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COMMISSION STAFF WORKING PAPER

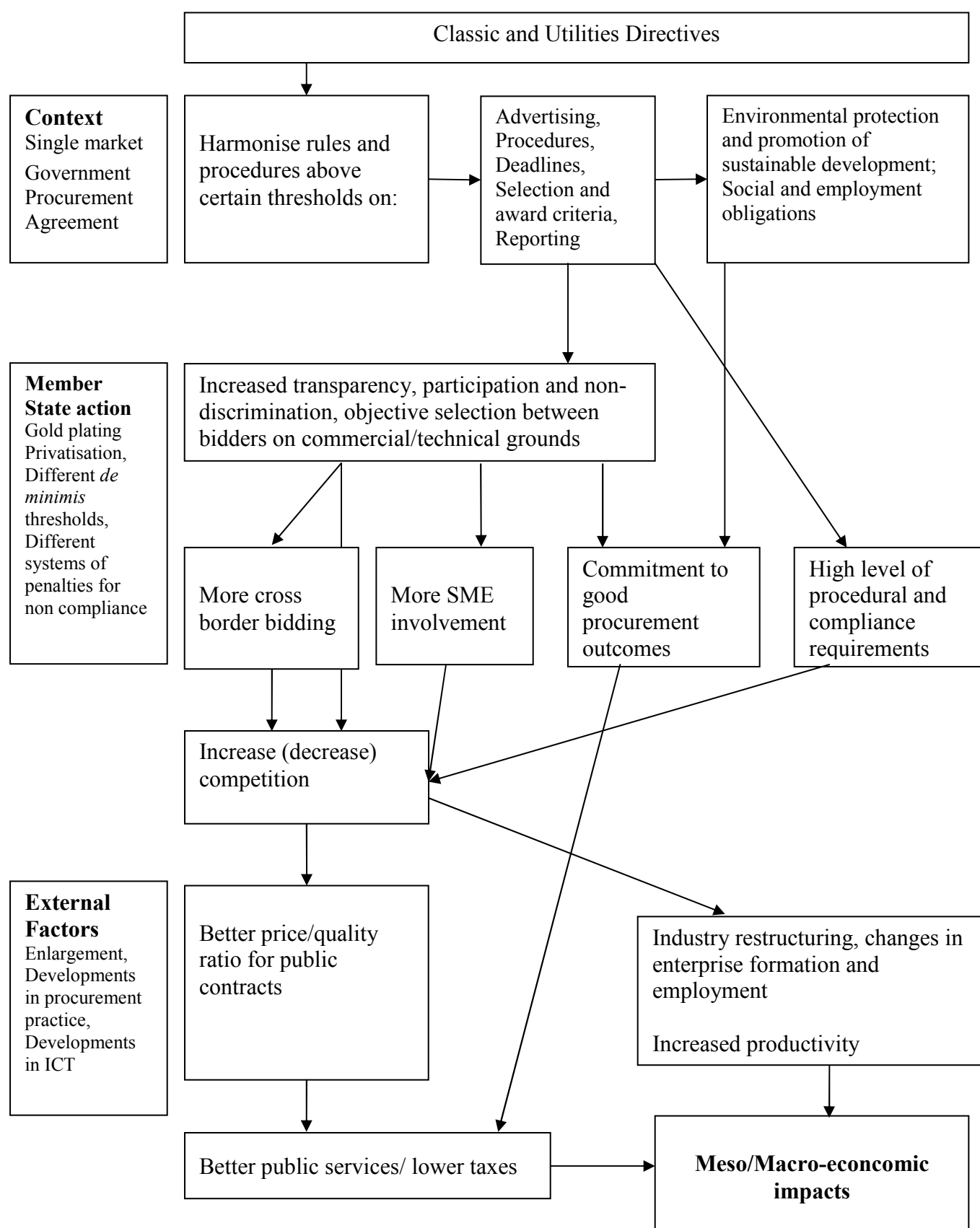
**Evaluation Report
Impact and Effectiveness of EU Public Procurement Legislation**

Part 2

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ANNEX 1: INTERVENTION LOGIC DIAGRAM



ANNEX 2: HISTORY OF PUBLIC PROCUREMENT LEGISLATION¹

2.1. The Treaty Principles

The Treaty on the Functioning of the European Union² (and its predecessors, in particular the Treaty establishing the European Economic Community) does not contain any specific provisions on public procurement. It does, however, lay down fundamental principles which are generally applicable and which contracting authorities and contracting entities have to observe when awarding all contracts, including those whose value falls below the thresholds for application of the specific rules laid down in the Directives.

2.2. Free Movement of Goods

The Treaty principle governing public supply contracts is the free movement of goods and, more specifically, the ban, established in what is now Article 34 et seq., on quantitative restrictions on imports and exports³ and all measures having equivalent effect.⁴

The principle of the free movement of goods, and the consequent ban on quantitative restrictions and measures having equivalent effect, applies both to goods originating in the Community and to goods coming from non-member countries which are put into free circulation in the Member States.

A measure having an effect equivalent to a quantitative restriction means any measure, be it a law or regulation, an administrative practice or an act of, or attributable to, a public authority, that is capable of hindering, directly or indirectly, actually or potentially, intra-Community trade.

Article 36 allows Member States to maintain in force or introduce prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security, the protection of health and life of humans, animals or plants, the protection of national treasures possessing artistic, historic or archaeological value, or the protection of industrial and commercial property, provided that the prohibitions or restrictions do not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

A frequently encountered type of measures, namely those that are equally applicable to domestic and to imported products, mainly comprises regulations prescribing technical requirements, quality standards or testing and type-approval conditions that have to be satisfied by any product of a certain kind that is put on sale on the domestic market. Most such regulations are introduced for consumer protection, environmental or health and safety reasons. However, they are contrary to the current Article 34 if their trade-restricting effect is excessive in relation to the mandatory requirements they are intended to satisfy. The basic principle applicable to technical regulations and

standards is that of mutual recognition by Member States of each others' quality standards, composition rules, national testing and certification procedures, etc.

The Treaty principles governing public works contracts are, in particular: the right of establishment (Articles 49 et seq.TFEU), the freedom to provide services (Articles 56 et seq.TFEU) and the general ban on discrimination on grounds of nationality (Article 18 TFEU).

2.3. Right of establishment

Under this principle, the Treaty on the Functioning of the European Union⁵ requires Member States to allow individuals and companies from other Member States to establish and carry on a business or self-employed activities in their territory under the conditions laid down for their own nationals, subject to the provisions on capital movements.

The principle of equality of treatment with the Member States' own nationals applies to all forms of business and self-employment carried on by natural or legal persons, including those involving the setting-up of agencies, branches or subsidiaries and the formation and management of companies or firms, including cooperatives and other legal persons governed by public or private law, except those which are non-profit-making.

The only business or self-employed activities which are not covered by the right of establishment are those connected, even occasionally, with the exercise of official authority.

On the "principle of national treatment", the Court had this to say:⁶

"It follows [...] from the Court's case-law that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it."

2.4. Freedom to provide services

The freedom to provide services⁷ is, like the right of establishment, governed by the principle of national treatment. Under the third paragraph of Article 57 TFEU, "the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals".

The basic difference between the right of establishment and the freedom to provide services is that the former involves a permanent business establishment in the host country, while the latter involves only temporary residence in the other Member State where the service is provided.

Freedom to provide services covers the performance of services, normally for consideration, in a Member State other than that of the service provider, where the services are not otherwise governed by the Treaty's provisions on the free movement of goods, capital and persons (in which case those special provisions are applicable). Services include activities of an industrial and commercial character and activities of craftsmen and the professions.

Transport services are excluded from the provisions on freedom to provide services and are governed exclusively by Title VI of the Treaty (Transport). There is also a special rule for banking and insurance services. These are to be liberalized in step with the progressive liberalization of capital movements.

The exceptions made in the establishment rules for activities connected with the exercise of official authority and for restrictions on grounds of public policy, public security and public health also apply to the provision of services.

Under the principle of national treatment all laws, regulations and administrative provisions and practices capable of restricting or impeding access to or the practice of self-employed occupations in the services sector by other Member States' nationals or subjecting other Member States' nationals to different treatment from the Member State's own nationals are prohibited. Differences of treatment may derive from rules that overtly discriminate between nationals and non-nationals or from rules that apply to both.

As the Court has stated,⁸ "Article [56] of the Treaty entails, in the first place, the abolition of any discrimination against a person providing services on account of his nationality or the fact that he is established in a Member State other than the one in which the service is provided. National rules which are not applicable to services without discrimination as regards their origin are compatible with Community law only if they can be brought within the scope of an express exemption, such as that contained in Article [52] of the Treaty.

In the absence of harmonization of the rules applicable to services, or even of a system of equivalence, restrictions on the freedom guaranteed by the Treaty in this field may arise in the second place as a result of the application of national rules which affect any person established in the national territory to persons providing services established in the territory of another Member State who already have to satisfy the requirements of that State's legislation.

As the Court has consistently held, such restrictions come within the scope of Article [56] if the application of the national legislation to foreign persons providing services is not justified by overriding reasons relating to the public interest or if the requirements embodied in that legislation are already satisfied by the rules imposed on those persons in the Member State in which they are established.

Lastly, as the Court has consistently held, the application of national provisions to providers of services established in other Member States must be such as to guarantee the achievement of the intended aim and must not go beyond that which is necessary in order to achieve that objective. In other words, it must not be possible to obtain the same result by less restrictive rules".

2.5. Secondary legislation

The abovementioned Treaty principles place a general ban on discriminatory measures and unfair treatment.

However, these prohibitions were not sufficient, on their own, to establish a single market in the specific area of public procurement. Differences between national rules together with the lack of any obligation to open up contracts to Community-wide competition often conspired to keep national markets walled off from foreign competitors. Legislation was therefore needed to make sure that public contracts throughout the Community were open to firms from all Member States on

equal terms and to make procurement procedures more transparent so that compliance with the principles laid down in the Treaty could be enforced more effectively.

To make it easier for firms to exercise their right of establishment and freedom to provide services in competing for public works contracts, on 26 July 1971 the Council adopted Directive 71/305/EEC⁹ concerning the coordination of procedures for the award of public works contracts.¹⁰

Its scope covered works contracts with an estimated value of at least 1 million Units of Account¹¹, awarded by contracting authorities (defined as the State, regional or local authorities and the legal persons governed by public law specified in Annex I). The award of public works concessions contracts¹² were not covered by the provisions of Directive 71/305/EEC¹³, nor did it apply to works contracts awarded by contracting authorities active in the transport, energy and water sectors. Concerning works contracts awarded by concessionaires not being themselves contracting authorities, the only obligation introduced by the Directive was for the conceding authorities to impose an obligation to observe the principle of non-discrimination on the grounds of nationality¹⁴.

To supplement the ban on restrictions on the free movement of goods, on 21 December 1976 the Council adopted Directive 77/62/EEC coordinating procedures for the award of public supply contracts.¹⁵

The scope of Directive 77/62/EEC covered supplies contracts with an estimated value of at least 200,000 European Units of Account, awarded by contracting authorities¹⁶. The field of application excluded the same three sectors (transport, energy and water) as did Directive 71/305/EEC, and a further sector, namely telecommunications.

To bring Community law into line with the outcome of the Tokyo Round of trade negotiations, i. e. the 1979 GATT Agreement on public procurement, the Directive was subsequently adapted and supplemented by Directive 80/767/EEC¹⁷. The main change introduced by that Directive was a list of the contracting authorities¹⁸ who were obliged to apply the provisions of Directive 77/62/EEC also for purchases with an estimated value between 140,000 European Units of Account¹⁹ and the previously fixed threshold of 200,000 European Units of Account.

Both the first works and supply Directives were based on three main principles:

Community-wide advertising of contracts to develop real competition between economic operators in all the Member States;

the banning of technical specifications liable to discriminate against potential foreign bidders;

application of objective criteria for the selection of tenderers and the award of contracts.

The initial works and supplies Directives did not open markets to the extent hoped for. Community legislation did not provide sufficient guarantees and left several lacunae²⁰. Its application at national level reflected a long-standing protectionism typical of this sector.

In order to cure the deficiencies of the original rules, new directives were adopted: Council Directive 88/295/EEC²¹ of 22 March 1988 amending Directives 77/62/EEC and 80/767/EEC, and Council Directive 89/440/EEC²² of 18 July 1989 amending Directive 71/305/EEC.

It had also become necessary to remove the disparities between the earlier directive on works (71/305/EEC) and the later directive on supplies (77/62/EEC). The innovations introduced in

Directive 71/305/EEC were, therefore, more numerous and more detailed than those made to Directive 77/62/EEC.

The principal innovations concerned in particular:

- the definition of the Directive's scope;
- information and tendering conditions;
- transparency of procedures²³; and
- the definition of the technical specifications.

Concerning in particular changes to the respective scopes of the directives, those introduced in the supply directive were rather limited (essentially they consisted in setting the threshold for central contracting authorities to 130,000 ECU, and broadening the Directive's applicability in the field of defence).

The changes to the scope of the works directive were, on the other hand, more extensive. First of all, the definition of public works contracts was clarified and extended to cover new contract forms²⁴, in particular by adding the last part of the definition²⁵. Similarly, the notion of "contracting authority" was also clarified and extended through the inclusion of "associations" of contracting authorities and, not least, by replacing "legal persons governed by public law" with the new notion of "bodies governed by public law", which was defined explicitly in Directive 89/440/EEC²⁶ and further clarified by listing such bodies as exhaustively as possible. At the same time, the previous obligations concerning concessions and works contracts awarded by concessionaires were given a legally binding statute, being explicitly provided for in the Directive instead of in a political declaration. Furthermore, the scope of the Directive was extended also to certain works contracts²⁷, awarded by entities other than contracting authorities but subsidised by at least 50% by the latter. The extent of the sectoral exclusions was also clarified in particular as regards the transport sector²⁸. At the same time the threshold was raised from 1 million ECU to 5 million ECU. According to the 13th recital this change took place "in view of the rise in the cost of construction work and the interest of small and medium-sized firms in bidding for medium-sized contracts". It should be noted that, at the time and contrary to what is currently the case, the EU did not have any international obligations for public works contracts with given minimum values.

The next major development of the secondary legislation on public procurement came with the adoption of the first Utilities Directive, Directive 90/531/EEC²⁹. This was in many ways a substantial innovation, not least because of its scope. In fact, Directive 90/531/EEC was rendered applicable not only to contracting authorities, defined in the same way as in the recently adopted Directive 89/440/EEC, but also to two further categories of entities, namely, public undertakings³⁰ and private undertakings, provided these latter exercise one of the relevant activities on the basis of an exclusive or special right³¹ (collectively these three groups are covered by the term "contracting entity"). A further condition for the applicability of the Directive, was that the contracting entities concerned themselves operated one of the activities covered, namely (most of³²) the four of the sectors which were until then excluded from the scope of secondary public procurement legislation: the water³³, energy³⁴, transport³⁵ and telecommunications sector³⁶).

Within the thus defined personal scope of the Directive, it covered works with an estimated value of at least 5 million ECU; in the case of supplies contracts the threshold was set at a minimum value of 400,000 ECU when the contracts were awarded by entities operating in the water, energy and

transport sectors. For contracting entities operating in the telecommunications sector, the corresponding threshold for supplies contracts was set at ECU 600 000³⁷. Unlike Directive 89/440/EEC, it did not introduce any obligations in respect of works concessions contracts awarded by contracting entities for the pursuit of a relevant activity, nor did it cover subsidised works contracts.

