



SIGMA

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ALBANIA

PUBLIC PROCUREMENT

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1. Summary

The legislative framework of the public procurement system in Albania has not changed substantially since the last assessment in 2007. It continues to be based on the Public Procurement Law (PPL), which entered into force on 1 January 2007. The year 2007 was thus the first year of application of new rules on public procurement. During 2007 the PPL was amended twice. Implementing regulations adopted by the Council of Ministers entered into force together with the law and were amended in 2008. Changes in the primary and secondary legislative framework were supplemented with the decision (instructions) on electronic procurement and the decision on centralised procurement.

In 2007 about 8000 public procurement procedures were organised. The total number of procedures announced in the *Public Procurement Bulletin* (renamed recently *Public Procurement Announcements*) amounted to 5683, of which 22 represented international procedures, 2776 open procedures, 20 restricted procedures, 2795 restricted procedures, 79 procedures concerning consultancy services, and 19 negotiated procedures with publication of notices. The number of appeals submitted to the Public Procurement Agency (PPA) against the decisions of contracting authorities was smaller than in 2006, but larger than in 2005 (645 in 2007, 1023 in 2006 and 481 in 2005). There were also seven complaints concerning concession procedures conducted by the Ministry of Economy, Trade and Industry.

The Public Procurement Agency, which is the central government institution responsible for co-ordination of public procurement activities, was strengthened in terms of human resources (the staff of PPA is now 30, ten more than one year ago). The post of Public Procurement Advocate, a new institution created by the PPL, was also filled by parliament in 2007. Electronic procurement was introduced, following the adoption of the Decision of the Council of Ministers no. 659.

2. Public Procurement Legislation

The cornerstone of the Albanian legal framework in the field of public procurement is the Law no. 9643 on Public Procurement (henceforth referred to as the PPL), which was adopted on 20 November 2006 and entered into force on 1 January 2007. The PPL replaced the Public Procurement Law no. 7971, which had been in force since 1995. The PPL is based mainly on the provisions of the Directive 2004/18/EC of the European Parliament and of the European Council of 31 March 2004 on the co-ordination of procedures for the award of public service contracts, public supply contracts and public works contracts (henceforth referred to as “the directive”), but it also reflects influences from other sources, such as the UNCITRAL Model Law on public procurement, and the World Bank and WTO Government Procurement Agreement (GPA). The PPL is based on the following principles of public procurement: non-discrimination and equal treatment of candidates and tenderers, transparency, equality of requirements and obligations imposed on economic operators, and the right of economic operators to judicial review of decisions of contracting authorities. The PPL applies to all contracts for supplies, services or works awarded by contracting authorities, unless explicitly exempted. The PPL has improved significantly the access to information on bidding opportunities

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by the obligation of contracting authorities to publish both procurement notices and tender dossiers (instructions for bidders) on the website of the Public Procurement Agency. The procedures for award of contracts provided for by the new law are basically in line with the requirements of the EC directives. The same applies to the scope and coverage of the PPL (although certain discrepancies concerning exempted contracts still remain – see below for details). Despite the reform of the review system, the model of organisation of review still does not comply with the requirements of the EC remedies directives (89/665 and 92/13).

Although basically consistent with the provisions of the directive, the law in certain aspects is not fully harmonised. Apart from the explicit exceptions referred to in article 5 – 9 (consistent with the *acquis*), the PPL also provides for the rather vague exception of “other contracts which are regulated in other than PPL legal provisions”. This may lead to the exclusion of contracts that should rather be covered by the PPL. Too wide is also the exception contained in article 5 which is based on the provisions of article 296 of the Treaty establishing the European Community. Unlike the Treaty, the PPL excludes, however, not only the purchase of arms, munitions and war materials but also “related services”. Another example of non-compliance with the *acquis* is the excessively short minimum time periods for submission of requests and tenders in restricted procedure and requests in negotiated procedure. On the other hand, there are provisions in the PPL that are stricter than in the directive. For example, the PPL does not reflect the two-tier approach to services contracts present in the directive. Since the PPL does not provide for the division of services into so-called priority and non-priority services, all services (with the exception of those that are explicitly excluded from the law) are treated alike.

