



**Evaluation of Public
Procurement Directives**

Markt/2004/10/D

Final Report

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EXECUTIVE SUMMARY

Introduction

- 1 This report by Europe Economics is the final output of project MARKET/2004/10/D, the purpose of which is to evaluate the effects in the 15 Member States that were subject to the EU Procurement Directives 1992–2003 of the introduction of those Directives. It is part of the European Commission's still relatively new policy of systematically evaluating the effects of its interventions in the EU economy, in order both to increase accountability and to help improve the basis for future policy-making.
- 2 The study commenced at the beginning of 2005. It required an economic analysis of the ways in which the Directives are likely to have affected the markets for procurement goods and services, and involved a legal review of the implementation of the Directives and new empirical research comprising 100 in-depth interviews of awarding authorities and suppliers and an electronic survey administered by the Commission Services.
- 3 Although one could argue that 100 in-depth interviews are not nearly enough to cover the full range of different conditions of awarding authorities and suppliers in 15 Member States, we believe that the results of this interview series nonetheless provide a valid basis for evaluation. Each Interview was conducted by a highly trained economist fully briefed on the legal background and using a carefully prepared interview structure. We obtained an excellent level of response in the interviews. The results fitted into a coherent pattern, as the report will discuss.
- 4 The results of the online surveys were not equally satisfactory. Despite considerable efforts by ourselves and the Commission services it did not prove possible to obtain an equally representative email address list for all Member States. Moreover the response rate as is common in online surveys was small as a percentage of emails sent out and not evenly balanced between Member States. On the other hand those who did respond were able to provide some detailed and specific information. The results have been interpreted in the light of these factors.
- 5 The new empirical research reported here has significantly added to the knowledge previously available on the effects of the EU public procurement Directives. .

10 Key Questions

Question 1: Compliance

How have contracting entities in the Member States complied with the administrative procedures laid down by the Directives?

- 6 The data basis for an assessment of compliance is incomplete and the scope of the present study did not allow for the creation of a new primary dataset which might have made it possible for firm conclusions to be drawn. However, a number of observations can be made:



(a) Overall compliance has improved significantly. In 1995 only 8 per cent of total public procurement (including procurement not subject to the Directives) was published in the OJEU, while in recent years the fraction was between 16 and 17 per cent (and even 20 per cent in the year 2003).

(b) On the other hand we think (even if we cannot prove it) that a significant amount of non-compliance still remains and is not uniform over the different Member States. The publication rate (and hence compliance) may be worse than average in the Netherlands (where a study had found that in 2002, authorities subject to the Directives publish only one third of the amount they should have published – although in fairness one should mention that the Netherlands are the only Member State to have provided an apparently reliable database on which to judge compliance) and in Germany where publication rates appear similarly low. Countries with better compliance rates probably include Spain, the UK and with some caveats Greece.¹

(c) We found that countries with a national legal system that is well integrated with the Directives have higher and more strongly growing publication rates than others.

Question 2: Costs of Compliance

What are the actual operational costs of complying with the Directives, for awarding authorities and suppliers respectively, compared with the cost of complying with other national legislation applicable in individual Member States, (for below threshold contracts for example)?

7 We found that as a result of the Directives the administrative costs of the tendering process have increased for awarding authorities and also that suppliers' costs of bidding have increased.

(a) For awarding authorities the factors increasing costs include the legal rights for bidders that were introduced by the Directives. The authorities subject to the Directives are obliged significantly to increase the accuracy and volume of their documentation and the formality of the process (for example, spelling out their specifications in more detail) in order to reduce the risk of legal challenge. There are indeed complaints that in order to comply with the Directives the authorities have to follow certain procedures even in cases where they believe that the procedures are not efficient. Overall the administrative costs for awarding authorities have gone up by 20-40 per cent (on average in our sample by 35 per cent). The additional cost is a substantial burden in relation to small contracts but a modest additional cost for middle sized and large contracts (meaning for contracts above the thresholds). For these contracts we estimate that overall the Directives have added to the administrative costs of the authorities by an amount equivalent to about 0.2 per cent of the contract values.

¹ As explained in more detail in the report the data basis for Greece is not as reliable as in other Member States.



- (b) For suppliers administrative costs have also increased due to the higher formality of the process which increases the need for form filling and also requires more detailed proposals. Administrative costs for suppliers in our sample rose by 30-50 per cent (on average by 42 per cent). Administrative costs rose less than proportionally with contract size so that the extra burden is greatest for small contracts. Overall the Directives added to the administrative costs of the suppliers an amount equivalent to about 0.2 per cent of the average contract value. Moreover the implication of the numbers of tenders for each contract advertised is that suppliers have to bid more often for a more or less fixed sum of work (we have no reason to believe that the total amount of public procurement increased due to the Directives). These additional bidding costs may double the extra costs incurred to suppliers in relation to each successful bid.

Question 3: Benefits of compliance and balance of costs and benefits

What are the benefits of compliance? Are the costs outweighed by the benefits that compliance provides to the different parties involved? How are these costs and benefits distributed amongst the different parties involved?

8 We can attribute significant benefits to the Directives:

- (a) **Transparency:** Nearly all suppliers and authorities interviewed thought that transparency has increased due to the Directives. Companies that have tried to enter new markets commended the OJEU publications as a significant help in providing market information.
- (b) **Fairness:** Most suppliers say that the Directives have increased their expectations of a fair award procedure and that more authorities now award their contracts based on the published award criteria.
- (c) **Better procurement practices:** In the opinion of most suppliers and awarding authorities the Directives have helped to improve the professionalism of procedures in public procurement. Some procurement officials say that the Directives enable them to fend off political pressure and to concentrate on value for money. (On the other hand both authorities and suppliers complain that the Directives too often require procedures which have no additional value and which reduce efficiency.)
- (d) **Competition:** Overall most suppliers and authorities thought that the competitive pressure in procurement markets had increased. This impression was stronger in markets for the more homogenous and tradable goods and services.
- (e) **Prices:** We concluded from three different sources of information that the overall prices are lower than they would otherwise have been as a result of the Directives but not by a great margin. We estimate this effect to be between 2.5 and 10 per cent of the contract value by 2002.



- (f) **Quality:** Opinions were mixed on the impacts of the Directives on the quality of the goods and services purchased. For standardised products the general opinion was that the authorities now explain in more detail what they want and so receive better quality. For less standardised goods and services, however, negative opinions dominated as many suppliers thought that the technical knowledge of many authorities is not sufficient to achieve the desired quality.

Balance of costs and benefits

- 9 An exact calculus is not possible but we conclude that the balance of costs and benefits has been significantly positive. For the overall welfare calculation we have compared the compliance costs for awarding authorities and the enforcement costs with the price and quality gains resulting from increased competition. The net balance of benefits over costs is an approximation for the welfare gains to society (compliance costs for suppliers are included in the price developments as suppliers will include these in their calculations). We assume for the purpose of this calculation that price reductions mainly reflect increased efficiency rather than merely a transfer from producers to customers; and that savings by awarding authorities benefit those served by the authorities rather than being dissipated in internal inefficiencies. Overall we think that prices are lower than they would otherwise have been by more than 2.5 per cent (€6 billion) of contract value and that enforcement costs and compliance costs for awarding authorities are less than 0.7 per cent (€1.75 billion) of contract value. The overall welfare gain should therefore have been more than €4.25 billion a year by 2002.

Cost and benefits for the different parties

- 10 There appears to be a somewhat uneven distribution of costs and benefits.
- (a) The benefit of lower prices than would otherwise have been paid accrues to the awarding authorities (and as a result, presumably, to the taxpayer or those served by the awarding authority). These benefits outweigh the costs of compliance but the balance is least favourable for complex requirements, and least for small contracts.
- (b) Among the suppliers costs and benefits are unevenly distributed. While efficient and expanding suppliers have been able to use the increased transparency and fairness in order to win additional business, other suppliers suffer from this increased competition as well as from the increased administrative costs of compliance. In the longer term, suppliers as a whole may be said to benefit from becoming more efficient.

Question 4: Costs of Non-Compliance

What is the overall cost of non compliance? Is it possible to measure this cost accurately? Have the costs and benefits of compliance changed over time?

- 11 We define the cost of non compliance as the net benefit that could have been gained had there been full compliance.



- 12 It is not possible to measure this cost accurately or to know how the costs and benefits of compliance have changed over time as we have only incomplete information on the level of non-compliance, and we do not know whether the effects of compliance on those contracts not currently complying would be similar to the effects on the contracts that are compliant.
- 13 If one were to assume that a 25 per cent publication rate would constitute full compliance in the whole EU-15 (as was suggested by some estimates for the Netherlands), and also to assume that the effects on non-compliant contracts would be broadly similar to the compliant contracts, then the additional net benefit (or the cost of non-compliance) of full compliance in 2002 would have been more than €2 billion. However, for the reasons explained it is impossible to provide an accurate measure of this cost.

