

European Public Procurement

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EIPA

European
Institute of
Public
Administration



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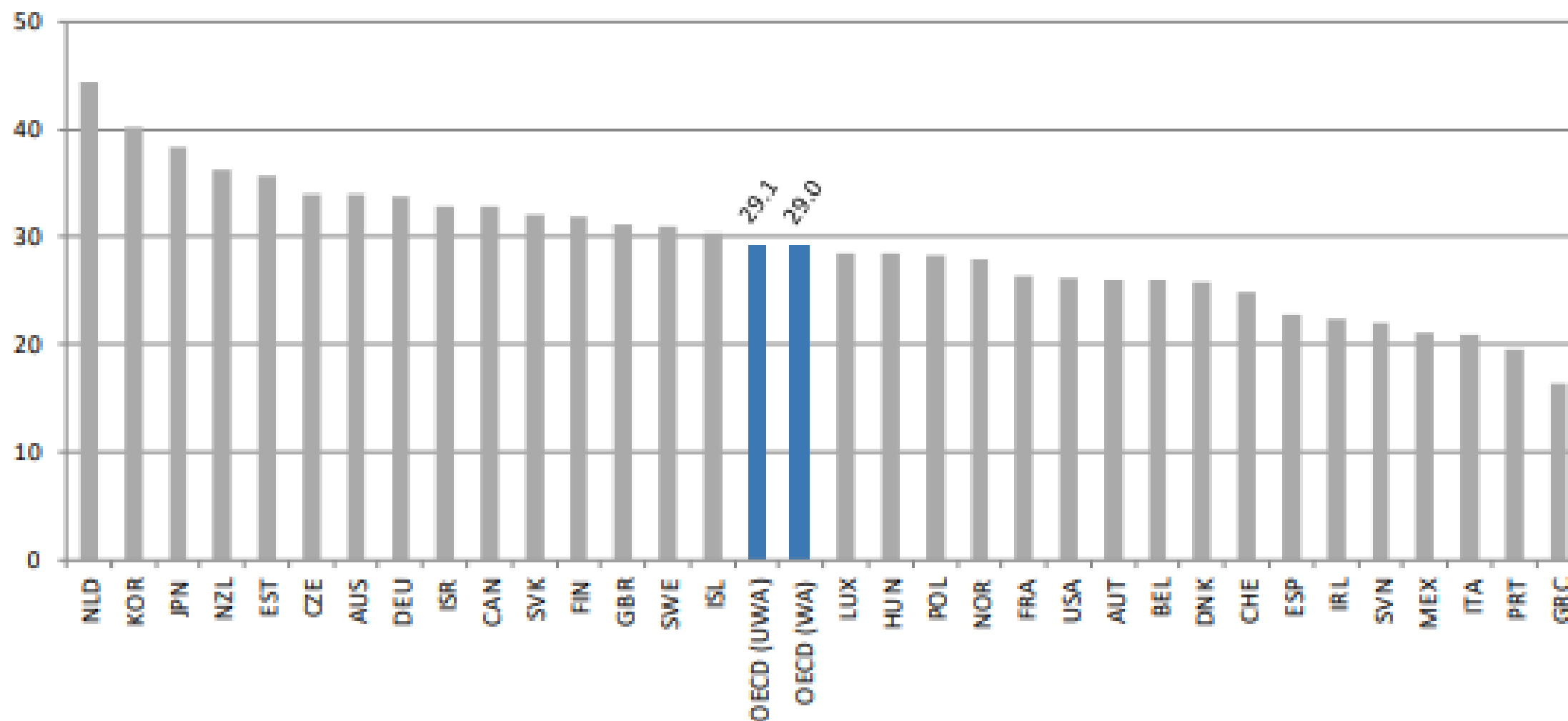
General considerations

Why is PP so important?

Every year, over 250 000 public authorities in the EU spend **around 14% of GDP (around €2 trillion per year)** on the purchase of services, works and supplies.

In many sectors such as energy, transport, waste management, social protection and the provision of health or education services, public authorities are the principal buyers.

