference CC/2010/02 of 18.12.2009.

[39] In order to summarise this case-law, the Commission services plan to publish a "Staff Working Document concerning public-public relations under EU public procurement law" in 2011.

[40] For an overview, see Annex 3"Thresholds".

[41] Commission Regulation (EC) N°1177/2009, OJ L 314 of 1.12.2009, p. 64.

[42] That is, works contracts concerning civil engineering or relating to building work for hospitals, facilities intended for sports, recreation and leisure, school and university buildings and buildings used for administrative purposes, where such contracts are awarded by entities other than contracting authorities but subsidised by at least 50% by the latter. An example might be a contract for the construction of a football stadium, which is awarded by a private football club, but subsidised by, say, the municipality in which the stadium is to be constructed.

[43] For further details, see Annex 3"Thresholds".

[44] That is, service contracts (typically for engineering or architectural services) relating to the same categories of works as those covered by the corresponding provision concerning subsidised works contracts, cf. endnote 39 above, which are subsidised by more than 50% and awarded by entities not being themselves contracting authorities. To continue the example of endnote 39, this provision would apply in case the municipality also subsidised by at least 50% a contract for the design of the stadium, to be awarded by the private football club.

[45] Except where they are awarded for the pursuit of one of the activities covered by the Utilities Directive by a contracting authority itself exercising that activity. In that case, the applicable Directive would have been the Utilities Directive, which explicitly excludes works concessions contracts from its scope. Consequently, such works concessions contracts are not subject to any detailed procedural rules of any of the public procurement directives; provided they present a certain cross-border interest, they are, however, subject to the provisions and principles of the Treaty,.

[46] It should be noted that while works concessions contracts are covered by the Classic Directive, neither Directive covers service concessions contracts, which, mutatis mutandis, are defined in the same way as are works concessions contracts.

[47] The normal procedural rules and threshold apply to works contracts that are awarded by a concessionaire who ***is*** a contracting authority.

[48] Priority services are listed in the Directive's Annex I and non-priority services in its Annex II. With the notable exception that *all* transport services are listed as priority services - unlike the two other Directives which consider rail transport, water transport and supporting and auxiliary transport services as residual or non-priority services - the priority services listed are substantially the same as in the two other Directives.

[49] The two lists are almost identical in the two Directives, except for a few limited differences such as the absence of an exclusion for central bank services from the scope of Directive 2004/17/EC.

[50] Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, OJ L 209, 24.7.1992, p. 1.

[51] See the 20th Recital of Directive 92/50/EEC and the corresponding recitals in the current Directives, n. 19 for Directive 2004/18/EC and Recital 18 in the current Utilities Directive.

[52] I. e., the services falling with Annex IIB of Directive 2004/18/EC or the corresponding Annex XVII B of Directive 2004/17/EC, either in one of the specific categories or under the non-exhaustive category 27 "other services".

[53] Observance of the provisions on technical specifications and an obligation to inform the Commission of contract awards. While this information takes the form of a contract award notice, it should be stressed that these may or may not be published in the OJ, depending on whether the sender consents to its publication. In the words of the 18th Recital of Directive 2004/17/EC (and the corresponding Recital 19 in the Classic Directive), the reason for the latter obligation is that “contracts for other services need to be monitored during this transitional period before a decision is taken on the full application of this Directive”. It should, of course, not be forgotten that other obligations may ensue from the Treaty, for instance an obligation to ensure a sufficient degree of advertising where there is "certain cross-border interest" in the contract, as established by the Court of Justice in its jurisprudence. See i. a. the judgment of 7 December 2000. Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG, joined party: Herold Business Data AG. Case C-324/98. European Court reports 2000 Page I-10745; Judgment of 13 November 2007. Commission of the European Communities v Ireland. Case C-507/03. European Court reports 2007 Page I-09777 and, finally, its judgment of 15 May 2008. SECAP SpA (C-147/06) and Santorso Soc. coop. arl (C-148/06) v Comune di Torino. Joined cases C-147/06 and C-148/06. European Court reports 2008 Page I-03565. These cases concern, respectively, service concessions contracts, part B services and below threshold procurement. For further discussion of this issue, see the Commission's interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives, OJ C 179 of 1.8.2006, p. 2, and the judgment of the General Court of 20 May 2010 In Case T-258/06, Germany v. Commission, not yet published.

54 "the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property or concerning rights thereon;", Art. 16(1)(a) of Directive 2004/18/EC, Art. 24(1)(a) of Directive 2004/17/EC.

55 Art. 16(1)(c) of Directive 2004/18/EC, Art. 24(1)(b) of Directive 2004/17/EC.

56 "financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments, in particular transactions by the contracting authorities to raise money or capital"; Art. 16(1)(d) of Directive 2004/18/EC, Art. 24(1)(c) of Directive 2004/17/EC. The Classic Directive in addition excludes "central bank services". On the other hand, Article 16(1)(a) explicitly provides that "financial service contracts concluded at the same time as, before or after the contract of acquisition or rental [of existing buildings etc., cf. endnote 51 above], in whatever form, shall be subject to this Directive".

57 Art. 16(1)(e) of Directive 2004/18/EC, Art. 24(1)(d) of Directive 2004/17/EC. This exclusion concerns contracts with employees as opposed to service providers; Personnel placement and supply services are non-priority services listed in category 22 of Annex II B of Directive 2004/18/EC and category 22 of Annex XVII B of Directive 2004/17/EC.

58 As is the case for pre-commercial procurement. See Commission communication COM/2007/799 and associated staff working document SEC(2007)1668 on "Pre-commercial procurement: Driving innovation to ensure high quality public services in Europe", December 2007.

59 "research and development services other than those where the benefits accrue exclusively to the contracting authority for its use in the conduct of its own affairs, on condition that the service provided is wholly remunerated by the contracting authority."; Art. 16(1)(f) of Directive 2004/18/EC, Art. 24(1)(e) of Directive 2004/17/EC. In other words, the *starting point* is that R&D contracts are *excluded* from their scope; however, the Directives *do* nevertheless apply where all results of the R&D go exclusively to the contracting authority *and* the R&D service undertaken by the contractor to achieve those R&D results is fully paid for by the contracting authority. If one of these two conditions is not met then we return to the starting point, that is, the R&D services contracts concerned are excluded from the Directives. Please note that even such R&D services contracts that are excluded from the procurement Directives still need to be compliant with the Treaty principles and EU competition rules. For those R&D services contracts excluded from the Directives that are intended to constitute State aid, in particular R&D grant co-financing type contracts, the State aid framework for R&D&I details the conditions, including in particular the permissible aid intensities, under which such contracts can be awarded in line with competition rules. For those R&D services contracts excluded from the Directives which do not intend to constitute State aid, such as in pre-commercial procurement, the State aid framework provisions on procuring at market price in a transparent, non-discriminatory and competitive way need to be ensured through an appropriate design of the contract and the tendering procedure. The Staff Working Document on pre-commercial procurement (SEC/2007/1668) illustrates how buying at market price can in principle be ensured in the specific case of pre-commercial procurement.