The Utilities Directive was based on the same three principles as the previous Directives³⁸, however, their concrete implementation was frequently somewhat different. Bearing in mind the broad range of contracting entities, which include commercial/industrial private companies, the 33rd Recital in fact states that "...the rules to be applied by the entities concerned should establish a framework for sound commercial practice and should leave a maximum of flexibility". Apart from the higher thresholds for supplies contracts, this higher degree of flexibility than what was foreseen for the contracting authorities under the Works and Supplies Directives among others showed itself through:

- a free choice between open, restricted and negotiated procedures (with a call for competition);
- more and different exclusions and exemptions (e. g. the above-mentioned possibility for exemption in the telecommunications sector; the exclusion for contracts awarded for the purpose of resale to third parties where the contracting entity has no special or exclusive right to sell or hire the subject of such contracts and other entities are free to sell or hire it under the same conditions as the contracting entity or the exclusion for contracts for, i. a., the purchase of fuel for the production of energy by entities themselves operating in that sector); and
- the possibility to use notices on the existence of a qualifications system or periodic indicative notices as a means of calling for competition in respect of (normally) more than one specific contract rather than through the traditional "ad hoc" contract notice to be published for each prospective contract.

The next substantial change was brought about by the adoption of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts³⁹. It was based on the same principles as the earlier Works and Supplies Directives and it shared their structure.

The scope of this first Service Directive covered, as of a threshold of at least ECU 200 000, service contracts, which were defined as a residual category, i. e. as contracts between a contracting authority⁴⁰ and a service provider for pecuniary interest other than works and supplies contracts. Certain services were excluded⁴¹, but more importantly the Directive introduced a "two-tier" system according to which the full set of rules only applied to sixteen categories of priority services, specified exhaustively in an annex (I A). This listed services which, at the time, were deemed to "enable the full potential for increased cross-frontier trade to be realized"⁴², among which one finds services such as accounting, auditing and bookkeeping services, land transport services⁴³ and engineering and architectural services.

For all other services⁴⁴, the Directive provided for a set of limited obligations⁴⁵. The Service Directive also applied to certain service contracts⁴⁶ that were subsidised by more than 50% and awarded by entities not being themselves contracting authorities. A set of limited obligations, essentially transparency and non-discrimination, also applied to design contests⁴⁷ either leading to the award of a service contract whose value was at least equal to the threshold value of ECU 200 000 or in which prizes or other payments to participants reached at least the same amount.

The Commission's original proposal⁴⁸ contained provisions on public service concessions analogous to those existing in the Works Directive for public works concessions. However, the Member States in Council decided not to include this type of contract because of wide divergence of national practices in matters of public service concessions.

By now both the Works Directive and the Supplies Directive had been amended substantially a number of times and it was therefore found necessary to coordinate the disparate legislative provisions into two codified versions so that citizens of the European Union could consult texts which were clear and transparent and rely more easily on the specific rights conferred on them. The directives on works were coordinated in Council Directive 93/37/EEC of 14 June 1993⁴⁹ and the directives on supplies were consolidated in Council Directive 93/36/EEC of 14 June 1993.⁵⁰ The latter also aligned the text on Supplies with that on Works.

At the same time Council Directive 93/38/EEC of 14 June 1993⁵¹ was adopted. This new Utilities Directive was both an amending Directive as well as a consolidation, in the sense that it amended Directive 90/531/EEC by adding provisions governing the award of service contracts, while uniting all the provisions in one legal instrument so that its provisions covered works and supplies contracts⁵² as well. It applied the same “two tier” system as did Directive 92/50/EEC to an almost identical list of services and exclusions⁵³, but within the procedural system of provided for by Directive 90/531/EEC. *Mutatis mutandis*, services contracts were in fact subject to essentially same set of procedural rules as works or supplies contracts under Directive 90/531/EEC as of the thresholds⁵⁴ applicable to supplies contracts (ECU 400 000 for contracting entities in the water, energy and transport sectors and ECU 600 000 for contracting entities in the telecommunications sector). There was, however, one notable specificity for service contracts, namely an exclusion in respect of service contracts awarded to affiliated companies having so close relations with its parent company as to be comparable to an internal division⁵⁵. Just as was the case for Directive 92/50/EEC, service concessions contracts were not covered.

The last substantial modifications of the public procurement directives before the large reform in 2004 were introduced through Directives 97/52/EC⁵⁶ and Directive 98/4/EC⁵⁷, which adapted the Directives in order to bring Community law into line with the outcome of the Uruguay Round of trade negotiations, i.e. the 1994 World Trade Organisation Agreement on public procurement (GPA). The main changes concerned a strengthening of transparency obligations, adjustments to certain deadlines and changes to the relevant thresholds, which now were different for contracts falling with the scope of the new GPA and the types of contracts that were not subject to the international obligations. This produced a fairly complex system with different thresholds for services contracts⁵⁸, supplies contracts⁵⁹, works contracts⁶⁰ and, not least, for utilities contracts⁶¹.

The main provisions of the current public procurement directives, Directive 2004/17/EC⁶² and Directive 2004/18/EC⁶³, are (summarily) described in chapter 3 of the main document. On the other hand, Directive 2009/81/EC⁶⁴ will not be dealt with in this document as the period set out for its implementation in national law has not yet expired; its effects can thus not be assessed as part of this evaluation.

The final elements of secondary legislation in the field of public procurement are the Directives in the area of remedies, namely, Directives 89/665/EEC⁶⁵ and Directive 92/13/EC⁶⁶, as recently amended through Directive 2007/66/EC⁶⁷.

Experience with the first Public Procurement Directives showed that there was a need to ensure that economic operators everywhere in the EU would have access to clear and effective procedures for seeking redress in cases where they consider contracts have been unfairly awarded. This was and is

in fact crucial to making sure contracts ultimately go to the company which has made the best offer, and therefore to building confidence among businesses and the public that public procurement procedures are fair.

Directives 89/665/EEC and 92/13/EEC aimed at doing precisely that and they did prove to constitute a valid first step in that direction. The level of legal protection was indeed raised in the EU, not least in countries which did not have a tradition for special administrative courts or tribunals dealing with public procurement. However, when reviewing this legislation, the Commission found that businesses and lawyers could still encounter legal and practical problems when using national review procedures to challenge decisions made by contracting authorities or contracting entities during award procedures. It therefore proposed modifications to the existing legislation on remedies. The new Directive 2007/66/EC requires contracting authorities and contracting entities to wait a certain number of days, known as a 'standstill period', before concluding the contract concerned. This gives rejected bidders the opportunity to start an effective review procedure at a time when unfair decisions can still be corrected. If this standstill period has not been respected, the Directive requires national courts under certain conditions to set aside a signed contract, by rendering the contract "ineffective". The Directive also seeks to combat illegal direct awards of contracts, which is the most serious infringement of EU procurement law. National courts will also be able to render these contracts ineffective if they have been illegally awarded without any transparency and prior competitive tendering. In these cases the contract will need to be tendered again, this time according to the appropriate rules. The introduction of these new rights for rejected bidders will create stronger incentives for EU businesses to bid for contracts anywhere in the EU.

ANNEX 2: HISTORY OF PUBLIC PROCUREMENT LEGISLATION

Overview of the main developments of secondary legislation			
Directive	Who	What, from which threshold	Comments
71/305/EEC	Public sector	Works contracts, EUR 1 million	Works concessions not covered, transport, water and energy sectors excluded
77/62/EEC	Public sector	Supplies contracts, EUR 200 000	transport, water, energy and telecommunications sectors excluded
80/767/EEC	Public sector, central state authorities	Supplies contracts, EUR 140 000	Amending Directive 77/62/EEC; mainly because of the 1979 GATT Agreement on Government procurement; transport, water, energy and telecommunications sectors excluded
88/295/EEC	Public sector	Supplies contracts, EUR 130,000 (for central state authorities), otherwise EUR 200 000	Amending Directive 77/62/EEC; i.a. because of the 1986 GATT Agreement on Government procurement; transport, water, energy and telecommunications sectors excluded
89/440/EEC	Public sector	Works contracts, works concessions contracts, works contracts awarded by concessionaires, subsidised works contracts, EUR 5 000 000	Amending Directive 71/305/EEC; Definition of contracting authorities broadened (bodies governed by public law), definition of works contracts broadened (execution and design, ... or the execution by whatever means ...) transport, water and energy sectors excluded
90/531/EEC	Utilities (water, energy, transport and telecommunications sectors)	Works and supplies contracts, EUR 5 000 000 for works, EUR 400 000 – 600 000 for supplies	Works concessions contracts not covered, very broad definition of special or exclusive rights

ANNEX 2: HISTORY OF PUBLIC PROCUREMENT LEGISLATION

92/50/EEC	Public sector	Service contracts, subsidised contracts, design contests EUR 200 000	Two tier system, service concessions excluded; water, energy, transport and telecommunications sectors excluded.
93/36/EEC	Public sector	Supplies contracts, EUR 130 000 – 200 000 (central state authorities, others)	Codified Directive 77/62/EEC and its subsequent amendments and introduced substantial changes; Definition of contracting authority broadened (body governed by public law), water, energy, transport and telecommunications sectors excluded.
93/37/EEC	Public sector	Works contracts, works concessions contracts, works contracts awarded by concessionaires, subsidised works contracts, EUR 5 000 000	Purely a codification of Directive 71/305/EEC and its subsequent amendments; See remarks to 89/440/EC. Water, energy, transport and telecommunications sectors excluded.
93/38/EEC	Utilities (water, energy, transport and telecommunications sectors)	Works contracts, supplies contracts services contracts, design contests, EUR 5 000 000 for works, EUR 400 000 - 600 000 for supplies and services	Codification of Directive 90/531/EEC with the new provisions concerning service contracts; Two tier system for services, works and service concessions contracts not covered, very broad definition of special or exclusive rights
97/52/EC & 98/4/EC	Public sector and Utilities	Changes to previous thresholds. EUR 5 000 000 / SDR 5 000 000 for works, SDR 130 000 - EUR 600 000 for supplies and services contracts	Directive 97/52/EC amended Directives 92/50/EEC, 93/36/EEC and 93/37/EEC, while Directive 98/4/EC amended Directive 93/38/EEC; mainly because of the 1994 WTO Agreement on Government procurement;

ANNEX 2: HISTORY OF PUBLIC PROCUREMENT LEGISLATION

2004/17/EC	Utilities (Water, energy, transport and postal sectors)	Works, supplies and services contracts, design contests, currently: EUR 4 845 000 for works contracts, EUR 387 000 for supplies and services.	Replaced Directive 93/38/EEC with its subsequent modifications; Two tier system for services, works and service concessions contracts not covered, narrower but refocused definition of special and exclusive rights. Postal sector added, telecommunications sector excluded. Provisions on e-procurement included.
2004/18/EC	Public sector	Works, supplies and services contracts, works concessions contracts, works contracts awarded by concessionaires, subsidised works and services contracts, design contests, currently EUR 4 845 000 for works contracts and works concessions, EUR 125 000 - 193 000 for supplies and services contracts	Replaced Directives 92/50/EEC, 93/36/EEC and 93/37/EEC with subsequent modifications; Two tier system for services, service concessions contracts not covered. Water, energy, transport, telecommunications and postal sectors excluded; Provisions on e-procurement included.

ANNEX 3: THRESHOLDS

Applies to/Amount	EUR 125 000	EUR 193 000	EUR 387 000	EUR 4 845 000
All works contracts, all subsidised works contracts, all works concessions, all works contracts awarded by concessionaires				X
Supplies and service contracts awarded by Utilities; design contests organised by Utilities, supplies and services contracts falling within the scope of the Defence and Security Procurement Directive			X	
Supplies and services contracts awarded by "sub-central" contracting authorities, subsidised service contracts, design contests organised by sub-central contracting authorities; all contracts and design contests concerning the services listed in Annex II B of Directive 2004/18/EEC; service contracts (and design contests) concerning certain telecommunications services and R&D services awarded by central Government contracting authorities; supplies not listed in Annex V of Directive 2004/18/EC and awarded by contracting authorities operating in the field of defence.		X		
All service contracts and design contests organised by central government authorities concerning services listed in Annex II A (except certain telecommunications services and R&D services); all supplies contracts awarded by Central Government authorities not operating in the field of defence; supplies contracts awarded by contracting authorities operating in the field of defence and concerning the products listed in Annex V of Directive 2004/18/EC	X			

ANNEX 3: THRESHOLDS

Directive 2004/17	All contracting entities, all sectors	Works contracts	EUR 4 845 000	
		All supplies and services contracts, all design contests	EUR 387 000	
Directive 2004/18/EC	Central Government authorities	Works contracts, works concessions contracts, subsidised works contracts	EUR 4 845 000	
		All contracts concerning services listed in Annex II B, certain telecommunications services and R&D services; all design contests concerning these services and all subsidised services,	EUR 193 000	
		All contracts and design contests concerning services listed in Annex II A <i><u>except</u></i> contracts and design contests concerning certain telecommunications services and R&D services	EUR 125 000	
		All supplies contracts awarded by contracting authorities <i><u>not</u></i> operating in the field of defence	EUR 125 000	
		Supplies contracts awarded by contracting authorities operating in the field of defence	Concerning products listed in Annex V	EUR 125 000
			Concerning other products	EUR 193 000
	Sub-central contracting authorities	Works contracts, works concessions contracts, subsidised works contracts	EUR 4 845 000	
		All service contracts, all design contests, subsidised service contracts, all supplies contracts	EUR 193 000	

ANNEX4: OVERVIEW OF NATIONAL LEGISLATION IMPLEMENTING EU PROCUREMENT DIRECTIVES**Table 1. Overview of national legislation implementing EU procurement Directives**

Member State	Act implementing the Directive in national legislation **	Date of adoption /publication	Date of entry into force ***
Belgium	Arrêté royal modifiant certains arrêtés royaux exécutant la loi du 24 décembre 1993 relative aux marchés publics et à certains marchés de travaux, de fournitures et de services/Koninklijk besluit tot wijziging van bepaalde koninklijke besluiten tot uitvoering van de wet van 24 december 1993 betreffende de overheidsopdrachten en sommige opdrachten voor aanneming van werken, leveringen en diensten (for Directive 2004/17/EC)	10.02.2010	16.02.2010
	Arrêté royal modifiant la loi du 24 décembre 1993 relative aux marchés publics et à certains marchés de travaux de fournitures et de services et certains arrêtés royaux pris en exécution de cette loi/ Koninklijk besluit tot wijziging van de wet van 24 december 1993 betreffende de overheidsopdrachten en sommige opdrachten voor aanneming van werken, leveringen en diensten en van sommige koninklijke besluiten tot uitvoering van deze wet (for Directive 2004/18/EC)	29.09.2009	29.09.2009
	Loi relative aux Marches Publics et a certains marches de travaux de fournitures et de services /Wet overheidsopdrachten en bepaalde opdrachten voor werken, leveringen en diensten	15.06.2006	
	Loi relative aux marchés publics et à certains marchés de travaux,de fournitures et de services et certains arrêtés royaux pris en exécution de cette loi,	24.12.1993	
Bulgaria	ЗАКОН за обществените поръчки	30.06.2006	01.07.2006
Czech Republic	Vyhláška č. 330/2006 Sb., o uveřejňování vyhlášení pro účely zákona o veřejných zakázkách	28.06.2006	07.2006
	Zákon č. 137/2006 Sb., o veřejných zakázkách	19.04.2006	
Denmark	Bekendtgørelse nr. 936 af 16. september 2004 om fremgangsmåderne ved indgåelse af kontrakter inden for vand- og energiforsyning, transport samt posttjenester (for Directive 2004/17/EC)	16.09.2004	01.2005
	Bekendtgørelse nr. 937 af 16. september 2004 om fremgangsmåderne ved indgåelse af offentlige vareindkøbskontrakter, offentlige tjenesteydelseskontrakter og offentlige bygge- og anlægskontrakter (for Directive 2004/18/EC)	16.09.2004	01.2005