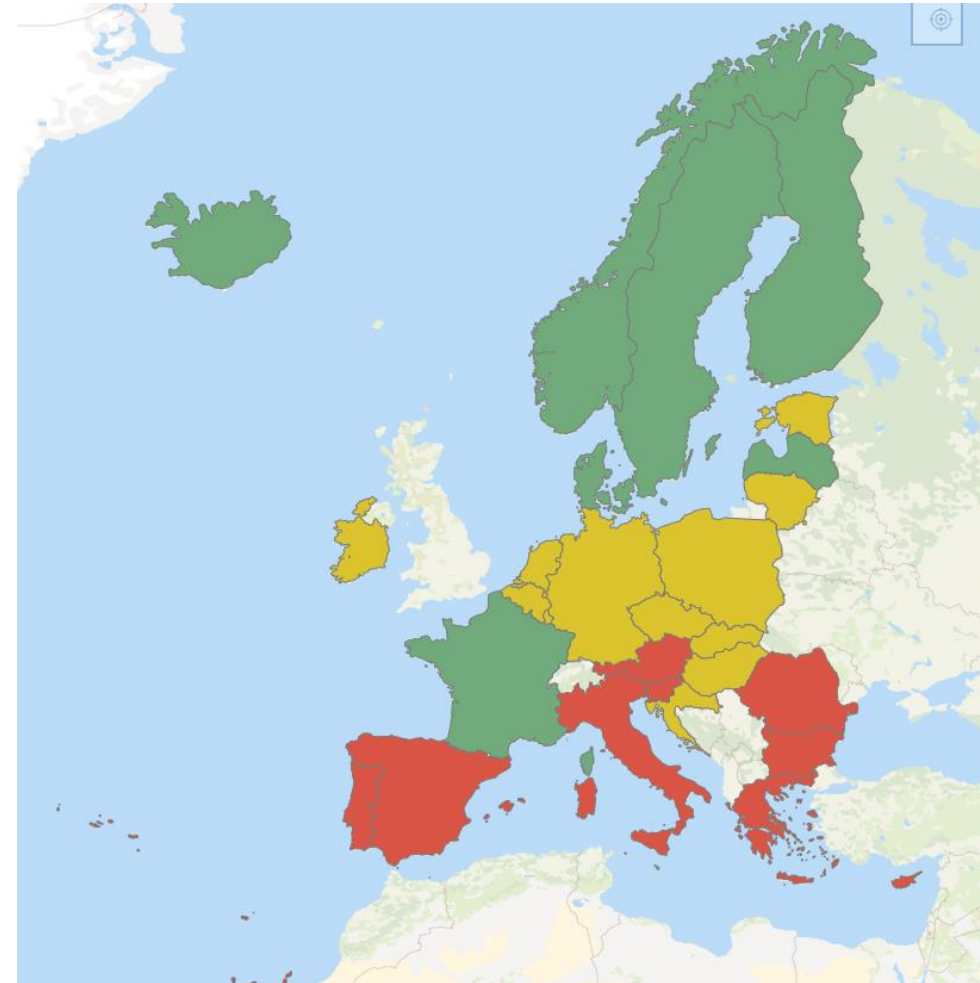
Figure 1. General government procurement as percentage of general government expenditure



Source: OECD National Accounts Statistics (database)

Internal Market Scoreboard 2020: Public Procurement

Indicator	Green	Red
[1] Single bidder	≤ 10%	> 20%
[2] No calls for bids	≤ 5%	≥ 10%
[3] Publication rate	> 5%	< 2.5%
[4] Cooperative procurement	≥ 10%	< 10%
[5] Award criteria	≤ 80%	> 80%
[6] Decision speed	≤ 120 days	> 120 days
[7] SME contractors	> 60%	< 45%
[8] SME bids	> 80%	< 60%
[9] Procedures divided into lots	> 40%	< 25%
[10] Missing calls for bids	≤ 3%	> 3%
[11] Missing seller registration numbers	≤ 3%	> 3%
[12] Missing buyer registration numbers	≤ 3%	> 3%







EUROPEAN COMMISSION
EUROPEAN ANTI-FRAUD OFFICE (OLAF)

Directorate D : Policy
Unit D.2 : Fraud Prevention, Reporting and Analysis

Fraud in Public Procurement

A collection of Red Flags and Best Practices

Developed by a working group of Member States' experts, directed and coordinated by the Fraud Prevention, Reporting and Analysis unit in the European Anti-Fraud Office (OLAF)

Integrity risk along the PP cycle

Pre tendering Phase

Needs assessment and market analysis

- Lack of adequate needs assessment
- Influence of external actors on officials decisions
- Informal agreement on contract

Planning and budgeting

- Poor procurement planning
- Procurement not aligned with overall investment decision-making process
- Failure to budget realistically or efficiency in the budget

Development of specifications/ requirements

- Technical specifications are tailored for a specific company
- Selection criteria is not objectively defined and not established in advance
- Requesting unnecessary samples of goods and services
- Buying information on the project specifications.

Choice of procurement procedure

- Lack of proper justification for the use of non-competitive procedures
- Abuse of non-competitive procedures on the basis of legal exceptions: contract splitting, abuse of extreme urgency, non-supported modifications

Integrity risk along the PP cycle

Tendering Phase

Request for proposal/bid

- Absence of public notice for the invitation to bid
- Evaluation and award criteria are not announced
- Procurement information isn't disclosed and isn't made public

Bid submission

Lack of competition or cases of collusive bidding (cover bidding, bid suppression, bid rotation, market allocation)

Bid evaluation

- Conflict of interest and corruption in the evaluation process through:
 - Familiarity with bidders over time
 - Personal interests such as gifts or future/additional employment
 - No effective implementation of the “four eyes-principle”