Question 5: Perceptions of costs and benefits

What have been the perceptions of costs and benefits by different parties?

- 14 We found perceptions on the costs and benefits of the Directives to be quite mixed. Many authorities and suppliers complained about the additional administrative burden, while on the other hand many recognised the additional possibilities provided by the Directives and the contribution they have made to improving procurement practices.

Question 6: Central Purchasing Bodies and Framework procurement practices

Are central purchasing bodies or framework procurement practices used in different ways in different Member States and what effect do they have on public procurement? What proportion of public procurement is conducted by these means and which sectors are most affected? Do they result in better value for money, compared to direct procurement by contracting authorities? Do they have a negative impact on the participation or success of small and medium sized enterprises in tendering procedures? Do they improve the overall level of compliance by aggregating what would otherwise consist of below threshold purchases?

- 15 Awarding authorities are using central purchasing bodies and framework contracts more frequently than before, for the following reasons:
 - (a) The facilitation of compliance was cited as the main reason for the use of central purchasing bodies and about half of the authorities also found them to provide better value for money.
 - (b) Both of these incentives were mentioned by the majority of the authorities as the reason for the use of framework contracts. An additional reason for greater use of framework agreements was the clarification of the law by the European Court of Justice and during negotiations over the new Directives.
- 16 The opinions of suppliers about both procedures are mixed:



- (a) Central purchasing bodies were found to be less transparent, less fair, and more bureaucratic than other public procurement bodies. Overall suppliers found central purchasing to be less efficient but more competitive.
- (b) Framework contracts were assessed as less transparent, less fair, and less competitive but slightly less bureaucratic. Overall framework contracts were found to be about as efficient as other public procurement.

Question 7: Effects on different sectors and authorities

Have there been significant differences in the effects on particular product or service sectors, or on particular categories of procuring entity? For example some services are not subject to the full provisions of the Directive. As they are not subject to the same competitive procedures, one might predict their prices relative to other services have increased. Is this so and are there reasons why they should still be considered less tradable?

- 17 The Directives were in general more positive for larger awarding authorities than for small. Compliance costs increased less in relation to the value of large contracts than for small contracts so the small authorities had to bear proportionately greater cost increases. Moreover, the burden of ensuring compliance also fell harder on smaller authorities than on larger authorities as their staff are less specialised and therefore have more difficulty in fully understanding the complex procedures and legal questions.
- 18 The Directives have increased the incentive of the authorities to increase average contract sizes, so small companies have now more problems in seeking to enter the public procurement markets. We found that small companies have on average more negative attitudes to the Directives.
- 19 The effects of the Directives on different sectors were strongly influenced by three characteristics:
 - (a) Complexity of specifications: In sectors where proposals contain a significant intellectual input and where proposals require correspondingly greater effort for their preparation, the attitudes towards the Directives were much more negative than elsewhere. Suppliers found that the authorities lack sufficient technical expertise to specify tenders adequately and that many of them are deterred by the Directives from seeking advice from suppliers before the tender is issued. In markets of this kind compliance costs have therefore risen by more than average and the benefits of competition have been smaller than average. Some suppliers in these markets think that the Directives have on balance made the market less competitive.
 - (b) Tradability of good/service: Additional competition rose most strongly in markets where no local presence is needed to conduct the contract (e.g. homogenous or standardised supplies and bulk goods) as companies did not have to change their company organisation or structure in order to compete.



- (c) Market share of public sector: In sectors where a local presence is needed the Directives have only increased competition when the market share of the public sector is big enough.
 - (d) As a result of these factors we found that compliance cost increases were much higher in relation to contract value in service contracts than in other contracts and that competition has increased most in supply contracts. Thus the overall balance was less positive in services than in supply.
- 20 It did not prove possible to conduct a price comparison between exempted sectors and other sectors as most exempted sectors cannot provide sufficiently standardised goods and services to allow prices to be compared.
- 21 We conducted an analysis of the exempted sectors that showed from a cost benefit point of view, that some of the sectors (military supplies, rail transport, water transport services) offer arguments for an inclusion into the Directives as they are tradable, some of the tenders are not especially complex, and the average contract size is big. If the Commission and Member States wish to pursue these possibilities, an ex ante impact assessment would be appropriate.

Question 8: Comparisons with private procurement

Has there been a significant difference between the behaviour of public and private institutions in some specific sectors, or between public institutions in different Member States where comparable data may be readily available across a range of relatively standardised products or services? For example hospital purchases or school meals provide a readily understood and easily identifiable purchase, which might none the less show significant variation across the EU or between public and private purchasers.

- 22 We were unable to find data which could sufficiently accurately measure price differences between privately and publicly bought goods and services.
- 23 The interviews nonetheless provided some insights into differences between public and private sector procurement:
- (a) The Directives prescribe that contracts have to be awarded following a rational assessment essentially designed to help to achieve value for money. Some authorities stated that this legal obligation has on occasion helped them to fend off political pressure. So in this respect the Directives have helped to make public procurement more similar to private procurement.
 - (b) In other respects, the Directives have made public procurement less similar to private procurement where rules are designed to be fit for the purpose and flexible, whereas public procurement officials have to follow the prescribed procedures in order not to risk litigation.



- 24 Most suppliers find private procurement more transparent, fairer, more competitive and less bureaucratic than public procurement, even though the OJEU contracts are regarded as better on these criteria than other public procurement.

Question 9: Impacts on Member States and over time

Have there been significant differences in any of these impacts on individual Member States, or over time?

- 25 The way in which the Directives affected the various Member States depends on the nature of their procurement arrangements :
- (a) Member States with strongly centralised procurement functions (like the UK or Portugal) could realise more benefits as their large contracts induced strong competition and relatively less costs. The gains appeared less in Germany and the Netherlands where procurement functions are more decentralised.
 - (b) On the other hand authorities in Member States with relatively informal procurement legislation before the Directives had more problems with compliance and more compliance costs. Examples are again Germany and the Netherlands, and Denmark.
 - (c) Publication rates tended to increase most strongly in countries where with the introduction of the Directives a new national public procurement framework was created which incorporated the Directives (like Austria, Sweden, Finland and France). In other countries where the Directives were implemented on top of the national law and not sufficiently integrated into it, authorities had more problems with compliance and faced higher compliance costs.
 - (d) Member States that undertook particular efforts to increase the professionalism of their public procurement officials (e.g. Sweden, Finland, Ireland and the UK) tended to reap more benefits from the Directives.
- 26 As the number of users in the OJEU grows only with the number of ITTs published in it, the first authorities publishing might not have achieved much more competition from their publication. Over time the suppliers are able to adapt to the additional information available and change their bidding behaviour and perhaps their company structure in order to compete.
- 27 Many authorities and suppliers told us that the effects of the Directives were not significant say 10 years ago but had become more important in the last five years. Our conclusion is that the cost/benefit ratio is more favourable today than it was 10 years ago.

Question 10: Value for money and level playing field

Have the Directives met their objective of allowing contracting entities to get best value for money from their procurement? Is there a level playing field in public procurement? Have the Directives had any unexpected effects (either good or bad)?