60 "the acquisition, development, production or co-production of programme material intended for broadcasting by broadcasters and contracts for broadcasting time;"; Art. 16(1)(f) of Directive 2004/18/EC.

61 It is e. g. difficult to organise a EU-wide call for tenders for the rental of a specific, existing building; conciliators are often designed jointly by the parties to the arbitration service, frequently directly after the beginning of the dispute; again, the Directive's procedures would not be suitable.

62 See Recital 25 of Directive 2004/18/EC.

63 See Recital 23 of Directive 2004/18/EC and the corresponding Recital 37 of Directive 2004/17/EC.

64 See Art. 15 of Directive 2004/18/EC and Art. 22 of Directive 2004/17/EC for the full details of the exclusions, which, as is always the case for exceptions, exclusions and exemptions, are subject to strict interpretations with the burden of proof on those invoking them. It should be noted that the Directives are addressed to Member States, they do not therefore apply to contracts awarded directly by international organisations on their own behalf and for their own account under their own procedural rules. What the exception covers, are contracts that are awarded by contracting authorities or entities where the contracts concerned *must* be awarded in accordance with the specific procedural rules of an international organisation. Such may be the case for instance where a Member State contributes a piece of equipment to the European Space Agency and the Agency's rules stipulate that contributions in kind must be procured in accordance with its procurement rules and procedures.

65 See Article 17 of the Classic Directive and Art. 18 of Directive 2004/17/EC. It is recalled that works concessions contracts are covered by Directive 2004/18/EC, while excluded from the scope of Directive 2004/17/EC.

66 See Art. 18 of Directive 2004/18/EC and Art. 25 of Directive 2004/17/EC.

67 See section 3.1.2 "Scope and coverage of national legislation" /Other optional provisions: Central Purchasing Bodies (both Directives) for further details.

68 Central purchasing bodies are contracting authorities which either act as wholesalers (i. e. buy, stock and sell on to other contracting authorities) or as intermediaries (i. e. award contracts or conclude framework agreements that will be used by other contracting authorities). Cf. Art. 1(10) and Art. 11 of Directive 2004/18/EC. It should be noted

that the definition in Art. 1(8) of Directive 2004/17/EC also requires central purchasing bodies to be a "contracting authority" (as opposed to a public undertaking or a private undertaking operating on the basis of a special or exclusive right), which may or may not itself exercise one of the relevant activities.

[69] See section 3.1.2 "Scope and coverage of national legislation" / The possibility to reserve participation in certain procurements for sheltered workshops for further details.

[70] Article 28 of the Utilities Directive and Article 19 of Directive 2004/18/EC.

[71] The decisive factor is thus the purpose for which the contract is awarded, not its subject-matter. See also section 2.2.1 "Contracting authorities and contracting entities" for further details.

[72] "in conditions not involving the physical use of a network or geographical area within the Community." An example could be where a contracting entity drills for oil off the coast of Angola.

[73] See also Article 9 of the Utilities Directive, which regulates "mixed" contracts, that is, contracts awarded for the pursuit of several activities.

[74] together with the extremely broad definition of special or exclusive rights that was applicable at the time, cf. endnote 23 above.

[75] i.e. that, over the last three years, at least 80% of the affiliated (selling) company's average turnover in the field of services, supplies or works derives from the provision of, respectively, services, supplies or works to undertakings to which it is affiliated. For full details, see Art. 23 itself.

[76] See Art. 23(1) for the full details. The possibility to exclude supplies and works contracts under this exclusion was introduced in the EU-legislation on public procurement by Directive 2004/17/EC; the previous corresponding exclusion had applied exclusively to service contracts. The reasoning behind its introduction in Directive 93/38/EC was that it was often fortuitous whether "supporting" services, such as for instance IT services, were being provided to a contracting entity by an internal division of its organisation or by a former internal division that had been turned into a separate company for fiscal reasons or to enhance financial transparency … It was therefore decided that such contracts should not be subject to the Directive in both cases, provided the "external" company was not active on the general market in a significant way (i. e. amounting to 20% of its average turnover or more).

[77] That is, entities involved in the provision or operation of drinking water networks or the supply of such networks with drinking water. Where the same entities also undertake activities connected to the collection and treatment of sewage or related to certain hydraulic engineering projects, cf. Art. 4(2) for the full details, then Directive 2004/17/EC applies also to contracts awarded for the pursuit of these connected activities. If, however, contracts for such activities are awarded by bodies ***not*** involved in drinking water activities, then the applicable Directive will be 2004/18/EC, provided, of course, that they are awarded by a body that falls within the notion of "contracting authority".

[78] Cf. Recital 26.

[79] i. e. entities operating in the electricity, gas and heat sector (Article 3) or exploiting a geographical area to explore for or extract oil, gas, coal or other solid fuels (Art. 7(a)).

[80] Cf. Art. 26(b).

[81] its Article 9(b).

[82] Cf. its 17th Recital: "Whereas the Commission has announced that it will propose measures to remove obstacles to cross-frontier exchanges of electricity by 1992; … whereas, as a result, it is not appropriate to include such purchases in the scope of this Directive, although it should be borne in mind that this exemption will be re-examined by the Council on the basis of a Commission report and Commission proposals;"

[83] See also section 3.1.2 "Scope and coverage of national legislation" / The possibility for individual contracting entities to introduce requests for exemptions for pursuant to Article 30 for further details.

[84] i. e. establishing that the exemption is, respectively, applicable, applicable to some but not all of the activities and/or territories for which exemption was requested, and not applicable.

[85] CZ, DK, IT, NL, AT, PL, FI, SE and UK. For further details, see http://ec.europa.eu/internal_market/publicprocurement/rules/exempt_markets/index_en.htm

[86] Another provision of the Utilities Directive, Article 5(2), similarly safeguards the effects of, in this case, an exclusion based on another no-longer existing provision of the former Utilities Directive. Directive 93/38/EEC excluded entities in the field of bus transport from its scope if their activity was fully exposed to competition ("where other entities are free to provide those services, either in general or in a particular geographical area, under the same condition as the contracting entities"). Article 5(2) of the current Directive ensures that entities, which were already excluded at the date of adoption of the current Utilities Directive, continue to be so.

[87] Article 3 of Directive 93/38/EEC provided for a special system - a "light" regime - for entities exploiting a geographical area for the purpose of exploring for or extracting oil, gas, coal or other solid fuels. It allowed the Commission, under certain conditions relating to the granting of operating licences, to provide that entities in Member States which have so requested shall not be subject to the detailed provisions set out in the Directive, but

must simply respect the principle of non-discrimination and meet certain obligations to ensure competition when awarding contracts, as well as certain statistical obligations.