ANNEX 3: THRESHOLDS

Member State	Act implementing the Directive in national legislation **	Date of adoption /publication	Date of entry into force ***
Germany	Verdingungsordnung für freiberufliche Leistungen		11.2006
	Bekanntmachung der Neufassung der Verdingungsordnung für freiberufliche Leistungen	16.03.2006	11.2006
	Bekanntmachung der Neufassung der Verdingungsordnung für Leistungen – Teil A	06.04.2006	11.2006
Estonia	Riigihangete Seadus	21.02.2007	01.05.2007
Ireland	European Communities (Award of Contracts by Utility Undertakings) Regulations 2007 (for Directive 2004/17/EC)	27.02.2006	28.02.2007
	European Communities (Award of Public Authorities' Contracts) Regulations SI No 329 of 2006 (for directive 2004/18/EC)	22.06.2006	22.06.2006
Greece	Προσαρμογή της Ελληνικής Νομοθεσίας στις διατάξεις της Οδηγίας 2004/17.....(for Directive 2004/17/EC)	16.03.2007	16.03.2007
	Προσαρμογή της Ελληνικής Νομοθεσίας στις διατάξεις της Οδηγίας 2004/18/EK.....(for Directive 2004/18/EC)	16.03.2007	16.03.2007
Spain	LEY 31/2007, de 30 de octubre, sobre procedimientos de contratación en los sectores del agua, la energía, los transportes y los servicios postales (for Directive 2004/17/EC)	31.10.2007	31.10.2007
	LEY 30/2007, de 30 de octubre, de Contratos del Sector Público (for Directive 2004/18/EC)	30.10.2007	30.10.2007
	LEY FORAL 6/2006, de 9 de junio, de Contratos Públicos	09.06.2006	
France	Décret no 2010-406 du 26 avril 2010 relatif aux contrats de concession de travaux publics et portant diverses dispositions en matière de commande publique	26.04.2010	
	Décret no 2006-975 du 1er août 2006 portant code des marchés publics	01.08.2006	05.08.2006

ANNEX 3: THRESHOLDS

Member State	Act implementing the Directive in national legislation **	Date of adoption /publication	Date of entry into force ***
Italy	Ulteriori disposizioni correttive e integrative del decreto legislativo 12 aprile 2006, n. 163, recante il Codice dei contratti pubblici relativi a lavori, servizi e forniture, a norma dell'articolo 25, comma 3, della legge 18 aprile 2005, n. 62.	11.09.2008	
	Disposizioni correttive ed integrative del decreto legislativo 12 aprile 2006, n. 163, recante il codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE, a norma dell'articolo 25, comma 3, della legge 18 aprile 2005, n. 62 (Legge comunitaria).	26.01.2007	
	Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE.		07.2006
Cyprus	Ο περί του Συντονισμού των Διαδικασιών Σύναψης Δημοσίων Συμβάσεων Προμηθειών, Έργων και Υπηρεσιών στους Τομείς του Ύδατος , της Ενέργειας, των Μεταφορών και των Ταχυδρομικών Υπηρεσιών Νόμος του 2006 -Νόμος, number: N. 11(I)/2006 (for directive 2004/17/EC)	17.02.2006	02.2006
	Ο περί του Συντονισμού των Διαδικασιών Σύναψης Δημοσίων Συμβάσεων, Προμηθειών, Έργων και Υπηρεσιών και για Συναφή Θέματα Νόμος του 2006 - Νόμος, number: N. 12(I)/2006; (for Directive 2004/18/EC)	17.02.2006	02.2006
Latvia	Noteikumi par līgumcenu robežām	03.12.2004	04.12.2004
	Noteikumi par iepirkumu sabiedrisko pakalpojumu sniedzēju vajadzībām	16.04.2004	01.05.2004
	Publisko iepirkumu likums		05.2006
Lithuania	Lietuvos Respublikos koncesijų įstatymo, Vietos savivaldos įstatymo pakeitimo ir papildymo įstatymas Nr. X-749	27.07.2006	27.07.2007
	Lietuvos Respublikos viešųjų pirkimų įstatymo pakeitimo įstatymas Nr. X-471	12.01.2006	31.01.2006
Luxembourg	Règlement grand-ducal du 3 août 2009 portant exécution de la loi du 25 juin 2009 sur les marchés publicset portant modification du seuil prévu à l'article 106 point 10° de la loi communale modifiée du 13 décembre 1988	03.08.2009	08.2009
	Loi du 25 juin 2009 sur les marchés publics	25.06.2009	
Hungary	A Kormány196/2006. (IX. 27.) Korm.rendeletea központosított közbeszerzési rendszerről, valamint a központi beszerző szervezetfeladat- és hatásköréről szóló168/2004. (V. 25.) Korm. rendelet módosításáról	27.09.2006	10.2006

ANNEX 3: THRESHOLDS

Member State	Act implementing the Directive in national legislation **	Date of adoption /publication	Date of entry into force ***
	A Kormány105/2006. (IV. 28.) Korm.rendeletea gyógyszerek és gyógyászati segédeszközök közbeszerzésének részletes és sajátos szabályairól szóló 130/2004. (IV. 29.) Korm. rendelet módosításáról	28.04.2006	
	2003. évi CXXIX. törvény a közbeszerzésekről	28.12.2003	
Malta	L.N. 178 of 2005 Public Procurement of Entities operating in the Water, Energy, Transport and Postal Services Sectors Regulations, 2005 (for Directive 2004/17/EC)	03.06.2005	03.06.2005
	L.N. 177 of 2005 Public Contracts Regulation (for Directive 2004/18/EC)	03.06.2005	03.06.2005
Netherlands	Regeling gegevensverstrekking overheidsopdrachten en speciale sectoren (for Directive 2004/17/EC)	12.12.2005	01.2006
	Besluit aanbestedingsregels voor overheidsopdrachten	06.09.2005	
	Raamwet EEG-voorschriften aanbestedingen	20.04.1993	
Austria	Bundesvergabegesetz 2006 – BVergG 2006	31.01.2006	01.02.2006
Poland	Ustawa z dnia 7 kwietnia 2006 r. o zmianie ustawy - Prawo zamówień publicznych oraz ustawy o odpowiedzialności za naruszenie dyscypliny finansów publicznych	07.04.2006	25.05.2006
Portugal	Ministério das Obras Públicas, Transportes e Comunicações-Estabelece os termos a que deve obedecer a apresentação e recepção de propostas, candidaturas e soluções no âmbito do Código dos Contratos Públicos, aprovado pelo Decreto-Lei n.º 18/2008, de 29 de Janeiro - Decreto-Lei, number: 143-A/2008	25.07.2008	25.07.2008
	Ministério das Obras Públicas, Transportes e Comunicações-Aprova o Código dos Contratos Públicos, que estabelece a disciplina aplicável à contratação pública e o regime substantivo dos contratos públicos que revistam a natureza de contrato administrativo - Decreto-Lei n.º 18/2008	29.01.2008	
Romania	Hotărâre pentru aprobarea Normelor de aplicare a prevederilor referitoare la atribuirea contractelor de concesiune de lucrări publice și a contractelor de concesiune de servicii prevăzute în Ordonanța de urgență a Guvernului nr.34/2006 privind atribuirea contractelor de achiziție publică, a contractelor de concesiune de lucrări publice și a contractelor de concesiune de servicii - Hotărâre de Guvern, numar: 71	08.02.2007	08.02.2007

ANNEX 3: THRESHOLDS

Member State	Act implementing the Directive in national legislation **	Date of adoption /publication	Date of entry into force ***
	Hotărâre pentru aprobarea normelor de aplicare a prevederilor referitoare la atribuirea contractelor de achiziție publică prin mijloace electronice din Ordonanța de urgență a Guvernului nr.34/2006 privind atribuirea contractelor de achiziție publică, a contractelor de concesiune de lucrări publice și a contractelor de concesiune de servicii -Hotărâre de Guvern, numar: 1660	07.12.2006	07.12.2006
	Ordonanță de urgență nr 34 privind atribuirea contractulelor de achiziție publică, a contractelor de concesiune de lucrări publice și a contractelor de concesiune de servicii	15.05.2006	30.06.2006
Slovenia	Zakon o javno-zasebnem partnerstvu	07.12.2006	07.03.2007
	Zakon o javnem naročanju na vodnem, energetskem, transportnem področju in področju poštних storitev (for Directive 2004/17/EC)	08.12.2006	23.12.2006
	Uredba o seznamih naročnikov, seznamih gradenj, storitev, določenih vrst blaga, obveznih informacijah v objavah, opisih tehničnih specifikacij in zahtevah, ki jih mora izpolnjevati oprema za elektronsko naročanje	28.02.2007	01.03.2007
	Zakon o javnem naročanju	08.12.2006	23.12.2006
Slovakia	Zákon č. 25/2006 Z. z. o verejnom obstarávaní a o zmene a doplnení niektorých zákonov	25.01.2006	01.02.2006
Finland	Laki vesi- ja energiahuollon, liikenteen ja postipalvelujen alalla toimivien yksiköiden hankinnoista / Lag om upphandling inom sektorerna vatten, energi, transporter och posttjänster (for directive 2004/18/EC°	05.04.2007	01.06.2007
	Laki julkisista hankinnoista / Lag om offentlig upphandling - Laki, number: 348/2007 (for Directive 2004/18/EC)	05.04.2007	01.06.2007
	Valtioneuvoston asetus julkisista hankinnoista / Statsrådets förordning om offentlig upphandling -Valtioneuvoston asetus, number: 614/2007	30.05.2007	01.06.2007
Sweden	Tillkännagivande (2007:1108) av de försvarsprodukter som avses i lagen (2007:1091) om offentlig upphandling	07.12.2007	01.2008
	Förordning (2007:1099) om offentlig upphandling och upphandling inom områdena vatten, energi, transporter och posttjänster (for Directive 2004/17/EC)	07.12.2007	01.2008
	lag (2007:1091) om offentlig upphandling (for Directive 2004/18/EC)	07.12.2007	01.2008
United Kingdom	The Utilities Contracts Regulations 2006		31.01.2006
	Public Utilities ontracts (Scotland) Regulations 2006		31.01.2006
	The Public Contracts Regulations 2006		31.01.2006

ANNEX 3: THRESHOLDS

Member State	Act implementing the Directive in national legislation **	Date of adoption /publication	Date of entry into force ***
	Public Contracts (Scotland) Regulations 2006		31.01.2006
<p>* The complete list of national measures transposing EU public procurement Directives can be found in the Official Journal of the European Union at the following adresss: http://eur-lex.europa.eu/Notice.do?val=413819:cs&lang=fr&list=413819:cs,&pos=1&page=1&nbl=1&pgs=10&hwords=&checktexte=checkbox&visu=#texte (for Directive 2004/17/EC) and http://eur-lex.europa.eu/Notice.do?val=413842:cs&lang=fr&list=413842:cs,&pos=1&page=1&nbl=1&pgs=10&hwords=&checktexte=checkbox&visu=#FIELD_BE (for Directive 2004/18/EC)</p> <p>** In cases where the transposition was made through several national legal acts, only the basic act and the latest modificationas are generally listed .</p> <p>*** The date of entry into force is considered the date of entry into force of the legal act considered to be completing the transposition of the directives.</p>			

ANNEX 5:BELOW THRESHOLDS

	How many levels of national thresholds are there below EU thresholds? Which are the national thresholds applicable below EU thresholds?	If there are more than one national threshold below EU-thresholds, are there differences in the applicable rules according to the different thresholds? If so, what are the main differences?	Is direct procurement allowed for small values contracts? How are these defined?
Austria	two levels	<ul style="list-style-type: none"> • for less than EUR 40 000, direct purchasing for classical sector • for less than EUR 60 000, direct purchasing for utilities sector • less EUR 120 000 for works and EUR 80 000 for supplies and services , restricted procedure without prior publication for the classical sector • less than EUR 350 000 negotiated procedure with prior publication 	<ul style="list-style-type: none"> • for less than EUR 40 000, direct purchasing for classical sector • for less than EUR 60 000, direct purchasing for utilities sector
Belgium	two levels	<p>Above EUR 67 000 a normal tender procedure should be followed.</p> <p>Between EUR 5 500 and EUR 67 000 at least 3 offers have to be requested,</p> <p>Below EUR 5 500 the contracting authority can do directly purchase from one company.</p>	Yes, for contracts bellow EUR 5 500

ANNEX 5:BELOW THRESHOLDS

	How many levels of national thresholds are there below EU thresholds? Which are the national thresholds applicable below EU thresholds?	If there are more than one national threshold below EU-thresholds, are there differences in the applicable rules according to the different thresholds? If so, what are the main differences?	Is direct procurement allowed for small values contracts? How are these defined?
Bulgaria	four levels. Four different sets of values (levels) of the national thresholds are defined "in case the place of fulfilment of the contract is outside the country"	for works over BGN 2 150 000, for supplies – over BGN 180 000 BGN and for services – over BGN 110 000 -EU procurement rules apply for works less than or equal to BGN 2 150 000, for public supplies less than or equal to BGN 180 000 and for public service contracts – less than or equal to BGN 110 000, open procedure or negotiated procedure with invitation for public works contracts from BGN 45 000 to BGN 200 000 and for public supply or service contracts – from BGN 15 000 to BGN 50 000 Contracting authorities shall request at least three offers When the value of contract is below BGN 45 000 for works and below BGN 15 000 for supply or services contracting authorities may use direct award.	Yes, when the value of contract is below BGN 45 000 (aprox EUR 23 000) for works and below BGN 15 000 (approx EUR 7 500)for supply or services
Cyprus	two levels	for more than EUR 85 000 the EU rules apply between EUR 1 700 and EUR 85 000 simplified procedure apply for less than EUR 1 700 direct award is allowed	Yes, for contracts of less than EUR 1 700

ANNEX 5:BELOW THRESHOLDS

	How many levels of national thresholds are there below EU thresholds? Which are the national thresholds applicable below EU thresholds?	If there are more than one national threshold below EU-thresholds, are there differences in the applicable rules according to the different thresholds? If so, what are the main differences?	Is direct procurement allowed for small values contracts? How are these defined?
Czech Republic	one level	for contracts between EUR 70 000 and EU threshold (for supplies and services) and for contracts between 210 000 and EU threshold (for works), EU rules apply or a simplified competitive procedure with prior publication (minimum 5 tenderers invited) below these values, EU Treaty principles apply	Yes, for contracts below EUR 70 000 (for supplies and services) and below EUR 210 000 for works, however, EU Treaty principles apply.
Denmark	one level	Above 67.00 EUR a tender notice must be published. Negotiated procedure accepted.	Not explicitly. Below EUR 67 000 there are however no rules obliging to organise a tendering procedure.
Estonia	one level.	for contracts of less than EUR 40 000 for supplies and services and EUR 250 000 for Works EU Treaty principles apply. Above these levels a public procurement procedure under national provisions needs to be organised.	Yes for services and supplies contracts below EUR 20 000 and for Works below EUR 130 000.
Finland	two levels	for contracts of less than EUR 30 000 for supplies and services and EUR 150 000 for works, direct award is allowed; for contracts between EUR 30 000 and EUR 50 000 for supplies and services and EUR 150 000 and EUR 500 000 for works negotiated procedure with	Yes, for contracts of less than EUR 30 000 for supplies and services and EUR 150 000 for works