Contract award

- Vendors fail to disclose accurate cost or pricing data in their price proposals, resulting in an increased contract price (i.e. invoice mark-ups, channel stuffing)
- Conflict of interest and corruption in the approval process (i.e. no effective separation of financial, contractual and project authorities)
- Lack of access to records on the procedure

Integrity risk along the PP cycle

Post award Phase

Contract management/ performance

- Abuses of the supplier in performing the contract, in particular in relation to its quality, price and timing:
 - Substantial change in contract conditions to allow more time and/or higher prices for the bidder
 - Product substitution or sub-standard work or service not meeting contract specifications
 - Theft of new assets before delivery to end-user or before being recorded
 - Deficient supervision from public officials and/or collusion between contractors and supervising officials
 - Subcontractors and partners chosen in an on-transparent way or not kept accountable

Order and payment

- Deficient separation of financial duties and/or lack of supervision of public officials leading to:
 - False accounting and cost misallocation or cost migration between contracts
 - Late payments of invoices
- False or duplicate invoicing for good and services not supplied and for interim payment in advance entitlement

Pre-tendering phase red flags

PRE-TENDERING PHASE

CASE EXAMPLE

Conflict of interest

A public authority signed a contract with a company about consultation services to prepare the technical specification for an IT public procurement. These consultation services concerned for questions during public procurement and evaluation of tenders submitted. Seventeen potential tenderers consulted the tender documentation; however, only one of them participated, most probably due to the discriminatory requirements in the tender documentation. The winner was a company where the chairman of the consultation company gained income in previous years.

After consultations with the Procurement Monitoring Bureau and lawyers, it was concluded that there was enough legal basis and documents to prove the conflict of interest. As a consequence, financial correction has been applied.

CASE EXAMPLE

A public authority made a contract with an IT company for building a computer system. As the contract amount was just under the threshold for public procurement, the competitive bidding procedures were not followed. Later, the same company offered to install additional features (system archive) for additional costs that exceeded the initial contract amount several times. Moreover, no public procurement tender was organised in this case, since the technical specifications of the installed computer systems were such that no other company could provide that capability.

PRE-TENDERING PHASE**CASE EXAMPLE**

A hospital carried out a tender to purchase additional highly specialised equipment together with installation. One of the requirements was that the equipment had to be of the same brand as the existing equipment in the hospital. Because of the restriction, only one bidder could submit a bid. In addition to that, the same bidder carried out also the construction works needed for the installation.

In your opinion, the red flag here relates to

- a) Conflict of interest
- b) Choice of procedure type
- c) Manipulation of the procedure

TENDERING PHASE

CASE EXAMPLE

In a construction project, the contracting authority asked bidders to submit a list of previously completed projects in a specified time period as part of the required qualifications. Later, it turned out that although the winning bidder had submitted the list, none of the projects were successfully completed during the specified time period and therefore, the bidder should have been disqualified from the tender. Moreover, the signed contract differed significantly from the contract advertised during the tender in terms of volume, deadlines and objects. Finally, the investigation revealed that the contracting authority had accepted the use of some inferior materials that significantly shortened the life-cycle of the project. The price of the materials used was ten times lower than the material specified in the contract, although the contracting authority still paid the full price to the contractor.

POST-TENDERING PHASE

CASE EXAMPLE

The constructor presented works and documents regarding the execution of works which, in fact, were not carried out or were executed but by using materials of inferior quality. The works were approved by the site supervisor in exchange of a bribe, who falsely recorded that the quantities and/or the quality of materials used were the sufficient ones. In this way, the constructor was paid excessively by the contractor and the part the payment was offered to the site supervisor.

Investigation into public procurement worth €1.6 million in Lithuania

Published on 8 June 2022

The European Public Prosecutor's Office (EPPO) in Lithuania is leading a pre-trial investigation into the possible lack of transparency in an EU-funded public procurement for street lighting in the municipality of Šiauliai. The investigation is carried out by the Special Investigation Service (STT).

The director of a private company, as a member of the public procurement committee organised by the municipality of Šiauliai, is suspected of having created exclusive conditions for another private company participating in the tender for the installation of street lighting. Evidence suggests that the suspect may have enabled the company to win a public procurement contract worth around €1.6 million funded by the European Union.

Until today, notifications of suspicion have been served to two persons. The director of the private company and member of the public procurement committee has been served with the notification of suspicion notices for abuse of office, while the representative of the company that participated in the tender procedure has been served with the notifications of suspicion for incitement to commit abuse of office.

Planned procedural actions were carried out this week, including searches at Šiauliai Municipality, at the suspects' homes and workplaces.

This pre-trial investigation is being carried out by officers of the Central Investigation Board and Šiauliai Board of the Special Investigation Service.

So again, WHY is Public Procurement (PP) so important?



Public Procurement is one of the most important economic factors in European Member States: An estimated 16% of the European GDP

- Public Procurement law is highly dynamic and increasingly determined by European Directives
- Lack of tendering: Among the 3 most frequent errors in previous SF period!

