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PUBLIC PROCUREMENT REVIEW

ACCEDING COUNTRIES

CENTRAL & EASTERN EUROPE

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Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, and Slovenia

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2, rue André-Pascal, 75775 Paris Cedex 16, France ; Tel : +33 (0) 1 45 24 82 00

Direct line : +33 (0) 1 45 24 79 93 ; Fax : +33 (0) 1 45 24 13 00 ; E-mail: sigma.contact@oecd.org; Internet : www.oecd.org/sigma

I. FINDINGS AND CONCLUSIONS

Common Strengths Identified

A number of important strengths have been identified in the public procurement systems of the ACs, which in general also reflect some of the priorities set by the Commission. An important aspect is how the positive elements experienced can be shared with the remaining candidate countries and the CARDS countries as well as with the Member States; in particular the impressive central institutional set-ups established may serve as models for other countries.

Individual deviations from the findings listed below are discussed in the country reports:

- the majority of ACs have legal frameworks that are very closely aligned with the European Directives. Adoption of fully compliant legislation by the due date is more likely than not.
- the central organisations have identified the main purchasers and have generally a good grasp of the purchasing side of the system. With the possession of experienced and capable central public procurement organisations, which generally is the case, ACs are well-positioned to draft and implement EC based legislation and to support contracting entities and economic operators effectively;
- systems for dissemination of procurement information are generally well advanced;
- the markets for public sector contracts are sufficiently competitive with a diversified private sector interested in competing on public tenders, as verified by high average participation rates;
- contracting entities are generally well familiarised with national procurement legislation;
- the systems for complaints and remedies are often rapid and effective.

1. The Legal Framework

The Legal Reform Process

As a first priority, all ACs are in the process of amending their current public procurement legislation (PPL) in order to have a PPL in force, at latest by the end of 2003, which is fully aligned with the EC Directives. Some of the ACs also intend to amend the legal framework applicable to contracts not covered by the EC Directives; but for the moment this ambition is generally seen as a secondary priority.

The PPLs of many of the ACs have been subject to frequent revisions and amendments over the past years, which constitutes a significant problem for both legislators and the users of the legislation. Legislative stability is a prerequisite for the effective implementation of the PPL, in particular with respect to the possibility of preparing secondary legislation and operational guidelines. When the process of harmonising their PPLs with the current Directives is finalised, the countries will soon need to consider the implementation of the EC Consolidated Directive.

ACs generally organise consultation processes, involving the major stakeholders, in the preparation of the draft amendments to PPLs before presenting the proposal to the Parliaments. However, the Review is not in the position to conclude to what extent the results of these consultations are considered in the drafting process by the legislators.

Conclusions

All eight accession countries have the capacity to align their legislation with the a*cquis communautaire* and to do this by the due date; but some face higher political or procedural hurdles than others.

Largely Identical Procedures in Place Above and Below the EC Thresholds

Contracts above the EC thresholds represent for all ACs only a minor share of all contracts (for the smaller ACs only a couple of hundred contracts annually). In addition to national legislation for contracts to which the EC Directives will apply in full, all ACs have introduced the full set of EC

procedures for contracts below the EC thresholds and above lower national thresholds; (except sometimes for some minor simplifications such as shorter time limits for the submission of tenders). Furthermore, the PPLs rarely make any distinction between the EC based procedures above the thresholds and the national procedures below the EC thresholds, which may constitute a problem both in principle and in practice.

The open, restricted and negotiated procedures as defined by the Directives have to be transposed into national law (with regard to time limits, publication rules, qualification requirements and procedures, technical specifications etc.) above the EC thresholds. Those national procedures that are above the EC thresholds have to be adapted to the needs of the Directives.

a. A problem, however, may arise when these EC procedures, designated in the same way, are also introduced below the EC thresholds, but in a slightly different way. National procedures which are not fully adapted to the needs of the Directives, or which are simplified versions of the defined procedures should be called something else to avoid any potential confusion or the raising of false expectations. The use of EC procedures below the EC thresholds may also have other implications (see ECJ Case C-28/98 Leur-Blom), which the ACs may wish to consider.

b. For the purposes of clarity and user-friendliness at the level of contracting entities and suppliers, it might also be advisable to use other denominations for the procedures below the EC thresholds (e.g. open simplified competition and selective simplified competition).

c. The collecting of statistics will be facilitated when the procedures above and below the EC thresholds are clearly distinguished from each other.

Conclusions

All ACs have adapted to the EC Directives not only above the EC thresholds but also down to lower national thresholds that vary from one AC to another. This strategy, although legally correct, can be questioned both in principle and from a practical point of view. National procedures below the EC thresholds should be distinguished clearly from the EC procedures and therefore be named differently. Such a measure would bring a number of advantages, such as increased clarity, a higher degree of user-friendliness and facilitation of the collecting of statistics.

The Formalistic Approach in the Design of Procurement Legislation

Clearly, below the EC thresholds, the ACs apply procurement procedures that generally appear to be more complicated compared with those of the EC Member States. The degree of simplification offered below the EC thresholds is usually minimal, which often provides strong grounds for dissatisfaction — as frequently expressed by many contracting entities. It seems that the procedural requirements imposed by the PPLs are not proportional to the value and complexity of the contracts.

If legislation is too complicated in terms of procedural inconsistency with the value of the contract this may lead to a number of undesirable consequences. Procurement statistics as well as interviews indicate a correlation between complicated and time-consuming procedures and improper, non-efficient procurement. In a majority of ACs there appears to be (i) overuse of non-competitive negotiated procedures, (ii) understandable requests for an increase of the national thresholds to avoid the application of the PPL in its entirety, and (iii) efforts to split up contracts to avoid the application of the complicated procedures above the national thresholds.

It appears that the primary concern of the legislators has been to implement procurement legislation that is fully aligned with the Directives whilst disregarding significantly the national interest of securing efficient procurement “value for money”. This position seems to have been further aggravated by the political goal of combating corruption and fraudulent practices, which appears to have been assumed as justification for increased rigidity in public procurement legislation or in any case has served to block all attempts to simplify the procedures.

Conclusions

Generally, there is a clear degree of dissatisfaction at the operational level, with procurement legislation imposing rules and procedures that are too formalistic and bureaucratic without recognising the need for flexibility and decentralised decision-making.

Specific Features/Elements of Procedural Complexity

Following the concerns which were raised above, a number of common features and provisions have been identified, which the ACs might wish to consider:

a. Simplified competitive procurement procedures below EC thresholds

Since the majority of PPLs offer the same procedures both above and below the EC thresholds (open, restricted and negotiated procedures) there are commonly no competitive simplified procedures available below the EC thresholds. Since the restricted procedure is very rarely practiced, the open procedure or the negotiated procedure are those that are predominantly in use.

Procurement methods below the EC thresholds should offer a higher degree of simplification and flexibility in order to better reflect the needs triggered by the average size and less complicated nature of the contracts normally subject to procurement in this region. As mentioned above, it is also an advantage to define national procedures that are distinctive from the EC procedures, both in terms of content and of terminology.

In addition to open competition, the other main procedure recognised internationally would be selective competition, where contracting entities invite tenderers by direct invitation from a standing list of qualified suppliers/contractors/service providers. The number of invited tenderers must be sufficient to ensure effective and genuine competition. The list must be established on fair and objective grounds. Selective competition should be available on equal terms with open competition and without any specific justifications.

The simplification of the procedures would be likely to reduce the pressure on contracting entities for an increase in the national thresholds below which the PPL does not apply at all, or where direct purchasing becomes acceptable. The availability of simplified procedures may also reduce the number of negotiated procedures without prior publication.

