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REPORT FROM THE COMMISSION

Implementation and best practices of national procurement policies in the Internal Market

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1. INTRODUCTION

This document reflects the contributions that Member States submitted during the first reporting and monitoring exercise under Articles 83 and 85 of Directive 2014/24/EU on public procurement, Article 45 of Directive 2014/23/EU on the award of concession contracts, as well as Articles 99 and 101 of Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sector (hereinafter 'the reporting obligation' or 'the reporting exercise').

Due to the delayed transposition of the Directives, the first implementation of the reporting obligation took place in 2018. Consequently, the reports covered in principle the period between the 1 January 2017 and 31 December 2017[1] (even if a Member State transposed the Directives after the 1 January 2017) depending on data availability.

In the context of the above obligations, the Commission received 27 reports: 26 from EU Member States[2] and one from Norway, as member of the European Economic Area (EEA). The original reports as submitted by Member States are available at the following address:

https://ec.europa.eu/growth/single-market/public-procurement/country-reports_en.

2. SUMMARY OF THE MEMBER STATES MONITORING REPORTS

As a general observation, qualitative information prevailed over quantitative data in all the reports received. However, the incompleteness of the latter limited the possibilities for a comprehensive aggregation and/or comparability of the available data at the EU level.

2.1. Key quantitative indicators – the number and value of procurement

The quantitative indicators are indispensable to define the procurement market. Member States mentioned various problems encountered while conducting this reporting exercise, e.g. partial or missing input data[3] or lack of such data[4] etc. The task itself seems to have been demanding and resource intensive to the extent that some Member States decided to seek supplementary assistance in this respect.

Bearing in mind the above issues encountered when compiling the data, selected key indicators received from Member States during the first reporting exercise have been

1 Some Member States submitted reports covering different period, depending on what information was available to them.

2 No reports were submitted by the United Kingdom and Austria.

3 For example, the report received from Sweden mentions: "*In addition, a relatively large proportion of the national procurements have missing values for the procurement value*." Similarly, the report received from Denmark mentions: "*It is not required to publish a tender below the EU threshold if said tender does not have cross-border interest. Data for these tenders are therefore not accessible. Without these data the total value of procurement under the EU threshold would be misguiding.*"

4 For example, the report received from Finland mentions: "*As regards the under EU threshold procurement, the Finnish central eNotification platform HILMA collects the data for the estimated value. Comprehensive data for the value of the awarded contracts (as requested in the template) under the EU thresholds is not available for the year 2017*." while the Norwegian government does not collect data on the value of procurement of contracts awarded below the EU-thresholds.

summarised in Table 1 (data in the table refer to calls for competition, unless specified otherwise).

Table 1: Number and value of above and below EU threshold procurement in 2017

Country	Number of procurement procedures		Value of procurement procedures [million EUR]	
	Above threshold	Below threshold	Above threshold	Below threshold
Austria	Report not submitted	Report not submitted	Report not submitted	Report not submitted
Belgium	n.a	n.a.	n.a.	6,435.80
Bulgaria	5,921	4,955	6,516.62	633.12
Croatia	1,370	7,413	2,730.19	2,606.68
Cyprus	262	1,490	n.a.	175.92
Czech Republic	4,486	5,758	8,546.68	2,241.13
Denmark	2,669	607	n.a.	n.a.
Estonia	9,005	1,369	1,700.00	800.00
Finland	4,333	n.a.	n.a.	n.a.
France	144,796		83,871.00	
Germany	n.a.	n.a.	280,000.00	
Greece	n.a.	n.a.	n.a.	1,800.00
Hungary	3,020	8,671	9,901.94	1,838.25
Ireland	879	1,406	6,033.56	261.27
Italy	47,631	89,606	122,364.75	16,610.25
Latvia	1,323	2,679	n.a.	567.59
Lithuania	n.a.	n.a.	n.a.	2,117.80
Luxembourg	n.a.	965	n.a.	251.84
Malta	372	5,150	513.92	194.88
Poland	22,458	n.a.	n.a.	22,604.58
Portugal	4,579	536,377	2,867.00	3,735.00
Romania	28,165		n.a.	3,230.45
Slovakia	1,650	26,293	n.a.	2,086.06
Slovenia	1,554	5,579	2,218.34	815.31
Spain	10,991	n.a.	n.a.	14,419.44
Sweden	7,561	10,769	72,236.48	
Netherlands	n.a.	n.a.	26,400.00	46,900.00
United Kingdom	Report not submitted	Report not submitted	Report not submitted	Report not submitted
Iceland	Report not submitted	Report not submitted	Report not submitted	Report not submitted
Liechtenstein	Report not submitted	Report not submitted	Report not submitted	Report not submitted
Norway	4,418	5,268	n.a.	n.a.