EMPHASISING that the efficiency of public procurement will have an important effect on the timely, adequate, and fit for the future public investments that support the **recovery**; and UNDERLYING that the efficiency of public procurement will therefore constitute an important success factor for the recovery, growth, and creation of fair jobs, thus strengthening the economic and social resilience of the Union, the protection of its citizens' health, and of the environment;

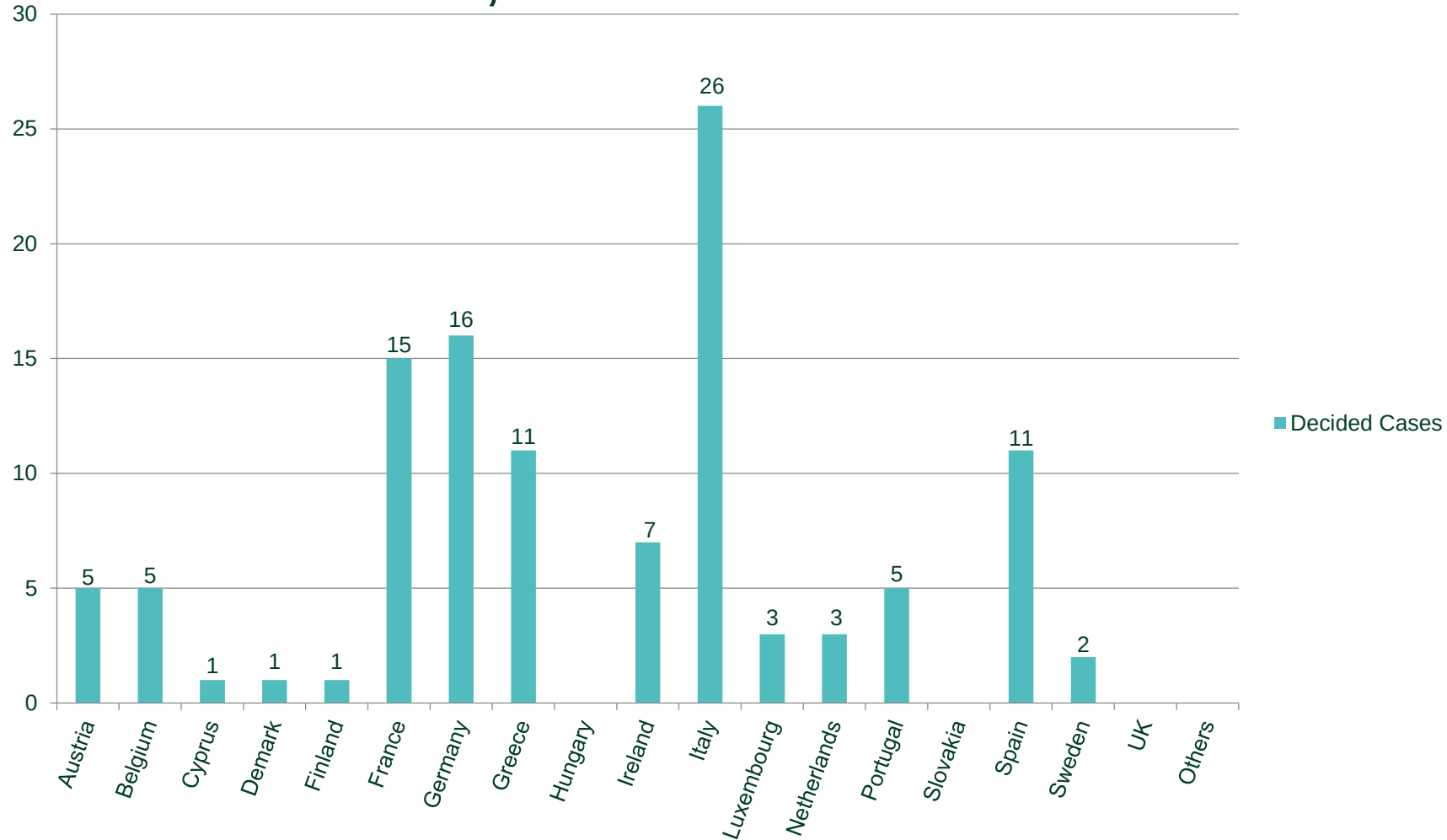
Council Conclusions

Public Investment through Public Procurement: Sustainable Recovery and Reboosting of a Resilient EU Economy
(2020/C 412 I/01)