88 To be noted that the Decisions concerning the Netherlands and the U. K. are without practical importance since the adoption of two positive Article 30 Decisions concerning the oil and gas sectors in those countries, respectively, 2009/546/EC and 2010/192/EU.

89 Such notices are also published in the Tenders Electronic Daily (TED) database and they can be accessed via the SIMAP (Système d'Information pour les MArchés Publics européens) portal.

90 See also section 2.3.2 "Award procedures, exclusion, selection and award criteria" for further details.

91 In the case of service contracts concerning the non-priority services, cf. section 2.2.4"Two-tier regime and specific exclusions for certain services" /Two-tier regime, the Commission must be informed of the outcome of the award procedure; contracting authorities and entities are, however, free to decide whether the information is to be published or not.

92 There is, however, no obligation to publish a contract award notice in respect of the individual contracts that are based on the framework agreement. This is one of the differences between framework agreements and dynamic purchasing systems: As there are no awards or even conclusions of an agreement following the publication of a notice to set up a dynamic purchasing system, there is no obligation to publish a contract award notice at that stage. On the other hand, such obligation does exist in respect of the individual contracts which are based on the system; it is, however, possible to group these notices on a quarterly basis.

93 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.

94 The Utilities Directive calls these notices "periodic indicative notices". As has been seen in section 2.3.1 "Transparency", such notices may - in addition to a more general "early warning" function - also be used as formal means of calling for competition. These two distinct functions should be borne in mind when examining a given periodic indicative notice.

95 This may seem bureaucratic, but is necessary to preserve one of the major advantages introduced by the Directives, namely having *one* site in the whole EU to search rather than notices being scattered across a myriad of different sites and electronic addresses in 27 Member States …

96 The terminology of the Utilities Directive is slightly different in that it refers to the negotiated procedure with prior call for competition and a procedure without prior call for competition. This difference is due to the fact that, as set out under section 2.3.1 "Transparency", other notices than a contract notice may be used to organise competition. *Unless otherwise specified, "negotiated procedure with / without prior publication of a contract notice" will be used here also in respect of the just mentioned corresponding procedures under the Utilities Directive.*

97 The reasons for introducing the competitive dialogue in Directive 2004/18/EC was the limited possibilities offered by that Directive for using the negotiated procedure with a prior publication of a contract notice. As there are no limitations to the use of the negotiated procedure with call for competition in the Utilities Directive, the legislator did not see a need for introducing the competitive dialogue in that Directive. However, nothing prevents a contracting entity from setting out in the tender documents that it will conduct a negotiated procedure with a call for competition in accordance with the modalities provided for under Directive 2004/18/EC.

98 To simplify, the negotiated procedure *with* prior publication may be used in four cases: a) where a previous procedure (open, restricted or competitive dialogue) yields only irregular or unacceptable tenders; b) where prior overall pricing is not possible because of the nature of the contract's subject-matter or the risks attaching thereto; c) for certain "intellectual" services, whose nature is such that the specifications can not be set out in such a way as to allow the contract to be awarded under an open or restricted procedure; and, finally, d) for works contracts only where the works are performed for research purposes only. For full details of the conditions to be met in order to justify use of a negotiated procedure with prior publication, please see the provision itself.

99 Whether carried out during the same stage of an award procedure or during different stages, the rules applicable to selection criteria are different from those governing award criteria and the two sets of criteria may not be confused/mixed, cf. long-standing jurisprudence, starting with the Court's judgement in the Beentjes case, mentioned in endnote 20 above, and further clarified subsequently, for instance in the judgment of the Court of 24 January 2008. Emm. G. Lianakis AE et al., Case C-532/06. European Court reports 2008 Page I-00251

100 Cf. Recital 46 of Directive 2004/18/EC or the corresponding Recital 53 of the Utilities Directive. See also the judgment of the Court of 17 September 2002. Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne. Case C-513/99. European Court reports 2002 Page I-07213, and its judgment of 4 December 2003. EVN AG and Wienstrom GmbH v Republik Österreich. Case C-448/01. European Court reports 2003 Page I-14527.

[101] These can be divided into obligatory and non-mandatory *exclusion criteria*; the obligatory clauses concern cases of final convictions for certain serious crimes (corruption, participation in criminal organisation, fraud or money laundering). These criteria are obligatory for all contracting authorities, including when they act as contracting entities; however, for the other groups of contracting entities (public undertakings and private undertakings having special or exclusive rights) their use is voluntary, as they may not necessarily have access to the information needed to verify these criteria. The non-obligatory exclusion criteria concern various situations (bankruptcy, non-compliance with obligations relating to payment of taxes or social security contributions, convictions of offences affecting the professional conduct - e. g. for breach of environmental legislation or labour laws- or where the economic operator has lied to the procurers) that render the economic operator unable or unsuited for the task. For full details, see Art. 45 of Directive 2004/18/EC. The Utilities Directive provides that the objective rules and criteria, which are used under qualification schemes or for the selection of participants may include the just mentioned exclusion criteria of the Classic Directive, cf. Art. 53(3) and Art. 54(4) of Directive 2004/17/EC.

[102] *Selection criteria* are criteria aimed at ensuring that economic operators have the required minimum levels of technical, financial and economic capacities, that they are enrolled in relevant professional or trade register and that, in respect of service contracts, they hold appropriate authorisations etc. Pursuant to Art. 44 of Directive 2004/18/EC, contracting authorities must set out beforehand - in the contract notice - which level of capacity is required, bearing in mind that these must be related and proportionate to the subject-matter of the contract. Compliance with the required minimum levels is then assessed in the light of the specific provisions of the Directive on the (types of) documents that may be required as proof. The Utilities Directive does not regulate these matters to the same degree of details; as set out in endnote 97 above, it simply provides that selection of economic operators must be carried out on the basis of objective rules and criteria which are available to interested economic operators.

[103] The Utilities Directive simply states that the objective rules and criteria used for selection "may be based on the objective need of the contracting entity to reduce the number of candidates to a level which is justified by the need to balance the particular characteristics of the procurement procedure with the resources required to conduct it. The number of candidates selected shall, however, take account of the need to ensure adequate competition", Art. 54(3).

[104] If the number of qualified candidates is insufficient to meet the minimum number set out in the notice, then contracting authorities may either continue the procedure with the lesser number of participants, cf. the third sub-paragraph of Art. 44(3) of Directive 2004/18/EC, or else annul the award procedure because it is not possible to ensure adequate competition, cf. the judgment of the Court of 16 September 1999. in case C-27/98, Metalmeccanica Fracasso SpA and Leitschutz Handels- und Montage GmbH v Amt der Salzburger Landesregierung für den Bundesminister für wirtschaftliche Angelegenheiten, European Court reports 1999 Page I-05697.