Comments: Denmark – below threshold value only concerns tenders with cross-border interest, France - data for 2016 and above 90 000 EUR only, unless voluntary reporting, Hungary – values refer to awarded contracts, Ireland – data refer to contract award notices, Italy – approximate division into above and below threshold procurement in goods and services, based on contact value of less than 150 000 EUR, Luxembourg - the number of procedures refers to the awarded contracts, Malta - data refer to awarded contracts, the Netherlands – data for 2015, Romania - reporting period from 1.01.2017 to 28.02.2018, Slovakia – for below EU threshold procurement data refer to the number of awarded contracts and estimated contract value, Spain – data collection has been closed on 15 December.2017, Sweden – data for 2016.

As can be noted in Table 1, the submitted information shows several inconsistencies, ranging from information gaps to compound reporting (e.g. above and below threshold procurement are reported together), or reporting on different stages of public procurement process (e.g. data referring to calls for tender versus awarded contracts), and different periods. Processing of such input becomes problematic when the above is

coupled with issues such as doubts about comparability between the units of measure or differences in coverage (i.e. monitoring of below EU threshold procurement depends of the level of national thresholds, which vary significantly). As a result, the information received from Member States was presented "as is" including placeholders for missing input (even if the latter is partially due to voluntary nature of data collection[5]) and no EU-level aggregates have been calculated on the basis of the information received.

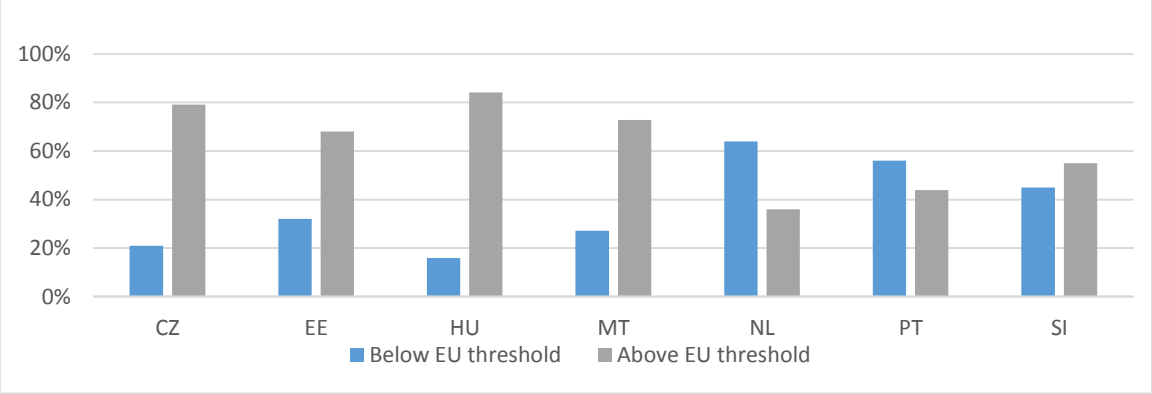
In several instances, when data was reported separately for below and above the thresholds, the national figures for above threshold procurement differed from data collected via TED (Tenders Electronic Daily)[6]. This may be due to a number of factors, such as insufficient integration of data transmission and/or publication between the national systems and TED, and it shall be further investigated. Examples of such discrepancies are provided in Table 2.

Table 2: Discrepancies between the number of contract notices (CNs) and contract awards (CAs) – examples

2017 (2016 SE)		
Country	**CNs published in TED vs. National reporting**	**CAs published in TED vs. National reporting**
FI	87%	93%
HU	84%	108%
SE	89%	107%

Figure 1 shows the share of below and above EU threshold procurement for selected Member States, which also provided the value of public procurement above EU threshold.

Figure 1: Value of below EU threshold procurement, compared with above EU threshold procurement



The graph shows divergent patterns among the selected Member States, which could be explained by differences in levels of national thresholds, as well as various methodologies for data collection. Interestingly, in some countries (the Netherlands and Portugal), below threshold procurement is more important than above threshold

5 According to Article 85.2, the reporting obligations do not refer to the value of above threshold public procurement, nor to the number of procurements.

6 TED (Tenders Electronic Daily) is the online version of the Supplement to the Official Journal of the EU, dedicated to European public procurement, available at https://ted.europa.eu/.

procurement. This highlights the importance of national procurement markets, as well as the importance of data collection and monitoring beyond TED (an exclusive task of Member States).