ANNEX 5:BELOW THRESHOLDS

	How many levels of national thresholds are there below EU thresholds? Which are the national thresholds applicable below EU thresholds?	If there are more than one national threshold below EU-thresholds, are there differences in the applicable rules according to the different thresholds? If so, what are the main differences?	Is direct procurement allowed for small values contracts? How are these defined?
France	Three levels	a) below EUR 4 000 - no requirement at all; b) between EUR 4 000 and EUR 90 000 - rules for publication; c) between EUR 90 000 and the Directives thresholds -compulsory publication on the Official Bulletin	Yes, below EUR 4 000
Germany	several levels according to sectors and regions	Examples for federal level: works: restricted tendering up to EUR 50 000: finishing/completion works without engineering, landscaping up to EUR 150 000: civil engineering, road construction up to EUR 100 000: all other construction works over that open procedure due to financial crisis 2009-2010: works: restricted tendering: EUR 1 000 000 supplies and services: restricted tendering: EUR 100 000 (equal to direct award)	Examples for federal level: works: EUR 10 000 supplies and services: 500 due to financial crisis 2009-2010: works: direct award: EUR 100 000 supplies and services: EUR 100 000
Greece	Two levels	Below EUR 15 000, direct award is allowed. Between EUR 15 000-EUR 45 000 a simplified tendering procedure is prescribed (negotiation with selected operators)	Yes - below EUR 15 000

ANNEX 5:BELOW THRESHOLDS

	How many levels of national thresholds are there below EU thresholds? Which are the national thresholds applicable below EU thresholds?	If there are more than one national threshold below EU-thresholds, are there differences in the applicable rules according to the different thresholds? If so, what are the main differences?	Is direct procurement allowed for small values contracts? How are these defined?
Hungary	One level:	EUR 26 700 for supplies and services and EUR 50 000 for works in the classical sector; EUR 166 700 for supplies and services and EUR 333 300 for works in the utilities sector	Yes below the national thresholds the procurement is not regulated
Italy	Three levels	for contracts of less than EUR 20 000 for supplies and services and EUR 40 000 for works sector direct award is allowed; for contracts between EUR 40 000 and EUR 500 000 for works negotiated procedure without publication for contracts between EUR 500 000 and EUR 750 000 for works negotiated procedure with publication	Yes, for contracts of less than EUR 20 000 for supplies and services and EUR 40 000 for works
Ireland	NA	NA	Yes, although according to the national guidelines contracts above EUR 50 000 must be published on national procurement website. Moreover, internal procedures of some contracting authorities require publication of contracts with values even lower than EUR 50 000.
Latvia	two levels	for contracts of less than EUR 4 200 for supplies and services and EUR 14 000 for works, direct award for contracts between EUR 4 200 and EUR 30 000 for supplies and services and EUR 14 000 and EUR 170 000 for works -simplified national procedure; above national threshold, simplified EU procedure	Yes for contracts of less than EUR 4 200 for supplies and services and EUR 14 000 for works

ANNEX 5:BELOW THRESHOLDS

	How many levels of national thresholds are there below EU thresholds? Which are the national thresholds applicable below EU thresholds?	If there are more than one national threshold below EU-thresholds, are there differences in the applicable rules according to the different thresholds? If so, what are the main differences?	Is direct procurement allowed for small values contracts? How are these defined?
Lithuania	two levels	for contracts of less than EUR 3 000 direct award is allowed for contracts between EUR 3 000 and EUR 30 000 for supplies and services and EUR 3 000 and EUR 145 000 for Works -simplified national procedure; for contracts above national threshold, simplified EU procedure	for contracts of less than EUR 3 000 direct award is allowed
Luxembourg	three levels	for contracts of less than EUR 55 000 - negotiated procedure without publication; for contracts between EUR 55 000 and EUR 100 000 - negotiated procedure without publication, provided that at least three tenderers are invited; for contracts above EUR 100 000 (for supplies and services) and EUR 800 000 (for works)- open procedure mandatory except in cases where negotiated procedure with or without publication is allowed by the directives	Yes, for contracts of less than EUR 55 000

ANNEX 5:BELOW THRESHOLDS

	How many levels of national thresholds are there below EU thresholds? Which are the national thresholds applicable below EU thresholds?	If there are more than one national threshold below EU-thresholds, are there differences in the applicable rules according to the different thresholds? If so, what are the main differences?	Is direct procurement allowed for small values contracts? How are these defined?
Malta	four levels	for contracts of less than EUR 2 500 - direct award is allowed; for contracts between EUR 2 500 and EUR 6 000 - restricted procedure or negotiated procedure with or without publication procedure with or without publication, for contracts between EUR 6 000 and EUR 120 000 - restricted procedure or open procedure; for contracts above EUR 120 000 and the thresholds the EU rules apply	Yes, for contracts of less than EUR 2 500
Netherlands	NA	NA	Yes, for bellow EU threshold
Poland	one level	for contracts of less than EUR 14 000 the Public Procurement Law of 2004 do not apply	Yes, for contracts of less than EUR 14 000
Portugal	One level	for works contracts below EUR 150 000 and for services and supply contracts below EUR 75 000, direct award is allowed.	Direct award is allowed for works contracts below EUR 150 000 and services and supply contracts below EUR 75 000. However, the number of exceptions to this general rule has multiplied over the last years permitting the direct award of an increasing number of public contracts with a value immediately below the EU Directives thresholds.

ANNEX 5:BELOW THRESHOLDS

	How many levels of national thresholds are there below EU thresholds? Which are the national thresholds applicable below EU thresholds?	If there are more than one national threshold below EU-thresholds, are there differences in the applicable rules according to the different thresholds? If so, what are the main differences?	Is direct procurement allowed for small values contracts? How are these defined?
Romania	three levels	for contracts of less than EUR 15 000 direct award for contracts between EUR 15 000 and EUR 100 000 for supplies and services and EUR 15 000 and EUR 750 000 for works -simplified procedure for contracts between EUR 100 000 and EU threshold for supplies and services and EUR 750 000 and EU threshold for works EU rules apply except for publication requirement and time limits	for contracts of less than EUR15 000
Slovak Republic	two levels	"Low Value Contracts" of less than 30 000 EUR for supplies and services and 120 000 EUR for works direct award "Under-threshold contracts" between EUR 30 000 and 60 000 for supplies and services and EUR 120 000 and EUR 360 000 for works -simplified procedure "Under-limit contract" above EUR 60 000 for supplies and services and above EUR 360 000 for works, EU rules apply, with shorter deadlines	Yes, for contracts of less than EUR 30 000 for supplies and services and EUR 120 000 for works
Slovenia	two levels	for contracts of less than EUR 10 000 for supplies and services and EUR 20 000 for works direct award for contracts between EUR 10 000 and EUR 40 000 for supplies and services and EUR 20 000 and EUR 80 000 for works -simplified procedure	Yes, for contracts of less than EUR 10 000 for supplies and services and EUR 20 000 for works

ANNEX 5:BELOW THRESHOLDS

	How many levels of national thresholds are there below EU thresholds? Which are the national thresholds applicable below EU thresholds?	If there are more than one national threshold below EU-thresholds, are there differences in the applicable rules according to the different thresholds? If so, what are the main differences?	Is direct procurement allowed for small values contracts? How are these defined?
Spain	At least 3 levels.	<p>Contracts can be awarded by negotiated procedure when their value is: -below EUR 1 000 000 for works contracts; - below EUR 500 000 of the value of the first establishment for the case of service concessions with a lower duration than 5 years; - below EUR 100 000 for supply/service contracts.</p> <p>For negotiated procedures publication of a contract notice in the national official journal or, the case being, the regional one, is compulsory when their value is: - above EUR 60 000 for service/supply contracts; - above EUR 200 000 for works contracts. Otherwise publication is only requested in the buyer's profile, unless the contract is a minor contract, in which case direct award is possible. There are different thresholds for publication of award notice: the award of the contract will always be published in the buyer's profile except for minor contracts. Contract awards above EUR 100 000 (in the case of service concessions if the value of the first establishment is EUR 100 000 or its duration higher than 5 years) will be published in the national official journal or, the case being, the relevant regional one.</p> <p>A contract can be awarded directly if their value is: - below EUR 18 000 for supply/services contracts; below EUR 50 000 for works contracts.</p>	Yes, for the so-called "minor contracts". Minor contracts are works contracts below EUR 50 000, and services/supply contracts below EUR 18 000.

	How many levels of national thresholds are there below EU thresholds? Which are the national thresholds applicable below EU thresholds?	If there are more than one national threshold below EU-thresholds, are there differences in the applicable rules according to the different thresholds? If so, what are the main differences?	Is direct procurement allowed for small values contracts? How are these defined?
Sweeden	NA	No	Yes, for below EU thresholds when the value is really low. (no real definition but case-law).
UK	NA	NA	Yes, for below EU thresholds.

Table 2.

ANNEX 6: IMPLEMENTATION INSTITUTIONS

Table 3.

Table 4. Implementation institutions

Member State	Institution Responsible for Public Procurement	Status/Legal standing	Staffing	Functions
Belgium	1. Commission for Public Procurement			- Advisory body in relation to drafting legislation - Monitoring and control
	2. Procurement Section of the Federal Public Service Chancellery of the Prime Minister	Prime Minister		- Drafting legislation - International relations - Monitoring and control - Information functions - Advisory functions
	3. Purchasing Advice and Policy Unit;	Federal Public Service		- Guidance and support
	4. Inspectorate General of Finances	Federal Public Service		- Monitoring and control of budgetary operations
Bulgaria	The Bulgarian Public Procurement Agency,	Executive Agency - Independent body under the Ministry of Economy and Energy	38	- Drafting legislation - International relations - Monitoring and control - Publication and information - Guidance and support - Training
Czech Republic	1. Ministry for Regional Development (Legislative section)	NA	17	- Drafting legislation - International relations - Monitoring and control - Guidance and support
	2. Office for Protection of Competition	Independent authority		- Review Body, handling complaints in sense 98/665/ES and 2007/66/EC

Member State	Institution Responsible for Public Procurement	Status/Legal standing	Staffing	Functions
Denmark	1.Danish Competition and Consumer Authority	Agency under the Ministry of Economic and Business Affairs	10	- Monitoring and control - Guidance and support - International relations
	2.Ministry of Finance	NA	?	- Monitoring and control
Germany	<u>Federal level:</u> 1.Federal Ministry of Economics and Technology (BMWi)	Government authority	10	- Drafting legislation at the relevant level - Guidance and support - Monitoring and control - International relations
	2.Ministry of Transport, Buildings and Urban Affairs	Government authority	?	
	<u>State level:</u> State Ministries competent for public procurement matters			
Estonia	1. Ministry of Finance;	NA	19	- Drafting legislation - International relations - Publication and information
	2.Public Procurement Office	Ministry of Finance		- Monitoring and control
Ireland	1.National Public Procurement Policy Unit	Department of Finance	6	- Drafting legislation - Guidance and support - Publication and information
	2.National Procurement Service	Office for Public Works	26	- Co-ordination of national strategy for public procurement - Publication
Greece	1. Ministry of Economy, Competitiveness and Shipping (supplies)	NA		- Drafting legislation - International relations - Monitoring - Information functions - Guidance and support for supplies

Member State	Institution Responsible for Public Procurement	Status/Legal standing	Staffing	Functions
	2. Ministry of Finance (services)	NA		<ul style="list-style-type: none"> - Drafting legislation - International relations - Monitoring - Information functions - Guidance and support for services
	3. Ministry of Infrastructures, Transport and Networks (works)	NA		<ul style="list-style-type: none"> - Drafting Legislation - International relations - Monitoring - Information functions - Guidance and support for works
Spain	1. Ministry of Trade, Industry and Tourism			<ul style="list-style-type: none"> - Drafting legislation - International relations
	2. Directorate General of State Patrimony			<ul style="list-style-type: none"> - Monitoring and control
	3. State Consultative Board of Administrative Procurement			<ul style="list-style-type: none"> - Guidance and support
	4. General Intervention of the Central Public Administration			<ul style="list-style-type: none"> - Control (<i>internal</i>)
France	1. Public Procurement sub Directorate of the Directorate for Legal Affaires (DAJ)	Ministry of Economy, Finance and Industry		<ul style="list-style-type: none"> - Drafting legislation - International relations - Publication and information - Guidance and support - E-procurement
	2. Advisory Commission on Public Procurement			<ul style="list-style-type: none"> - Guidance and support
	3. Supporting Mission for the achievement of Public-Private Partnership Contracts			<ul style="list-style-type: none"> - Guidance and support

Member State	Institution Responsible for Public Procurement	Status/Legal standing	Staffing	Functions
Italy	1. Department for the co-ordination of EU policies	Prime Minister Office		- Drafting Legislation - Monitoring and control - International relations - Guidance and support
	2. Ministry of Infrastructure	NA		- Drafting legislation - Guidance and support
	3. Authority for Supervision of Public Contracts of works, services and supplies			- Guidance and support - Monitoring and control
Cyprus	The Cypriot Public Procurement Directorate	Treasury	14	- Drafting legislation - International relations - Monitoring and control - Information functions - Guidance and support - Training
Latvia	1. Procurement Monitoring Bureau			- Drafting legislation - International relations - Guidance and support - Monitoring and control - Publication and information - Review and remedies
Lithuania	1. Public Procurement Office	Ministry of Economy		- Drafting secondary legislation - Monitoring and control - Publication and information
	2. Ministry of Economy	NA		- Drafting primary legislation - International relations

Member State	Institution Responsible for Public Procurement	Status/Legal standing	Staffing	Functions
Luxembourg	1. Department of Public Works	Ministry of Public Works		- Drafting legislation - Guidance and support - Monitoring - Publication
	2. Ministry for Sustainable Development and Infrastructure	NA		- Guidance and support
Hungary	1. Ministry of National Development;	NA		- Drafting Legislation - Monitoring and control - International relations
	2. Public Procurement Council	National Parliament		- Monitoring and advisory activities - Management of publications and official registers - Preparation of guidance documents
Malta	1. Department of Contracts;	Ministry of Finance	?	- Monitoring and control - Guidance and support - International relations
	2. Ministry of Finance,	NA	37	- Drafting legislation - International relations
Netherlands	1. Department for Competition and Consumer Policy	Ministry of Economic Affairs		- Drafting legislation
	2. PIANOo (Public Network for Professionals in Contracting and Procurement)	Government Agency within the Ministry of Economic Affairs		- Advisory function - Training function
Austria	1. Federal Chancellery (Bundeskanzleramt Österreich)	Prime minister	4	- Drafting Legislation - International relations - Monitoring and control - Information functions
	2. Federal Procurement	Ministry of Finance	58	- Guidance and Support