Furthermore, as may be feared by the ACs, the simplification of the procedures does not necessarily bring with it an increased risk of corruption, on the contrary in fact, since the numbers of reasons for the rejection of a tender are reduced. The major risk of corruption comes rather with the use of non-competitive procedures where the mechanism of challenge may also be removed.

b. Tender and performance securities

The use of tender and performance securities is common practice above as well as below the EC thresholds; either it is made mandatory or is expressed in "may" terms by the PPLs. The request for securities is an apparent obstacle for all tenderers — but is particularly so for SMEs — to participation in a tender proceeding or to conclusion of a contract. It represents financial costs as well as being an administrative burden for all participating firms. Furthermore, in the end the costs will be borne by the contracting entities. The value of tender securities, in general, can be questioned, except for very high value contracts where a possible withdrawal by a tenderer could be very costly for the contracting entity. Whenever applicable, it should be at the discretion of the contracting entities to decide whether it is used or not; but normally such instruments should be avoided. The reliability of tenderers should be achieved by other means: mainly through the use of the qualification system and the request for quality assurance certification. Tender and performance securities may work in connection with one-off contracts, but are impractical for framework contracts and in conjunction with the future use of electronic procurement.

c. Public opening of tenders

In all ACs, public opening of tenders is made mandatory for every contract, commonly irrespective of the contract value or the procurement method applied. Since it adds transparency there is no

questioning of the procedure as such, but for the purposes of simplification and speedy handling, it would be appropriate in addition, to accept non-public opening procedures as long as the regularity of the proceedings could be guaranteed; especially in the context of low-value contracts or contracts where the public opening would not provide any value added. The minutes of the opening may be distributed to the tenderers. A further complication of the public opening relates to the problem of revealing tender prices and the later possibility of entering into a negotiated procedure on the same contract. It should also be observed that public opening of tenders in the future context of electronic procurement might hardly be practicable.

d. Qualification and eligibility requirements

ACs, commonly, have implemented the provisions of the Directives regarding the qualification of tenderers and the determining of eligibility for participation in a manner that often goes beyond what the Directives require. Firstly, as a general problem, they apply the same rules as the Directives apply even for relatively low value contracts below the EC thresholds. Secondly they are implemented in a mandatory fashion when the Directives actually use the term “may”. Frequently, there is an obligation to submit original documents on financial, technical capacity and project references for each tender irrespective of the contract value and often out of proportion to the value of the contract, which is a very burdensome exercise for tenderers who tender on a regular basis. The formalistic approach would also imply that tenders will be rejected for formal reasons, such as pages not being initialled, or a certain document being missing, with a complete lack of any possibility for the contracting entity to seek clarification in order to complete an otherwise fully responsive tender. This rigidity produces a number of negative consequences both for contracting entities and the private sector, and in fact, the whole procurement system. Contracting entities will be deprived of the possibility to evaluate a tender that potentially would have been the most favourable one, and this cannot be in the interest of any purchaser. Firms may be discouraged from tendering because of this formalism and may even refrain from competing on future public sector contracts for this reason — something that is wholly detrimental to the competitive status of the market. Such a formalistic approach may also be a device which could facilitate corrupt practices, even though the provisions were introduced with the opposite intention in mind. The ability to reject or favour tenders on rigidly formal grounds enables parties to ensure that only the formally responsive tenders of those persons implicated in the fraud are considered.

The vast number of critical comments heard on this issue during the missions is a clear indication of the seriousness of the matter.

Conclusions

The excessive procedural complexity introduced in the PPLs of all the ACs constitutes a significant problem, which needs to be seriously considered and addressed by the countries themselves. The current lack of flexibility and simplicity is counterproductive and does not promote efficient or sound procurement practice.

Other Critical Features in the Legal Framework

a. The implementation of the restricted procedure

Concerns are raised in many of the country reports on the manner in which the restricted procedure has been transposed into national PPLs. In the Directives the restricted procedure stands on an equal footing with the open procedure and is considered by nature to be an open competition in which any economic operator can express an interest and seek an invitation to tender. It is therefore available as an equal alternative to the open procedure without any special justification being needed. Some ACs have chosen to implement the restricted procedure in a manner secondary to the open procedure as the preferred method, but in addition, this is often combined with a set of justifications which appear to have their origin in the UNCITRAL Model Law. It is legally correct to adopt a more limited application of the restricted procedure, but the main problem is that the justifications for the use of restricted procedure reveal a lack of understanding of the rationale behind it. The restricted procedure is designed to offer the contracting entities the possibility of conducting an open tendering with prequalification or short-listing in the context of a specific contract. Some

PPLs even offer, in addition, separate prequalification proceedings in conjunction with the open procedure, which highlights the apparent misunderstanding. The UNCITRAL restricted tendering is a procedure with a direct invitation to tenderers and without an open contract-specific prequalification exercise. It is based on the assumption that there are only a few firms available in the market, which may explain the confusion. As shown in the procurement statistics the restricted procedure is very rarely practised, which may well be a result of the situation described above. This is clearly different to the situation in many EC Member States where the restricted procedure is commonly used for large or complex works and goods contracts and frequently for services contracts.

Conclusions

The implementation of the restricted procedure in many ACs deviates from the definition laid down in the Directives and the selective procedures legitimised under the EC rules and GPA, where the stated preference for open procedure is combined with justifications based on the UNCITRAL definition for restricted tendering: the implementation appears to be incompatible with the Directives. The restricted procedure is rarely practised, which is likely to be an effect of this negative attitude towards it, though not the only contributing reason. A further implication of this non-use of the restricted procedure is that the contracting entities, in reality, are in possession of only two methods, namely the open and negotiated procedures.

b. High national thresholds

Frequently, it is found that the thresholds set (either to ensure coverage of the PPL in its entirety or to permit the use of simplified methods), whether regulated by the PPL or by separate regulations seem to be too high. With thresholds in the range of €20 000-60 000 for the application of the PPL, there is a significant risk that the majority of all contracts will fall outside of the PPL's scope of application, and that they are therefore concluded with the use of non-competitive and non-transparent procedures without access to remedies. High thresholds, above which the whole set of complicated procedures commonly apply in full (see above), may also constitute a compelling reason for the inappropriate practice of splitting contracts.

Conclusions

High national thresholds may give rise to the undesirable situation in which a large proportion of contracts falling outside the application of the PPL are controlled by government regulations or merely by internal regulations. An alternative approach would be to allow the PPL to apply to all contracts, but to introduce simplified procedures for low value contracts.

c. The widespread and predominant use of the lowest price award criterion

In many ACs the main award criterion used appears to be the lowest price only for all types of contracts, including services contracts, while the economically most advantageous criterion is perceived to be a problem. Interestingly, the predominant use of lowest price criterion seems to apply irrespective of whether the PPL imposes its use or not. The Directives allow for the free choice between the two criteria, and in the Member States the most commonly practised criterion is the most economically advantageous tender. It provides for the possibility of considering factors other than the tender price, which becomes essential for contracts where price is of secondary importance, e.g. in service contracts or where other cost-related factors need to be considered. Actually, the main concern is not so much the fact that the lowest price is clearly preferred, since this could be seen as a transitional problem that may be overcome by further information and training; but the questionable reasons for the current practice as expressed by contracting entities. The Review team was repeatedly informed by contracting entities that the choice of award criterion was governed more by a desire to minimise complaints from dissatisfied tenderers and to avoid criticism by internal and external audit than to maximise the economic outcome of the tendering. This scepticism against the more complicated award criterion may be further aggravated by a lack of understanding and knowledge on how to apply the most economically advantageous award criterion.