[105] Cf. Art. 6(2) of Directive 77/62/EEC as amended by Directive 88/295/EEC, mentioned in endnote 23 of Annex 2 "History of public procurement legislation".

[106] Art. 38(8) of Directive 2004/18/EC.

[107] The so-called accelerated, negotiated procedure is not a separate and different procedure; it is simply a "normal" negotiated procedure with prior publication in which the normally applicable deadlines may be shortened where "where urgency renders impracticable" the normal time limits, cf. Art. 38(8) of Directive 2004/18/EC. There is no corresponding provision under the Utilities Directive, because the "normal" provisions on time limits allow contracting entities to apply similarly short deadlines without having to meet similar conditions.

[108] With the exception of the particular situation referred to in Art. 30(1)(a), second sub-paragraph, in which the only participants are those who met the selection criteria in the preceding - unsuccessful - open or restricted procedure or the preceding competitive dialogue. For further details, see the provision itself.

[109] Even though it would have been possible to choose a negotiated procedure from the outset, this prohibition of negotiations in the course of open or restricted procedures also applies in the context of the Utilities Directive, cf. the judgment of the Court of 25 April 1996 in case C-87/94, Commission of the European Communities v Kingdom of Belgium ("Walloon buses"), European Court reports 1996 Page I-02043.

[110] Art. 38(8) of Directive 2004/18/EC.

[111] In Article 40(3) of Directive 2004/17/EC and in Article 31 of the Classic Directive. Directive 2004/18/EC allows use of this procedure in 10 cases, whereas the Utilities Directive lists 12 cases. Most of these and the conditions foreseen are substantially similar in both Directives; the two additional cases in the Utilities Directive concern contracts based on a framework agreement, which itself was awarded in accordance with the Directive and certain "bargain purchases".

It should be borne in mind that not all of these cases are applicable to all three types of contracts (works - W, supplies - SU and services - SR). Simplifying, these cases are as follows: a) where a prior award procedure results in the absence of (suitable) tenders or requests for participation (W, SU, SR); b) the contract can only be awarded

to one specific economic operator because of technical reasons or the existence of exclusive rights (W, SU, SR); c) because of urgencies due to force majeure situations (W, SU, SR); d) for contracts for the purpose of research, experiment, study or development (SU only in Directive 2004/18/EEC); (W, SU, SR) under the Utilities Directive); e) for certain additional works or services (W, SR), f) in respect of certain works or services which are a repetition of previous works or services, that were part of the same, common project (W and SR under Directive 2004/18/EC; W only under the Utilities Directive); g) for certain additional supplies (SU); h) for supplies quoted and procured on a commodity market (SU); i) for particularly advantageous purchases from suppliers that are ceasing their activity (SU); j) for service contracts awarded to (one of) the winner(s) of a preceding design contest (SR). The Utilities Directive provides for two further cases, in which use of a procedure without a call for competition is allowed, namely, k) for contracts awarded on the basis of a framework agreement, provided the agreement itself was awarded in accordance with the Directive (W, SU and SR), and l) for certain bargain purchases (sales etc) (SU only).

112 Cf. Article 2d(1)(a) of, respectively, Directive 89/665/EEC for contracts falling with the scope of Directive 2004/178/EC and Directive 92/13/EEC for Utilities contracts. See also section 2.3.1 "Transparency" for further details.

113 See also section 3.1.2 "Scope and coverage of national legislation"/The competitive dialogue (Classic Directive only) for further details.

114 Directives 92/50/EEC, 93/36/EEC and 93/37/EEC.

115 The complexity may be due to the technical aspects of the contracts and also to the legal and/or financial setup, cf. Art. 1(11) c) of Directive 2004/18/EC and its Recital 31.

116 As no such limitation exists within the Utilities Directive, the competitive dialogue was not introduced in that Directive. However, there is nothing to prevent a contracting authority which has opted for a negotiated procedure with prior call for competition from stipulating in the specifications that the procedure will be as laid down in Directive 2004/18/EC for the competitive dialogue.

117 "However, such clarification, specification, fine-tuning or additional information may not involve changes to the basic features of the tender or the call for tender, variations in which are likely to distort competition or have a discriminatory effect."

118 "provided this does not have the effect of modifying substantial aspects of the tender or of the call for tender and does not risk distorting competition or causing discrimination."

119 The late 1960's and early 1970's saw a great expansion of HLMs ("*habitation à loyer modéré*") …

120 Having recourse to procurement from or through central purchasing bodies (and other forms of centralisation of procurement) could also have been listed as a procurement technique. It will, however, not be discussed further here, as it has been examined briefly under section 2.2.5 "Other specific exclusions common to both directives"/Central Purchasing bodies for further details.

121 See also section 3.1.2 "Scope and coverage of national legislation"/The new regime applicable to framework agreements and contracts based thereon for further details.

122 The initial tenders are thus either fully binding if the contracting authority has stipulated that all conditions will be fixed in the agreement itself. If not, then they are binding as far as certain conditions are concerned and non-binding in respect of the conditions which the contracting authorities have stipulated will be the subject of the subsequent mini-competitions.

123 Under the Utilities Directive, the individual contracts based on a framework agreement may be concluded by a procedure without a call for competition, cf. endnote 108 above.

124 i. e. there is no possibilities of the agreement being used by contracting authorities not included from the start, just as no new economic operators may enter the agreements.

125 Cf. Art. 32(4).

126 See also section 3.1.2 "Scope and coverage of national legislation"/Dynamic Purchasing Systems for further details.

127 In the words of the Directives, "a completely electronic process for making commonly used purchases, the characteristics of which, as generally available on the market …", Art. 1(6) of Directive 2004/18/EC; Art. 1(5) of the Utilities Directive.

128 See section 2.3.1 "Transparency" for further details. This is also the reason why the contract notice must specify clearly that it aims to set up a DPS.

129 i. e. they must meet the stated selection criteria and their indicative tenders must comply with the specifications.

130 See also section 3.1.2 "Scope and coverage of national legislation"/Electronic auctions, for further details.

131 To be the subject of an electronic auction, such elements must be quantifiable, capable of being expressed as figures or percentages; in other words, they must be "suitable for automatic evaluation by electronic means, without any intervention and/or appreciation", cf. Recitals 22 and 14 of, respectively, Directives 2004/17/EC and 2004/18/EC.

[132] This is often the case for recurring supplies, works and service contracts, cf. Recitals 22 and 14 of, respectively, Directives 2004/17/EC and 2004/18/EC. On the other hand, the Directives provide that electronic auctions may not be used in connection with "certain service contracts and certain works contracts having as their subject-matter intellectual performances, such as the design of works", cf. Articles 1(6) and 1(7) of, respectively, the Utilities Directive and Directive 2004/18/EC.