The law was amended twice in the course of 2007. The first amendment (law no. 9800, dated 10 September 2007) concerned mainly corrections of errors in the original text of the law. It also partially changed provisions concerning conditions for application of the negotiated procedure without notice in order to bring it in line with article 31 of Directive 2004/18 (application of negotiated procedure due to extreme urgency). The application of the negotiated procedure without notice due to extreme urgency is allowed only if the following conditions are cumulatively met:

- a) it is strictly necessary, for reasons of urgency;
- b) it has been brought about by causes unforeseeable by the contracting authority;
- c) the time limits for open, restricted or negotiated procedures with publication cannot be complied with; and
- d) the circumstances invoked to justify urgency are not attributed to the contracting authority.

The general rule that when the contracting authority introduces changes in the tender dossier it should extend the time period for the submission of tenders by five or ten days (depending on the value of the contract in question) was also introduced in order to give suppliers more time to take account of those changes in their offers.

The second amendment to the PPL (law no. 9885) was adopted on 26 December 2007 and entered into force 15 days after its publication. This amendment concerned exclusively the procedures for the award of contracts concerning the purchase of electricity. The most important changes concerned:

- introduction of definition, concept and procedural rules for the award of framework agreements;
- exemption from the remit of the law of domestically produced electricity;
- introduction of three new conditions for application of the negotiated procedure without publication of notice (in line with EU requirements);
- shortening of time periods for submission of tenders or requests in public procurement procedures concerning the purchase of electricity.

The above-mentioned changes call for a short comment. The amendment exempted from the law the purchase of electricity (on condition that it is produced domestically), not only for electricity utilities but for all contracting authorities. Such provisions go further than provisions of EC law and are contradictory to them¹.

¹ Directive 2004/18 does not contain a corresponding exemption and Directive 2004/17 provides for the exemption of energy or fuels to produce, but only by energy operators.

The law introduced for the first time to the public procurement system in Albania the concept and rules on framework agreements, albeit in extremely narrowly defined areas of public procurement; provisions concerning the award of framework agreements and the conclusion of contracts covered by them were modelled on the provisions of Directive 2004/18 (notwithstanding the fact that they concern only procurement covered by Directive 2004/17). The provisions of the PPL are more rigid than the EU requirements in the following sense:

- framework agreements are authorised only for the purchase of electricity and hydrocarbons;
- their maximum duration is limited to merely 24 months, and they can be awarded following open or restricted procedure only.

The process of alignment of public procurement provisions with the *acquis* has not yet been fully accomplished in Albania. The PPL does not implement the provisions of Directive 2004/17/EC of the European Parliament and of the European Council of 31 March 2004 co-ordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (“utilities directive”). The upshot is that, with the exception of energy utilities, which benefited from the latest amendment concerning the purchase of electricity, the utilities sector entities are covered by the same public procurement rules as classical sector entities, while EC rules allow for a more flexible approach. The draft of the law implementing the rules of Directive 2004/17 was prepared in the course of 2007. Sigma was involved in the preparatory work concerning the draft, providing its active assistance. At the moment of the assessment (beginning of April 2008), the draft was practically ready for consultations with major stakeholders. It was expected that the draft could be submitted to parliament before the 2008 summer holidays.

By a decision of the Council of Ministers (Decision no. 53) of 16 January 2008, a sort of centralised procurement was created. The central purchasing body is the Ministry of Interior. Its task is to carry out –for the needs of central administration– public procurement procedures concerning goods and services listed in the decision. The list covers exclusively the supply of:

- fuels;
- internet and electronic mail communication services;
- vehicles for high state officials or for the needs of institutions;
- computers and photocopying machines;
- stationery products; and
- provision of security services.

The contracting authorities mentioned above were obliged to submit by the deadline of January 2008 technical and quantity specifications and allocated funds for each procurement procedure. The Ministry of Interior was obliged to publish calls for tenders until 1 February 2008. It seems that centralised procurement was introduced too hastily, without appropriate preparations, and many contracting authorities were taken by surprise. In practice, all contracting authorities concerned were given less than two weeks to define their needs and submit the required information to the Ministry of Interior. Smooth application of new rules on centralised procurement is hindered by the fact that the Ministry of Interior, which is responsible for central purchasing, is short of staff. At the time of the assessment only five staff were employed in the relevant unit dealing with public procurement procedures.