The imposition of the lowest price criterion is in addition often seen as a safeguard against corruption, but this is a questionable conclusion or at least not as self-evident in a context where

corruption is practised. Lowest price may actually be used as a means to avoid review and challenges, whilst compensatory pecuniary actions by the involved parties either may take place by supplying items that do not meet stipulated technical specifications or by re-negotiating the contract conditions with the purpose to allow increased prices or other more favourable terms as compared with the original contract conditions.

d. Defining an abnormally low price

Some PPLs include a rule on how an abnormally low price shall be determined in the evaluation. Such a rule indicates a certain percentage by which a tender with the lowest price is allowed to differ from a tender with the next lowest price or an average of tendered prices in order to be seen as acceptable. A tender with a lowest price that exceeds the percentage set shall be rejected as non-responsive.

This approach is questionable and may appear to be incompatible with the EC Directives. Strong differences in price should be analysed on a case- by- case basis taking into consideration the market situation, the state of competition and other important circumstances applicable to the specific contract subject to procurement. What is considered an abnormally low price in a certain situation may be fully acceptable and natural in another situation; consequently, it is not for the legislators to make market intervention type decisions, but for the contracting entity to decide on the appropriate action in accordance with its mandate and responsibility.

e. Maximised periods of tender validity

It is not unusual that PPLs include provisions on maximum periods of tender validity, which is a questionable practice although the purpose is understandable. The main priority, however, for any contracting entity should be to ensure a technically and commercially correct evaluation for the purposes of determining the most favourable tender — which for large and complex projects would normally require far more time than that allowed under the PPL. Furthermore, in general, it should be at the discretion of the contracting entity to plan and set the time limits for the tender validity, so allowing for both a speedy and correct tender evaluation process.

f. The two-envelope system

A number of the ACs employs the two-envelope system in conjunction with the submission of tenders for all types of contract. The two-envelope system by which the technical and financial proposal is submitted in two different envelopes and opened at two separate opening sessions is, in some contexts, used for the procurement of consultancy services, but rarely for goods and works contracts.

The rationale for the two-envelope system is that the technical evaluation shall be completed without access to any price information, so as to avoid any biased influence in cases where the technical evaluation includes “soft” selection criteria. When the technical evaluation is completed by determining the technical score and ranking of each technical proposal the price of the financial proposal is simply added, according to a certain formula, in order to determine the most favourable tender.

The use of the two-envelope system does not fulfil any useful function in relation to the procurement of goods and works since the evaluation process is not harmed by access to price information. On the contrary, such a system may have negative effects, including the following:

- prevents the possibility of conducting a correct and efficient technical and commercial evaluation, especially with respect to the criterion of economically most advantageous tender;
- delays the evaluation process by employing two opening procedures;
- encourages the use of lowest price criterion further, since this is the only time in theory the system could be used for goods and works contracts;
- separates quality and price with a tendency to drive up quality unnecessarily and without regard to price;

- does not add any value to the process, but requires the contracting entities to carry out ineffective evaluation procedures.

Conclusions

The use of a two-envelope system is not good practice in connection with the procurement of goods and works. Although it could possibly be acceptable for the procurement of intellectual services it should not be encouraged.

g. Lack of user-friendliness

There is the impression that the earlier UNCITRAL based PPLs, purely from a user's perspective, were generally better structured and more clearly organised, thereby making them easier to apply than the current EC based legislation. This may change when the Consolidated Directive comes into force, but it seems that the first priority of all ACs has been to draft laws that are compatible with the Directives without considering sufficiently other important factors, such as practicability, user-friendliness and readability. This problem becomes further accentuated by the extension of concepts from the EC Directives below the EC thresholds. Consequentially, perhaps, the ACs have implemented legislation using the consolidated approach for the current separate Directives, including the utilities, which of course generates a number of drafting problems for the legislators. This pre-empts proposed changes in the EU but will need to be revisited as soon as the EU position becomes clear.

Conclusions

There is a common need to revise the PPLs in order to strengthen the readability and user-friendliness of the laws. The next good opportunity for this will be the implementation of the EC Consolidated Directive.

2. Central Institutional Organisation

The availability of a Public Procurement Organisation (PPO) centrally located within a government administration is seen to be a key to the successful implementation of procurement legislation and the creation of an effective public procurement system. In contrast to the Member States, all ACs have established central PPOs, which is something very satisfactory since this circumstance was evidently one of the major reasons why the ACs were so effective in introducing public procurement systems built on market economy principles in the early and mid 90s. At the same time, there are differences between the countries in terms of mandate, functions and responsibilities, and organisational location; but clearly, since there is no single organisational solution available and to be recommended, no preferences are expressed in the country reports. On the contrary, rather, each country has to decide on its own institutional solution on the basis of its individual political, administrative and legal structures. However, whatever model is introduced and put in place, the availability of sufficient central institutional capacity to support legal implementation; to provide qualified guidance to contracting entities as well as the private sector; to create information systems; to provide development services; and to monitor public procurement is regarded as a key prerequisite for the development of a sound and efficient public procurement system.

Capacity to draft legislation

It is noted with satisfaction that the AC countries, with some few exceptions, have established central institutional set-ups that basically possess the prerequisites and the necessary capacity to implement public procurement legislation effectively and to contribute to the development of the procurement system. Some PPOs are directly responsible for drafting new legislation, while in other ACs this responsibility rests with a line ministry, such as the Ministry of Finance, or Economy or, as in one case, with the Ministry of Justice. Generally, all ACs appear to be in a position to draft procurement legislation satisfactorily.

EU Structural Funds

All ACs have made preparations for the handling of EU provided structural funds after accession, and it appears that the PPOs of the countries will play an important role. It still remains clear that the inclusion of both these rules and institutions will require further efforts, monitoring and specialised training.

For the purposes of the Review, some principal issues have been identified in the current institutional structures; these are discussed below in brief.

a. The lack of clarity concerning the role of a PPO

Many PPOs have been assigned the responsibility of fulfilling both advisory, review and monitoring functions under the same organisational umbrella. PPOs that try to combine advisory and regulatory functions with an executive monitoring and review function appear to be exposed to a "systemic built-in conflict". This conclusion is based on the assumption that PPOs with this combination of functions, as perceived, may face a potential conflict of interest. As an additional complication, some PPOs also exercise an *ex-ante* control in the decision making process of the contracting entities; for example the PPLs may require them to seek prior approval from the PPOs for certain procurement decisions — such as the right to use a negotiated procedure or to terminate a tender proceeding. This implies that such a PPO risks being party to a dispute in connection with which it may later be engaged in reviewing a complaint filed by a dissatisfied candidate or tenderer. There is a fear that the credibility of a PPO with combined functions and a significant involvement in the procurement process may be adversely affected.

A clear organisational separation of these functions is to be recommended, preferably by allocating the complaint review function to an independent body. Secondly, the *ex-ante* involvement of the PPO in the procurement process is also questionable for the above-mentioned reason, but principally and equally importantly, because it is in clear conflict with the idea of a decentralised public procurement system where the contracting entity should be entitled to the right to make all decisions and to shoulder the accountability that accompanies them. Control should be exercised through the complaints and remedies system.

b. The future orientation of a PPO

The tasks assigned to the PPOs at the time of introducing a market-based public procurement system at the beginning of the 90s would, by necessity, have a different orientation than would be the case today. More than 10 years experience of public procurement in a market-based competitive environment will make a huge difference in terms of the common capacity, knowledge and standard of the public procurement systems.