[133] "Discarding" those whose tenders are not admissible is the **only** additional selection that may take place at this stage of the chosen procedure - it is therefore not possible to limit the number of tenderers that are admitted to the electronic auction.

[134] The definitions of electronic auctions provide that prices must be revised downwards; electronic auctions under the Directives are thus so-called "reverse" auctions.

[135] For instance the number of years to be covered by the guarantee …

[136] At a certain date and time, after a given number of rounds have been concluded, when no more (valid) new prices or values are received or in accordance with a combination of these methods.

[137] Often such qualitative aspects may not be the subject of an electronic auction because they do not meet the already mentioned requirement of being capable of being evaluated in a "fully automatic" mode, cf. endnote 128.

[138] Thus, the Directives require that contracting authorities and entities "shall instantaneously communicate to all tenderers at least sufficient information to enable them to ascertain their relative rankings at any moment", cf. respectively, Art. 56(6) and 54(6) of Directives 2004/17/EC and 2004/18/EC.

[139] Recital 29, Article 23 and Annex VI in the Classic Directive, Recital 42, Article 34 and Annex XXI in Directive 2004/17/EC.

[140] The two annexes define technical specifications in a quite broad way, which includes aspects such as the environmental performance levels, design and costing of works, marking and labelling, user instructions, production processes…

[141] Comité Européen de Normalisation, the European Committee for Standardisation; Comité Européen de Normalisation Electrotechnique, the European Committee for Electrotechnical Standardization

[142] See Article 24(6) of Directive 2004/18/EC or the corresponding Art. 34(6) of the Utilities Directive for full details. Further explanations are given at http://ec.europa.eu/environment/gpp/pdf/buying_green_handbook_en.pdf.

[143] To give an example quoted in the just mentioned buying green handbook: http://ec.europa.eu/environment/gpp/pdf/buying_green_handbook_en.pdf: The EU eco-label criteria for light bulbs require that they should have an average life-span of 10 000 hours (this is, in other words, the underlying technical requirement). When reflecting this in a call for tender for light bulbs, 10 000 hours could be set as the technical specification for the minimum life span, and a bonus point could be given in the award criteria for every 1 000 hours over and above 10 000.

[144] 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.

[145] 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

[146] 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.

[147] The Remedies Directives explicitly foresee that different bodies may be responsible for different aspects of review procedures and that the bodies concerned need not be judicial in character (they may thus be an administrative organ, provided that it is independent of the contracting authority or entity complained against). If so, then it must, however, be possible appeal to a judicial body, cf. Art. 2(9) of Directive 89/665/EEC (as amended by Directive 2007/66/EC) and the parallel provision in Article 2(9) of Directive 92/13/EEC (as amended by Directive 2007/66/EC).

[148] These powers include the possibility to take interim measures (e.g. suspend the award procedure), setting aside unlawful decisions and awarding damages. See Article 2 of both Remedies Directives for full details.

[149] 20.12.2009.

[150] See European Commission, Public procurement Indicators 2009 at http://ec.europa.eu/internal_market/publicprocurement/docs/indicators2009_en.pdf

[151] It should be noted that the value of published awards is calculated without VAT. Based on standard rates of VAT in 2009 an additional EUR 79 billion should be included to allow comparison with national account figures at market prices (EUR 76 billion in 2008). See figure 1.

[152] Public Procurement below threshold is reported by these Member States in their statistical reports and also in more detailed databases made publicly available by national procurement bodies.

[153] Publication in OJ/TED data is compared to public expenditure by functions of government (COFOG) .

[154] Estimates for the sectors in this section are based on data for 2008.

[155] In the Oymanns judgment (case C-300/07, 11 June 2009), the ECJ confirmed that German statutory sickness insurance funds are contracting authorities under the procurement directive 2004/18/EC.

[156] The source of data for these estimates is the input/output tables (use table) supplied to Eurostat. In general the latest data are for 2006 (except for Bulgaria, Latvia and the United Kingdom 2004, Belgium and Poland 2005, Germany and Finland 2007, Greece and Luxembourg 2008). Figures for 2006, for which data are not yet available are estimates provided by linear extrapolation of the data for the last three years available. No data are yet available for Malta or Cyprus.

[157] This EUR 6.2 billion is probably an underestimate as about 17% of the relevant notices did not indicate the contract price.

[158] It is too early to measure accurately the value of what is covered by 2009/81/EC.

[159] See endnote 156.

[160] Progress Report on the Single European Electronic Communications Market 2008 (14th Report) COM(2009)140 Final.

[161] And of Annex XVII of Directive 2004/17/EC. This category covers contracts between contracting authorities (entities) and service providers, the object of which is the placement and/or supply of personnel.

[162] Annual Report and Accounts 2008/09 The BBC Executive's review and assessment, Part Two, page 18, at http://downloads.bbc.co.uk/annualreport/pdf/bbc_executive_08_09.pdf

[163] OJ L 336, 23.12.1994, p. 1.

[164] European Parliament and Council Directive 97/52/EC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively, OJ L 328, 28.11.1997, p. 1.

[165] Directive 98/4/EC of the European Parliament and of the Council of 16 February 1998 amending Directive 93/38/EEC coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ L 101, 1.4.1998, p. 1

[166] For further details on the adaptations to the Directives, see Annex 2 "History of public procurement legislation", p. 180.

[167] For further details, see section 2.2.1 "Contracting authorities and contracting entities".

[168] However, contracts concerning dredging works are not offered in relation to Canada.

[169] Not, however, to "subsidised" contracts that may be awarded by bodies that are not themselves contracting authorities. See note 39 for further details.

[170] The SDR is a reference currency, consisting of a weighted "basket" of different currencies, defined by the International Monetary Fund and used in the GPA.

[171] The counter-value of all GPA thresholds in EUR (and in the national currency of countries not participating in the monetary union) is calculated each two years (and rounded down to the nearest thousand), cf. Articles 78 and 69 of, respectively, Directives 2004/18/EC and 2004/17/EC. The current set of values is applicable until the end of 2011.

[172] i.e. any contracting authority other than those listed in Annex IV of Directive 2004/18/EC. This also applies to service contracts awarded by sub-central contracting authorities

[173] i. e. works, supplies and service contracts.

[174] Including contracts awarded by contracting authorities in the field of defence in respect of a product that *is* listed in Annex V of Directive 2004/18/EC.

[175] These supplies contracts are covered as of the below-mentioned threshold of 200 000 SDR. It should be noted that procurement, which is subject to the new Defence and Security Directive, Directive 2009/81/EC, is not covered under the GPA, given that, by definition, such procurement either concerns military equipment, works or services or sensitive purchases having a security purpose and involving classified information.