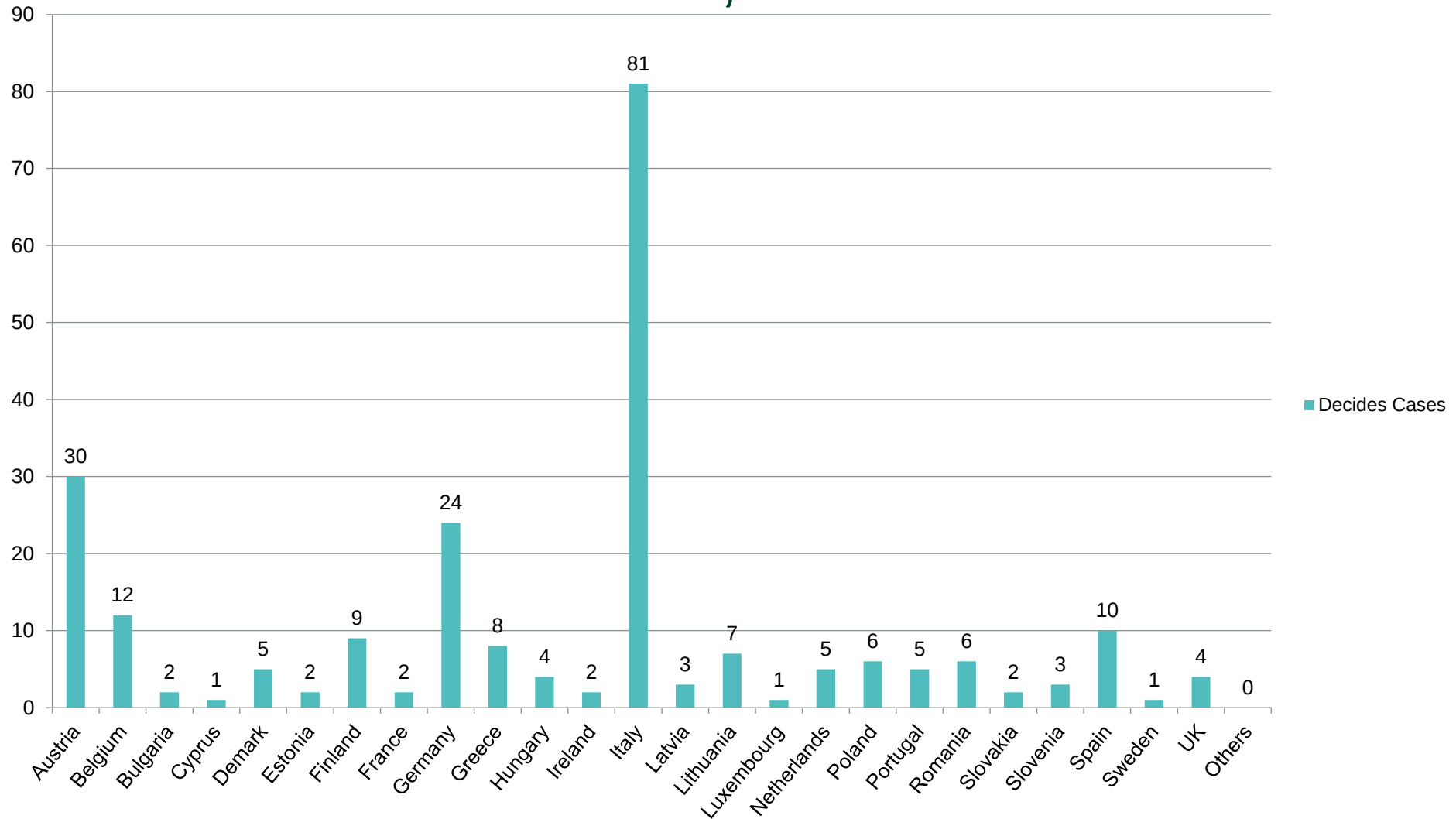
Facts on procurement

- procurement represents about 13% of EU GDP, about Euro 2050 billion in 2017 (excluding utilities and some concessions)
- value of tenders published at EU level (only the public sector directive) was about 437 billion in 2017
- in 2017 contracting authorities and entities published public contracts worth 545 billion Euro (all directives)
- publication in the Official Journal (OJ) in 24 languages; Tenders Electronic Daily (TED)
- through public procurement, Member States national budgets can save between 15-30 billion Euro per year
- direct cross-border procurement was relatively low, 2.4% of the number of contract awards but indirect cross-border procurement was considerably higher at 20.2% of contract awards with a value below EUR200 million (between 2016 and 2019)