Member State	Institution Responsible for Public Procurement	Status/Legal standing	Staffing	Functions
	Company			
Poland	Public Procurement Office	Office of the Prime Minister	120	<ul style="list-style-type: none"> - Drafting legislation - Guidance and support - Publication and information - Monitoring and control - International relations
Portugal	1. Ministry of Finance and Public Administration			<ul style="list-style-type: none"> - Drafting legislation - International relations
	2. Ministry of Public Works, Transport and Communication			<ul style="list-style-type: none"> - Drafting legislation - International relations
	3. National Agency for Public Procurement			<ul style="list-style-type: none"> - Monitoring and control - Guidance and support
	4. "Imprensa Nacional -Casa de Moeda"			<ul style="list-style-type: none"> - Publication
Romania	1.National Authority for Regulating and Monitoring Public Procurement	Government		<ul style="list-style-type: none"> - Drafting legislation - Advisory function - Monitoring and control - Information function - International relations
Slovenia	1. Ministry of Finance	NA	10	<ul style="list-style-type: none"> - Drafting legislation - Advisory function - Monitoring and control - International relations - Publication and information
	2. Public Procurement Agency	?		<ul style="list-style-type: none"> - Monitoring and control - Guidance and support
Slovakia	Office for Public Procurement	Independent		<ul style="list-style-type: none"> - Drafting legislation - Guidance and support - Monitoring and control - Publication and

Member State	Institution Responsible for Public Procurement	Status/Legal standing	Staffing	Functions
				information - Training
Finland	1. Ministry of Employment and Economy	NA		- Drafting legislation - International relations - Guidance and support - Monitoring and control
	2. Public Procurement advisory Unit	Ministry of Employment and Economy		- Guidance and support
	3.The Strategic Group on Government Procurement	Ministry of Finance		- Guidance and support
Sweden	1.Competition Authority		15*	- Monitoring and control - Guidance and support - International relations - Publication
	2. National Financial Management Authority			- Guidance and support - Monitoring
United Kingdom	1.Office for Government Commerce (OGC) for GB	HM Treasury		- Drafting legislation - International relations - Guidance and support - Monitoring and control - Information
	2. Scottish Executive for Scotland			

Table 5. *Public Procurement Department**Table 6.**

ANNEX 7: CENTRAL PURCHASING BODIES

There is one main central purchasing body in Austria, the Federal Procurement Agency Bundesbeschaffung GmbH (BBG).⁶⁸ The BBG was established in 2001 at first as a central purchasing organisation for central, federal government administration. Now however any authority or entity subject to the provisions of the Federal Procurement Act may now take advantage the service. The BBG has framework contracts for some 250 000 products and services. By pooling authorities' purchasing it estimates that around 18% of the costs can be saved. In 2009, around EUR 870 million was procured through BBG contracts.

In Belgium the CMS (Centrale de Marchés pour Services fédéraux) acts as the central purchasing body for all federal bodies organisations and institutions and established framework contracts which can be accessed via an electronic catalogues. There are also a number of other central purchasing bodies set up, for example, by the federal police for local police authorities or by certain institutions in the hospital and health care sector.

In Bulgaria a central purchasing body was established during 2010 as a specialised unit within the ministry of Finance, but this Central Financing and Contracting Unit Directorate is not yet fully operational.

In Cyprus the main central purchasing bodies are departments of central government: the Department for IT products, the Purchasing and Supply Department and the Electromechanical services Department for electromechanical products and the Printing Office.

The Czech Republic has established no central purchasing body, but its legal framework allows any contracting authority to act as a central purchasing body on behalf of other contracting authorities.

In Denmark there are established two central purchasing organisations.

Firstly, SKI – Staten og Kommunernes Indkøbscentral, which is owned jointly by the Ministry of Finance and the organisation Local Government Denmark. Both local and national authorities can use the framework agreements offered by SKI. SKI was established in 1994 and in 2009 had a turn over of 13 billion DKK, which is roughly 1,7 billion EUR. SKI has 32 500 public customers from almost 300 different public authorities in Denmark.

Secondly, Statens Indkøb was established in 2006 and is owned 100% by the state. Statens Indkøb offers obligatory framework agreement for state level purchasing authorities. In addition regional and local authorities can use the Statens Indkøb framework agreements in certain cases.⁶⁹

The Center for Public Procurement (Riigihangete Keskus) acts as a central procurement body in Estonia establishing framework contracts for its clients.⁷⁰

Hansel Ltd. is a non-profit company that operates as the central procurement unit of the Finnish government under the auspices of the Ministry of Finance. Certain types of central government procurement must be carried out through Hansel. Hansel has some 70 framework agreements and the number of purchases made them has grown sharply in recent years, with a

value of approximately EUR 534 million in 2009. KL-Kuntahankinnat Oy is the central purchasing body for local government administrations.⁷¹

The French State Procurement Service (Service des achats de l'État (SAE)) is responsible for defining and ensuring the implementation of strategies for all the regular purchases of state administration (central and devolved), such as: furniture and office equipment; computer hardware, software and related services; telecommunication equipment and services; passenger travel and freight transport; development and maintenance of estate and technical installations; non-specialized vehicles, fuels and lubricants; printing equipment and services, postage and shipping; energy; financial services, insurance and banking. Where the SAE has a framework agreement or other contract central government ministries cannot award their own contracts for the same goods or services. Any appropriate procuring authority may establish or use a central procurement body. Many authorities appear to make use of common group buying for particular goods or services, in particular within the health sector (hospitals) or between local authorities. There are few very large bodies with the exception of l'Union des groupements d'achats publics (UGAP).

The largest central purchasing body in Germany is the Bundesamt für Wehrtechnik und Beschaffung (BWB) for the defence sector. The second main central purchasing body is the Procurement Agency of the Federal Ministry of the interior, the Beschaffungsamt des Bundesministeriums des Innern, which was originally setup in 1951 as the procurement agency of the Federal Border Guard and is now responsible for procurement by 26 federal authorities and public law foundations and international organisations financed and supported by the federal awarded about 1220 contracts worth EUR 956.8 million in 2009.⁷²

In Greece the General Secretariat of Commerce in the Ministry of Economy, Competitiveness & Shipping (formerly Greek Ministry of Development), organizes procurements for ministries and central government authorities except for health-related material, defence materiel and supplies for local authorities.

In Hungary, centralized public procurement on the central governmental level has been regulated and available since 1995. There is one central purchasing body in Hungary operated by the Central Service Directorate General. All entities under central government control (ministries, central budgetary organs etc.) are obliged to use the centralized public procurement system for the goods and services listed in the relevant Government Decree such as stationery, cars, IT equipment etc. Local governments are similarly entitled to mandate the use of central purchasing within their territory.

In Ireland the National Procurement Service provides a central procurement service for Government Departments, Offices and Agencies for a variety of products and services such as office supplies, energy, uniforms and clothing, printing, advertising services etc. While there is no legal obligation on authorities to use the agency contracts, they are required to use them under an administrative circular issued by the Minister for Finance.

In Italy Consip S.p.A, a public company owned by the Ministry of Economy and Finance, was created in 1997 in order to manage changes in the use of information technology in what was then the Ministry of the Treasury, the Budget and Economic Planning.⁷³ Since 2000 Consip has been procuring goods and services on behalf of public administrations and now operates as a central purchasing body on behalf of the State. State administrations (central and local except for schools and universities) are obliged to use its framework contracts for a list of product categories which are identified each year by a Decree of the Minister of Economy and

Finance. In 2009, Consip had contracts or agreements for 56 different categories of merchandise including computers, printers, heating oil, meal vouchers, mobile and fixed telephony and more than 11,000 users made purchases worth EUR 1 713 million through them.

According to Consip authorities can achieve significant savings in the process as well as prices for goods. In fact, by aggregating demand for the government, Consip estimate that they have been able to reduce the unit costs of purchase by on average 15-20%, while maintaining high quality standards in the supplies.⁷⁴

Other public entities are not bound to use these framework agreements, but they must respect the price-quality benchmarks of framework agreements for the same category of goods and services. Italian regions can also set up their own purchasing bodies which act of behalf of regional or local authorities.

In Latvia the State Regional Development Agency is responsible for framework agreements (for computers, furniture and medicines for example).⁷⁵ Central government institutions are obliged, since 2010 to use of e-Catalogues based on these framework agreements. The Providing State Agency for Internal Affairs and the State Agency for Defence Properties of the Ministry of Defence also act as permanent or *ad hoc* central purchasing bodies.

The Central Project Management Agency (CPMA) in Lithuania, set up in 2007 and fully operational since 2008, has established framework agreements which are managed through an e-Catalogue and are obligatory for central government bodies since 2009.⁷⁶

In Luxembourg there is no main central purchasing body, but a number of central purchasing bodies are responsible for purchasing computers and IT material and also for office equipment.

The Department of Contracts acts as the main central purchasing body for Malta

The Netherlands does not have a main central purchasing body. However there is an expertise centre for procurement and an electronic procurement network and encourage common services among local authorities. The Netherlands Inkoop Centrum (NIC) was privatised in the in 1990, but still handles many public sector tenders but not as a central procurement body using framework agreements.

There is no centralized purchasing body in Norway. Each contracting authority is responsible for its own procurement. However the Norwegian Agency for Public Management and e-Government (Difi) does provide a central e-commerce platform (Ehandel.no) which, in 2010, had 99 public sector subscribers who made 355 345 on-line transactions with some 300 suppliers through on line catalogues amounting to a turnover of about NOK 4 127 million (EUR 516 million).⁷⁷

There is no main central purchasing body in Poland although under the procurement legislation the Prime Minister may appoint a government administration to be a central purchasing body to establish framework contracts and determine which bodies must or could use them.

In Portugal the agência nacional de compras públicas (ANCP) together with the instituto da construção e do imobiliário (InCI) is responsible for the public procurement portal and central framework contracts, which central administration contracting authorities and public institutes

are obliged to use and autonomous administrations and public undertaking may use on a global or specific basis.

In Romania some the Ministry of Health buys drugs or equipment for public hospitals. There is a proposal to establish a central purchasing body.

In the Slovak Republic it is not mandatory for contracting authorities to purchase goods/services from or through a central purchasing body and no such body has been established.

In Slovenia the Ministry for Public Administration carries out joint procurement for energy, cars, computers and screens, paper, mobile phones and air travel. A public procurement agency will be established in 2011. The Ministry of Health also carries out some centralised procurement and some local communities carry out joint procurement

In Spain there is no one main central purchasing body. However, Spain had established, before 2004, a unit within the Ministerio de Economía y Hacienda responsible for the management and operation of a Centralised State Acquisitions System for the procurement of common goods, works and services used generally by all departments.⁷⁸ The Centralised Acquisition System is aimed at all government administrations, autonomous bodies, the Social Security agency and other public state entities that buy through the Centralised Acquisition's Catalogue of Goods and Services, The Ministerio de Economía y Hacienda also provides a national portal for procurement (Plataforma de Contratación del Estado).⁷⁹

From the first of January 2011 central purchasing for central government bodies was centralised into one body the Legal, financial and administrative services agency (Kammarkollegiet) which will form a central purchasing body. Two other authorities are still responsible for central purchasing in certain areas: the Swedish National Financial Management Authority (Ekonomistyrningsverket) for administrative systems and the Swedish National Debt Office (Riksgäldskontoret) for payment systems.

In the United Kingdom the main central purchasing body, Buying Solutions, became operational in 2001, one year after the Office of Government Commerce, through a merger of the procurement functions of two earlier purchasing bodies, the Buying Agency and CCTA. It is part of the Efficiency and Reform Group within the Cabinet Office and has procurement arrangements which cover a wide range of areas such as ICT, energy, travel, motor vehicles, office equipment and supplies, property and professional services Buying Solutions operates as a Trading Fund which generates income to cover its costs. Any contracting authority or entity covered by Directives 2004/17/EC or 2004/18/EC, can make use of its contracts and framework agreements for over 500 000 products and services with more than 1 500 suppliers. There are over 40 other buying organisations in the wider UK public sector, but none has as wide a remit.

In addition to the savings from lower prices due to economies of scale Buying Solutions estimates that it can save contracting authorities 77 days, on average, by enabling contracting authorities or entities to bypass the full procurement process.

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ANNEX 9: UTILITIES PROCUREMENT

This annex focuses on the utilities sectors covered by Directive 2004/17/EC⁸⁰ (hereafter referred to as the utilities directive). It considers:

- the value of public procurement in each utility sector, in each Member State, above and below the EU threshold;
- the extent to which these markets are characterised by regulatory liberalisation (removal of regulatory or legal barriers to freedom of access to markets) and effective competition.

This annex draws heavily on a study⁸¹ which was conducted for the European Commission in the context of the evaluation.

9.1. Volume of utilities procurement

Utilities procurement accounts for around 1/5 of total public procurement reported by MS and a similar share of procurement advertised in the OJ TED. The ratio of expenditure covered by 'classical' Directive to that covered by Utilities Directive is therefore 4:1.

Data sources employed to calculate the value of procurement in utility sectors in each Member State were: the Member State Statistical Reports (MSSRs), submitted by each Member State in accordance with their statistical obligations under Art 67 of the utilities Directive, the GPA reports and the Eurostat data on turnover in each sector.

The methodology applied used those countries and sectors for which MSSR or GPA data on above and below threshold procurement are available, (comparator Member States), as the basis for estimating procurement in those countries and sectors where such data are not available. The working assumption is that procurement is proportional to the turnover in each sector.

In each sector, the estimates of the levels of procurement in comparator Member States are calculated as follows:

- for those Member States in which there is data on above threshold procurement from either the GPA reports or the MSSRs, a ratio of above threshold procurement to turnover is calculated by dividing the above threshold procurement figure by the turnover for that sector in that Member State;
- the ratios for all these comparator Member States were then weighted by the turnover in each Member State so that undue importance is not given to a Member State which has a high level of above threshold procurement (relative to turnover) in a relatively small sector. This weighting process is repeated for all the sectors to which the Directive applies;

ANNEX 9: UTILITIES PROCUREMENT

- a weighted average was calculated for each sector in 2006, 2007 and 2008. For each sector, these three weighted averages are then averaged to produce a single ratio of above threshold procurement to turnover in each sector, in order to “smooth out” the impact of unusually high value of procurement in any particular year;
- this ratio was then multiplied by the relevant utility turnover in Member States (taken from Eurostat) for which there is no estimate of above threshold procurement from GPA reports or the MSSRs, in order to derive an estimate of above threshold procurement; and
- the same process was applied to estimate below threshold procurement.

After adjusting for the missing data, the estimate for total utility procurement covered by the Directive was around €135 billion in 2008.⁸² A significant increase was recorded over the course of the period 2006-2008 – almost of all of the increase was accounted for by above-threshold utilities procurement.

Four sectors - electricity, gas, water and railways - accounted for over two thirds of all utility procurement. About 75 per cent of total utilities procurement was above thresholds. The EU total estimated by Europe Economics approximates the figure which the Commission estimates for what is published in the Official Journal.

Utilities procurement accounts for 30-40% of total intermediate consumption for the four sectors for which comparable data is available from the input/output tables. Thus, procurement related outlays covered by the Directive represent as significant fraction of the total expenditure in these sectors.