[176] Whose CPC references are 7524, 7525, 7526. It should be noted also that our (current) GPA coverage *continues to exclude* voice telephony, telex, radiotelephony, paging and satellite services, whereas the corresponding exclusion was eliminated by Directives 2004/17/EC and 2004/18/18/EC.

[177] See Article 31(3) of Directive 2004/18/EC.

[178] See Article XV(1)(j) of the (current) GPA. If the thresholds set out in Directive 2004/18/EC for design contests are also aligned on those applicable to service contracts covered by the GPA, it is precisely in order to facilitate observance of this GPA rule and for reasons of legislative simplification.

[179] For further details, see section 2.2.1 "Contracting authorities and contracting entities".

[180] Provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of drinking water or the supply thereof to such networks.

[181] More precisely, this covers provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of electricity, gas or heat or the supply thereof to such networks.

[182] The relevant activities in the transport sector are defined as covering the provision or operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable.

[183] i. e. works, supplies and service contracts.

[184] However, contracts concerning dredging works, tendered by entities operating in the ports sector, are not offered in relation to the U. S.

[185] Whose CPC references are 7524, 7525, 7526. It should be noted also that our (current) GPA coverage *continues to exclude* voice telephony, telex, radiotelephony, paging and satellite services, whereas the corresponding exclusion was eliminated by Directives 2004/17/EC and 2004/18/18/EC.

[186] Category 2 of part A of Annex XVII.

[187] See the judgment of 16.12.2008 in Case C-213/07, Michaniki.

[188] See the judgment of 16.12.2008 in Case C-213/07, Michaniki.

[188] However, implementation of Article 6 that defines postal services as one of the relevant activities under the Utilities Directive could be postponed until 31.12.2008 in all Member States, including Bulgaria and Romania.

[189] ES, HU, PL and PT.

[190] ES and HU.

[191] CZ; HU; IT; RO; SK; ES

[192] Services and supplies contracts that are awarded pursuant to Directive 2004/18/EC may, however, be reserved for sheltered workshops by German contracting authorities.

[193] CZ, DK, ES, IT, NL, AT, PL, FI, SE and UK.

[194] CZ, DK, IT, NL, AT, PL, FI, SE and UK.

[195] i. e. establishing that the exemption is, respectively, applicable, applicable to some but not all of the activities and/or territories for which exemption was requested, and not applicable.

[196] DE; EL

[197] DE; ES; IT;

[198] FR

[199] ES; IT; PL

[200] IT

[201] DE

[202] DE: Regulation on prices for public contracts of 21.11.1953.

[203] e.g mandatory publication in buyer's profile in France, the website of the General Secretariat for Commerce and at least two financial newspapers in Greece, the website of the Procurement Monitoring Bureau in Latvia, on the central public procurement portal in Lithuania; to newspapers of wide circulation in Portugal; on the National Public Procurement Portal in Slovenia

[204] AT, BE, CY, CZ, EE, FR, DE, HU, IT, LV, LT, RO, SK, ES.

[205] I.e. AT; CZ; DE; EL; HU; IT; LV; LU; MT; PT; RO; SL.

[206] Publishing different information in the notices published at national level compared to that published at EU level would, in fact, be contrary to Articles 37(5) second sub-paragraph and 44(5) second sub-paragraph of, respectively Directive 2004/18/EC and Directive 2004/17/EC.

[207] Last amended by Commission Regulation (EC) 1150/2009 of 10 November 2009 amending Regulation (EC) No 1564/2005 as regards the standard forms for the publication of notices in the framework of public procurement in accordance with Council Directives 89/665/EEC and 92/13/EEC**,** OJ L 313 of 28.11.2009, p. 3.

[208] Contracting authorities and entities are "given" the difference and may consequently shorten deadlines for participation in award procedure by seven days, counted from the day of transmission of the notice for publication. This means that economic operators are no worse off since the deadline remains unchanged when counted from the date of publication.

[209] BE; CZ; FI; FR; HU.

[210] i. e. the detailed provisions of the Public Procurement Directives – Treaty provisions and principles do apply. See also Commission interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives, OJ C 179 of 1.8.2006, p. 2.

[211] i.e.BE; CZ; DK; EE; FI; EL; HU; SK; ES; SV.

[212] i.e. CZ; FI; FR; EL; HU; SL; ES.

[213] Judgments by the Court of Justice on the merits of the case, recognition of the alleged breaches by the Member States concerned, closure of the case by the Commission because the explanations given show that no infringement did take place.

[214] Under the non compliance procedure started by the Commission, the first phase is the pre litigation administrative phase also called “Infringement proceedings” The purpose of this pre-litigation stage is to enable the Member State to conform voluntarily with the requirements of the Treaty. There are several formal stages in the infringement procedure. The Commission may first have to carry out some investigation, namely when infringement procedures are launched further to a complaint. The *letter of formal notice* represents the first stage in the pre-litigation procedure, during which the Commission requests a Member State to submit its observations on an identified problem regarding the application of EU law within a given time limit. The purpose of the *reasoned opinion* is to set out the Commission’s position on the infringement and to determine the subject matter of any action, requesting the Member State to comply within a given time limit. The reasoned opinion must give a coherent and detailed statement, based on the letter of formal notice, of the reasons that have led it to conclude that the Member State concerned has failed to fulfill one or more of its obligations under the Treaties or secondary legislation. Referral by the Commission to the Court of Justice opens the litigation procedure.
See http://ec.europa.eu/eu_law/infringements/infringements_en.htm for further details.

[215] In certain cases, there are no answers (within the applicable deadlines).

[216] This issue has been looked in Table 3. "Overview of national implementation –timeliness-2004/18/EC" and in Table 4 "Overview of national implementation –timeliness-2004/17/EC".

[217] The absence of infringement procedures concerning 8 Member States does not necessarily mean that the implementation of EU public procurement rules is flawless in those countries. As most of these cases are based on complaints, it might simply be an indication of a reluctance to complain to the Commission - complaints at the national level can be found in each and every Member State.

[218] It is for instance frequent that the same issue may pose problems in respect of Treaty provisions and principles as well as in respect of the Directives. Similarly, the same issue may concern both the Utilities and the Classic Directives, just as a case may pose questions in relation to the rules on remedies (Directives 89/665/EEC and/or 92/13/EEC.)

[219] Some cases (also) concerned its predecessors, Directives 92/50/EEC, 93/36/EEC and 93/37/EEC.

[220] And/or its predecessor, Directive 93/38/EEC.

[221] In some cases, however, it was concluded that the arrangement concerned did not, after all, constitute a (public) procurement (concessions) contract within the meaning of EU law on public procurement.