COMMISSION PROCUREMENT CASES AGAINST MEMBER STATES, TO 12 MAY 2023

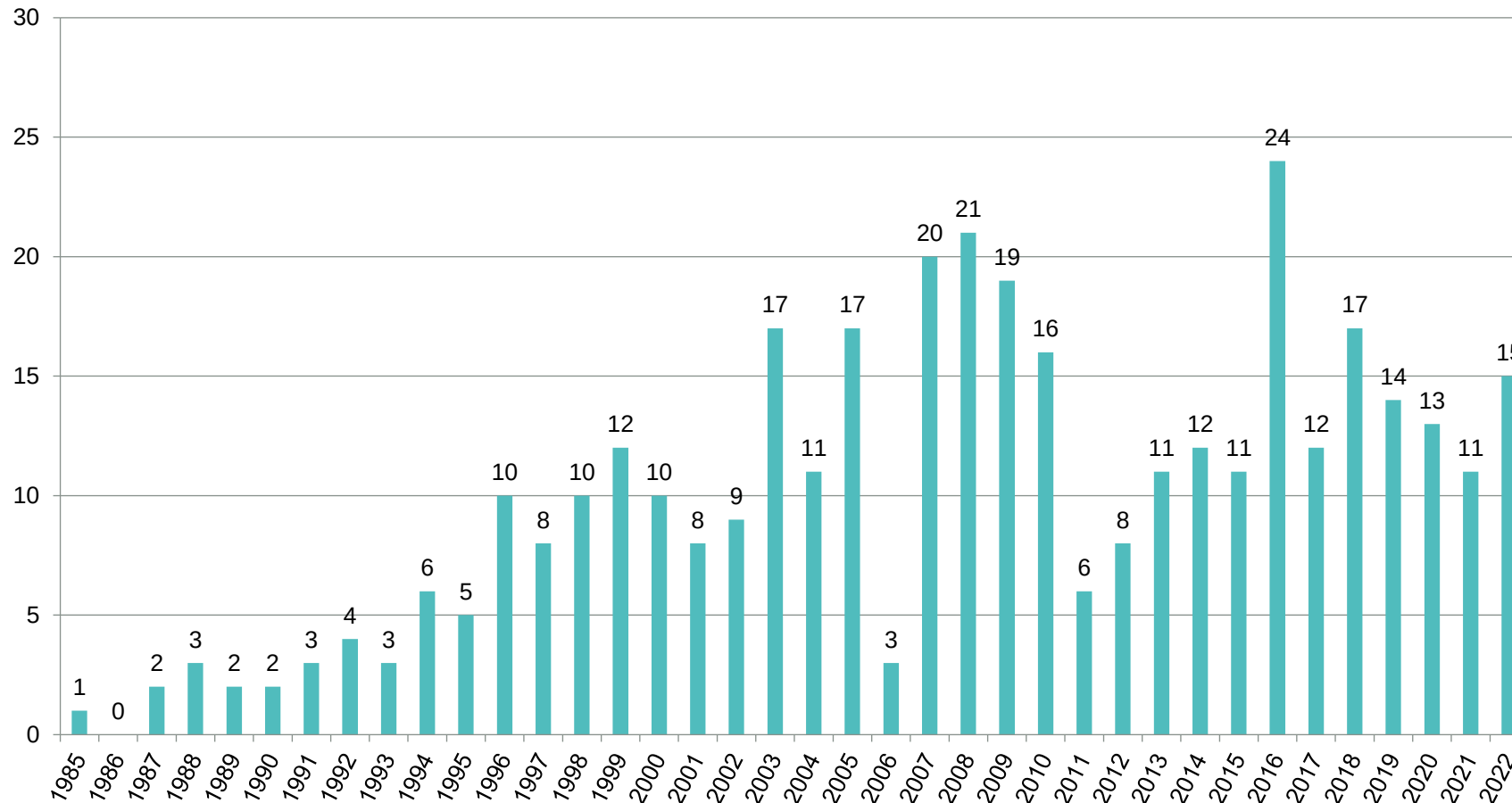


PROCUREMENT-RELATED REFERENCES TO CJEU FROM NATIONAL COURTS, TO 12 MAY 2023



TOTAL NUMBER OF PROCUREMENT CASES DECIDED BY ECJ PER ANNUM, 1985-2022

Decided Cases



What is the EU law objective of PP?

To create **a level playing field for businesses across Europe**, EU law sets out minimum harmonised public procurement rules.

These govern the way public authorities and certain public utility operators purchase goods, works and services.

The European Commission's public procurement strategy is designed to improve EU public procurement practices in a collaborative manner by working with public authorities and other stakeholders.

General objectives of PP in the EU

1. open up public procurement to competition
2. buy goods and services of a better quality and a better price, value for money
3. anti-corruption tool
4. tool for stimulating innovation
5. tool for stimulating sustainable development
6. **establishment of a single market**

Principles in the Treaty applying to Public Procurement

TREATY PRINCIPLES:

- free movement of goods - Article 34 TFEU
- freedom of establishment - Article 49 TFEU
- freedom to provide services - Article 56 TFEU

PRINCIPLES DERIVING FROM TREATY PROVISIONS:

- non-discrimination
- equal treatment
- transparency
- proportionality
- mutual recognition

Legal framework

International Agreement:

- WTO: Government Procurement Agreement (GPA)
- EU Treaties: no definition
- Primary EU law (Internal Market, fundamental principles, case-law)
- Secondary EU law: Procurement directives, case-law
- Agreements with third countries
- European Economic Area (EEA)

National law

Sub-national

EU public procurement rules

Procurement Directive 2014/24/EU
for contracting authorities
- supplies, services, works

Utilities Directive 2014/25/EU
for contracting entities
- supplies, services, works

Concessions Directive 2014/23/EU
for contracting authorities and entities
- works and services concessions
- remedies referring to remedies directives

Directive 2014/55/EU of 16 April 2014 on
electronic invoicing in Public Procurement

Remedies Directives
(need to refer to concessions directive)
- 89/665/EEC
- 92/13/EEC
- amending remedies directive 2007/66/EC

Defence and Security Procurement Directive 2009/81/EC
for contracting authorities and entities
- specific remedies

Third Country regulation?