3. Central Public Procurement Organisation

With regard to the institutional framework, the central body responsible for public procurement is the Public Procurement Agency (PPA). The PPA has a legal personality, is financed from the state budget and reports to the Prime Minister. The PPA is not a central procuring entity. Rather, its main responsibilities are to:

- draft legislation and regulations;
- monitor procurement activities;
- produce the *Public Procurement Bulletin*;
- perform administrative review of complaints;
- promote and organise training of central and local government officials involved in public procurement activities; and

- assist procuring entities with advice and other support to ensure proper and uniform application of the PPL.

According to the law, the PPA is the highest body in the field of public procurement – its decisions and instructions are administratively final. It should be noted, however, that at the moment of assessment the draft of the law on administrative appeals was being prepared by the Ministry of Justice. Once adopted, this law would introduce the possibility of appealing to the administrative courts against the decisions of the PPA, including the resolution of appeals.

The staff of the PPA are recruited and promoted in accordance with the Civil Service Law. This law does not apply, however, to the Director of the PPA, who is appointed and dismissed by the Prime Minister. Since Sigma's last assessment, the PPA has been strengthened in terms of its human resources. The total number of staff at the time of the assessment was 30 (10 more than in 2007). With regard to the organisational structure, there have been changes in the PPA since the last assessment: a new unit responsible for concessions issues was established², and the Juridical and Procurement Sector Directorate was reorganised as the Directorate for Procurement Complaints and Legal Issues. There were also improvements in terms of the remuneration of PPA staff, thanks to the additional resources allocated to the PPA for hiring new employees (there are 30 staff in the PPA, while the budget was supposed to finance the salaries of 36 staff).

The new institution established by the PPL is the **Public Procurement Advocate** ("PP Advocate"). The PP Advocate was added at the last moment of the legislative process leading to the adoption of the PPL in 2006. His role in accordance with the PPL is to safeguard the legal rights and interests of suppliers against irregular actions or omissions of contracting authorities in the field of public procurement by monitoring and investigating administrative procedures in public procurement. The PP Advocate is elected by parliament upon a proposal by the Council of Ministers for a five-year term of office (with the possibility of renewal). The PP Advocate monitors the public procurement procedure against irregular and illegal actions or lack of actions of contracting authorities. Unfortunately, the position of PP Advocate has no power of its own and its functions duplicate the monitoring tasks of the PPA – the results of investigations carried out by the PPA Advocate play a supportive role to the reviews or investigations conducted by either the PPA or other competent authorities.

In summary, the main concerns observed are:

- the review of appeals by the PPA, which is also responsible for giving advice on public procurement matters to contracting authorities, may lead to a conflict of interest;
- the process of approximation with EC rules should also be continued with regard to public procurement in utilities sectors (water, energy, transportation and postal services); the PPA should be strengthened in order to allow it to perform properly all of the tasks attributed to it by the PPL or implementing regulations;
- the position and competences of the PP Advocate with regard to the review of public procurement procedures overlap partially with those of the PPA; as the position of PP Advocate has no powers of its own, in the event of identifying irregularities in public procurement proceedings it has to report to the PPA or other competent authorities.

4. Procurement Operations and Practices

The Public Procurement Law (PPL) does not provide any preferential treatment rules. All suppliers, independent of their origin, should be treated equally. Equal and impartial treatment of economic operators has also been imposed by the rules concerning access to information on envisaged contracts. Provisions on the publication of procurement opportunities are basically in line with the requirements of the directive. The PPL requires contracting authorities to publish procurement notices (calls for tender) as well as results of procurement procedures (contract award notices). The minimum requirements concerning the content of notices are provided by the regulations. The PPL requires all bidding opportunities to be published in the *Public Procurement Bulletin* (recently renamed *Public Procurement Announcements*), which is published every Monday – in 2007 there were 52 issues of the *Public Procurement Bulletin*, containing 5683 contract notices. It is also available online, on the PPA website, free of charge. All tender documents prepared by the contracting authority have to be published on the PPA website. Thus the suppliers who are interested in

² In accordance with Law no. 9663 of 6 December 2006 on concessions, the PPA is the body responsible for supervising the implementation of concessionary procedures.

competing for public contracts in order to find interesting opportunities need to refer only to the website of PPA instead of perusing dozens of publications and websites.