2.2. Most frequent sources of wrong application or of legal uncertainty

This section focuses on the most frequent sources of wrong application or of legal uncertainty, including possible structural or recurring problems in the application of the public procurement rules, as reported by Member States. The most frequently identified general problems were the following:

- insufficient knowledge of the rules by practitioners, especially rules not clarified by case-law;
- inadequate staffing (required quality and variety of profiles), as well as staff retention, especially at local level;
- lack of procurement skills and insufficient knowledge of the market;
- pressure to ensure a specific result of the procedure by the political hierarchy;
- pressure to ensure results quickly resulting in shortened time for proper planning and conduct of the procedure;
- lack of central purchasing units or insufficient support available to small and understaffed authorities.

Concerning the concrete application of legal provisions by the national contracting authorities, about a quarter of the Member States mentioned the following issues:

- calculation of the value of the procurement – Article 5: artificial splitting by the contracting authority, either when used purposefully in an illegal context, or through wrong interpretation which could lead to inadvertent artificial splitting;
- exclusion grounds – Article 57: the use of exclusion grounds by the contracting authority for the purpose of favouritism or overly liberal interpretation leading to their insufficiently strict enforcement;
- award criteria – Article 67: difficulty for the contracting authority to formulate proper and meaningful quality criteria, including those involving strategic public procurement (green, socially responsible and innovative) and establishing a relevant link with the subject matter of the procurement.

Finally, despite the limited number of answers, the following patterns were observed frequently:

- preference by contracting authorities to use lowest price as an award criterion, seen as simpler and more objective; best price-quality ratio is used in limited cases, due to fears of risks in compliance audits;
- no or little prior market research resulting in non-realistic or outdated specifications;
- use of shortest possible deadlines for submitting tenders or requests to participate, and short deadlines for contract execution;

- imposing too many selection criteria or not imposing any at all.

2.3. Fraud, corruption, conflict of interest and serious irregularities

Many Member States outlined their legislative solutions, the institutional set-up and the "soft law" measures taken, with certain statistics on the functioning of the system. In the majority of cases, the general anticorruption and anti-collusion legislation and institutions predate the Directives. However, the EU rules usually provided the impetus to focus specifically on public procurement-related issues, if not already covered.

Interesting specific obligations and rights mentioned are, for instance:

- obligation to publish all documents, including information on the economic operators;
- obligation of competition authorities to conduct tests and simulations of the market, in order to detect collusive behaviour;
- obligation of economic operators to provide data on their ownership structure;
- mandatory appointments of integrity officials and establishment of internal audit departments in contracting authorities.

The "soft law" measures[7] indicated in the reports were the most numerous and displayed the greatest coherence across Member States. They include national strategies against corruption, manuals and guidance notes (especially on methods to conduct market research, negotiations or to detect collusive behaviour), professionalisation, education and training, or codes of conduct for civil servants (when not set out in legislation) and sometimes also for economic operators. The focus devoted to soft measures shows that Member States are aware that activity in the field of integrity and anticorruption requires not just legal barriers, but also a positive influence on administrative culture, on personal behaviour and values.

Most of the abovementioned measures apply *mutatis mutandis* to conflict of interest. There are some specific national measures with respect to conflict of interests:

- around one quarter of Member States report more detailed rules on the definition of conflict of interests than the one provided by the Directives. In general, these pertain to clarifying family and personal links that fall admittedly in the scope of the notion of interest, as well as rules on shareholding in private companies;
- many Member States indicate declarations on the absence of conflict of interests, impartiality and objectivity, as a measure used at national level. In some cases, there is a general obligation to declare any possible conflict of interest, with the obligation to publish that information. In general, penalties for breach of such rules are in place;
- other measures included:

[7] Measures that do not amount to a strict legal obligation on the side of the practitioners of procurement.

- a ban on simultaneous participation in multiple technical and/or evaluation committees dealing with the same procurement procedure;
- strict provisions that contracts concluded contrary to the rules regulating conflict of interests are null and void;
- the obligation for civil servants controlling public procurement to submit regular declarations of assets.

The reports also confirm that Member States are currently pursuing collusion prevention and detection policies largely inspired by the OECD guidelines[8]. Measures to fight collusion that are common in Member States include: elaborating and disseminating guidance on detection, awareness-raising and training, direct helplines for reporting alleged cases, leniency programmes for operators that come forward with information, criminal law sanctions for colluders, etc.