There is less than one year to go before the ACs will become an integral part of the Internal Market and operate public procurement systems based on EC legislation adhering to the principles of the European Treaty. This presents a number of new challenges. In such a context, the priority tasks for any PPO in the short and medium-term perspectives could be envisaged as follows:

- exercise a general monitoring function of the public procurement system for the purpose of providing the principal stakeholders — the government, the parliament and the public — with adequate information and guidance on the state of public procurement in the country;
- actively support the procurement community — contracting entities and the private sector — in the implementation and application of procurement legislation based on the EC Directives, by the provision of training and information, including awareness campaigns to the private sector on how to operate effectively in the Internal Market and how to take advantage of the increased business opportunities offered by a larger market;
- create information gathering and dissemination systems that comply with EU as well as national requirements;
- develop operational tools for contracting entities, such as guidelines, manuals, and model documents and formats to facilitate their planning, preparation, and conducting of procurement processes and the execution of contracts;

- take active part in the long-term building of capacity and competence in public procurement;
- propose and initiate constructive measures to strengthen integrity and ethical values within the sphere of public procurement;
- be a driving force for the introduction of new technologies in procurement, including electronic tendering;
- introduce arrangements for coordinated and centralised purchasing, including the use of framework agreements;
- establish systems for cooperation in public procurement, both nationally and internationally. The setting-up of formal or informal networks/organisations of procurement professionals should be considered;
- be the centre point for policy development and a forceful advocate of sound and efficient public procurement that rests on the principles of strong and equitable competition.

A PPO formed along these lines will need to redefine its role and functions and organise and staff itself to meet other professional demands. There will, of course, be a considerable on-going need for legal experts, but with a change of focus into non-legal areas other types of expertise will become increasingly necessary; such as qualified practical experience of procurement of works, goods, and services; specialists in IT-systems; contract experts; contract and project managers; economists; and publication and media experts.

Based on the assumption of the impracticability, in the long run, of maintaining the advisory and review functions within the same organisational structure, there seems to be a need for each of the PPOs to make a strategic decision: namely to determine if it wishes to develop organisation and competence with the objective of becoming a “Centre of Excellence” in public procurement, while maintaining a general monitoring function, or to simply be a “Procurement Monitoring and Review Authority”. A PPO with the former orientation will strive to seek solutions that are consistent with the ideas of an efficient public procurement system.

3. Central Institutional Capacity

Central institutional procurement functions and services are provided or arranged by the central public administration, though this is not necessarily in the hands of the PPO since other public entities may be involved in certain areas. The operations could even be outsourced to private firms, but in such a case the ultimate responsibility for the implementation and quality of the services/areas rests with the public body in charge of the specific area.

The country reports address the following areas with the main findings as follows:

Procurement Statistics

All ACs have in their possession or are in the process of introducing IT systems that meet the information requirements under the EC Directives as well as under national requirements. Most ACs had the capacity to provide the Review Team with the statistics and other data requested in the context of the Review.

Training and Information

Systematic training and information in relation to the implementation of EC based legislation and to prepare the parties to operate efficiently within the Internal Market will be an essential task in the near future. It is important that governments actively prepare for this step by formulating an action plan agreed by all parties concerned and that they allocate sufficient resources for the purpose. To the extent known, only limited efforts, in general, have been devoted to this task so far.

There is also the impression, with some important exceptions, that the PPOs take a rather passive role in the building of long-term capacity in public procurement, which may be the result of limited budgetary resources.

Model Tender and Contract Documents

Too little has been done at government level to introduce the model tender and contract documents that would facilitate the operational side of procurement. It appears that some contracting entities, by means of internal regulations, have implemented standard documents to cover their own needs. The lack of general contract conditions, in particular, constitutes a serious problem in many countries.

Technical Standards and Quality Assurance Systems

In the course of its discussions with standardisation bodies, it has been found that the ACs have successfully adopted national standards implementing European standards. This positive fact, however, does not appear to have led to more widespread use of technical standards in the design of technical specifications within the area of public procurement, which is something that needs to be rectified in the future.

Systems for Accreditation of Procurement Professionals

The concept of accreditation of procurement professionals is welcome; however, apart from one impressive exception (Slovakia), the ACs have not introduced this system.

Environmental and Social Considerations

In contrast to the situation in the Member States, limited attention is currently being paid to these areas within the context of public procurement. It is recommended that the Commission's Communications on these issues be referred to.

Electronic Procurement

In one case, the PPL includes a section on electronic procurement but practical application is non-existent. This is an area that will require reinforcement in the future.

Systems for Centralised and Coordinated Purchasing

Some ACs have systems for centralised purchasing, but the use of framework agreements is commonly not permitted under the PPLs and the potentials for coordinated purchasing are not exploited at all. This is an area that definitely needs to be further developed in the future.

4. Procurement Dissemination

The standard of procurement dissemination systems varies between the ACs. Some countries have a highly sophisticated information system for the publication of contract notices and other useful procurement information while others are still in the process of developing their information systems. The common feature is that the systems will be made available on the Internet, thus complementing, or in the future even replacing, the current paper versions. In the vast majority of cases the publication of notices is arranged centrally and the cost is borne by the contracting entities and /or the subscribers of the Bulletin.

As yet, few ACs, such as Lithuania, have developed and implemented systems for the future electronic submission of contract notices to the OJEU. However, no country foresees any problem with the creation of such a system.

5. Procurement Operations and Practice Standard

As discussed above, it is at the operational level of a public procurement system — in the interaction between purchasers and the private sector — that the final performance is measured in terms of efficiency and other goals set up for public procurement. It should be emphasised that this part of the Review, due to time constraints, is subject to more uncertainty with regard to findings and conclusions since the number of contracting entities and suppliers met with was comparatively few, local entities in particular were not sufficiently represented.

Contracting Entities

Generally, the majority of contracting entities met with seem to be well familiarised with public procurement legislation and with the institutional side of public procurement. Over the years, training and information activities have been arranged in order to increase knowledge on the correct application of procurement legislation. Normally, as often expressed, the weak links in this respect are the local authorities. However, the perceived lack of capability in this sector is difficult to verify. The local entities met with did not differ in any significant way from government authorities.

The main purchasers are in most cases clearly identified by the PPOs and they appear to have a good understanding of the procurement legislation.

The main issues identified, with specific reference to the situation of the contracting entities, are:

- the practical and commercial knowledge of public procurement operations needs to be enhanced, especially in the area of contract management;
- the use of the dual system of tender committees and line organisation may create confusion with regard to line responsibility and accountability;
- the PPLs are, in the main, cumbersome to apply and provide insufficient flexibility and simplicity for low-value contracts, in particular, which may be one of the major reasons for the overuse of negotiated procedures;
- provisions and conditions laid down in budget laws and financial regulations often obstruct the possibility of conducting efficient procurement, e.g. by restricting entities from concluding contracts for more than one year and reallocating funds from one year to the next;
- the exposure to excessive internal and external control, including the evident risk of receiving complaints and penalties, often determines the choice of procedures, including award criteria: these are governed by the need to reduce the risk of being challenged.

Conclusions

It follows from the issues raised above, that there is a need to change the focus from the current climate of control and distrust towards one that is more centred on trust that encourages the attainment of efficiency. Contracting entities would benefit from more central support in terms of practically oriented training, access to practical guidelines on how to conduct procurement in practice, and centrally prepared model tender and contract documents. There is also a considerable need to establish specialised procurement departments, for example for specialist services and joint purchasing — which may operate more freely from the tender committees.

Economic Operators

The public sector market is important to the private sector with the business opportunities that it offers a broad variety of firms. They appear to be fairly familiarised with public procurement legislation thanks to participation in information seminars and through regularly competing for public sector contracts, the frequent use of the complaint mechanisms offered under the PPLs is particularly noticeable.

Private operators are concerned about the formalistic approach imposed by the PPLs as put into practise by the contracting entities; in particular regarding the extensive requirements on proving qualification and eligibility. Criticism was also expressed on the lack of technical knowledge of those responsible for the evaluation of tenders.