On the basis of the new law, the Council of Ministers adopted implementing regulations in the form of Decision no. 1 dated 10 January 2007 (henceforth referred to as “regulations”). The regulations elaborate the legal framework set out in the PPL. They cover, for instance, such issues as: details concerning the award of consultancy services, thresholds of application of the PPL, detailed methods of calculating the value of contracts, content of public procurement notices, opening and evaluation of tenders, etc. One of the peculiar characteristics of the law on public procurement in Albania is that contracting authorities are obliged to disclose at the outset of the procurement procedure (in the contract notice, for example) the so-called fund limit – i.e. the maximum amount of money that may be spent on a particular subject of public procurement. Put simply, interested suppliers know before formulating their tenders how much money contracting authorities have at their disposal. Not surprisingly, tenders submitted oscillate close to the maximum limit, and those tenders containing tender prices significantly lower than the fund limit are perceived as abnormally low. It is noteworthy that, in accordance with implementing regulations, all public procurement procedures should be completed in practice not later than 31 October of a given year. This is the limit because up until that date contracting authorities are obliged, in order to publish in the *Public Procurement Bulletin* (now renamed *Public Procurement Announcements*), to provide the required information about the award of contract. It is not permissible to conclude the contract before the above-mentioned publication.

A great deal of emphasis is currently being placed on the issue of introducing electronic procurement. In general, the introduction of e-procedures is perceived as the best tool for increasing transparency and reducing the costs of conducting the procurement process. On 3 October 2007 the decision on endorsing e-procurement rules was adopted by the Council of Ministers (Decision no. 659, valid from the moment of its publication in the *Official Gazette*). This decision establishes 1) necessary operational and legal requirements for contracting authorities to conduct procurement procedures by electronic means; and 2) main technical, functional and security-related requirements that should be met by the system of e-procurement. In accordance with the instructions, contracting authorities may apply the system of electronic procurement to all public procurement procedures as defined in the PPL. It includes performing the procedures exclusively by electronic means or by a combination of electronic and traditional paper-based means. If the contracting authority decides to apply electronic means, the electronic tools must be non-discriminatory, generally available and interoperable with the information and communication technology products in general use. While the introduction of IT technologies in public procurement is a step in the right direction, it is noteworthy that the contracting authorities interviewed during the assessment did not seem to think that the introduction of electronic procurement without any transitional period was an ideal solution. The vast majority of purchasers expressed their concerns about the capacity to have recourse to electronic procurement, technical problems (power cuts are still a daily phenomenon in Albania), and insufficient knowledge (introduction of electronic procurement has not been assisted by any comprehensive training on new software and new legal requirements). With regard to the state of preparedness of purchasers for the introduction of e-procurement, only 34 entities are ready to apply electronic tools in their procedures. The first three electronic procedures were launched on 31 March 2008 by the Ministry of the Interior, Ministry of Defence and Central Registration Office, and these procedures concerned fuels, software as well as internet subscription. At the time of the assessment the results of the procedures were not yet known.

Both contracting authorities and suppliers are now fairly familiar with the rules provided by the new PPL. It transpires, however, from the interviews held during the assessment, that there is a constant need for more training, in particular more practice-oriented seminars or workshops. Contracting authorities would appreciate especially sessions during which it would be possible to exchange views freely with the PPA concerning the application of the PPL and the implementing rules in particular.

Also to be noted is the increased relevance of training in the activities of the PPA (creation of a separate unit directly responsible for providing training and for co-operation with trainers). In addition to training provided directly by the PPA, there is also a group of certified trainers, whose role is to share their knowledge and experience with employees of contracting authorities.

The practical application of some provisions of the PPL is still problematic for contracting authorities. These problems concern the distinction between selection (qualification) and contract award criteria, the procedure for tenders identified as abnormally low, etc.

More emphasis should also be placed on practical training concerning the application of the new rules on electronic procurement.

5. Audit and Complaints Review Procedures

5.1 External Audit

The external audit of public procurement procedures is conducted by the Supreme State Audit Office (SSAO). This audit takes place ex post with regard to public procurement procedures that have already been concluded. The audit of public procurement activities undertaken in accordance with the new law has not yet begun. In the meeting with SSAO representatives held during the assessment mission, they expressed concern about the fact that the PPL, which is still relatively new, had already been amended a few times.