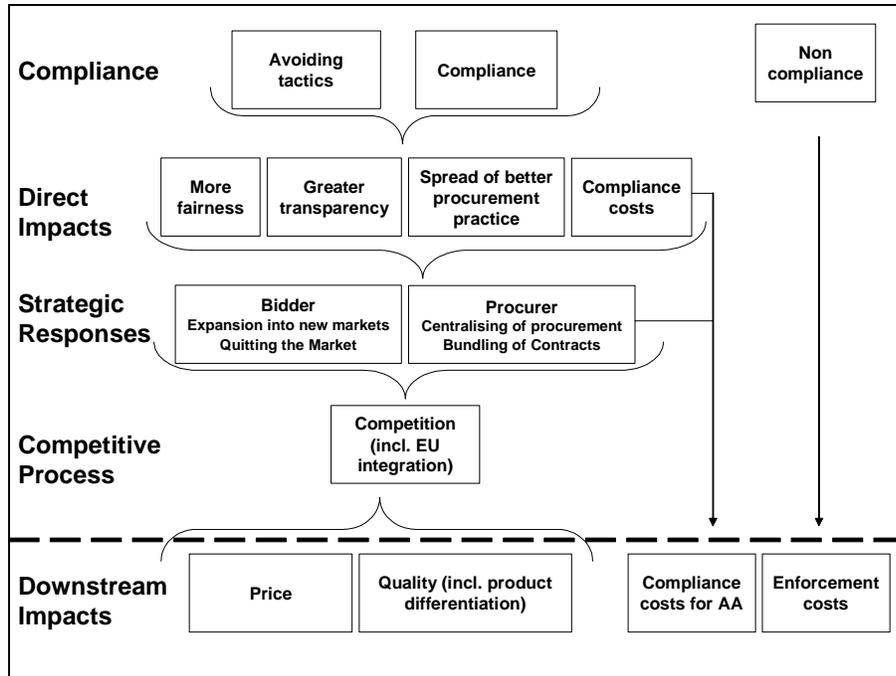
- 28 As mentioned previously we have concluded that overall the Directives have helped the authorities to get better value for money (see Question 2: Benefits of compliance)
- 29 We conducted an analysis of the input-output tables of eight of the EU-15 Member States and found that import penetration in the public sector has risen more strongly in the majority of countries than the import penetration in the private sector between the years 1995 and 2000.
- 30 Moreover, the overall import penetration rate of the public sector in most of the eight countries is now nearly as high (and in some even higher) than that of the private sector if adjusted for sectoral differences of purchases. (If not adjusted the private sector import penetration rate stays higher due to the fact that the public sector buys less tradable goods and services.) This is indication of a reasonably level playing field.
- 31 Most suppliers thought that success rates in foreign countries are much lower than in the home country. This is not surprising if one takes into account that in many public purchasing markets a local presence is necessary for the efficient performance of contracts.
- 32 By formalising the procurement procedures the Directives have increased the demands on the professionalism of the public procurement official. Officials have to be more technically adept (as they have to specify the product more closely) and at the same time legally competent (to avoid legal challenges). Consequently, the Directives have contributed to significant changes in the sector regarding staffing and organisation of public procurement departments. They have also increased the emphasis on the legal aspects of procurement relative to its economic purpose. This may be regarded as an unintended, or negative, effect.
- 33 One source of criticism was the prohibition of using the experience of prior working relationships between awarding authority and supplier as an award criterion. Authorities complained that they could neither favour an incumbent (because they found his experience so valuable) nor discriminate against him (if they wanted to ensure future competition).
- 34 Another negative and presumably unintended consequence is that it has become harder for some smaller suppliers to enter procurement markets.

Structure and Conclusions of the Report

- 35 The order followed in the research, and hence in the report, uses the analytical framework on which the evaluation was based. This framework begins with a categorisation of different types of effect, as illustrated below. Thus we first sought to understand the ways in which awarding authorities and suppliers complied with the new requirements (or failed to do so); then moved on to an assessment of the direct effects on equity, transparency, procurement practice, and compliance costs. The third step was to investigate the strategic responses made by players in the procurement markets; and the fourth, the effects of those new strategies on the competitive process. Finally, we address the question of likely impacts on welfare.



The Relationship between Different Impacts of the Directives



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- 36 In all cases, the impact of the Directives is defined as the difference between the actual situation and that which would have prevailed in the absence of the Directives (referred to as the counterfactual). The counterfactual differs from country to country, from period to period, and from type of procurement to type of procurement. Detailed accounts of the legal frameworks in each Member State on which assessments of the counterfactual drew were part of the study, and were provided in the interim report.
- 37 The main conclusions reached about the impacts of the Directives may be briefly stated as follows:
- Compliance has increased over time and is now substantial, but the available information suggests that there is still significant non-compliance.
 - Positive direct impacts were achieved. Transparency has increased; there is a more level playing field, and better procurement practices have been encouraged (though comparisons with the efficiency of private sector procurement remain favourable to the private sector). However, many suppliers emphasized that some authorities focus too much on legal compliance and not enough on an efficient procurement process to gain value for money. The effect on compliance costs was moreover significantly adverse for both awarding authorities and suppliers.
 - The main strategic response of awarding authorities was to endorse the principles on which the Directives were based, and to accept that less close continuing relationships with incumbent suppliers was a price probably worth paying. Increasing



use has been made of central purchasing, and of framework arrangements, as ways of both improving efficiency and facilitating compliance with the Directives. The strategic responses of suppliers included adaptation to a large EU market, with some greater emphasis on selling outside the home country, and some increase in specialisation. However, some smaller potential suppliers were deterred by the additional administrative burdens.

- (d) The result of these strategic responses and of the direct benefits has been a significant increase in the competition for many public procurement contracts.
- (e) The likely benefits in improved value for money, from lower price and better quality than would otherwise have been available, significantly outweigh the increases in compliance costs for awarding authorities, so that an overall improvement in welfare has almost certainly resulted from the Directives. (This is on the twin assumptions that the price reductions largely reflect improvements in efficiency and that consumers and taxpayers will benefit from reductions in the costs of public procurement.)

38 Thus, the overall evaluation has reached a significantly positive assessment of the effects of the Directives. We estimate the orders of magnitude as follows (the estimates are presented to decimal places in order to reflect the detailed calculations described in the text but are subject to considerable degrees of uncertainty, as the report explains) :

Overall Net Welfare Benefit of the Directives per year in 2002 (in €billion)

	Most estimate	negative	Most estimate	positive
Price decrease (including quality improvements)	6		24	
Compliance costs of awarding authorities	-0.75		-0.25	
Enforcement costs	-1.0		-0.35	
Net benefit of Directives	4.25		23.4	

Source: Estimates by Europe Economics

Recommendations

39 The research reported here leads us to suggest that the Commission consider the following recommendations which may increase the net benefit of the Directives, and which may reduce the burden of regulation as the nature of procurement changes.

- (a) *Improving the data available on public procurement.* The Commission Services should ask the Member State experts to reconcile their estimates with those of Eurostat. Depending on the results of this reconciliation, it may then be appropriate to conduct an analysis of authority accounts using a sample sufficient to give an accurate picture of procurement throughout the EU-25 and in every category of public procurement authority. In addition our analysis on public sector import penetration



could be repeated and extended as datasets from new countries or more recent years become available.

- (b) *Tailoring the provisions better to different cases:* The Commission could try to allow authorities to adapt the provisions more to the different types of awards. Possible areas for such a tailoring and increased flexibility could be time limits, information exchange between bidders and authorities, and thresholds (we would especially recommend that the Commission consider how the difference in the balance of costs and benefits for service contracts, as compared with supply contracts, could best be addressed). Some of these issues have been addressed in the 2004 Directives and the Commission should evaluate in how far the new Directives solve the identified problems.
- (c) *Promotion of better procurement practices:* The Commission could seek to support policies of Member States aiming at the improvement of the professionalism of public procurement officials.
- (d) *Encouraging a greater focus on economic as distinct from legal aspects of compliance.* This could be pursued through the promotion of better procurement practices, and by encouraging changes that would allow those involved in procurement greater scope to adopt methods best suited to different cases.
- (e) *Discussion with the Member States on national legal frameworks:* The Commission could discuss with some Member States how to improve the integration of the national legal framework with the Directives.
- (f) An important concern of both authorities and suppliers was the *system of remedies*. The Commission has worked in the last years to improve legal security and efficiency of remedies and should review whether this endeavour proves successful.
- (g) In some places the Directives may be reformulated to use *principles instead of prescriptions*. As procurement practices change, for example with “freedom of information” legislation and with increasing use of e-procurement, prescriptions which are now helpful may become unhelpful. Also as member countries revise their legislation to achieve the same ends as those of the Directives, exemptions could be issued to simplify the compliance required from authorities and suppliers within those countries.

40 In summary, it should not be concluded from the fact that the Directives have had a significantly beneficial net effect in the past that their scope should be extended or that they should be continued in force indefinitely. As circumstances change, the need for the prescriptive requirements of the Directives may reduce, and a more generally deregulatory approach may become more appropriate.



1 INTRODUCTION

Purpose of the Study

- 1.1 This is the final report of project MARKT/2004/10/D, the purpose of which is to evaluate the effects on the 15 Member States that were subject to the EC Procurement Directives between 1993 and 2002.
- 1.2 The study commenced at the beginning of 2005 with a budget of €400,000 to include all expenses.
- 1.3 The research methods employed were finalised in the light of comments from DG Internal Market on the interim report and include a review of previous relevant studies, an electronic survey administered by the Commission services and one hundred in-depth interviews with awarding authorities and suppliers conducted throughout the 15 Member States.
- 1.4 The terms of reference comprise “10 key questions”, as follows:

Question 1: Implementation of Directives

How have contracting entities in the Member States complied with the administrative procedures laid down by the Directives?