As part of the Review, SIGMA has tried to gauge the extent to which the private sector is prepared for the Internal Market. The question of cross-border trade has at least two dimensions; namely, whether national firms have the capacity to compete effectively with foreign firms for domestic contracts or whether firms of an AC origin have the capacity to compete successfully for contracts in an EC member country. Cross-border trade appears to be negligible in terms of contracts signed with firms located outside the AC in question. On the other hand, precisely the same could be said of current Internal Market trade in the public procurement field; namely very few contracts are concluded in a cross-border manner. However, many examples were found of foreign firms

established in the AC (thereby a domestic firm by definition) who were competing on public sector contracts; this indicates soundness and a certain degree of maturity in respect to the ACs markets.

6. Procurement Market Functioning

Due to incomplete statistics and data, it has been difficult to get a firm grasp on this important area, however, the most prevalent features identified across all the ACs are the following:

- the average participation rate on tenders for all types of contracts appears to be satisfactory; which indicates the presence of sufficient competition in the market;
- only a very limited number of contracts are above the EC thresholds;
- the vast majority of contracts are awarded to domestic firms;
- a large proportion of contracts is concluded following negotiated procedures;
- the system for dissemination of procurement notices and other procurement information is generally very good and promotes transparency in the market;
- some sectors in the economy, in particular the construction industry, are subject to insufficient competition — with a few, large economic operators;
- the formation of cartels, when a problem, in the tendering process, seems to occur in these non-competitive areas.

Generally speaking, the requirement for transparency is well satisfied among the ACs to the extent that open procedures are applied in terms of publication of tender notices and award results, announcement of qualification and award criteria in the tender documents and tender notices, public tender openings, and information on preliminary award decisions before contracts are concluded. The main problem, which could be seen to be in conflict with the transparency principle, is the frequent pattern of using non-competitive procedures for both high and low value contracts.

The Report does not address the important principle of non-discrimination and equal treatment in detail for the simple reason that it is not directed towards compatibility with the Directives. However, current provisions on domestic preferences and preferential treatment are clearly incompatible with the Acquis and where applicable, the ACs will need to remove these provisions from their PPLs at latest at the time of accession. Other circumstances were observed that might also imply a problem, such as the issuing of licences for the carrying out certain types of works, some registration requirements and more generally, the short time-limits for the filing of complaints. It was difficult, however, to draw any firm conclusions on the extent of incompatibility with the Treaty.

Conclusions

The Review is not in the position to draw any firm conclusions on the functioning of the national markets, but the statistics provided indicate no major problems. On the contrary and perhaps rather surprisingly, participation rates are generally very satisfactory.

7. External Audit

Effective *ex-post* control and audit of public procurement operations are important components of a public procurement system for ensuring the credibility and integrity of the system as well as providing assurance on the efficient use of public funds. Control may be exercised by different means, and earlier in this report the Review discussed the control and monitoring functions carried out by the PPOs.

The principal view, based on SIGMA’s particular experience and expertise in the field of financial control and audit, is given as follows:

- Effective internal audit should be in place within each contracting entity. This needs to be based on risk and materiality and focused on the process and product quality of the procurement system (policies, organisation, procedures, reliability and integrity of information, decision making systems and professionalism/skills) with the aim of improving the organisation's operations.

- Effective External Audit should be in place and there are two aspects of external audit: financial and performance audit. On the financial side the external audit should annually attest the reliability of the information in the contracting entity's financial reports, and the quality of the overall internal control systems (including the quality of the internal audit); with the aim of giving reasonable assurance that the funds entrusted to the organisation are spent in compliance with the regulations in force. Attention should be paid in the annual audit of the Government's Financial Statement as to how the Government have handled their overall responsibility in executing the budget.
- On the performance side the External Audit should focus on the efficiency and effectiveness of the procurement system as a whole with the aim of fostering procurement operations in line with best practices.

All ACs have established Supreme Audit Institutions (SAI) directly under the control of the Parliaments and entrusted with the mandate and power to undertake independent procurement audits. SAIs, generally, have the organisation and capacity to carry out procurement audits effectively. However, there is currently a strong emphasis on compliance audit in order to determine whether the procurement procedures applied are in accordance with the PPL and with other regulations; while comparatively limited attention is paid to performance audit, the aim of which is to determine the quality of the system and processes and whether the efficiency goals have been met satisfactorily. The Review was even confronted with information that some SAIs frequently undertake complete re-evaluations of the contracts, which, unless very specific reasons exist, are inappropriate for various reasons. This would indicate that an auditor would claim to be more skilled and knowledgeable than procurement professionals in making correct tender evaluations. The natural control mechanism to rely on instead would be the complaint review systems.

Conclusions

SAIs need to redirect their current focus on compliance audit progressively towards performance audit, and encourage the development of attitudes that prioritise quality and efficiency in systems, processes and the final results.

8. Complaints and Remedies

It appears that most ACs have established systems for complaints and remedies that, although in different forms, appear to be compatible with the EC Directives, which is very impressive. The fact that review systems are established, however, does not automatically imply that the systems are free from deficiencies or certain shortcomings. The country reports identify a number of common problems that need to be addressed, and which are, in brief:

- the annual number of complaints is high in comparison with the situation in the EU Member States and there seems to be an increasing tendency;
- the high number of complaints indicates the establishment of a potential "complaints culture" in many countries; the high percentage of unjustified complaints rejected by the remedies systems suggests that this indeed may be true as does the extent of coinciding comments by contracting entities, which imply that an award decision will generate a complaint from a dissatisfied tenderer more or less automatically;
- the Review has discussed the potential conflict of interest in cases where the PPO is responsible for the review of complaints and combines this task with advisory duties;
- the procedures regarding damages fall under the responsibility of ordinary courts, but this mechanism appears to be very rarely employed;
- while the short time limits prescribed in the PPLs for the filing and reviewing of complaints ensure a speedy review process which is very positive for contracting entities, it may have negative repercussions on the quality of the decisions and may also prove to be an obstacle to the lodging of complaints by foreign tenderers.

Conclusions

The high number of complaints could be interpreted positively as well as negatively. A positive interpretation would be that the high number of complaints is an expression of confidence in the remedies system — providing fair and objective decisions. A negative interpretation, on the other hand, would insist on the fact that it reflects a system with problems, implying additional costs and delays for the contracting entities in implementing the procurement process. One may speculate on the grounds for the high level of complaints, but there appears to be a combination of reasons: the most important being (i) a PPL that is too detailed and complicated, (ii) insufficient procurement knowledge on the part of the procurement staff, and (iii) the minimal cost to a dissatisfied tenderer of filing a complaint.

9. Ethics in Procurement

It is absolutely vital to the credibility and efficiency of a public procurement system that it is free from corrupt and fraudulent practices, but regrettably, the presence of corruption is considered a real problem in all the ACs, although to varying degrees. However, it is often unclear to what extent corrupt practices are actually prevalent in the area of public procurement. The country reports, which do not elaborate on the reasons or the nature of the phenomenon as such, discuss the approach and measures taken or proposed by the governments to prevent corrupt or unethical practices in the field of public procurement.

The ACs appear to use the perceived existence of corruption to justify the maintenance of very strict procurement legislation and a high level of control. In fact, there is very little evidence of corrupt practices in terms of court cases in any AC; but this does not mean that the problem does not exist or that it could not constitute a serious problem. The validity of the conclusions is not discussed on the extent of corruption in ACs, but the Review wishes to address the issue of the measures that have been adopted to combat corrupt practices. A common solution to the problem appears to be the introduction of an even higher degree of rigidity in procurement legislation and reinforced capacity for control and supervision.

However, such measures (i) clearly risk being counter-productive in terms of efficiency, and (ii), secondly and most importantly, will not result in any reduction of corruption, but on the contrary, in the worst case scenario may even lead to increased corruption. Further formalism offers more opportunities for contracting entities to reject fully responsive tenders on formal grounds as well as being a disincentive for participation.