[222] Cf. the explanations in section 2.2.2 "In house relations and cases of public cooperation" for further details.

[223] These cases concerned three Member States; however half of them occurred in one of these.

[224] Both cases took place before the end of the implementation deadline for the Defence and Security Procurement Directive.

[225] See Art. 18 of Directive 2004/18/EC.

[226] While publishing at the national level

[227] For instance that publication was omitted because the contract was considered to be a service concessions contract, not a service contract, and besides an in-house relation was considered to exist.

[228] For instance in the shape of "offsets" in what was considered to be a defence procurement; an obligation to invest in R & D in the Member State concerned; requirements of previous experience in the regional/country concerned; distance from building site as award criterion; requirements for establishment in the region as condition for participation, enrolment in regional register as condition for participation …

[229] With 4 cases concerning the same Member State.

[230] They concern: discriminatory specifications for IT procurement, unequal treatment in relation to certain deadlines connected to bank guarantees, exclusion criteria in relation to possible conflict of interest, issues of equal treatment and transparency in relation to the interpretation of contract-specific clauses in the tender documents and, finally, debriefing obligations.

[231] E. g. because of ineligible expenditures.

[232] Cases C-324/98, Telaustria, [2000] ECR I-10745, paragraph 62, C-231/03, Coname, judgment of 21.7.2005, paragraphs16 to 19 and C-458/03, Parking Brixen, judgment of 13.10.2005, paragraph 49.

[233] Telaustria case, paragraph 62 and Parking Brixen case, paragraph 49. For further guidance on contracts not or only partially covered, see Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives, OJ C 179 of 1.8.2006, p. 2; http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:179:0002:0007:EN:PDF

[234] In the UK there is only national guidance (soft law) regarding below threshold procurement.

[235] Source: Sigma Paper 45 of May 2010 "*Public Procurement in EU Member States: the regulation of contract below the EU thresholds and in areas not covered by the detailed rules of the EU directives*".
[236] Sigma Paper 45 of May 2010 "*Public Procurement in EU Member States: the regulation of contract below the EU thresholds and in areas not covered by the detailed rules of the EU directives*".
[237] BE; ES.
[238] CZ; EE; FI.
[239] HU; SK.
[240] SV – publication in generaly accepted databases "readily accessible for all in any other form in order to ensure the widest possible participation in competitive tendering".
[241] EL.
[242] BE; CZ; HU; SK; ES.
[243] Art. 1(3) and Art. 1(3) and (4) of, respectively, Directive 2004/17/EC and 2004/18/EC.
[244] Unless otherwise stated, the rules and principles applicable to service concessions can be taken to apply - mutatis mutandis - to works concessions in the utilities sectors
[245] Sigma Paper no. 40 – "*Central Procurement Structures and capacity in Member States of the European Union*" – March 2007. –hereinafter referred to as Sigma Paper no. 40.
[246] Idem as endnote 245.
[247] *OJ L 395, 30.12.1989, p. 33.*
[248] *OJ L 76, 23.3.1992, p. 14.*
[249] *OJ L 335, 20.12.2007, p. 31.*
[250] See e.g. case C-17/09, Commission vs Germany.
[251] E.g: Austria, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, Germany, Hungary, Lithuania, Malta, Netherlands, Poland, Portugal, Slovak Republic, Slovenia, Spain
[252] This section is based on the findings of Sigma Paper 41 of April 2007 "*Public Procurement Review and Remedies System in the European Union*", which analysed the review and remedies systems of 24 Member States.
[253] Commission Interpretative communication on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement, COM(2001) 274 final, Brussels, 4.7.2001.
[254] Commission Communication on Integrated Product Policy - Building on Environmental Life-Cycle Thinking, COM(2003) 302 final, 18.7.2003
[255] Buying Green - Handbook on environmental public procurement
[256] European Commission, Communication on Public Procurement for a better environment, COM(2008) 400 final, Brussels, 16.7.2008 and the Sustainable Consumption and Production and Sustainable Industrial Policy Action Plan, COM(2008) 397 final, Brussels, 16.7.2008
[257] PricewaterhouseCoopers, Significant and Ecofys, Collection of statistical information on Green public procurement in the EU, January 2009.
[258] AEA Technology for European Commission, Assessment and Comparison of National Green and Sustainable Public Procurement Criteria and Underlying Schemes, November 2010. The countries covered were Austria, Belgium, Denmark, Finland, France, Germany, the Netherlands, Norway, Sweden and the United Kingdom.
[259] This section makes extensive use of the findings of the study undertaken for the Commission by Adelphi, Strategic use of public procurement in Europe. See also summary in Table 12.
[260] See Commission Communication on the Energy Efficiency Plan 2011, COM(2011) 109 final.
[261] Defined by GRIP – Norwegian centre for sustainable production and consumption. See: www.grip.no.
[262] Adelphi, Strategic use of public procurement in Europe. Page 16.
[263] Directive 2009/33/EC on the Promotion of Clean and Energy Efficient Road Transport Vehicles.
[264] Under the European Energy Star Programme central government authorities are obliged to procure equipment not less efficient than Energy Star ((EC) No 106/2008).
[265] Directive 2010/31/EC on the Energy Performance of Buildings.
[266] Adelphi, Strategic use of public procurement in Europe. Chapter 3.
[267] European Commission, Buying social: A Guide to Taking Account of Social Consideration in Public Procurement, 2010.
[268] See endnote reference 271, page 7.
[269] See, for example, Williams, S. Coordinating public procurement to support EU objectives, in Arrowsmith, S and Kunzlik, P, Social and environmental policies in EC procurement law, Cambridge, 2009.
[270] Austria, Belgium, the Czech Republic, Germany, Denmark, Finland, France, Italy, Lithuania, Luxembourg, the Netherlands, Norway, Poland, Slovakia, Spain, Sweden and the UK.
[271] Adelphi, Strategic use of public procurement in Europe. Chapter 3

[272] European Commission, staff working document SEC(2007) 280, "Guide on dealing with innovative solutions in public procurement" see http://ec.europa.eu/enterprise/policies/innovation/policy/lead-market-initiative/public-proc_en.htm#h2-5

[273] European Commission, Risk management in the procurement of innovation - Concepts and empirical evidence in the European Union, Luxembourg, 2010 See http://ec.europa.eu/invest-in-research/pdf/download_en/risk_management.pdf

[274] Austria, Denmark, Estonia, Finland, Germany, Hungary, Ireland, Lithuania, Luxembourg, Malta, Norway, Poland, Portugal, Slovakia, Spain, and the UK.