Table 7. Summary of above and below threshold procurement by sector in EU27

	2006		2007		2008	
	Above (€m)	Below (€m)	Above (€m)	Below (€m)	Above (€m)	Below (€m)
Water	17 112	2 450	19 668	2 427	19 338	2 894
Electricity	9 093	8 467	15 425	8 950	25 265	9 890
Gas	12 239	1 845	8 284	2 170	9 161	2 509
Railways	8 291	8 295	14 930	8 853	22 864	7 223
Other transport	4 117	2 372	10 187	2 394	7 093	3 002
Post	2 719	3 034	3 307	3 248	2 471	3 383
Exploration						
- Oil or gas	3 653	1 010	3 117	960	3 714	1 161
- Coal	3 076	1 037	2 869	848	3 966	1 437
Airports	2 957	2 365	9 145	2 312	6 087	2 510
Ports	593	884	798	951	1 433	1 018
Total	63 850	31 759	87 730	33 113	101 392	35 027

Source: GPA reports, MS Statistical Reports and Europe Economics calculations.⁸³

Heat is absent from the above table as the available data does not allow for separate info on this sector.

The study also noted that the patterns of procurement varied considerably from country to country and between sectors but it could not find correlations between the volumes of procurement and the specific exemptions or structural features of the sectors. The analysis suggests that 'lumpy' utilities investment projects in different Member States may explain this volatility.

9.2. Liberalisation and competition in sectors covered by the utilities directive

The Utilities Directive seeks to ensure the opening up to competition of public procurement contracts in the relevant sectors. It was considered that entities active in these sectors could not be presumed to procure in an open and competitive manner because of:

- Links to national or other public authorities which might leave the utility operator vulnerable to suasion to purchase from locally preferred suppliers;
- The absence of competition arising from the generally closed nature of the markets in which they operate (either because of de facto or de jure monopoly rights, special/exclusive rights to provide certain services or undertake certain activities).

The evaluation investigated whether circumstances have changed since the introduction of the Utilities directive. It assessed whether the utilities operators are more exposed to competition than was the case then, or originally, back in the early 1990's, when the first directive regulating their procurement was adopted. Utilities such as telecommunications, transport and energy were the subject of specific policy initiatives under the Single European Act. This sectoral liberalisation has helped to unleash technological or commercial dynamics which have driven a deep transformation of these markets. The Commission implicitly acknowledged this by excluding certain telecommunications services from the Utilities Directive in 1999 and, all of them, in 2004, recognising that effective competition existed in these markets.⁸⁴

The Utilities Directive also provides a mechanism under Article 30 which allows the waiver of the Directive for relevant 'markets' where there has been both a regulatory liberalisation and the emergence of meaningful competition. Applications under Article 30 can be initiated by the Commission, or requested by a Member State or, if their national legislation allows, by contracting entities.

To date 24 applications have been received for ten Member States concerning either the postal or energy sectors. Two applications are still under examination, three have been withdrawn and sixteen Decisions have been adopted (one of which takes a position on four requests).

The factors which, separately or in conjunction, should encourage self-disciplines to procure efficiently are: the liberalisation of the sectors, their openness up to competition, privatisation of the incumbents and sector regulation which may impose price caps and limit the margin for feather-bedding inefficient procurement.

- *Liberalisation:* Many utilities have traditionally been considered natural monopolies and only one operator has been legally entitled to service these markets. Liberalisation entails the removal of legal, regulatory barriers or provision of access to critical networks so that other suppliers can enter markets and compete for market share. Liberalisation challenges legally held monopolies and allows other suppliers to enter these markets.
- *Competition:* The removal of legal barriers does not equate to effective competition, which requires that new entrants actually take up the legal opportunity created by liberalisation to compete successfully with incumbents. Where markets are liberalized new entrants (or the real possibility of new entrants in the not too remote future) encourages incumbents to behave competitively for fear of losing market share to these entrants. Where such encouragement results in actual competitive behaviour this will extend to procuring efficiently.

The assessment of whether there is a sufficient level of competition on a given market is carried out on the basis of competition-related criteria such as the characteristics of the goods or services concerned, the existence of substitute goods or services, the prices and the actual or potential presence of more than one supplier of the goods or services in question. In this context, the relevant geographic market may be found to consist of the entire territory of the Member State concerned or may be more localized. In some sectors, such as electricity and gas, interconnections may lead to the relevant market definition being wider than Member States level. Within each utility it may also be necessary to consider the operation of competition in sub-sectors (e. g. wholesale of electricity as opposed to retail sale or the operation of transmission grids).

In assessing competition, account must be taken not only of the existence of competition from other actors in the provision of the same service but upstream/downstream activities may also be relevant. If, for instance, there are restrictions on alternative sources of supply (as may arise in cases where such supply must necessarily imply the use of physical infrastructures), utility operators may be shielded from pressure on price and margins even if there are 3 or more significant suppliers.

- *Privatisation:* Where incumbents are privatized, the responsibility to shareholders may discipline them to procure competitively. Seeking profit to pay dividends to shareholders creates incentives for firms to contain costs and consequently, procure efficiently. A need to remain within the good graces of public authorities granting special or exclusive rights that may form the very basis for their operation may, on the other hand, counter-balance such incentives for the firms concerned.
- *Regulation:* Sectoral (including tariff) regulation may also create incentives for utility operators that simulate competitive market conditions for these operators. For example, sector regulation in the form of price-cap regulation could potentially create incentives for utility operators to procure as competitively and efficiently as possible. This is because this form of sector regulation limits the prices which suppliers can charge. Therefore, the profit of these suppliers will depend upon their ability to contain their costs, which incentivizes them to contain these costs through efficient procurement and other innovations. Any assessment of the impact of regulation will need to judge the extent to

which the simulated effects of competition can ‘compensate’ for the incentives deriving from the operation of a natural monopoly.

9.2.1. *Electricity Sector*

Liberalisation was first introduced in the electricity sector in the nineties, and the latest package of liberalisation measures requires extensive opening of the electricity market to competition, and measures to facilitate the development of competition in parts of the supply chain in which competition can occur. In general, this appears to have led to an increase in the number of operators in the electricity sector, suggesting that the opening of the market has fostered new entry. The magnitude of the increase in the number of operators is larger in electricity generation than it is in electricity supply, which may suggest that although the liberalising measures have allowed and encouraged entry into the retail end of the supply chain, the introduction of competition in this sector has not been as effective; therefore, procurement practices may not be subject to the same competitive forces that can be seen upstream.

In general, market opening, if successful, should result in a decrease in the market share of incumbent generators and suppliers. In 2008, the market share of the largest generator had not fallen by much relative to 2000, suggesting that the entry in generation may have been on a small scale. As such, the rationale for the procurement directives, with respect to electricity generation, still holds. The limited number of Article 30 exemptions that have been granted for in respect of electricity generation and wholesale provides further support for this argument.

The market reforms have led to the creation of wholesale markets for electricity. Ensuring competitive wholesale markets is essential to the development of competition in the electricity market as a whole; however, evidence suggests that wholesale markets tend to be highly concentrated. Therefore, procurement practices in wholesale markets may not be subject to sufficient competitive pressure to ensure efficient procurement.

Despite the levels of concentration in generation and wholesale markets, it is still possible for retail markets to be competitive; however, on the whole, the retail markets in most Member States are dominated by a small number of firms. On the other hand, more mature markets appear to have experienced greater levels of customer switching. Therefore, although the level of competition in retail markets does not appear to have developed sufficiently to negate the need for the procurement directives, over time there may be less of a need for the directives as competition develops further. The limited number of Article 30 exemptions that have been granted for the retail sector provides further support for this argument.

Prior to liberalisation, electricity companies in many Member States were vertically integrated state-owned monopolies. Following liberalisation and privatisation in the sector, the extent to which different stages of the value chain are still publicly owned has changed. The liberalisation of the generation and retail markets has generally fostered new entry; however, the proportion of public ownership has not diminished to the same extent in the network sectors. A presentation in June 2010 to the European Parliament on the state of play

in the EU energy markets reported that public ownership of TSO (transmission system operator) and DSO (distribution system operator) activities remained strong.⁸⁵ The technical annex to the Commission report on progress in creating the internal gas and electricity market⁸⁶ presents information on the extent of privatisation which has occurred.

Network industries, i.e. the transmission and distribution of electricity will, in general, continue to have their prices regulated despite developments of competition in the sector, given the natural monopoly nature of these activities. The majority of national regulatory authorities have implemented some form of price cap for the electricity networks, providing them with incentives to reduce their costs. End user price regulation is still widely applied across Europe for both, household customers and for non-household customers.

The creation of wholesale markets and competitive retail markets should in theory allow both generators and suppliers to respond to market signals provided by competitive market prices. If there are barriers to free price formation, e.g. the regulation of retail prices for electricity, this will impact the market for electricity (particularly if retail price caps are set below the wholesale price for electricity) and may deter entry in both the retail and generation stages of the value chain as the price signals to which companies would respond is distorted.

However, from a national regulator's point of view, if competition has not developed sufficiently, it may be important to continue regulating retail electricity prices.

9.2.2. *Gas Sector*

Liberalisation measures were first introduced in the gas sector more than ten years ago. Both non-domestic and domestic consumers now have the opportunity to choose their supplier. In addition, the latest package of legislative measures requires the unbundling of transmission systems from transmission system operators. On the whole, the liberalisation measures have fostered entry in the gas sector; however, in most Member States the increase has been small. Looking at the number of operators carrying out activities related to the distribution and trade in gas, the number of operators has actually decreased in many Member States between 2003 and 2008 which may suggest that the liberalisation measures have not been successful in generating new entry and developing competition; in this case, there may not be sufficient competitive pressure in this market to ensure efficient procurement practices at this stage.

If successful, market opening should reduce the market share of incumbent firms in the sector as new entrants enter the market and capture some of the market. The data available show that the market for gas production is still dominated by very few firms in most Member States, suggesting that any new entry that has occurred has been on a small scale and has not managed to capture much market share. As such, the rationale for the procurement directives would still hold with respect to the production of gas.

The third package of gas liberalisation measures aim to facilitate the emergence of a well-functioning and transparent wholesale market which is essential to the development of competition in the gas market. Evidence suggests that there is currently a high degree of concentration in wholesale markets which may make it difficult for new entrants to get access

to gas. In turn, this may mean that there is insufficient competitive pressure in the gas supply market to ensure efficient procurement processes.

Looking at market shares in the retail market, the picture is quite varied across Member States; the retail markets in some Member States are dominated by very few firms, while competition appears to have developed more in other Member States. However, data on the levels of consumer switching show that there has been very little switching between suppliers, particularly for small businesses and households. This would suggest that competition has not developed sufficiently across Europe to negate the need for the procurement directives.

Prior to liberalisation, gas companies in many Member States were vertically integrated state-owned monopolies. However, the opening of the market to competition and the separation of gas supply from the transport and delivery of gas removes the natural monopoly element from gas supply activities. Although network activities remain as natural monopolies, and there may therefore be a rationale for continued public ownership, there has in fact been some degree of privatisation of gas transmission in most Member States: in 9 Member States the gas transmission is almost 100% private, while in other 8 Member States the gas transmission systems are more than 50% privately owned.

At present there are different stages of development with regards to the effectiveness of market opening in Member States. While the gas Directive introduces common rules for the transmission, distribution and supply of gas, it does not prescribe the forms of regulation that national regulators must employ. The majority of national regulatory authorities have implemented some form of price cap for the gas networks, providing them with incentives to reduce their costs, therefore, providing, in theory at least, with incentives to procure efficiently.

9.2.3. *Heat Sector*

There is a considerable difference between Member States in the use of district heating. In part this is a reflection of climate with district heating being more developed in Northern European countries, particularly, Denmark, Latvia, Finland, Poland and Sweden. Heat is generated either in dedicated boilers or, increasingly and more efficiently, in combined heat and power (CHP also known as cogeneration) plants which generate electricity and capture the heat for distribution in buildings or for industrial processes.

The main development in recent years in the supply of heat has been the encouragement given to the development of CHP as an energy efficient technology. Preference given to CHP plant may have enhanced the competitive position of heat supply relative to use of other fuels but there has only been limited development of new heat supply networks.

There has been no general liberalisation in this part of the market and district heating networks remain local monopolies which are not subject to independent regulation. The existence of some private sector participants may provide some incentive to efficiency in operation and procurement but overall the position of the sector cannot be said to have

changed significantly since 2004. It is likely that the procurement requirements of many local district heating schemes are below the thresholds at which the Directive applies. Where procurement is above the threshold the rationale for applying the Directive continues to apply.

9.2.4. *Water sector*

The economics of the EU water sector continue to conform very much to what would traditionally be expected within a natural monopoly industry, which water more closely approximates across all stages of the vertical supply chain than any other network industry.

These natural monopoly characteristics may explain the lack of an EU attempt to liberalise the sector. Certainly, attempts to encourage competition in the sector have been less extensive than in other utility sectors and have had much less success. These attempts have been largely confined to competition for markets, as oppose to competition within markets.

The European Parliament has tended to be resistant to attempts that have been made by the Commission to extend competition in the water sector since the introduction of the Directive. Even the UK, the Member State, which has been most ambitious in terms of extending competition, has been largely limited to establishing competition for markets; a form of competition that Ofwat - the sector regulator in the UK - concedes is much more limited in the benefits that it generates than competition in the market.

While 20 years have passed since liberalisation (largely in the form of competition for markets) and privatisation were applied to the UK water industry, the UK remains an outlier both in respect of the scale and vigour of its attempts to inject competition and in the exposure which water operators in the UK have to shareholder discipline (although the considerable incidence of private ownership in France makes the UK less of an outlier in this respect than in attempts to inject competition). No Member State has significantly advanced in either of these directions since the introduction of the Directive, which means that incumbents retain dominant market positions, often bequeathed to them through grandfathering, to a large extent across the EU. There have been no exemptions under Article 30 granted in the water sector (nor have any been applied for in this sector).

As the widely varying number of operators in each Member State illustrates, the structure of water sectors within Member States does differ between Member States and largely remain products of particular historical circumstance within each Member State. Therefore, while the Water Framework Directive (2000) has introduced the principle of full cost recovery to water regulation across the EU, which should tend to increase incentives towards efficiency, the rationale for the Directive appears as sound today as it was when it was introduced.

9.2.5. *Railways and other transport*

Given the current state of play within the EU rail sector, the rationale for the Directive appears to continue to hold for this sector. Liberalisation efforts at an EU level have so far

been limited to international routes only and have not been applied to domestic routes; either in respect of freight or passenger services.

While some Member States have made efforts towards opening up their domestic markets through the use of competitive tendering and franchising, i.e. competition for markets, this has not been the case generally across the EU. Moreover, no Article 30 applications have been made in this sector, which seems to suggest a perceived lack of exposure to competition.

This suggestion is reinforced by, for example, the existence of monopolies in the rail freight markets of numerous Member States (Greece, Finland, Ireland, Latvia, Lithuania and Slovenia). In the majority of Member States, the largest freight company has over 70 per cent of the market share, and, therefore, has considerable market power.

The experience of the UK - the Member State which has most aggressively sought to liberalise and privatise its rail sector - indicates that these processes are not without challenges and complications. Nonetheless, the near completion of liberalisation of international routes within the EU- though some Member States remain subject to infringement proceedings- is a noticeable achievement since the introduction of the Directive, which means that there is the potential for operators to be more exposed to competition than was the case when the Directive was introduced.

However, the market power of incumbent operators, who remain largely in public ownership, remains so considerable that the rationale for the Directive remains strong. The fact that the rail network is a natural monopoly implies the need for regulation of the network to ensure fair and non-discriminatory access, which may in turn help to develop competition between operators. Directive 2001/12/EC and Directive 2001/14/EC lay the groundwork for this. However, in order for regulation to be effective, the regulator must have sufficient powers to allow for effective monitoring and enforcement, and more could be done in this respect.