Instead, other measures to prevent unethical practices in public procurement should be considered, such as:

- increase the transparency in the process by removing the current overuse of non-competitive procedures through giving contracting entities access to simplified competitive procedures below the EC thresholds;
- as a potential source of corrupt practices, biased technical specifications could be avoided by the use of standards and increased technical competence on the part of those preparing and evaluating tenders;
- clarify the unacceptability of corrupt practices in the tender documents, include standard contract terms and let the signing of tenders explicitly imply a commitment on the part of the firm to act in accordance with the tender documents;
- introduce a quality assurance system for contracting entities and the accreditation of procurement professionals;
- clarify the position of responsibility and accountability in the procurement process, especially with respect to the relationship between tender committees and the line organisation;
- request from the tenderers, whenever appropriate, as part of the qualification exercise, proof of ISO certification or equivalent;
- encourage the private sector to adopt a Code of Ethics;

- initiate countrywide anti-corruption programmes, which extend to all public sector activities and do not single out procurement as a special case.

II. FINAL CONCLUSIONS AND RECOMMENDATIONS

In summary, the SIGMA Review concludes that whatever approach acceding Member States take to organising their public procurement, they will need to strike balances between their various policy objectives. For example, in applying Community rules to contracts for which they were not intended, they will need to take care that adopting the terms and procedures envisaged by the EU for contracts above the thresholds of the Directives does not create legitimate but unintentional expectations and that it is not counterproductive in terms of the burdens placed on purchasers or economic operators.

On the other hand, new Member States will need to take account of their own circumstances, of the skills and resources available to contracting authorities and of the competitive forces in their markets. They may also wish to explore the interpretation of Community law, the parameters within which challenges are likely to succeed and whether the jurisprudence has developed in light of all the facts.

The Review cannot do more, therefore, than make suggestions to the acceding countries as to the approaches they might find useful to them. The decision whether to accept any or all of the suggestions must lie with countries themselves, provided their policy and legal frameworks, their strategies and support systems and the practices of their contracting authorities are compatible with Community law.

Based on the findings of the Review it appears that:

- all 8 acceding countries have the capacity to align their legislation with the *acquis communautaire* by the due date, but some face higher political or procedural hurdles than others;
- there are doubts about the independence of some complaints bodies as conflicts of interest may arise where a body has ex ante control or both advisory and review functions, including sometimes the right to impose penalties against individuals as well as contracting entities;
- all ACs have taken the view that they need legislation on the award of contracts to which the Directives do not apply and that largely similar co-ordinated procedures should apply, with the probable result that the lack of flexibility will encourage avoidance of the legislation or the use of competitive procedures;
- the present focus on legislative alignment means that the ACs have not yet given sufficient thought to what else they need to do to clarify procurement responsibilities, to improve efficiency in their national interests, to be ready to meet their wider Treaty obligations, and to operate in the Single Market;
- none of the ACs expected membership of the EU to bring significant changes to their public procurement markets or to open up significant new opportunities for their economic operators.

Recommendations to the Countries

The country specific recommendations are included in the Country Reports. The following summary is to a large extent common to all the ACs.

The Legal Framework

There are a number of questionable elements in current legislation that need to be addressed by the ACs either as part of their on-going legal reform process or on a separate occasion in the near future.

➢ A revision of the PPLs should be initiated with the aim of providing a strong legal basis, built on the Directives and good international practice, which optimally promotes efficient and sound public procurement in accordance with the principles of the EC Treaty. The following main amendments are recommended:

- make a clear distinction between contracts governed by the EC directives and other national procedures;
- introduce simplified competitive procedures below EC thresholds;
- remove provisions and conditions that have negative effects on market access and competition;
- remove provisions and conditions that have negative effects on the operational efficiency of contracting entities;
- introduce procedures and rules that promote efficient procurement taking into account modern practices and new technologies.

Central Institutional Set-ups and Capacity

All ACs have impressive central procurement organisations that over the years have contributed considerably to the successful establishment of public procurement law in the ACs. They have in general the experience and capacity to implement procurement legislation effectively. However, a number of problems that need to be tackled by ACs have been identified. In particular the following actions to be taken in the short or medium-term perspective are proposed:

➢ The ACs, where applicable, should consider separation of the advisory and review functions of the PPOs, preferably into separate bodies, as well removing the *ex ante* control of procurement decisions proper to contracting entities themselves.

➢ Organise and build-up the PPOs with the objective of establishing “Centres of Excellence” in public procurement. This would mean a shift of direction from control to monitoring the effectiveness of the policy and legal framework and investing more in areas such as capacity building, the procurement information function, the provision of efficient operational tools and, more generally, the development of a modern public procurement system as skills develop.

➢ Organise PPOs to take into account their new role in a European context, including the need to establish a first point of call with the European Commission.

➢ Take immediate measures on the procurement aspects of the organisation and execution of EU funds after accession.

➢ Adopt a strategy and action plan on public procurement with the following main ingredients:

  - the creation of nationwide training and information programmes for the procurement community — contracting entities and the private sector — on the new EC based procurement legislation and how to operate in the Single Market;
  - increased operational support to contracting entities by the provision of operational guidelines, model tender documents, and general conditions of contracts using international models;
  - the creation of a quality assurance system for contracting entities, including systems for accreditation of procurement professionals;
  - plans on how to support long-term capacity building in procurement, in particular on how to strengthen the operational competence and capacity of contracting entities;
  - plans and measures on how to organise systems for coordinated and centralised purchasing;
  - plans and measures on the introduction of electronic procurement.

Procurement Practice and Market Functioning

Contracting entities and economic operators overall have a good understanding and knowledge of the application of public procurement legislation. However, the commercial and operational side of public procurement needs to be enhanced in the future; and to this end, some of the most important and urgent measures proposed are outlined below. The competitive situation seems to be satisfactory in all ACs, except in some important sectors, such as the construction industry.

The following actions be taken to improve these areas of the public procurement system are recommended:

- That the current system with procurement committees should be reviewed in broad consultation with all concerned parties to determine its appropriateness and efficiency, e.g. in terms of accountability, the extent the PPL is the appropriate instrument to regulate organisational matters, the availability of procurement expertise and the need for specialisation, new contracting arrangements and contract management skills.
- Initiatives should be taken to support contracting entities in their efforts to enhance the efficiency of their procurement operations, by providing models and guidance on how to organise the procurement function and decision-making processes in a rational and cost-effective manner, making appropriate provision for the separation of functions within contracting entities so as to limit the scope for fraud and corruption.
- Where applicable, revise and adapt budget and financial regulations to the needs of the public procurement processes, in particular to allow the conclusion of contracts for more than one year, the reallocation of non-used funds from one year to another, and to avoid improper planning and execution of procurement during the year.
- Initiatives should be taken with the purpose of assisting economic operators to operate efficiently and with integrity in the public procurement market, domestically as well as in the context of the single market and beyond.
- Investigate imperfections in the procurement market, such as insufficient competition and signs of cartels, and utilise the competence of the competition authorities for advice on appropriate actions.
- Take measures to strengthen the position of SME in public procurement without compromising efficiency, such as providing targeted information, removing obstacles to participation, allowing subcontracting and facilitating the formation of joint ventures.

The areas of External Audit, Complaints and Remedies, and Ethics in Procurement

There is the emergence of a *“compliance culture”* within the administration, in its negative meaning, creating an environment where procedural regularity becomes more important than performance driven actions, as indicted by the high number of complaints and extensive control and audit functions that focus on procedural compliance; and a common distrust of the integrity and competence of the operators — purchasers and economic operators. Such an environment is in significant contrast to a *“performance culture”* where processes are controlled more in terms of economic outcomes, internal operational efficiency and compliance with policy objectives, and with legal and procedural conformity — ensured by audit and an effective remedies system. The Review also concludes that the perception that corruption and fraud constitutes a significant problem in public procurement in many ACs is largely unsubstantiated but nevertheless casts its shadow on the procurement reform process.