Specific rules

Transport Regulation 1370/2007

Environmental / energy directives

PPI & PCP

The rules - remedies directives

- Procurement Directives set common principles and procedures across the Single Market
- Their objectives could not be entirely achieved if economic operators were unable to ensure that their rights were observed across the EU through access to clear, rapid and effective review procedures
- The Remedies Directives are at the core of public procurement legislation as they allow bidders to enforce their substantive right

By 18 April 2016, EU countries had to transpose the following three directives into national law

- [Directive 2014/24/EU on public procurement](#)
- [Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors](#)
- [Directive 2014/23/EU on the award of concession contracts](#)

These new rules simplify public procurement procedures and make them more flexible. This will benefit public purchasers and businesses, particularly SMEs.

DEFINITION OF CONTRACTING AUTHORITY

The procuring body is a 'contracting authority' as defined in the Directive (except for entities operating in the water, energy, transport and postal services sectors):

'Contracting authority' means the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law.

OR Private bodies in certain services connected with building works AND subsidised more than 50% (rarely relevant to ETC)

Definition of contracting authorities

Article 2 (1(1- 4)), Recital 10

- the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law
- central government authorities (Annex I)
- sub-central authorities (not central)

Definition of bodies governed by public law

3 **cumulative** criteria:

- established for... meeting *needs in the general interest*, not having an industrial or commercial character
- having *legal personality*; and
- *financed, or management supervision or board appointed* for the most part, by the *State, regional, local, other bodies*

Considerable case-law concerning these concepts:

...meeting needs in the general interest

...management supervision or financing by the State

Definition of public contracts

Article 2 (1(5-9)), Recitals 8-9

Concluded in writing; for pecuniary interest; for execution of works, the supply of products or provision of services

Which contracts are affected?

- contracts which exceed certain financial thresholds
- contracts which are not excluded (Art. 7-12)

Contracts below the relevant threshold level:

fundamental principles apply, transparency (degree of advertising), cross-border interest (case-law)

Commission interpretative communication, contract awards not or not fully subject to the provisions of procurement directives, OJ C179 1.8. 2006

Judgment of the General Court of 20 May 2010 - Germany v Commission (Case T-258/06)

Types of public contracts

*Dir 2014/24/EU

Works contracts

Public contracts having as their objective either the execution, or both the design and execution, of works, for example building or civil engineering works such as a road or sewage plant. (detailed list in Annex II of the Dir)

“work” means outcome of building or civil engineering works ... sufficient in itself to fulfil an economic or technical function

Supply contracts

Public contracts having as their object the purchase, lease, rental or hire-purchase with or without option to buy, of products such as computers, vehicles etc. “A public supply contract may include as an incidental matter, siting and installation operations”

Services

Public contracts other than public works or supply contracts having as their object the provision of services such as consultancy, training or cleaning services. (detailed list in Annex XIV of the Dir)

Thresholds and estimated value

Articles 4-6,13, Recitals 18-20

Thresholds as of 1 January 2022 (OJ L279 and OJ C370, 31.Oct 2019)

EUR 140 000

- public supply/service contracts and design contests - central government authorities
- public supply contracts for Annex III list of products awarded by c.a. in the field of defence

EUR 215 000

- public supply/service contracts and design contests - sub-central authorities
- subsidised service contracts (Art. 13)
- public supply contracts for products not covered in Annex III awarded by central government authorities in the field of defence

EUR 750 000*

- public service contracts for social and other specific services listed in Annex XIV

EUR 5 382 000

- public works contracts
- subsidised works contracts (Art. 13)

*** This threshold will not be revised**

Thresholds are updated every two years
MS may also set lower thresholds.

Procedures

- **Open** procedure (Art. 27) (one-stage procedure, all potential suppliers / contractors / service providers)
- **Restricted** procedure (Art. 28) (only selected potential suppliers/contractors/service providers, two-stage procedure) (minimum of 5 must be invited to tender)

Possibility for sub-central authorities to use PIN (Prior Information Notice) as a call for competition (Art. 26(5))

- **Competitive procedure with negotiation** (Art. 29) only selected potential suppliers/contractors/service providers, two-stage procedure) (minimum of 3 must be invited to negotiate)

Possibility for sub-central authorities to use PIN as a call for competition (Art. 26(5))