It appears that, in most Member States, national competition authorities are primarily responsible for carrying out such policies. The role of central procurement authorities[9] in this area is not developed. The importance of establishing and/or maintaining clear communication and cooperation channels between competition authorities, central procurement authorities and contracting authorities is generally acknowledged as a major element of the policy to fight collusion.

The reports show that developing and applying means for the quantitative assessment of collusion risks in award procedures, mostly in the form of risk indicators, remains a challenge.

2.4. SMEs participation

The diversity in reporting and data shared makes it difficult to compare the data from different countries on SME participation.

Around three quarters of Member States have provided contributions on the quantitative reporting. However, only a limited number of Member States have explicitly mentioned challenges encountered by SMEs in public procurement. These include in particular the administrative burden, the lack of knowledge of the SMEs product market, or the lack of dialogue between contracting authorities and SMEs. To address them, most of the measures reported are those required by the EU Directives on public procurement (division of contracts into lots, turnover cap, etc.). Several Member States report on complementary measures such as helpdesks and other support structures, introducing e-procurement modules even for below threshold procurement. Most of the challenges encountered by SMEs relate to participation in public procurement in general, while some reports also revealed certain challenges that are more related to national specificities.

Certain Member States have presented additional measures to the ones included in the Directives to improve SMEs participation in public procurement.

[8] OECD Recommendation on Fighting Bid Rigging in Public Procurement (https://www.oecd.org/daf/competition/oecdrecommendationonfightingbidrigginginpublicprocurement.htm).

[9] Centralized procurement entities in place in most Member States, responsible for procurement policy.

Some interesting practices can be highlighted:

- the Dutch government encouraged SMEs to work with contracting authorities to identify constraints and developed concrete actions to improve public procurement practices, which the government presented in February 2018[10];
- the Italian government initiated Supplier Training Desks[11] that provided training and assistance to local enterprises, and in particular micro, small and medium enterprises on the use of electronic procurement tools.

Some Member States, which had difficulties in providing data, indicated that they intend to put in place data collection systems in the future.

2.5. Practical implementation of national strategic procurement

Strategic public procurement includes green, socially responsible and innovative procurement. The objective is to increase the value added and impact of the procedure and of the public expenditure, thereby contributing to the effective implementation of economic, social and environmental policy objectives at EU, national, regional and/or local levels) and to an inclusive recovery, as well as promoting the twin transition and strengthening social resilience.

2.5.1. Green public procurement

Green Public Procurement (hereinafter 'GPP') is defined as "*a process whereby public authorities seek to procure goods, services and works with a reduced environmental impact throughout their life cycle when compared to goods, services and works with the same primary function that would otherwise be procured*"[12].

Member States reported on some main challenges they encountered in the implementation of GPP, such as:

- the difficulty to foster GPP practices due to the lack of legal obligation for contracting authorities to use environmental criteria in tendering procedures;
- the lack of legal certainty on the correct interpretation of the requirement for 'link to the subject matter of the contract' and the general fear of litigation;
- the lack of data on the effectiveness and economic benefits of applying GPP criteria and the difficulty to monitor their application;
- the lack of specific knowledge and skills of the public servants engaged in tendering procedures, the fact that GPP may be perceived as an obstacle to competition, specifically restricting SME participation in public tendering.

Ambiguity with respect to the definition of GPP exists in many Member States, as they did not clearly define GPP in their domestic legal order, while the rest have often opted for the European Commission's definition mentioned above. It is important to mention

[10] Beter Aanbesteden, 16 February 2018.
[11] Sportelli in Rete.
[12] Communication (COM (2008) 400) "Public procurement for a better environment".

that measures to promote the procurement of products, buildings and services with high energy efficiency performance are made mandatory by the Energy Efficiency Directive 2012/27/EU[13], but they haven't been specifically assessed in this report (neither it is required to report on them under the Directive 2012/27/EU).

Member States have implemented GPP to different degrees. The main factor is whether there is a legal obligation for contracting authorities to include environmental considerations in their procurement procedures. Approximately, one third of the Member States have introduced a legal obligation for specific sectors, product groups, or if the value of the contract is above specified thresholds. The others have opted for the voluntary inclusion of GPP.

Many Member States reported the absence of data on the use of GPP. In addition, while many Member States have included guidance on how to incorporate green criteria in procurement procedures, only some of them have explained how to assess those criteria in the evaluation stages.

Good practice examples include:

- including mandatory GPP criteria or targets in national sectorial legislation;
- create a library with GPP criteria for different products and services, which is freely available and includes different criteria in terms of degree of environmental focus;
- impose mandatory annual reporting on the environmental aspects in procurement procedures to ensure transparency and enable easy data collection;
- provide training on GPP to both contracting authorities and businesses;
- engage the environmental protection agencies (or another body performing similar activities) in the implementation of GPP.