The continuous development of the procurement system in this “controlling” direction may obstruct the creation of efficient and sound public procurement systems in the ACs. Therefore, the following actions are recommended:

- As the further restrictiveness of procurement legislation is seen to be inappropriate, ACs are recommended to take other more constructive measures to prevent corruption and to ensure integrity in the procurement processes. Such measures may focus on changing attitudes, perceptions and behaviour, including the removal of the underlying reasons for corrupt behaviour — with both short and long-term perspectives — in order to establish a commercial culture significantly free from such practices and capable of contributing to economic growth. A list of measures proposed by the Review is found in Section IX. Ethics in Procurement.
- The current level of complaints is very costly for all parties involved, except perhaps for the complainants, and various measures should be taken to improve the situation. Some measures are associated with the simplification of the PPLs and capacity building, as

discussed earlier, but in this context one measure would be to require complainants to compensate contracting entities and review bodies for the costs of unjustified or unsuccessful complaints.

- The Supreme Audit Institutions (SAIs) should take appropriate initiatives and measures in their operations:
  - to analyse the quality of the financial management and control, including the internal audit in the contracting entities;
  - with this as a base gradually shift the approach in the public sector external audit from a transaction approach towards a system approach focusing on efficiency and effectiveness in the management operations;
  - to analyse the possibilities of carrying out thematic audits of the entire public procurement system with the objective to support the capacity building in the system;
  - to assess the programming and project design capacity in the public administration, including capacity of financial planning for big investment projects; and
  - to progressively develop their capacity to audit procurements and procurement policies from a performance point of view.

Recommendations to the European Commission

The recommendations in the country reports to the Commission are deliberately formulated in general terms to enable the Commission to draw its own conclusions on the basis of the findings and recommendations made for the individual country. The recommendations can be grouped within the three categories:

a. The Commission may wish to recognise the efforts being made to align the PPL with the *Acquis* in preparation for accession and to express an opinion to the Governments of the ACs on the importance of adopting compliant procurement legislation that also allows public purchasers to operate efficiently and effectively in order to contribute to sustainable growth in accordance with the fundamental objectives of the European Union; thus, if in agreement, to express concurrence with the findings and recommendations proposed by the Review as to the future revision of the PPL, in particular as regards the following areas: *(as indicated in the Country Reports)*

b. The Commission may also wish to express an opinion to the Governments of the ACs on the importance of possessing adequate central organisational and institutional capacity to support both the effective application of compliant procurement legislation and efficient operation in the Single Market; thereby endorsing the concerns raised by the Review on the present state of the institutional arrangements currently in place and, more generally, supporting the measures suggested for the improvement of the system in these and other respects, in particular as regards: *(as indicated in the Country Reports)*

c. The Commission is recommended to ask for clarification on the status of preparations for the management of pre-and post accession funds and to re-iterate, ***when applicable***, that funds may not be forthcoming following accession unless the AC has aligned its legislative framework with the *Acquis Communautaire*.

Recommended Actions

A number of initiatives is proposed for the purpose of facilitating the integration of new Member States into the Internal Market, the future improvement of their public procurement systems, and not least important, to pave an easier road for the existing candidate countries. The Commission may wish to consider the following actions:

- All the valuable experiences and knowledge accumulated during the accession process in the area of public procurement should be compiled in a “lessons learnt” document, to be shared with both existing candidate countries and Member States, and prepared as an accession guidance/strategy document.

- Initiate the preparation of a Report on how national legislation outside the scope of the EC Directives is designed, based on a review of current systems in Member States, and taking into account other international good procurement practice.
- Measures and initiatives to support acceding member states in the area of electronic procurement.
- The arrangement of conferences and seminars on topics of special importance or interest identified by the Review, such as environmental issues, statistical requirements and systems, and how to organise the first point of call with the Commission.
- Since there is lack of clarity, take measures to clarify how the acceding countries will be covered by the GPA.
- Encourage the acceding countries to take active part in the on-going development of the public procurement systems within the European Union.

Input to the Monitoring Report

In considering what to say in the Monitoring Report, the Commission may wish to consider the conclusions and recommendations in the specific country reports. However, for the purpose of facilitating this input, SIGMA offers the following recommendations:

Czech Republic

It is found that the public procurement system of the Czech Republic is not yet fully developed, having a number of significant weaknesses and deficiencies, in particular as regards the legal framework and the institutional arrangements. The Government of the Czech Republic is recommended to consider the following actions with a view to improving the public procurement system, principally in the national interest but also to enable the Czech Republic to meet its obligations as a Member State:

- ➢ Alignment must be completed as soon as possible and the legislation team in the Ministry needs high-level political support if the deadline is to be met.
- ➢ Whichever approach is taken to achieving alignment, be it replacement of the PPL or adoption of the minimum amendments necessary, the PPL will need further revision in the interests of simplification, user-friendliness and internationally recognized good practice.
- ➢ The institutional arrangements need to be adjusted and strengthened to clarify and separate the responsibilities of the Ministry for Regional Development, the Office for the Protection of Competition and the Supreme Audit Office:
    - to provide leadership and best practice support for public purchasers and economic operators;
    - to maintain a credible and effective review system compliant with EC requirements, with a view to internal audit within contracting entities and complaints by economic operators being the principal means to ensure compliance with the PPL; and
    - to re-focus existing external audit skills and resources more towards economic outcomes than strict regulatory compliance.

<u>For actions by the Commission</u>

- The Czech legislation team needs political support in dealing with the Parliament. The pressure put on by the EU Delegation concerning future EU funds has been helpful and should be maintained.

Estonia

It is found that the public procurement system of Estonia overall maintains a good standard, in particular the institutional arrangements are found to be satisfactory. Estonia should have the capacity to implement EC legislation effectively. However, a number of weaknesses have been identified which should be addressed by the Government. The Government of Estonia is

recommended to consider the following actions with a view to improving the public procurement system:

- Legal alignment is almost complete and a fully compliant PPL will adopted in due time, however, the PPL needs further revision in the interests of simplification, user-friendliness and recognised international good practice.
- Institutional arrangements are generally good, but the potential conflict of interest within the PPO requires attention. Efforts should be devoted to the strengthening of good practice support for public purchasers and economic operators, and to focus external audit even more strongly than is the case today towards economic outcomes rather than strict regulatory compliance.

Hungary

It is found that the public procurement system of Hungary overall maintains a good standard, in particular the institutional arrangements are found to be impressive. Hungary should have the capacity to implement EC legislation effectively. However, a number of weaknesses have been identified which should be addressed by the Government. The Government of Hungary is recommended to consider the following actions with a view to improving the public procurement system:

- Legal alignment is almost complete and a fully compliant PPL is seen to be adopted in due time, however, the PPL needs further revision in the interests of simplification, user-friendliness and recognised international good practice.
- Institutional arrangements are generally impressive, but the potential conflict of interest within the PPO requires attention. Efforts should be devoted to the strengthening of good practice support for public purchasers and economic operators, and to focus external audit even more strongly than is the case today towards economic outcomes rather than strict regulatory compliance.

Latvia

It is found that the public procurement system of Latvia overall maintains a good standard. The institutional arrangements now in place would provide the prerequisites for the successful establishment of an effective public procurement system and for implementing EC legislation effectively. However, a number of weaknesses have been identified which should be addressed by the Government. The Government of Latvia is recommended to consider the following actions with a view to improving the public procurement system:

- Legal alignment is almost complete and a fully compliant PPL will be adopted in due time, however, the PPL needs further revision in the interests of simplification, user-friendliness and recognised international good practice.
- Institutional arrangements appear now to be satisfactory, but the potential conflict of interest within the PPO requires attention. Efforts should be devoted to the strengthening of good practice support for public purchasers and economic operators, and to a greater focus than is the case today on an external audit directed towards economic outcomes rather than strict regulatory compliance.