Question 2: Costs of Compliance

What are the actual operational costs of complying with the Directives, for awarding authorities and suppliers respectively, compared with the cost of complying with other national legislation applicable in individual Member States, (for below threshold contracts for example)?

Question 3: Benefits of Compliance and balance of costs and benefits

What are the benefits of compliance? Are the costs outweighed by the benefits that compliance provides to the different parties involved? How are these costs and benefits distributed amongst the different parties involved?

Question 4: Cost of Non-Compliance

What is the overall cost of non compliance? Is it possible to measure this cost accurately? Have the costs and benefits of compliance changed over time?

Question 5: Perceptions of Costs and Benefits

What have been the perceptions of costs and benefits by different parties?



Question 6: Central Purchasing and Framework Procurement Practices

Are central purchasing bodies or framework procurement practices used in different ways in different Member States and what effect do they have on public procurement? What proportion of public procurement is conducted by these means and which sectors are most affected? Do they result in better value for money, compared to direct procurement by contracting authorities? Do they have a negative impact on the participation or success of small and medium sized enterprises in tendering procedures? Do they improve the overall level of compliance by aggregating what would otherwise consist of below threshold purchases?

Question 7: Effects on Different Sectors and Authorities

Have there been significant differences in the effects on particular product or service sectors, or on particular categories of procuring entity? For example some services are not subject to the full provisions of the Directive. As they are not subject to the same competitive procedures, one might predict their prices relative to other services have increased. Is this so and are there reasons why they should still be considered less tradable?

Question 8: Comparisons with Private Procurement

Has there been a significant difference in the behaviour of public and private institutions in some specific sectors, or between public institutions in different Member States where comparable data may be readily available across a range of relatively standardised products or services? For example hospital purchases or school meals provide a readily understood and easily identifiable purchase, which might none the less show significant variation across the EU or between the public and private purchasers.

Question 9: Differences across Member States and Over Time

Have there been significant differences in any of these impacts on individual Member States, or over time?

Question 10: Value for Money and Level Playing Field

Have the Directives met their objective of allowing contracting entities to get best value for money from their procurement? Is there a level playing field in public procurement? Have the Directives had any unexpected effects (either good or bad)?

- 1.5 This list covers a large number of issues. In order to address them effectively we developed the analytic framework described in Chapter 2. As will be explained in more detail below, we considered first the question of compliance with the Directives and its direct impacts, then the effects of the Directives on the strategies of awarding authorities and suppliers, then the effects on the competitive process, and finally the welfare effects on consumers and taxpayers.



Evaluation within the EC

- 1.6 A new financial regulation laying down rules governing expenditure for all EU institutions was enacted in January 2003 obliging the institutions to undertake *ex ante* and *ex post* evaluations to improve decision-making.² In 2002, the Commission published standards for evaluation along with recommendations for good practice, which entered into force in July 2003. These standards cover the profile, role, tasks and resources of the evaluation function within each DG; the management of evaluation activities; the evaluation process; and the quality of reports. The standards also require that, except in duly substantiated cases in which this would breach requirements for confidentiality, evaluation results shall be made publicly available.
- 1.7 Our understanding is that the essential purpose of a policy evaluation is to help the Commission in meeting its requirement for accountability to the Governments and populations of the EU Member States, and also to help in considering how to make future policies more effective.³
- 1.8 The DG Internal Market Annual Management Plan for 2004 included in its list of planned evaluations an external evaluation of the then current regime for public procurement, which is the subject of the present report.

Overview of the Directives

- 1.9 Between 1992 and 2001 the EU issued seven Directives on public procurement. The Directives generally came into effect one year after they were issued.⁴ However some of the implementations were contested by the Commission and implementation in the national laws followed different timetables. Some of the final implementations of the earlier Directives took place as late as 1999.
- 1.10 At the strategic level, the objective of the Directives was to open public procurement markets to suppliers from any Member State and thus encourage the development of the EU Single Market. The expected economic benefits were improved efficiency leading to lower prices, improved quality, and increased competitiveness of the EU economy at improved income levels, all by comparison with the situation that would otherwise have obtained.
- 1.11 The Directives removed barriers to entry to procurement markets for potential suppliers by increasing the availability of information about forthcoming procurement contracts and

² Financial Regulation SEC (2003) 1605 and its implementation rules SEC (2002) 2342.

³ DG Internal Market has stated that "the European Commission and DG Internal Market in particular are committed to increasing the role evaluation plays in improving law-making in the EU and making administration more efficient." http://europa.eu.int/comm/dgs/internal_market/evaluation_en.htm planning

⁴ Directive 90/531 in 1993, 92/50 in 1993, the 93 Directives in 1994 - except for Austria, Finland and Sweden where they came into effect with the accession in 1995 and Greece, Portugal and Spain that had extensions for the 90/531 Directive.



requiring objectivity in the decisions of awarding authorities. The main provisions may be summarized as follows:

- (a) **Application:** All public bodies, or companies that “operate under special or exclusive rights granted by a competent authority or a member state” (interpreted to mean companies in utility sectors that are either owned by the state or have a dominant market position due to a present or past state monopoly), were to be subject to the Directives for all procurement contracts above specified thresholds.⁵ Defence procurement and several service sectors were however excluded from the scope of the Directives during the period relevant to this study (the Commission is currently considering a revised specification of the exemption for defence procurement).
- (b) **Decision criteria:** The awarding authorities subject to the Directives were required to award the contract to the tender offering the lowest price or to the economically most advantageous tender. When awarding to the “economically most advantageous tender” an assessment had to be based on objective quality criteria listed, where possible, in descending order of importance and stated in advance either in the contract notice or in the contract documents provided to those wishing to submit tenders. The awarding of the contract had to be made by exclusive reference to the tender and these criteria.
- (c) **Transparency obligations:** The Directives obliged the awarding authorities to publish a tender notice in the Official Journal of the EU (OJEU) before awarding a contract, including a characterization of the desired product or service and a description of the criteria to be used in awarding the contract. After awarding the contract, the awarding authority was required to publish a Contract Award Notice (CAN) in the OJEU that included the contract value and the name of the successful bidder. In addition, it had to privately provide bidders with the reasons for the decision taken.
- (d) **Procedure provisions:** The Directives offered three different types of procedures all of which involve the transparency obligations described above and prescribe the timing of the steps of the procedure. Generally the awarding authorities were obliged to use either an *open procedure* which as the name implies is open to all bidders or a *restricted procedure* that separates the procurement process into two steps. In the first of these steps, bidders which meet the qualification criteria are identified. The second step is to invite qualifying bidders to submit tenders. Under some conditions, for example if the requirements are too complex to be fully defined in advance of the contract or if the awarding authorities had only received irregular tenders in an open procedure or if the timescale was too short for an open or restricted procedure, the awarding authorities could use the *negotiated procedure* and negotiate the contents

⁵ The original thresholds were very high for works contracts (5,000,000 ECU) and lower for service and supply contracts (200,000 ECU). The thresholds changed following the 1997 and 1998 Directives, bringing them into alignment with the WTO’s Government Procurement Agreement (GPA).



of the contracts with one or several bidders.⁶ Every procedure required various minimum periods for the bidding process (from the notice to the award) that could be reduced if the awarding authority issued a prior information notice announcing its intention to do so.

1.12 The contents of the Directives are summarized in the following table:

Table 1.1: EC Public Procurement Directives 1992–2003

Year	Directives	Main Features
1992	92/50/EEC public service	applies the public procurement rules to public services contracts (excluding military supplies and some other specified categories e.g. arbitration services);
1993	93/36/EEC public supply 93/37/EEC public works 93/38/EEC industries where special rights reduce competition	apply the public procurement rules to public supply contracts, public works contracts and to certain “excluded sectors” (i.e. sectors excluded under the earlier Directives), namely water, energy, transport and telecommunications in relation to public bodies or bodies operating under special and exclusive rights;
1997	97/52/EEC public service, supply and works	brings the public services, supplies and works directive in line with the GPA;
1998	98/4/EEC water, energy, transport and telecoms.	amends the Utilities Directive to bring it line with the GPA;
2001	2001/78/EC all public contract notices	introduces new standard forms;

Research Methods

1.13 Our research methods are outlined here, and explained in more detail in Appendix 1.

Legal and literature reviews

1.14 Our sub-contractor, the law firm Nabarro Nathanson, asked law firms in each Member State to provide a legal history for their country of the implementation of the Directives, and a summary of significant court cases that had arisen. These documents were included in our interim report, and are not reproduced here. They provided context for the economic analysis, and the basis for judgement on the most likely counterfactual situation. We also reviewed published literature and other material that the Commission services provided relating to previous research in this area. Again, a summary was provided in our interim report and is not repeated here.