It is also the case that the extent of public ownership and relative lack of competition throughout much of the sector continues to mean that the rationale for the Directive continues to hold in transport sectors other than rail.

9.2.6. *Post*

The EU Commission has worked towards a full liberalisation of the postal sector. During 2010, full market opening will have been achieved in 95% of EU letter post market (in terms of volumes). Substantial or intense competition has followed from this liberalisation within parts of the sector. For instance, competition in unaddressed advertising is considered substantial or intense across much of the EU. However, competition within other postal sectors is much less intense.

The intensity of competition also varies considerably by Member State, as well as by postal sector. Some Member States are thought to have intense or substantial competition in cross-border outbound letter post, while competition in this postal sector is considered completely absent in other Member States. It tends to be the case that Member States which liberalised their postal sectors earliest now have the most competitive postal markets.

There is also substantial variation in exposure to private ownership and shareholder discipline between Member State postal sectors. The clear majority of Member States fall into the category of those where the postal incumbent remains wholly in public ownership. However, there are other Member States where the incumbent has been completely privatised (Malta, Netherlands) and in others the incumbents have been partly privatised (Belgium, Denmark, Germany, Greece, Italy). Where partial privatisation has taken place, with the exception of Germany, more than 50 per cent of the shares remain in public ownership.

Having led a liberalisation of the sector, the Commission is now seeking to ensure that sector regulation leads to efficient outcomes. The latest Postal Directive requires that Member State postal regulators set prices such that they give incentives for an efficient universal service provision. However, the evidence that Member State regulators are actually behaving so as to create such incentives is limited. This is strikingly illustrated by the fact that six Member State regulators (Belgium, Denmark, Finland, Hungary, Luxembourg, Netherlands), who in total cover 14 per cent of the EU letter post market, do not use cost data to inform the pricing of universal services.

Since the introduction of the Directive the EU postal sector has been successfully liberalised, with competition increasingly emerging. This emergence of competition creates incentives towards efficient procurement, as do the extension of private ownership within the sector and the setting of prices for universal services by regulators such that these prices encourage efficiency. However, many incumbents remain wholly publicly owned and it is not clear that sector regulators are consistently behaving in ways that would properly enable them to set prices for universal services that induce incentives towards efficiency for incumbents.

Given the lack of competition in parts of the sector and the lack of consistent application of regulatory techniques that would incentivise efficiency, while the sector has evolved in various ways since 2004 such that the rationale of the Directive is less relevant than it was then, it remains the case the rationale retains sufficient relevance that the sector as a whole should not be exempted from the Directive. Parts of the sector may have a stronger case for exemptions than others but such exemptions could be taken forward under the Article 30 provision on a case by case basis.

9.2.7. Exploration for and extraction of oil, gas, coal or other solid fuels

Directive 94/22/EC of the European Parliament and of the Council of 1994 laid down the conditions for granting and using authorisations for the prospection, exploration and production of hydrocarbons and it has been fully transposed by all Member States⁸⁷. The aim of this Directive is in part to encourage greater competition within the internal market by preventing a single entity from having exclusive rights for an area whose prospection, exploration and production could be carried out more effectively by several entities.

The statistics show that the overall number of enterprises in the mining and quarrying of energy producing materials sector in the majority of Member States has increased since 2000. Since conditions vary for the different activities concerned and not all activities are applicable to all Member States, the number of operators by different activity type (mining of

hard coal, mining of lignite, oil and natural gas exploration and production, etc) was considered, and again it appears that the picture is rather varied across EU.

Information on the extent of public and private ownership across the whole of the EU's exploration/extraction of oil, gas, coal or other solid fuels is very limited. The "majors" in oil and gas in the EU are private companies. Generally, there has been an increase of public sector companies in the coal mining sector and many previously public entities have been privatised. Moreover, there is no sector regulation pertinent to this sector.

It is to be noted that two Article 30 exemptions have been granted to UK and the Netherlands for exploration for and exploitation of oil and gas and to Italy for exploration for oil and gas and exploitation of gas. Furthermore, two applications have been withdrawn and one is currently (June 2011) under examination.

9.2.8. *Ports*

There is limited evidence to the effect that changes have occurred in the EU ports sector since the introduction of the Directive such that its rationale is significantly less relevant now than it was when it was introduced.

While the Commission is taking forward an action plan to "establish a European maritime space without borders", its attempts to liberalise the sector did not materialized yet. This does not mean that competition both within and between ports is non-existent, although there is limited evidence that these forms of competition have grown considerably more intense since 2004.

The market power of large hub ports remains considerable and the sector remains largely in public ownership. Neither intense competition between ports nor the shareholder discipline of private ownership can, therefore, be said to provide strong incentives towards efficient procurement.

Equally, such incentives cannot be said to have been created by regulation of the sector. Unlike in other sectors, such as gas and electricity, there has been no concerted effort either at the EU level or at Member State level to use regulation as a tool to drive efficiency within the ports sector.

There have been changes within the sector since 2004. Not least the increasing complexity of international logistics systems and the integration of ports within these systems. However, insufficient change appears to have occurred in relation to competition, ownership and regulation to sustain an argument in favour of the rationale for the Directive no longer holding.

9.2.9. *Airports*

Although airports themselves have not been subject to an EU wide drive towards liberalisation, the liberalisation in other parts of the air transport sector, such as ground handling and the EU wide liberalisation of airlines, has impacted upon airports.

Competition between airlines and ground-handlers has continued to intensify since the introduction of the Directive. This intensification may in turn have increased the competitive pressures on airports and sharpened the incentives facing airports to behave efficiently.

This sharpening is also complemented in some parts of the EU by incentives towards efficiency through exposure of airports to the shareholder discipline of private ownership and various kinds of sector regulation. However, only the UK government has made a strong push towards privatising airports and this push preceded the introduction of the Directive.

Moreover, as regards sector regulation, like liberalisation, no policy or legislation from the Commission has been consistently applied with the intension of seeking to reform airports in ways that would sharpen their incentives towards efficiency.

While airports have not been the subject of direct liberalisation through EU legislation that could result in exposure to competition, EU legislation of airlines and ground-handling could to some extent have had the indirect consequence of increasing competitive pressures upon airports. The most important pieces of EU legislation in respect of both airlines and ground-handling were, however, in place prior to the introduction of the Directive.

That these important pieces of legislation were in place when the Directive was introduced are reasons to conclude that the rationale for the Directive continues to hold. This is reinforced by the lack of direct legislative liberalisation upon airports by the Commission in respect of either liberalisation or regulation. Furthermore, the lack of Article 30 applications from airports tends to suggest airports either find the Directive beneficial (or at least sufficiently undemanding as to not wish to escape from it) or that it is acknowledged that competition within the sector does not compare with that achieved in sectors where exemptions have been granted.

9.3. **Conclusions**

The evaluation observes considerable progress in adopting the legal steps to liberalise access in three sectors -electricity, gas and postal services. The markets were -to varying degrees-open (or at least opening) to competition. However, progress in adopting the regulatory conditions for freedom of access to rail, 'other land transport' or port sectors and little or none for water or airports has been less comprehensive. It should be noted that liberalising the air transport sector could to some extent have increased competitive pressure on airports.

Despite progress in creating the legal/regulatory conditions for competition in some sectors, this has not been followed by the emergence of real competitive challenge to the previous incumbents. In many markets, competition in utilities sectors covered by the Directives remains limited.

It is hard to draw general conclusions about the existence of effective competition and regulatory liberalisation across sectors as a whole. Where these conditions have both been demonstrably realised within identifiable relevant markets, Member States or utility operators have been able to apply successfully for exemption under Article 30. Exploration for oil and gas is perhaps the only sector which can be viewed as largely open to international competition.

Member States continue to vary widely in terms of the extent of public or private ownership with no general pattern to be discerned across the EU as a whole. Tariff regulation has been potentially effective in the electricity and gas markets where regulation of the networks could encourage competition in generation or supply, but in other sectors the study found much more variation between Member States in the extent and strength of regulation.

A summary of the main regulatory and competition conditions applying in each utility sector is set out below:

Table 8. Analysis of regulatory and competition developments in utilities sectors

	Liberalisation	Competition	Public/private sector	Regulation
Electricity	Major development of EU wide liberalisation framework. Retail markets fully open to competition.	Increased number of operators in generation and supply. Development of wholesale markets. But incumbent companies continue to dominate market in many MS.	Varying degrees of public ownership. Opportunities for new entrants have encouraged private sector companies.	Networks remain subject to regulation. Most MS have adopted incentive based regulation to encourage efficiency. Some price controls in retail markets may deter competition.
Gas	Major development of EU wide liberalisation framework. Retail markets fully open to competition.	Limited number of gas production companies and wholesale markets highly concentrated. Increase in retail suppliers but some MS markets dominated by incumbents with low levels of switching of suppliers.	High level of private sector ownership in most MS.	Networks remain subject to regulation. Most MS have adopted incentive based regulation to encourage efficiency. Some price controls in retail markets may deter competition.
Heat	No specific EU liberalisation initiative	Heat mainly provided by local monopolies	Some increase in private sector provision but no major change since 2004	No independent regulatory structure
Water	No development of EU wide liberalisation framework.	Strong natural monopoly features. Some periodic competition for franchises. Wide variation in number of operators in each MS.	Largely in public sector ownership. UK and France main exceptions.	Cost recovery principle introduced by Water Framework Directive, mainly directed at efficient use of water.

ANNEX 9: UTILITIES PROCUREMENT

	Liberalisation	Competition	Public/private sector	Regulation
Railways	Liberalisation at EU level largely confined to international routes.	Some competition for franchises but not general. More competition on international routes but relevant Directives not fully transposed. High market shares of incumbents in both passenger and freight.	Incumbents largely remain in public sector.	EU Requirement for regulation in each MS but effectiveness varies considerably. Further development required to incentivise efficiency and establish non-discriminatory access regime.
Other land transport	EU level liberalisation for international bus travel. Other liberalisation varies from country to country.	Some competition in international bus travel but still dominated by major suppliers. Varying levels of competition for local services.	Many operators municipally owned. Some private sector ownership, particularly for international and inter city services	Little systematic regulation.
Posts	EU wide liberalisation process now established. 95% market opening in 2010.	Intense competition has developed in some parts of the market and in some MS. But in some MS competition has yet to develop.	In majority of MS incumbent remains in public sector but in some MS there has been full or partial privatisation.	EU requirement that regulation incentivise efficient provision of universal service. But a number of MS regulators do not monitor costs.
Exploration	Directive 94/22/EC requires open competition for exploration licences.	No dominant market players on oil and gas sector.	Oil and gas largely private sector. Some public sector ownership.	Sector not subject to economic regulation.
Ports	Earlier EU liberalisation plans not successful. Further measures being	Competition between ports and other integrated logistics suppliers.	Ports largely remain in public ownership. UK is	No EU level initiative to develop regulation to drive efficiency.

ANNEX 9: UTILITIES PROCUREMENT

	Liberalisation	Competition	Public/private sector	Regulation
	implemented.	Competition to provide services within ports. Market power of hub ports remains strong.	exception.	
Airports	No liberalisation requirements for airports but liberalisation of airlines and ground handling has had impact on airports.	Competitive pressure from airlines provides efficiency incentive for airports.	Some move towards private or mixed ownership. Public sector airports increasingly use corporate structure.	No EU level requirement for regulation. Independent regulation only operates in a minority of MS.

Source: Europe Economics (2011)

NOTES TO ANNEXES

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- ¹ As far as Treaty principles and the Directives other than the Utilities Directive are concerned, this annex is to a large extent an adaptation of the guides to the Community Rules on Public Supplies, Works and Services Contracts that were issued by Commission Services in relation to Directives 92/50/EEC, 93/36/EEC and 93/37/EEC. For further details, these can therefore be consulted, bearing in mind that the numbering of Treaty provisions may often have changed.
- ² **In the following, all references are to the Treaty on the Functioning of the European Union (TFEU) unless otherwise stated.**
- ³ Quantitative restrictions are measures that limit the quantities of products that may be imported or exported (e. g. by imposing a system of quotas). Such measures are prohibited.
- ⁴ Article 30 *et seq.* of the EC-Treaty, currently Articles 34 *et seq.* TFEU. In the Euratom Treaty, quantitative restrictions are prohibited by Article 93. Equivalent provisions existed in the now abolished European Coal and Steel Community (ECSC) Treaty.
- ⁵ Article 97 of the Euratom Treaty provides that no restrictions based on nationality may be applied to natural or legal persons, whether public or private, under the jurisdiction of a Member State, where they desire to participate in the construction of nuclear installations of a scientific or industrial nature in the Community. This provision guarantees *inter alia* the right of establishment in connection with the construction of such installations and is directly applicable. In so far as Articles 49 *et seq.* TFEU do not conflict with provisions of the Euratom Treaty, they too are applicable in the nuclear field. Such was also the case for the now abolished ECSC Treaty.
- ⁶ Paragraph 37 of the judgment of 30 September 1995 in Case C-55/94 *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165.
- ⁷ In the Euratom Treaty, the principle of the freedom to provide services is established by Article 97. In so far as Articles 56 *et seq.* TFEU do not conflict with provisions of the Euratom Treaty, they reinforce the ban on discrimination enshrined in Article 97. The now abolished ECSC Treaty did not regulate neither the right of establishment, nor the freedom to provide services. Consequently, Articles 59 *et seq.* of the EC Treaty were also applicable to the coal and steel industries, as they did not conflict with provisions of the ECSC Treaty.
- ⁸ Judgment of 25 July 1991 in Case C-288/89 *Stichting Collectieve Antennevoorziening Gouda and Others v Commissariaat voor de Media* [1991] ECR I-4007.
- ⁹ Three other measures could also be mentioned among the distant ancestors of the current public procurement Directives, namely Commission Directive 66/683/EEC of 7 November 1966 eliminating all differences between the treatment of national products and that of products which, under Articles 9 and 10 of the Treaty, must be admitted for free movement, as regards laws, regulations or administrative provisions prohibiting the use of the said products and prescribing the use of national products or making such use subject to profitability (unofficial English translation), OJ 220, 30.11.1966, p. 3748; Commission Directive 70/32/EEC of 17 December 1969 on provision of goods to the State, to local authorities and other official bodies, OJ L 13, 19.1.1970, p. 1, and, finally, Council Directive 71/304/EEC of 26 July 1971 concerning the abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to contractors acting through agencies or branches, OJ L 185, 16.8.1971, p. 1. These Directives did not, however, contain any detailed provisions concerning the award procedures to be applied for the award of public contracts. They will not be further dealt with.
- ¹⁰ OJ No L 185, 16.8.1971, p. 5.
- ¹¹ The first public procurement legislation fixed its thresholds in European Units of Account, a "paper currency" used for accounting purposes but not minted. These were replaced, at parity, by the ECU, the European Currency Unit, as of 13.3.1979. In turn, the ECU was replaced, also at parity, by the EUR as of 1st of January 1999. In other words, 1 EUA=1 ECU=1 Euro.
- ¹² That is, works contracts for which the remuneration consists, wholly or in part, in the right to exploit the works. Typical examples are toll-roads.
- ¹³ There was, however, a "Declaration by the Representatives of the Governments of the Member States, meeting in the Council, concerning procedures to be followed in the field of public works concessions",