5.2 Review of procurement procedures

The PPL designates the PPA as the body responsible for the handling of administrative complaints concerning public procurement proceedings. The complaint procedure is basically a two-stage process. The complainant first of all lodges an objection with the procuring entity, and subsequently, if he is not satisfied with the decision of the procuring entity, he can appeal to the PPA.

The number of appeals submitted to the Public Procurement Agency (PPA) against the decisions of procuring entities was smaller than in 2006 but larger than in 2005 (645 in 2007, 1023 in 2006 and 481 in 2005). There were also seven complaints concerning concession procedures conducted by the Ministry of Economy, Trade and Industry. In the opinion of the PPA, the smaller number of complaints in 2007 resulted from a combination of the following factors:

- enhanced transparency – obligation of contracting authorities to disclose tender dossiers on the Internet reduced the number of appeals against the failure of purchasers to disclose tender dossiers;
- increased awareness of economic operators concerning the organisation of the review system and procedures;
- adoption of standard forms for the submission of complaints, requiring the submission of factual and legal justifications on the part of the appellant.

Still, as many as 159 complaints were rejected in 2007 by the PPA for not having met the formal requirements (either because of the failure of the supplier to respect the correct order of the review procedure (stages) or to apply standard forms of complaints). Out of all of the complaints reviewed by the PPA on the merits of the case, 222 were dismissed as unfounded and in 201 cases the PPA accepted the arguments submitted by the complainant.

The organisation of the review system requires a few words of comment. First of all, the institutional framework does not meet the requirements of the EC remedies directive (89/665). The remedies directive leaves to EU Member States the choice of arrangement concerning the organisation of review structures and does not oblige the body responsible for the review of appeals to be a court or tribunal. It does require, however, the possibility that an appeal against the decision of such a body may be made to an institution that meets the conditions provided for in the EC Treaty concerning courts or tribunals, and in particular that this institutions be independent from both the contracting authority and the review body. The organisation of the review process within the PPA also raises another concern. The PPA does not have a separate unit dealing with review cases. Decisions on appeals are taken by the same unit that is responsible for interpreting the law and giving advice to contracting authorities. Basically, the staff are also the judges at their own trial. PPA employees may be reluctant, in the case of an appeal against a decision of the contracting authority which had previously been advised by the PPA, to take the side of the appellant. This is a fundamental flaw that must be remedied. In general, current procedures for handling complaints still do not meet recognised international standards. A new complaints review mechanism in line with EC directives needs to be elaborated and implemented.

6. External Assistance

Funding by the USAID Millennium Challenge Corporation (MCC) was made available in 2006 for a two-year project on “Transparency in public procurement: attaining transparency and elimination of corruption in government procurement”. The financial envelope available was 5 million USD. The MCC started the project in December 2006. Apart from the issue of transparency and the fight against corruption, the project will also focus on the strengthening of the PPA, training of procurement officers, electronic procurement,

and public awareness components. There are no other major international donors currently involved in the field of public procurement. It should be noted, however, that Sigma supported the Albanian authorities with regard to the implementation of rules concerning procurement in the utilities sectors (preparation of drafts of amendments) and framework agreements.

7. Capacity to Further Develop the System

The public procurement system has undergone over the past year a number of positive changes, in particular with regard to the adoption of the new PPL, based on the EC directives, as well as a comprehensive set of implementing regulations, templates of standard bidding documents and other documents, training of contracting authorities and suppliers, and availability of review mechanisms (although insufficient). Although capacity-wise there is a good basis for continuing reform work, there is a further need to strengthen the central capacity of the PPA. The restructuring of the complaints review mechanism in order to meet the requirements of EC law as well as good international standards should also become a priority task. The same priority should be given to the harmonisation of regulations on sectoral contracts (implementation of EC Directive 2004/17). All previous initiatives in that regard in 2007 were very limited in their scope, as they concerned merely the procedure for the purchase of electricity. While admitting a certain dose of flexibility, such as exemption for the purchase of domestically produced energy, significantly shorter time periods, and additional grounds for the negotiated procedure, the amendment adopted at the end of last year has not remedied all of the PPL's shortcomings. The purchase of energy by enterprises such as KESH is still subject to the PPL, whereas in accordance with EC legislation the purchase of energy or fuel for the production of energy by energy utilities could be completely exempt from the PPL.