[275] For more info on the EC survey on the status of implementation of PCP across Europe, refer to http://cordis.europa.eu/fp7/ict/pcp/pcp-survey.pdf

[276] Beschluss zur verstärkten Innovationsorientierung öffentlicher Beschaffung (2007)

[277] Adelphi, Strategic use of public procurement in Europe. Pages 69-80

[278] This calculation, made by the Commission services from notices published in Tenders Electronic Daily (TED), differs from similar estimates made in other studies [European Commission, Evaluation of SMEs' access to public procurement (2010) or European Commission, Procurement procedures and techniques (2011) which exclude financial services and EEA contracts and include more recent but uncorrected data respectively.]

[279] The data include the EEA countries (Iceland, Liechtenstein and Norway) and include EU-15 to 2003, EU-25 to 2006 and EU-27 thereafter. It should also be noted that the ten new Member States acceding in 2004 were only obliged to publish notices in the Official Journal as from May 2004. Data for the utility sectors is not always complete as for technical reasons confidential contract award values may not yet be included for all years.

[280] 2007-2009 for Bulgaria and Romania.

[281] See Directive 2004/18/EC, Article 35(1)(a) and Regulation (EC) 1564/2005, Article 2.

[282] The figures do not take into account any notices published by entities in the sectors covered by Directive 2004/17/EC.

[283] See the account of Het Rijksinkoopbureau in the inventory of the Ministry of Finance in the Dutch national archive at http://www.nationaalarchief.nl

[284] Bianchi, T. and Guidi, V., The Comparative survey on the National public procurement systems across the PPN, Rome 2010, available at http://www.publicprocurementnetwork.org.

[285] See Table 2.

[286] See for example, Nicola Dimitri, Gustavo Piga, Giancarlo Spagnolo, Handbook of procurement, Cambridge 2006. Karjalainen, K. (2009) Challenges of purchasing centralization, Helsinki 2009, gives some examples of savings in Finland. http://hsepubl.lib.hse.fi/pdf/diss/a344.pdf

[287] A discussion of how central procurement can take these broader policy concerns into account is presented in Albano, G.L., Sparro, M. (2010). Flexible Strategies for Centralized Public Procurement. *Review of Economics and Institutions, 1* (2), Article 4.

[288] See National Audit Office and Audit Commission, A review of collaborative procurement across the public sector, May 2010, available at http://www.nao.org.uk.

[289] It should be noted that this analysis of division into lots does not give the same results as the analysis of lots in [European Commission, Evaluation of SMEs' access to public procurement (2010), pages 35-38.] This is because here we analyse contract notices which have indicated they are to be divided into lots whereas in the SME study contract awards grouped within a contract award notice are described as lots whether they were initially so divided or not.

[290] Evaluation of the 2004 Action Plan for Electronic Procurement, accompanying document to the Green Paper on expanding the use of e-Procurement in the EU, SEC(2010) 1214 final, Brussels, 18.10.2010.

[291] Siemens-time.lex, Study on the evaluation of the Action Plan for the implementation of the legal framework for electronic procurement, May 2010.

[292] e-gov benchmark: the findings of the 2010 eGovernment benchmark survey, ?? 2010.

[293] e-gov benchmark, p.41.

[294] CEN/ISSS Workshop eCAT, Classification and catalogue systems for public and private procurement http://www.cen.eu/cen/Sectors/Sectors/ISSS/Activity/Documents/CC3PEnglishLR%20(2).pdf.

[295] [European Commission, Evaluation of SMEs' access to public procurement (2010), pages 21-42.].

[296] Ibid, page 25.

[297] It is important to note that the term "duration of procedures" is understood in this chapter as the time that elapses between different stages of the procedure (e.g. publication, award of a contract etc.) and it is not equal to the time effectively spend on carrying out the formalities required by the procedures.

[298] In the following statistics the figure used is based on the median duration in days. This is because many of the distributions are showed, so an average figure may overestimate the typical duration.

[299] i.e. the UK, Denmark, Ireland, Finland, Luxembourg and Italy. The Netherlands takes 108 days.

[300] The procedure is only available to contracting authorities covered by Directive 2004/18/EC.

[301] The weighted average of 5.9 differs from unweighted figure of 5.4 which was referred to in the context of the analysis of competition.

[302] 48 days – the typical duration of main procedures from the dispatch of a contract notice to the submission of offers or the request to participate.

[303] 58 days - the typical duration of main procedures from the submission of offers or request to participate to award.

[304] This chapter is based heavily on work carried out by Rambøll Management in a study undertaken for the Commission services on "Cross-border procurement above EU thresholds".

[305] See Chapter 1 page 4 and endnote 3.

[306] The datasets for each of the years are different. For example data for the UK is only available for 1995. Only limited data from the new Member States was available in 1995 and not always for the year 1995. Moreover the fact that these countries were not at that time EU Member States may mean that several different patterns of influence or causality may be in operation apart from the single market. The following data was used: in 1995 data from Estonia (for 1997), Hungary (1998), Latvia (1996), Slovenia (1996) was included; in 2000 data from Estonia, Hungary, Latvia (1998), Lithuania, Poland, Romania, Slovakia and Slovenia was included.

[307] EE Evaluation page 102.

[308] CPA is established by Regulation (EC) 451/2008 and earlier regulations. 11 sectors have been listed as CPA 11 and 45 show equal shares of 1.7%.

[309] The Common Procurement Vocabulary (CPV) established by Regulation (EC) 213/2008 is used to classify contracts published in the OJEU. It is based on the CPA. Although the years compared are different and CPV division 75 is not a perfect match CPA 75 product group.

[310] Exports as a proportion of the total use for Products/CPA/45 (from Eurostat National Account Input-output table at basic prices).

[311] See also Baldwin "The great trade collapse: What caused it and what does it mean?" in Baldwin (Ed.), "The Great Trade Collapse: Causes, Consequences and Prospects".

[312] "*Trade effects of discriminatory public procurement: a guide to measuring the degree of discrimination and associated budget costs*", Federico Trionfetti, Centre for Economic Performance, The London School of Economics and Political Science, Paper prepared for the International Trade Centre (February, 2000).

[313] Only the 21 countries were used where both datasets were available. Some data for Bulgaria, Cyprus, Luxembourg, Latvia, Malta and the United Kingdom is not available.

[314] PwC study.

[315] http://ec.europa.eu/yourvoice/ebtp/consultations/2011/cross-border-public-procurement/index_en.htm

[316] Cross-reference to the publication levels.

[317] Europe Economics, Evaluation of Public Procurement Directives, 2006

[318] See Internal Market Scoreboard, No 19 July 2009 page 27.

[319] Europe Economics, Estimating the benefits from the procurement Directives, 2011.

[320] Europe Economics, 2006.

[321] Vogel, L., Macroeconomic effects of cost savings in public procurement, European Economy Economic Papers 389, Brussels 2009. Available at http://ec.europa.eu/economy_finance/publications/publication16259_en.pdf

[322] The key questions are reproduced in Chapter 1.