⁶ While under the public procurement rules awarding authorities are generally obliged to use either the open or restricted procedure with a call for tender under the utilities directive, utilities are also free to use the negotiated tender with a call for tender, i.e. with a contract notice (use of the negotiated procedure without a contract notice is, however, similarly restricted as described in the paragraph).



Statistical analysis

- 1.15 We examined official statistics relevant to the propensity to import among private and public sector purchasers.
- 1.16 We used the Multidimensional Public Procurement Database (MAPP) database of the Commission that has collected all OJEU notices since 1993.
- 1.17 The Commission provided some provisional estimates for Member States.

Online survey with the Interactive Policy Making tool (IPM)

- 1.18 We conducted two online surveys among awarding authorities and suppliers using the EC Interactive Policy Making Tool (IPM), a website managed by the Commission Services and used in consultation exercises. E-mails were sent to awarding authorities and suppliers whose names were provided by national governments or other organisations, or extracted by Europe Economics from the MAPP database. The e-mails were also distributed by a number of other organisations including utility associations, local authority associations, tender websites, and societies of procurement officers. The list included 25,000 addresses representing between 15,000 and 20,000 different authorities (as we approached some large authorities more than once) and over 50,000 suppliers.
- 1.19 The address sample was not balanced in terms of Member States. In some countries (notably, Austria, Germany and Ireland but also Italy, Belgium, Denmark, Finland and Sweden) we had very good coverage while in other countries we had to rely entirely on addresses from the MAPP database, and as a result had fewer addresses to which the questionnaire could be sent.
- 1.20 The questionnaires were tested in advance and were translated into all 11 EU-15 languages. Nevertheless, a low response rate was encountered, as is usual in electronic surveys. We received replies from 389 suppliers and 421 awarding authorities. Some recipients may have been deterred by comprehensive nature of the questionnaire which for awarding authorities required about two hours for its completion. Although, therefore, the responses came from a relatively small sample they provided detailed information that allowed us to address some of the questions posed in the terms of reference.
- 1.21 The authority replies were fairly balanced among the countries. Only for three countries (Greece, Luxembourg and the Netherlands) was the number of returns supplied insufficient to permit generalisation.
- 1.22 The distribution of replies from suppliers was less even. Nearly half of the replies came from Germany and another 20 per cent from Austria. Some of this imbalance is the result of the differing length and quality of email address lists.
- 1.23 The results of the survey have to be interpreted with this distribution taken into account but they do provide coverage of all countries, types of authorities, types of contracts and



sectors and help in providing some of the comparisons required by the terms of reference.

In-depth interviews

- 1.24 We also conducted one hundred interviews in all EU-15 countries, 51 of them with suppliers and 49 of them with awarding authorities. Most interviews were conducted in the national language by native speakers, except in Belgium, the Netherlands, Denmark and Sweden where the interviews were conducted in English.
- 1.25 All interviewers were trained economists and Europe Economics provided them with a detailed interview structure and description of the counterfactual they should use for their interviews.
- 1.26 A programme of 100 interviews is, of course, small in relation to the numbers of awarding authorities and suppliers operating in the public procurement markets. Nonetheless this was a more comprehensive programme than had previously been undertaken, and the sample included, in every country a central government department and in nearly every country a local authority. Additionally we interviewed authorities of other types such as utilities, public transport companies, regional authorities, health authorities, hospitals and social housing companies all in more than one country. Suppliers were similarly well represented by sector in all of the countries surveyed.
- 1.27 We regard the interviews as generally very successful, and are grateful to those who took part. In most countries authorities and suppliers were willing to spend two hours (more in some cases) discussing the effects of the Directives, and in many cases they also provided supplementary information outside the interview.

Layout of the Report

- 1.28 The report is organised as follows:
 - (a) Chapter 2 explains the analytical framework.
 - (b) Chapters 3 to 7 present the main results, dealing respectively with Compliance, Direct Impacts, Strategic Responses, the Competitive Process and Welfare Impacts.
 - (c) Chapter 8 draws together suggestions of areas where further research may be justified.
- 1.29 Detailed information is provided in appendices.

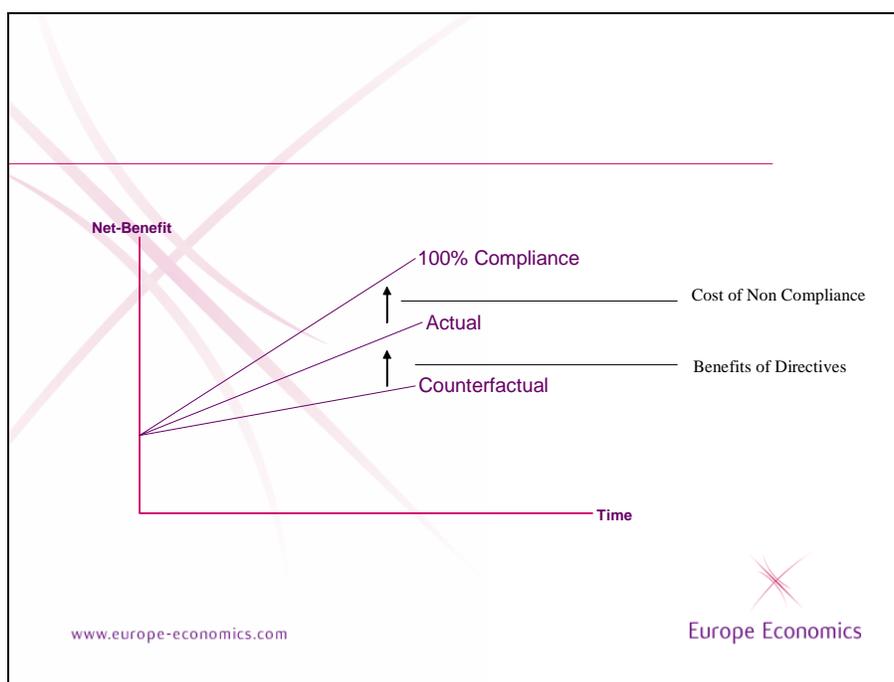


2 THE ANALYTIC FRAMEWORK

Basic Theory

- 2.1 In any evaluation or impact assessment, it is necessary to be clear about the basis for comparisons. The effect of a policy has to be measured by comparing the situation which actually obtains with that would obtain in the absence of the policy, here termed the counterfactual. This is illustrated in the following chart.

Chart 2.1: The Benefits of Compliance and the Cost of Non-Compliance



Source: Europe Economics

- 2.2 The chart describes a situation in which with unchanged policies there would, over time, be an increase in some kind of benefit to society resulting from public procurement. This is reflected in the upward slope of the bottom line. It is also assumed that the introduction of the Directives would increase this benefit; this is shown by the extent to which the middle line (the actual situation) is above the counterfactual. The top line assumes that if there had been complete compliance with the Directives, the benefits would have been even greater and the cost of non-compliance is indicated by the difference between the top and the middle lines on this chart.
- 2.3 How might the Directives have led to an improvement in social welfare by comparison with the counterfactual?
- 2.4 If the Directives succeeded in removing some obstacles in the way of potential suppliers — say by reducing the costs of searching for business opportunities — and more



competitors have entered the markets for procured goods and services, supply curves will have shifted to the right, helping to reduce prices and increase output. Some of the new entrants will be more efficient than the firms that would otherwise have won contracts, so the overall efficiency of supply should improve. In the longer run, such increased competition can also lead to a restructuring of some companies and other dynamic changes that may lead to a further rightwards shift of the supply curve.

- 2.5 Changes in administrative or other transaction costs may however cause the supply curve to shift in either direction, depending on whether the effect of the Directives is to increase or decrease the costs facing suppliers compared with the costs that would otherwise have been incurred. If the Directives have increased tendering costs overall, and if this increase were to outweigh the reduction in search costs, then the supply curves would on balance shift to the left giving an adverse effect — higher prices and lower output.
- 2.6 The administrative costs for awarding authorities may be increased or decreased by the Directives and enforcement costs. If the administrative costs have increased, any price drop must first outweigh these additional costs before the Directives could result in a net benefit.