2.5.2. Socially responsible public procurement

Socially responsible public procurement (hereinafter 'SRPP') is defined as procurement that takes into account one or several social considerations for advancing social objectives. SRPP can cover a wide spectrum of social considerations, such as employment opportunities, decent work conditions and compliance with social and labour rights, social inclusion, equal opportunities and accessibility.

In general, the quality of information provided was insufficient for a clear and comprehensive assessment of this aspect of public procurement policy across the Member States. National authorities engaged in preparing the reports sometimes included information on labour law and social provisions, without providing a clear link to the public procurement legislation. Additionally, the majority of Member States provided hardly any data on SRPP.

The following key issues were mentioned by Member States concerning the implementation of social criteria in procurement:

[13] Article 6: Purchasing by public bodies.

- the lack of clear guidance about the correct implementation;
- difficulties in calculating social effects and life cycle costing;
- difficulties in connecting social considerations to the subject matter of a contract;
- absence of a generally accepted definition of SRPP.

Approximately two-thirds of Member States have provisions in national law or strategies pertaining to the implementation of SRPP. Member States mentioning SRPP in national legislation have included precise criteria on the introduction of social considerations in the procurement process as technical specifications, exclusion grounds, award criteria and contract performance conditions. This paves the way towards greater legal certainty about the use of SRPP and better guidance for contracting authorities when engaging in public expenditure. Some Member States even went a step further and incorporated proper assessment mechanisms in national law, guidance or assigned a body to assist contracting authorities in implementing SRPP and evaluate the social impact of tenders.

In this context, some interesting practices can be highlighted:

- drawing up of a "Collection of good practices on social public procurement";
- establishment of a Working Group on Social Aspects of Public Procurement to analyse social aspects that may be taken into account by contracting authorities in the different stages of procurement, also preparing and publishing a detailed guide;
- setting-up of an inter-ministerial committee for the inclusion of social criteria in public procurement, with the objective of ensuring the coordination of the integration of social criteria in public procurement and in the implementation of reserved contracts to certain entities in the social field;
- drawing up of a code of conduct for suppliers to ensure that procured goods and services are supplied according to sustainable and socially responsible conditions.

2.5.3. Innovation public procurement

The quality of the reporting on the public procurement of innovation[14] (hereinafter 'IPP') varies considerably among Member States. Because of lack of data, several Member States have not provided any information on measures taken to support IPP.

The most common obstacles encountered by Member States often related to resources and administrative capacity necessary to implement IPP, for example:

- the lack of awareness;
- insufficient methodological competence of public buyers;
- low risk tolerance in public spending;
- scarce or lack of funding dedicated to innovation in public bodies;
- resistance to change stemming from the organisational culture.

[14] Buying the process of innovation, such as research and development services, or buying the outcomes of the process of innovation.

The measures taken to promote IPP varied significantly. Some Member States have set out specific national targets, for instance a share of all public procurement that should be innovative by a given year. Such targets ranged from 2% to 5%. Others have adopted a national strategy or an action plan, eventually as part of a wider strategy set out at national level to foster innovation. Very few Member States have decided to set up competence centres and/or brokers acting as intermediaries between buyers and suppliers. The aim of these centres is to increase the strategic use of public procurement, and offer expertise, sharing of best practices, training and methodological support in specific projects. However, Member States, which have not implemented competence centres, frequently offer specialised training on procurement for innovation and guidelines. The establishment of such centres is a good practice, as they contribute to strengthening the capacity of the public procurement workforce to conduct IPP.

In general, the revised Directives, and in particular the innovation partnership, which was included in the new legislative package are positively perceived concerning fostering IPP. Nonetheless, only two Member States reported a small number of cases where the innovation partnership was used.

3. GENERAL CONCLUSIONS

Overall, the first reporting exercise allowed all involved parties to accumulate previously dispersed information on the implementation of the Directives and provided useful knowledge about public procurement practice across the EU. The reports also presented practical examples, which could be source of inspiration and knowledge sharing among national authorities.

Undoubtedly, the first data collection exercise has shown that there is much room for improvement, especially regarding quantitative reporting. Moreover, more stringent implementation of strategic procurement considerations is key for supporting an inclusive recovery, promoting a just transition and strengthening socio-economic resilience in line with the European Green Deal as new growth strategy for the EU.

Finally, Member States are encouraged to co-own the reporting process to the largest extent possible, as ultimately aimed at improving their insight into their respective governance systems, with the assistance from the Commission services.