- **Competitive dialogue** (Art. 30) contracting authority enters into dialogue with bidders following a request to participate in response to a contract notice (minimum of 3 must be invited to the dialogue)
- **Innovation partnership** (Art. 31) contracting authority invites bidder/bidders following a request to participate in response to a contract notice
- **Negotiated procedure without prior publication** (Art. 32) (direct negotiation with chosen suppliers/contractors/service providers; only in those cases as provided for in the directive; burden of proof on contracting authority; justification)

Selection

Suppliers, contractors or service providers must meet specific objective criteria:

- Exclusion grounds> not excluded in accordance with Article 57 (mandatory and optional exclusions, self-cleaning)
- tenderer meets selection criteria (Article 58, Annex XI, XII)
 - suitability to pursue the professional activity
 - economic and financial standing
 - technical and professional ability

Table 9. Examples of selection criteria

Objective	Requirement for economic operators
Assess suitability to pursue the professional activity	Be enrolled in one of the official professional or trade registers kept in the relevant Member State
	Official authorisation to perform a certain type of service (e.g. civil engineers, architects)
	Valid professional insurance certificate (this can also be requested at the time of signing the contract)
Assess economic and financial capacity	Minimum yearly turnover, which must not exceed twice the estimated contract value (e.g. EUR 2 million where the contract value is EUR 1 million per year), including a particular minimum turnover in the area covered by the contract
	Information on annual accounts showing the ratio between assets and liabilities (e.g. a minimum solvency level of 25 % or more)
	Appropriate level of professional risk indemnity insurance
Assess technical and professional ability	Appropriate human resources (e.g. relevant qualifications for key staff) and technical resources (e.g. specific equipment) to carry out the contract to the required quality standard
	Experience of the contractor itself — not of individual staff members — to carry out the contract to an appropriate quality standard (e.g. references from previous contracts within the last three years, including at least two from similar contracts)
	The necessary skills, efficiency, experience and reliability to provide the service or to execute the installation or the work

European Single Procurement Document

Commission Implementing Reg. (EU) 2016/7 of 5 January 2016
establishing the standard form for the European Single
Procurement Document (OJEU L3 of 6.1.2016)

- ANNEX 2 Standard Form for the ESPD:
 - Part I. Information concerning the procurement procedure and the contracting authority or contracting entity
 - Part II. Information concerning the economic operator
 - Part III. Exclusion criteria
 - Part IV. Selection criteria
 - Part V. Reduction of the number of qualified candidates
 - Part VI. Concluding statements
- at the latest from 18 April 2016
- where economic operator relies on the capacities of other entities, ESPD needs to be filled in by such entities
- subcontractors ESPD, if required (Art. 71 (5) third subpar.)

European Single Procurement Document (ESPD) Article 59, Recitals 84-85

- updated self-declaration by economic operator (replacing certificates, concerning grounds for exclusion (Art. 57), meets relevant selection criteria (Art. 58) and meets criteria, if applicable, as set out in Art. 65 (reduction of number of otherwise qualified candidates to be invited to participate)
- ESPD should also provide the relevant information in respect of entities on whose capacities an economic operator relies; subcontractors if required (Art. 71 (5) third subpar.)
- ESPD shall identify the public authority/third party responsible for establishing the supporting documents
- if c.a. can obtain documents from a database - internet address database
- EC established a standard form, January 2016, needs to be used since 18.4.2016
- ESPD provided exclusively in electronic form since 19 April 2018
- eESPD online service: <https://ec.europa.eu/growth/tools-databases/espd/filter?lang=en> no longer provided
- EC review of practical application of ESPD by 18.4.2017

Award criteria (1)

- sole award criterion: most economically advantageous tender (meat)
on the basis of :
 - Price only, or
 - Cost only, using a cost-effectiveness approach such as life-cycle costing, or
 - the best price-quality ratio (BPQR) to be assessed on the basis of criteria linked to the subject matter of the contract
- choice for the contracting authorities
- M.S. can exclude/restrict the use of price or cost only as sole award criterion

Award criteria (2)

- non-exhaustive list of award criteria mentioned in the directive, for example:
 - quality, technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions
 - organisation, qualification and experience of staff assigned to performing the contract where this can significantly impact the level of performance of the contract
 - after-sales services...delivery conditions

Award criteria (3)

- award criteria must be linked to the subject-matter of the contract
- award criteria shall be considered to be linked to the subject-matter...where they relate to the works, supplies or services to be provided under the contract in any respect and at any stage of their life cycle... (Art. 67 (3))
- shall not have the effect of conferring an unrestricted freedom of choice on the contracting authority... (Art. 67 (4))

Award criteria (4)

- the contracting authority shall state in the procurement documents the relative weighting which it gives to each of the criteria (range)
- if not possible: descending order of importance (justified cases, reasons!)

Award decision and conclusion of contract

- contracting authority is obliged to inform tenderers of its award decision prior to conclusion of contract
- standstill period between award decision and signature of the contract
- decision to award a contract must in all cases be open to review procedures prior to the conclusion of the contract



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