Different Types of Impact

- 2.7 In order to assess the effects of the Directives and to avoid the danger of double counting costs or benefits, it is necessary to distinguish carefully between different types of impact.
- 2.8 For example increased transparency, increased competition and a decrease in prices would all be considered benefits, yet simply to list and describe each of them might risk giving an exaggerated impression of the gains since the fall in prices may partly be a consequence of the increased competition, which itself may be due to the increased transparency. It is therefore important to consider different types of impact and to understand the likely relationships between them.
- 2.9 This report distinguishes five types of impact, broadly corresponding to steps in the chain of events that would lead to effects on economic welfare:
- (a) The **compliance decision** is taken by the awarding authorities in response to the implementation of the Directives.
 - (b) **Direct impacts** are the costs and benefits caused by the Directives, without taking into account any behavioural change other than that required by the compliance decision.
 - (c) **Strategic responses** are the further reactions of the suppliers and awarding authorities to the Directives, including any changes to procurement policies and to bidding.
 - (d) These reactions will in turn affect the **competitive process**.



- (e) The behavioural changes and the impacts on competition together produce outcomes or **welfare impacts** that are the final impacts on the economic welfare of consumers.

Compliance decision

2.10 Following the implementation of the Directives each awarding authority might either comply or not comply. If it is complying with the Directives, two different types of compliance behaviour are of interest:

- “straight” compliance;
- avoiding tactics that comply with the letter of the Directives but not with the spirit.

2.11 Authorities may, for example, split contracts to bring them below the relevant thresholds, or make inappropriate use of social clauses, or the inappropriate use of the negotiated procedure may be technically compliant but nevertheless represent a different outcome to that envisaged by those enacting the Directive. Many of these practices have been found to be technical breaches by the ECJ but are likely to be among the less easily detectable breaches.

Direct impacts

2.12 The compliance of awarding authorities with the Directives may give rise to a number of direct impacts:

- (a) Improved transparency in EU public procurement markets. This higher transparency is mainly caused by the obligation to publish in the OJEU before awarding a contract and by the obligation to publish contract award notices after awarding the contract. Some avoiding tactics (such as splitting of contracts to avoid the obligation to publish or the use of negotiated procedures) will diminish this increase in transparency.
- (b) Fairness, providing foreign and unknown national bidders with the same chances as local incumbents in competing for public sector contracts. With a ban on discrimination against foreign bidders confirmed in the legal framework of every Member State, such suppliers can assume that their bids have a better chance than they might otherwise have enjoyed. Awarding authorities that use avoiding tactics may seek to avoid this impact, perhaps managing the procedures in order to favour domestic suppliers.
- (c) The spread of better procurement practice throughout the EU. Awarding authorities may have been prompted to give more thought to the procurement process generally and especially to the description of the contract content. On the other hand, if the Directives have inhibited the maintenance of long-term relationships between suppliers and contracting authorities, this may have had some offsetting disadvantages.
- (d) Compliance with the Directives can impose direct costs on both the awarding authorities and the suppliers.



- (e) Awarding authorities that do not comply may incur enforcement costs, as may those suppliers seeking enforcement.

Strategic responses

- 2.13 The necessity for compliance and the direct impacts are likely to lead to longer term strategic responses by the awarding authorities and by suppliers that will determine the longer term effects of the Directives.
- 2.14 The strategic responses of the awarding authorities could include a change in their approach to procurement, and in their relations with suppliers. Rising compliance costs might cause the authorities to make their contracts larger or to seek other simplifications (for example through the use of framework contracts) and a rising risk of legal challenges might increase the incentives to specialise and centralise procurement.
- 2.15 For suppliers there are at least two possible types of response:
 - (a) The direct benefits (transparency, fairness, enhanced quality in the procurement process) might lead to a change in bidding behaviour. Cross-border procurement might then increase and the average quality of the bids could also improve. The strategic responses of the suppliers might extend to their whole business model and even company structure.
 - (b) On the other hand higher costs for suppliers or perceived reduced chances of success may deter suppliers from bidding, or alternatively lead them to raise their prices in an attempt to recover these costs.

Effects on the competitive process

- 2.16 An increased number of potential suppliers and more focused bidding should lead to more effective competition, in which the average quality of the bids would rise. In the long run, the process would reinforce itself as competitive suppliers gain a greater share of the market and the less competitive suppliers either face decreasing market shares or themselves become more competitive.
- 2.17 On the other hand some suppliers may stop bidding if the administrative costs are higher, or if the chances of success have declined. This change of behaviour could have a negative impact on the degree of competition and disproportionately deter small firms from bidding.
- 2.18 If awarding authorities use central purchasing bodies or framework practices to reduce the administrative costs of the procurement process, the impact on competition might be positive or negative. Central purchasing bodies issuing larger contracts could lead to more intense competition because of economies of scale, but could also result in higher entry barriers. The same is true for framework practices, which may strengthen the competitive process by lowering bidding costs for suppliers but also act as entry barriers for some potential suppliers.



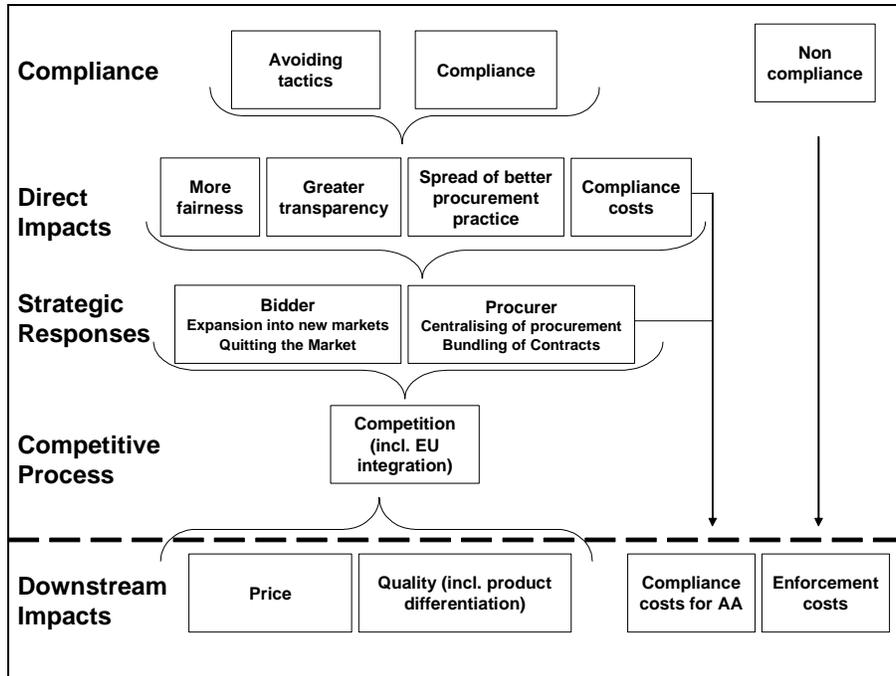
Downstream impacts

- 2.19 If the Directives were to enhance the competitive process, this would tend to improve welfare.
- (a) Price reductions may be prompted by efficiency gains of the suppliers or by a (perhaps temporary) squeezing of profit margins.
 - (b) There may be improved quality of goods and services supplied to procurement authorities.
- 2.20 Additionally, the public sector faces impacts unrelated to the market outcomes:
- (a) Awarding authorities that comply with the Directives and adjust their awarding behaviour in any way (by, e.g. the adoption of avoiding tactics or of special procedures) are likely to face different compliance costs as described above.⁷
 - (b) Awarding authorities that do not comply may cause additional enforcement costs for the Commission and the Member States, as also described above.
- 2.21 The costs of non-compliance are defined as the lost net benefits (or net costs) of non-compliance. They are not included in the following table as they are not an impact of the Directives.
- 2.22 The categorisation of the costs and benefits described above is displayed in Chart 2.2.

⁷ The compliance costs of suppliers are among the factors that will impinge on costs and prices overall.



Chart 2.2: The Relationship between the Different Impacts



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2.23 An important distinction is indicated in Chart 2.2 by the dashed line. The downstream impacts or outcomes of the process are the net benefits and costs for the society after all stakeholders have adapted to the Directives. If the balance of the four downstream impacts (price, quality, compliance costs for awarding authorities, and enforcement costs) is positive, the implementation of the Directives had a net benefit for society.

2.24 This does not imply that the evaluation of the other types of effect is less important. It is, rather, that it is necessary to understand all steps of the impact chain to achieve the purposes of the evaluation.

The 10 Key Questions

2.25 Our analytical framework is not identical to the structure of the 10 key questions but includes all points identified there. The following table shows how the key questions relate to the analytic concepts.