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- Official Journal C 082 , 16/08/1971 p. 13, which introduced a series of limited obligations for works concessions contracts, not least an obligation to ensure transparency through a publication in the Official Journal, as of the 1 million European Units of Account threshold applicable to works contracts.
- ¹⁴ The just mentioned Declaration did, however, foresee an obligation to sub-contract certain percentages of the works (either at least 30% of the total value or a percentage to be specified by the bidders) to third parties (i.e. companies that are neither part of a winning consortium nor an affiliated company related to the winner(s). The political agreement (i.e. the Declaration) foresaw a system which was substantially similar to the legally binding provisions that were introduced in Directive 89/440/EEC, cf. below.
- ¹⁵ OJ No L 13, 15.1.1977, p. 1.
- ¹⁶ The scope of this notion was as to substance the same as in the first works Directive. Due to the accession of Denmark, Ireland and the United Kingdom as of 1.1.1973, its wording was, however, changed to "the State, regional or local authorities and the legal persons governed by public law or, in member states where the latter are unknown, bodies corresponding thereto as specified in Annex I".
- ¹⁷ Council Directive 80/767/EEC of 22 July 1980 adapting and supplementing in respect of certain contracting authorities Directive 77/62/EEC coordinating procedures for the award of public supply contracts, OJ No L 215, 18.8.1980, p. 1.
- ¹⁸ This list can be compared to the list of "central government authorities" in Annex IV of Directive 2004/18/EC.
- ¹⁹ However, for central Government authorities in the field of defence only in respect of contracts for certain products listed in an annex to Directive 80/767/EEC. To the extent that procurement in the defence sector was not excluded pursuant to what is now Art. 346 TFEU, the situation in this sector was as follows: Central Government authorities in the field of defence would apply the Directive as of 140 000 in respect of the listed products and as of the general threshold of 200 000 for all other products. Other contracting authorities had to apply the provisions of the Directive to procurements in the field of defence as of 200 000 EUA.
- ²⁰ For instance, the absence of binding provisions on works concessions contracts or the relatively narrow definition of "contracting authorities". Also, the first Directives only foresaw three award procedures: open or restricted procedures, among which the choice was free, and cases in which only the provisions on technical specifications were applicable (these exceptional cases were known as "direct awards" or "gré-à-gré").
- ²¹ OJ L 127, 20.5.1988, p. 1.
- ²² OJ L210, 21.7.1989, p. 1.
- ²³ Both of the amending Directives introduced provisions on negotiated procedures with prior publication and replaced the previous "direct award" with provisions allowing use of a negotiated procedure without prior publication. As a curiosity, it might be noted that Directive 88/295/EEC limited use of the restricted procedure to "justified cases", adding that such "justification may inter alia be constituted by:
- a need to maintain a balance between contract value and procedural costs,
 - the specific nature of the products to be procured." This limitation was again abolished through Directive 93/36/EEC.
- ²⁴ E. g. general contractor arrangements, in which the general contractor would undertake to ensure the specified works to be carried out without (necessarily) executing any works himself.
- ²⁵ "... or the execution by whatever means of a work corresponding to the requirements specified by the contracting authority". Further, the definition was changed to cover contracts having as "their object either the execution, or both the execution and design" of works, as opposed to the previous definition which did not include "mixed" contracts also including design.
- ²⁶ This definition has remained substantially unchanged to this day.
- ²⁷ Civil engineering contracts and contracts relating to building work for hospitals, facilities intended for sports, recreation and leisure, school and university buildings and buildings used for administrative purposes.
- ²⁸ By changing from an exclusion for works contracts awarded by "bodies which are governed by public law and which administer transport services" to one applicable to works contracts awarded by "carriers by land, air, sea or inland waterway".
- ²⁹ Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ L 297, 29.10.1990, p. 1
- ³⁰ These were (and are) defined as "any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it". This was completed by a list of circumstances under which there was a legal presumption of a direct or indirect dominant influence. In some ways, the definition of public undertakings can be likened to that of "body governed by public law" except for the distinguishing fact that public

undertakings are meeting needs in the general interest, which *do have an industrial or commercial character*.

³¹ These rights were given an quite inclusive definition, according to which i. a. the simple right to place network equipment (such as an electricity pylon or a water pipe) on, over or under the public highway was deemed to constitute such a right. Similarly, supply of water, electricity, gas or heat to a network that was operated on the basis of exclusive or special rights was in itself also deemed to constitute such a right.

³² The main difference being that the previous directives had excluded contracts awarded by "carriers by land, air, sea or inland waterway", whereas Directive 90/531/EEC was not rendered applicable to sectors such as road transport (other than bus transport services to the public through a scheduled network), transport by sea and inland waterways as well as air transport. The main reason was that these sectors were generally considered to be sufficiently liberalized and subject to competitive pressure.

³³ Provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of drinking water or the supply thereof to such networks.

³⁴ This covered provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of electricity, gas or heat or the supply thereof to such networks. In this context, the "energy" sector also comprised "exploitation of a geographical area for the purpose of exploring for or extracting oil, gas, coal or other solid fuels".

³⁵ Defined as covering the operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable; a further part of the transport sector in a broad sense was described as covering the exploitation of a geographical area for the purpose of the provision of airport, maritime or inland port or other terminal facilities to carriers by air, sea or inland waterway.

³⁶ Covering the provision or operation of public telecommunications networks or the provision of one or more public telecommunications services.

³⁷ The Commission originally envisaged two separate directives covering award procedures in the water, energy and transport sectors and, the second one, in the telecommunications sector, cf. respectively COM(88) 377 final of 11 October 1988 and COM(88) 378 of the same date. During the legislative procedure, the two proposals were merged but a certain number of provisions remained that were specific for the telecommunications sector, for instance the specific threshold for supplies contracts, a specific legal basis (art. 8) allowing an exemption in case of effective competition in the sector, a specific advisory committee ...

³⁸ As mentioned above, these were Community-wide advertising of contracts to develop real competition between economic operators in all the Member States; the banning of technical specifications liable to discriminate against potential foreign bidders; and application of objective criteria for the selection of tenderers and the award of contracts.

³⁹ OJ L 209, 24.7.1992, p. 1

⁴⁰ unless the contracting authority was itself a contracting entity, i. e. carried out one of the activities covered under the Utilities Directive and the contract in question was awarded for the purpose of pursuing that activity. The notion of "contracting authority" was defined in the same way in this Directive as in the previous Directives.

⁴¹ E. g. contracts for the acquisition or rental of existing buildings, certain telecommunications services or contracts for arbitration and mediation services. The reasons for these exclusions were either that the award procedures were not suitable, given the specificity of the service concerned. It is e. g. difficult to organise a EU-wide call for tenders for the location of a specific, existing building; conciliators are often designed jointly by the parties to the arbitration service, frequently directly after the beginning of the dispute; again, the Directive's procedures would not be suitable. The telecommunications services concerned were excluded given that, at the time, the liberalisation of the sector had not yet spread to voice telephony services and related services. There was thus almost always only one possible service provider because of the existence of exclusive rights. To be noted that, with the progress in liberalisation, this exclusion was abolished by the 2004 Directives.

⁴² See the 20th Recital of Directive 92/50/EEC.

⁴³ Except railway transport services

⁴⁴ I. e., the services falling with Annex IB, either in one of the specific categories or under the non-exhaustive category 27 "other services".

⁴⁵ Observance of the provisions on technical specifications and an obligation to inform the Commission of contract awards. In the words of the 20th Recital, the reason for the latter obligation was that "contracts for other services need to be monitored for a certain period before a decision is taken on the full application of this Directive".

- ⁴⁶ Service contracts (typically for engineering or architectural services) relating the same categories of works as those covered by the corresponding provision in Directive 89/440/EEC, cf. footnote 22 above.
- ⁴⁷ Defined as national procedures “which enable the contracting authority to acquire, mainly in the fields of area planning, town planning, architecture and civil engineering, or data processing, a plan or design selected by a jury after being put out to competition with or without the award of prizes”.
- ⁴⁸ COM(90)72; OJ C23, 31.1.1993, p.1.
- ⁴⁹ OJ L199, 9.8.1993, p. 54.
- ⁵⁰ OJ L199, 9.8.1993, p. 1.
- ⁵¹ OJ L 199, 9.8.1993, p. 84
- ⁵² The provisions governing works and supplies contracts were left substantially unchanged compared to the provisions of Directive 90/531/EEC.
- ⁵³ There were small differences such as the absence of an exclusion for central bank services from the scope of Directive 93/38/EEC.
- ⁵⁴ These thresholds were also applicable to design contests, for which the provisions were substantially the same as under Directive 92/50/EEC.
- ⁵⁵ The so-called “intra-group” exclusion, cf. Article 13 of Directive 93/38/EEC.
- ⁵⁶ European Parliament and Council Directive 97/52/EC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively, OJ L 328, 28.11.1997, p. 1.
- ⁵⁷ Directive 98/4/EC of the European Parliament and of the Council of 16 February 1998 amending Directive 93/38/EEC coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ L 101, 1.4.1998, p. 1
- ⁵⁸ Directive 92/50/EEC thus counted three different thresholds, 200,000 ECU for the non-priority services listed in its Annex IB and the few priority services not covered by the GPA (R&D services and certain telecommunications services); the equivalent amount in ECU of 200,000 Special Drawing Rights (SDR) for all other priority services when awarded by a contracting authority which was not a central State authority and a third threshold of the equivalent amount in ECU of 130,000 SDR for the same priority services when awarded by a central state authority. Design contests followed the same thresholds. SDR is a reserve asset, introduced by the International Monetary Fund, fixed as a basket of currencies, and used to establish the internationally applicable thresholds in the framework of the GPA.
- ⁵⁹ Directive 93/36/EC now contained two different thresholds, namely, first, the equivalent amount in ECU of 130,000 SDR for contracts awarded by central state authorities and for contracts in the field of defence concerning certain products listed exhaustively in a specific annex and, secondly, a general threshold of the equivalent amount in ECU of 200,000 SDR for other contracts in the field of defence and supply contracts awarded by other contracting authorities than central state authorities.
- ⁶⁰ Directive 93/37/EEC now counted two different thresholds, namely 5 million ECU for works concessions contracts, subsidised works contracts and work contracts awarded by concessionaires who are not themselves contracting authorities; for all other works contracts the applicable threshold was now set at the equivalent amount in ECU of 5 million SDR.
- ⁶¹ The situation was particular complex in the context of the Utilities Directive, 93/38/EEC, given that the GPA applied to certain of the sectors covered by the Directive – this was the case for drinking water, electricity, urban transport, ports and airports – but not to other sectors, equally within the Directive’s scope (telecommunications, gas, heat, oil and natural gas, other solid fuels and railway transports). The resulting system meant having an impressive list of different thresholds: 5 million ECU and 600,000 ECU for, respectively, works contracts and supplies and services contracts in the telecommunications sector; 5 million ECU and 400,000 ECU for, respectively, works contracts and supplies and services contracts awarded in the other sectors not covered by the GPA and, finally, for the sectors covered by the GPA, the equivalent amount in ECU of 5 million SDRs for works contracts; the equivalent amount in ECU of 400,000 SDRs for supplies contracts and for the priority services covered by the GPA as well as a threshold of 400,000 ECU in respect of all other services contracts awarded by contracting entities in the GPA-covered sectors. The thresholds for design contest followed those applicable to services contracts.
- ⁶² Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ L 134, 30.4.2004, p. 1. Directive as last amended by Commission Regulation (EC) N°1177/2009 of 30 November 2009 amending Directives 2004/17/EC, 2004/18/EC and 2009/81/EC of the European Parliament and of the Council in respect of their application thresholds for the procedures for the award of contracts, OJ L 314, 1.12.2009, p. 64.

- ⁶³ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134, 30.4.2004, p. 114. Directive as last amended by Commission Regulation (EC) N°1177/2009.
- ⁶⁴ Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC, OJ L 216, 20.8.2009, p. 76. Directive as last amended by Commission Regulation (EC) N°1177/2009.
- ⁶⁵ Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, OJ L 395, 30.12.1989, p. 33.
- ⁶⁶ Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ L 76, 23.3.1992, p. 14.
- ⁶⁷ Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, OJ L 335, 20.12.2007, p. 31.
- ⁶⁸ See website at www.bbg.gv.at
- ⁶⁹ See website at www.ski.dk.
- ⁷⁰ See website at www.riigihangetekeskus.ee
- ⁷¹ See website at www.kuntahankinnat.fi
- ⁷² See www.bescha.bund.de.
- ⁷³ See website at www.consip.it. The company name was originally an acronym for "Concessionaria Servizi Informativi Pubblici".
- ⁷⁴ Ministero dell'economia e delle finanze, Programma di razionalizzazione degli acquisti di beni e servizi per le Pubbliche Amministrazioni Relazione al Parlamento per l'anno 2009, Rome 2010, page 31. http://www.dag.mef.gov.it/programma_di_razionalizzazione_degli_acquisti_nella_p.a/documenti/Relazione_2009.pdf and for more detail see the Rilevazione dei prezzi relativi a beni e servizi per le pubbliche amministrazioni -Edizione 2009, at the same site.
- ⁷⁵ See website at <http://www.vraa.gov.lv>
- ⁷⁶ See website at <http://www.cpva.lt>
- ⁷⁷ See <http://www.anskaffelser.no/e-handel/ehandelsplattform/ehandelsplattformen-i-tall>
- ⁷⁸ See website at <http://catalogopatrimonio.meh.es>
- ⁷⁹ See website at <http://contrataciondelestado.es>
- ⁸⁰ Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ L 134, 30.4.2004, p. 1. Directive as last amended by Commission Regulation (EC) N°1177/2009 of 30 November 2009 amending Directives 2004/17/EC, 2004/18/EC and 2009/81/EC of the European Parliament and of the Council in respect of their application thresholds for the procedures for the award of contracts, OJ L 314, 1.12.2009, p. 64
- ⁸¹ "Taking Stock of the Utilities Procurement" – Feb 2011 - a study by Europe Economics
- ⁸² Europe Economics, Taking stock of utilities procurement: a report for DG Internal Market, February 2011.
- ⁸³ Ibid, table 2.1 page 7
- ⁸⁴ It can be noted that while telecoms liberalisation has changed market structures within national markets, it has not yet resulted in an integrated single market, where competition works across borders. Many telecoms services continue to be characterised by very pronounced tariff differences between EU MS.
- ⁸⁵ EU Energy Market in Gas and Electricity – State of Play and Implementation; Matthias Altmann, Ludwig-Bölkow-Systemtechnik and Antton Rönholm, Centre for European Policy Studies CEPS, European Parliament, ITRE Committee, Brussels, 24 June 2010. Available at: http://www.europarl.europa.eu/document/activities/cont/201006/20100625ATT76971/20100625ATT76971_EN.pdf
- ⁸⁶ Commission Staff Working Document: Technical Annex to the Communication from the Commission to the Council and the European Parliament Report on progress in creating the internal gas and electricity market, SEC(2010)251 final of 11.3.2010.
- ⁸⁷ Note that Luxembourg and Finland are exempt from transposition as they do not have any potential hydrocarbon resources. Denmark is considered to be in a special situation due to the fact that it is obliged to enter into negotiations on a possible continuation of the activities after the expiry of the concession, issued in 1962. Due to this, Denmark is covered by a derogation in respect of activities in certain areas for which the concession expires on 8 July 2012.