Lithuania

It is found that the public procurement system of Lithuania overall maintains a good standard. The institutional arrangements now in place would provide the prerequisites for the successful establishment of an effective public procurement system and for implementing EC legislation effectively. However, a number of weaknesses have been identified which should be addressed by the Government. The Government of Lithuania is recommended to consider the following actions with a view to improving the public procurement system:

- Legal alignment is almost complete and a fully compliant PPL will be adopted in due time, however, the PPL requires further revision in the interests of simplification, user-friendliness and recognised international good practice.
- Institutional arrangements appear now to be satisfactory, but the consent procedure exercised by the PPO needs attention. Efforts should be devoted to the strengthening of good practice support for public purchasers and economic operators, and to focus external audit more strongly than is the case today towards economic outcomes rather than strict regulatory compliance.

Poland

It is found that the public procurement system of Poland needs improvements, having a number of weaknesses and deficiencies, in particular as regards the legal framework and to some extent the central institutional operations. The PPO has the capacity to implement EC legislation effectively. The Government of Poland is recommended to consider the following actions with a view to improving the public procurement system, principally in the national interest, but also to enable Poland to meet its obligations as a Member State:

- Alignment is not yet complete, and the PPL needs further revision in the interests of simplification, user-friendliness and recognised international good practice.
- Institutional arrangements and capacity are generally good, but the consent procedure exercised by the PPO needs attention. Efforts should be devoted to the strengthening of good practice support for public purchasers and economic operators, and to focus external audit more strongly than is the case today towards economic outcomes rather than strict regulatory compliance.

Slovakia

It is found that the public procurement system of Slovakia overall maintains a good standard. The institutional arrangements and capacity are impressive and Slovakia should be able to implement EC legislation effectively. However, a number of weaknesses have been identified which should be addressed by the Government. The Government of Slovakia is recommended to consider the following actions with a view to improving the public procurement system:

- Legal alignment is almost complete and a fully compliant PPL will be adopted in due time, however, the PPL needs further revision in the interests of simplification, user-friendliness and recognised international good practice.
- Institutional arrangements in terms of capacity are very good, but the potential risk of a conflict of interest within the PPO needs attention, as does the complaints review system. Efforts should be devoted to the strengthening of good practice support for public purchasers and economic operators, and to focus external audit more strongly than is the case today on economic outcomes rather than strict regulatory compliance.

Slovenia

It is noted with satisfaction the quality of the complaints review system, but it is also found that other parts of the public procurement system needs further improvement, in particular the legal framework and the future direction and operations of the PPO. However, Slovenia should be able to implement EC legislation effectively. A number of weaknesses have been identified which should be addressed by the Government. The Government of the Slovenia is recommended to consider the following actions with a view to improving the public procurement system:

- Legal alignment is almost complete and a fully compliant PPL is expected to be adopted in due time, however, the PPL needs further revision in the interests of simplification, user-friendliness and recognised international good practice.
- Institutional arrangements need clarification and further attention towards the operational support provided by the PPO. Efforts should be devoted to the strengthening of good practice support for public purchasers and economic operators, and to focus external audit

more strongly than is the case today towards economic outcomes rather than strict regulatory compliance.

ANNEX

Approach and Methodology

It was agreed with the Commission not to address in-depth the process of harmonisation of national procurement legislation with the EC Directives, or the progress in this respect; but to limit its review to those areas essentially not covered by the EC Directives. The specific direction of the Review revealed a number of methodological problems that had to be discussed, resolved and agreed upon, in particular as regards the issue of defining a standard of "good practice" for a public procurement system. Outside the scope of the EC Directives, while adhering to the obligations under the EC Treaty, the ACs may design the legal and institutional framework on the basis of national interests and priorities. Therefore, whatever conclusions are reached in the Report beyond the boundaries of EC membership obligations, those are not enforceable under EC law. They may only be regarded as findings and conclusions based on experience, which hopefully will lay the ground for serious contemplation and consideration on the part of the ACs and provide guidance on the actions recommended to ensure the successful implementation of EC-based procurement legislation and the future improvement of the public procurement systems; in particular as regards the legal and institutional frameworks and long-term capacity building.

The problem of defining reasonable benchmarks for the assessments was envisaged and discussed in the Methodology Paper. During the review process, therefore, internal working papers were prepared for the purpose of further clarifying this very important issue. Agreement on the positions taken in the Report was achieved at the final meeting with the Review and Peer experts in Paris at the beginning of June. The issues discussed and the conclusions reached in the Report are therefore based on the collective experience and knowledge of the procurement experts engaged for this Review. The Consolidated Report and the Country Reports, including conclusions and recommendations, have been subject to review and approval by the Peers and Review Team members.

<u>In summary, the conceptual approach and basic assumptions on what should constitute a public procurement system formed by the principles and ideas of "international good practice" are as follows:</u>

The principal objective of a national public procurement system is to deliver efficiency and "value for money" in the use of public funds whilst adhering to the EC Directives, the fundamental rules of the European Treaty, and national law and policies. Performance and efficiency in procurement operations are ultimately measured at the level of market interaction between purchasers and suppliers. The legal and institutional frameworks, including other influencing factors, set the basic conditions for the way in which procurement may be undertaken procedurally; the results that can be expected; and the potential efficiency gains that can be achieved. Within this environment, the professionalism of public purchasers in managing the procurement process and taking advantage of the competition in the market is decisive to the outcome in terms of "value for money".

Furthermore, legislative alignment is not sufficient in itself to enable ACs to meet their obligations regarding the implementation and application of Community legislation. As mentioned above, their public purchasers need to operate efficiently and effectively in order to contribute to sustainable economic growth in accordance with the fundamental objects of the European Union. Similarly, legislative alignment is not all that is required to enable economic operators to compete effectively within the Single Market, in regulated third country markets or in world markets in general.

In addition to national legislation adapted to give effect to the Community Directives, ACs need:

- appropriate policies on the effective, efficient and proper use of public resources, including Community funding, whether or not the Directives apply;
- review systems capable of providing rapid and effective remedies;
- arrangements for managing the Member State's relationship with the Commission and other Member States;

- information gathering systems that will enable the Member State to comply with its obligations to provide information on request;
- strategies for the allocation of responsibility for public procurement decisions, on accountability for public expenditure, for improving efficiency and for combating fraud and corruption;
- systems for the preparation and dissemination of information, guidance and training to stakeholders in the system including purchasers, economic operators, review bodies and auditors; and
- the means to monitor the effectiveness of their policy and legal framework.

In particular, a procurement "good practice" platform should be characterised as having the following features:

- ➢ That the principle of a decentralised public procurement system is consistently adhered to and that public purchasers are granted the appropriate degree of responsibility and have the power and means to conduct and manage the entire procurement process efficiently under the rule of accountability.
- ➢ That the public sector market, resting on the principles of the EC Treaty, is open, sound and competitive, and from the suppliers' perspective attractive and credible, with fair and reasonable conditions for participation; and that it provides access to a rapid and effective system for remedies.
- ➢ That the future direction of the public procurement system, legally and institutionally, is formed and guided by a wide-spread and genuine understanding of the conditions and prerequisites needed for the creation of an efficient, transparent and credible public procurement system, capable of generating efficiency and cost-effective procurement in the best interests of the contracting entities and of the country as a whole.

Following on from these basic assumptions, the Review discusses in terms of strengths and weaknesses to what extent the public procurement systems of the ACs meet the above requirements, particularly with respect to the legal and institutional framework.