Table 2.1: Classification and the 10 Key Questions

Analytical Concept	Related Key Question
Compliance Behaviour	Key question 1 (compliance)
Direct Benefits (Transparency, Fairness, Better Procurement Practices)	Key question 3 (benefits of compliance), parts of key question 5 (perceptions of costs and benefits), parts of key question 7 (costs and benefits in different sectors and types of awarding authorities), parts of key question 9 (costs and benefits in different Member States and over time) and key question 10 (fairness)
Compliance Costs	Key question 2 (cost of compliance), parts of key question 5 (perceptions of costs and benefits), key question 7 (costs and benefits in different sectors and types of awarding authorities), key question 8 (differences between private and public procurement) and key question 9 (costs and benefits in different Member States and over time)
Strategic Responses	Key question 6 (use and impacts of central purchasing bodies and framework agreements); all questions
Competitive Process	Key question 10 (fairness)
Downstream Effects (Price, Quality, Compliance Costs for Awarding Authorities, Enforcement Costs)	Key question 3 (benefits of compliance), parts of key question 5 (perceptions of costs and benefits), key question 7 (costs and benefits in different sectors and types of awarding authorities), key question 9 (costs and benefits in different Member States and over time) and key question 4 (cost of non-compliance)



3 COMPLIANCE

- 3.1 This chapter reviews the extent to which awarding authorities in different EU Member States have complied with the Directives.

Introduction

- 3.2 The compliance process has four parts.
- (a) *Pre-award transparency*: Such transparency is achieved when an awarding authority follows the publication rules laid down in the Directives for the chosen procedure.
 - (b) *Procedure selection*: Compliance with the procedures relating to the selection of the successful bidder is achieved when an awarding authority uses the negotiated procedure or the accelerated restricted procedure only if the reasons defined in the Directives apply (as the use is less restricted for utilities this chapter mainly relates to other types of awarding authorities).
 - (c) *Fair decision process*: Compliance is achieved when an awarding authority publishes the decision criteria (and its pre-selection criteria) in advance and awards the contract employing these criteria and the weighting assigned to them without taking into account any characteristic of the bidders other than those specified in the published criteria.
 - (d) *Post-award transparency*: Transparency is achieved when an awarding authority publishes a Contract Award Notice (CAN) and provides failed bidders with sufficient information about the reasons for their failure to be selected.
- 3.3 The main sources of information are MAPP, Eurostat and Europe Economics' own investigations. We also refer to previous studies of compliance behaviour.

Pre-Award Publication

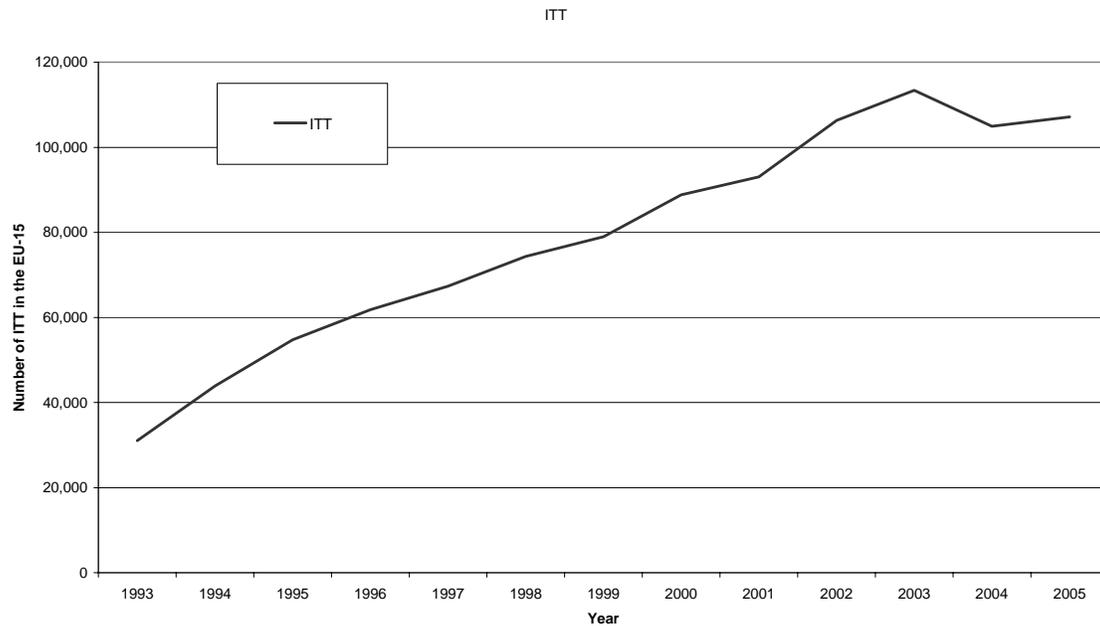
- 3.4 The main duty of the authorities awarding procurement contracts under the Directives regarding pre-award publication in the Official Journal is to publish Invitations to Tender (ITT) before the award of the contract. We wish to review the extent to which there has been compliance with this requirement.

The number of ITTs published

- 3.5 Chart 3.1 is drawn from data from MAPP recording the number of ITTs published. This has increased from 31,000 in 1993 to over 100,000 in 2005. The growth was relatively steady until 2001. It then accelerated until 2003 but fell back to the old trend line in 2004 and 2005. The trend represents a growth rate of about 11 per cent per year.



Chart 3.1: Number of ITTs Published in the OJEU (EU-15)



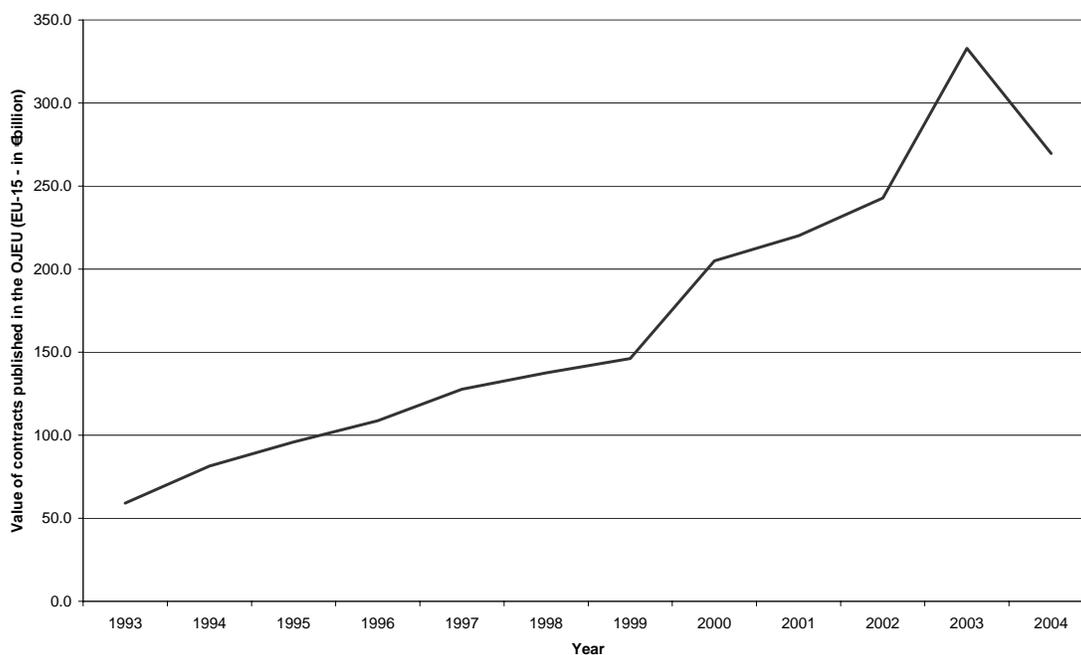
Source: MAPP

The aggregate value of contracts

- 3.6 The next Chart 3.2 and Table 3.1 show that the aggregate value of procurement contracts covered in the ITTs published in the OJEU, has increased significantly over the period. It grew from €59 billion in 1993 to €270 billion in 2004 (2003 €335 billion), an overall growth of 450 per cent.
- 3.7 Combining the information summarised in Charts 3.1 and 3.2 shows that the average size of contract has increased, from €1.9 to €2.6 million or by 34 per cent (an average 2.7 per cent per year) over the period, during which average EU inflation was below 2 per cent.
- 3.8 The real increase in contract sizes was probably even faster than these numbers suggest. It well may be the case that authorities started publishing their biggest contracts in the OJEU and are now publishing more and more of their smaller contracts. An indicator for this is the development of publication in the different types of contracts. While the presumably bigger works contracts made up more than 50 per cent of the published contract volume in 1993 this proportion has sunk to around 40 per cent in the last years.
- 3.9 The figures for 2003 show a sharp increase, especially in the UK where there were three exceptionally large PFI contracts (worth €45 billion) for work on the London Underground. The figures for Germany also rose considerably in 2003 (from a relatively low level), and there were significant increases for France, Spain and Italy. The fall in 2004 brought the total back more closely into line with the trend over the period.