Furthermore, the Albanian authorities do not seem to have a coherent, comprehensive strategy concerning the further development of the procurement system in either a medium or long-term perspective. In practice, almost all of the actions that have been taken recently were the result of dispersed initiatives of various stakeholders, undertaken on an ad hoc basis. There is considerable risk that such a dispersal of initiatives may undermine the efforts previously made with regard to the implementation of public procurement reform.

With regard to particular actions that should be undertaken in a short-term perspective, it is recommended that the Albanian authorities:

- prepare a strategy for the further development of the system;
- pursue the objective of further approximation of legislation with EU requirements; implement in a coherent and comprehensive way the rules concerning procurement in utilities sectors (water, energy, transport and postal services);
- reorganise the system of review of appeals submitted by economic operators in order to bring it in line with international standards and EC requirements.

In order to finalise the actions mentioned above, the Albanian authorities may require additional support in the form of external assistance.

8. Summary and Next Steps

The public procurement system in Albania has developed in the right direction due to the adoption in 2006 of a new law on public procurement. Further progress is, however, still required, basically with regard to the capacity-building in the PPA and in contracting authorities. Although a great deal has been done in the previous two years in terms of legislation, there is still considerable room for improvement, especially with regard to the institutional framework (see the comments above concerning the PP Advocate and organisation of the review process). In order to achieve a more efficient system of public procurement, it will also be necessary to streamline activities that have been and are being undertaken by various stakeholders. The central administration (PPA) which, in accordance with the PPL, should be responsible for the co-ordination of public procurement activities seems to be losing control of the actions being undertaken in the field of public procurement. Legislative activities concerning public procurement are dispersed and carried out by various stakeholders on their own initiative, sometimes without even consulting the PPA. To name just a few examples of such recent actions:

- concessions issues are dealt with mainly by the Ministry of Economy, Trade and Industry, although the PPA is responsible for their implementation;

- the PPA does not have much say in the process of adoption of new rules on centralised procurement;
- the draft law on administrative disputes, although it also concerns complaints against decisions on appeals adopted by the PPA, is being prepared by the Ministry of Justice, without the PPA even being consulted.

After the adoption of a completely new law on public procurement, the greatest priority should now be given to providing written guidance to contracting authorities and suppliers and elaborating secondary legislation to assist in the practical application of the law. All contracting authorities interviewed at the time of the assessment highlighted the need for more in-depth training in the field of public procurement. The activities concerning training, which took place after the adoption of the new law (seminars organised by the PPA) were not sufficient – it seems that there is a persistent need for more practical training. Further work to improve the professionalism of contracting authorities to assist in the implementation of open procurement based on the principles of non-discrimination and value-for-money is also necessary.

In particular, priority should be given to the following actions:

In a short-term perspective:

- Streamline various initiatives undertaken in the field of public procurement (e-procurement, concessions, utilities procurement, review measures and procedures) – all of these activities, even if they are initiated and directly run by players other than the PPA, should be co-ordinated by the PPA;
- Assist contracting authorities and suppliers in the application of the new law; in particular, provide training on the basis of the new law and its implementing rules, focusing in particular on those elements of the new law that are relatively new for the contracting procedure and create problems in terms of their practical application (such as the new rules on e-procurement; procedures involving abnormally low tenders; conditions for selection of a procedure other than the open procedure, in particular the negotiated procedure without notice; proper application of contract award criteria, specifically the most economically advantageous tender; and difference between qualification and award criteria); the training should be as practical as possible (one of the preferred forms should be roundtable meetings allowing for the free exchange of opinions and good practice among procurement officers and PPA staff);
- Further strengthen the PPA, especially with regard to its advisory capacity;
- Amend the rules on review measures and procedures – the institutional framework for the organisation of the review of appeals process should be modified so as to ensure compliance with EC requirements and good international practice;
- Adopt the rules implementing the provisions of EC Directive 2004/17.

In a medium-term perspective:

- Continue the process of alignment with the *acquis* by removing the remaining discrepancies with the EC directives, as described in detail above;
- Further professionalise the procurement function, including continuing efforts to strengthen operational capacity through training and information; this training should go beyond seminars on changes in the law and take the form of systematic training programmes, to be launched in all Albanian contracting authorities.