Chart 3.2: Aggregate value of Public Procurement Published in the OJEU (€billion)⁸



Source: Eurostat

Table 3.1: Estimated Value of Public Procurement Published in the OJEU (€billion)

	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004
Austria	0.05	0.6	1.5	2.5	2.4	2.8	2.5	4.8	5.0	5.5	6.0	7.7
Belgium	1.5	1.7	2.2	2.4	3.4	4.5	5.5	5.7	7.1	6.3	7.2	7.3
Denmark	2.3	3.2	3.7	3.2	3.3	3.5	4.0	6.3	5.2	5.0	4.4	5.4
Finland	0.0	0.8	1.3	1.6	1.5	1.7	1.9	2.7	3.2	3.2	3.7	4.4
France	8.3	9.0	11.2	14.5	18.0	23.6	26.0	34.2	40.5	48.3	59.2	45.9
Germany	9.2	13.8	17.2	19.0	20.4	21.5	17.5	19.4	20.0	26.9	39.2	26.0
Greece	2.7	4.4	4.2	4.8	5.8	6.4	6.0	5.3	6.0	8.2	7.6	6.9
Ireland	0.7	0.6	0.8	1.2	1.7	1.5	1.8	2.7	2.9	3.1	3.2	5.0
Italy	7.7	9.5	10.6	11.9	14.2	14.1	18.3	25.3	23.7	28.3	35.7	32.7
Luxembourg	0.1	0.1	0.1	0.2	0.2	0.4	0.4	0.3	0.3	0.5	0.5	0.9
Netherlands	2.3	2.9	3.1	3.4	3.7	3.7	4.5	8.8	11.1	8.5	8.2	8.6
Portugal	1.3	1.1	1.9	2.4	2.2	2.3	2.4	2.4	3.0	3.3	3.2	3.6
Spain	4.4	4.4	5.4	6.9	7.4	8.0	12.6	19.7	19.4	21.2	26.7	25.1
Sweden	0.2	3.4	4.5	4.8	5.1	5.3	6.0	9.1	11.5	10.1	9.9	9.6
UK	18.4	26.0	28.3	30.0	38.3	38.3	37.0	58.4	61.3	64.6	118.3	80.8
EU-15 Total	59.2	81.4	95.8	108.8	127.6	137.5	146.2	205.0	220.1	242.9	333.0	269.7

Source: Eurostat

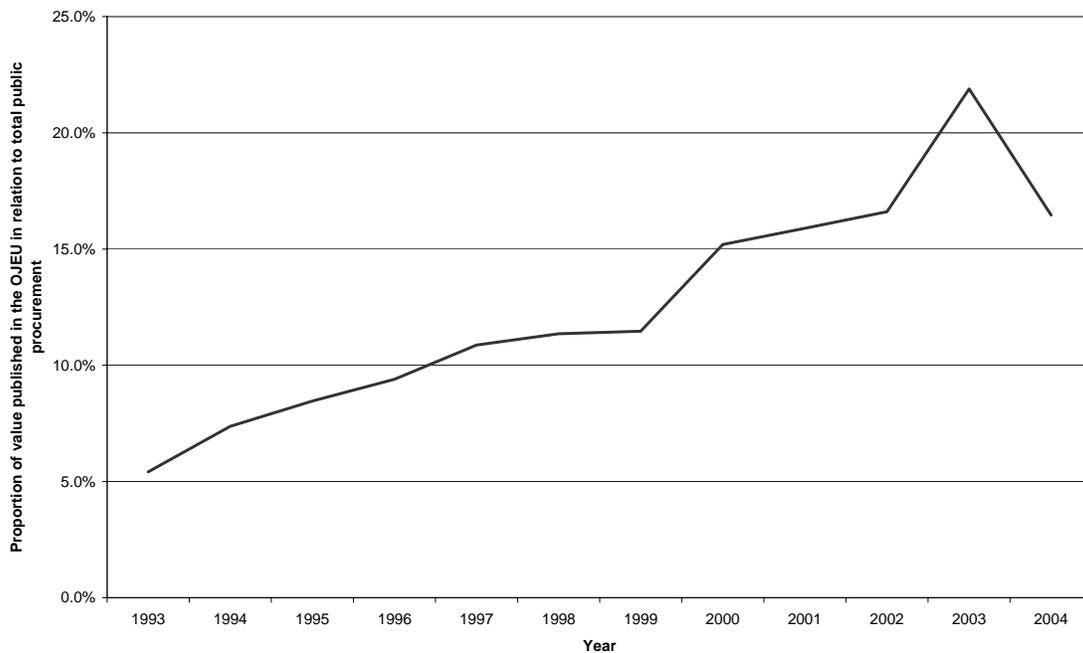
3.10 Thus there is clear evidence of a significant increase over time in both the number and total value of procurement contracts published in the OJ.

⁸ At the time of writing, data were only available until 2004.



- 3.11 Part of this increase reflected the broadening in scope of the Directives over the period, and part the increasing of total procurement, due to inflation, growth, and fiscal policies in the Member States. Total public procurement including that part not subject to the Directives rose by 62 per cent between 1993 and 2004.⁹
- 3.12 Eurostat compiles data on total public procurement (including that part which is not subject to the Directives) and uses estimates prepared by the Commission services in order to calculate the proportion of total procurement that is published in the OJ. This has increased from 5.4 per cent in 1993 to 16.5 per cent in 2004. Details are provided in Chart 3.3 and Table 3.2 below.

Chart 3.3: The Proportion of Total Public Procurement that is Published in the OJEU



Source: Eurostat

⁹ Source: Eurostat.



Table 3.2: Value of Tenders Advertised in the OJEU as a Percentage of Total Public Procurement by Member State (1993–2004)¹⁰

	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004
Austria	0.2%	1.9%	4.5%	7.5%	7.6%	8.5%	7.2%	13.9%	15.1%	15.7%	16.5%	19.8%
Belgium	5.5%	5.9%	6.9%	7.6%	10.9%	13.8%	15.5%	15.1%	18.5%	15.5%	16.8%	16.1%
Denmark	12.9%	16.3%	16.4%	13.4%	13.4%	13.5%	14.3%	20.9%	16.4%	15.1%	12.8%	16.6%
Finland	0.2%	5.5%	8.0%	9.2%	8.2%	9.2%	9.8%	13.2%	15.3%	14.0%	15.2%	17.4%
France	4.1%	4.4%	5.5%	6.8%	8.4%	11.0%	11.7%	15.1%	18.1%	20.5%	23.8%	16.2%
Germany	3.0%	4.2%	5.1%	5.7%	6.3%	6.5%	5.2%	5.6%	5.6%	7.3%	10.6%	7.5%
Greece	26.5%	41.8%	34.1%	37.7%	42.4%	44.9%	37.3%	27.9%	30.9%	39.8%	35.3%	36.4%
Ireland	11.1%	9.7%	11.4%	16.3%	19.3%	16.2%	16.9%	21.6%	19.6%	18.5%	19.0%	27.8%
Italy	6.3%	8.1%	9.8%	9.9%	11.3%	10.8%	13.2%	17.5%	15.9%	19.6%	22.4%	16.3%
Luxembourg	6.8%	4.7%	5.3%	7.1%	9.3%	14.3%	12.8%	12.0%	10.7%	13.0%	14.2%	18.5%
Netherlands	3.8%	4.6%	4.8%	5.1%	5.6%	5.2%	5.9%	10.8%	12.2%	8.6%	7.9%	7.5%
Portugal	11.8%	10.7%	15.5%	17.7%	15.1%	15.5%	14.6%	14.5%	18.3%	19.9%	18.7%	16.7%
Spain	n.a.	n.a.	8.5%	11.0%	11.5%	11.5%	16.9%	25.0%	23.1%	22.8%	26.7%	21.6%
Sweden	0.5%	8.2%	10.6%	10.7%	11.6%	11.7%	12.6%	18.2%	24.7%	20.1%	19.1%	18.9%
UK	11.3%	15.1%	16.6%	17.5%	20.4%	19.1%	17.1%	24.1%	23.6%	22.6%	40.5%	25.3%
EU-15	5.4%	7.4%	8.5%	9.4%	10.9%	11.4%	11.5%	15.2%	15.9%	16.6%	21.9%	16.5%

Source: Eurostat

- 3.13 The total value of procurement published in the OJEU that acts as the numerator in this table is estimated by the Commission services, using the average contract value of the published CAN (without the very big contracts) and multiplying this value by the number of ITTs published. In small countries the average contract value over several years is used in order to reduce the volatility of the estimate.
- 3.14 The proportion of procurement that is published may be exaggerated if the contracts for which CANs are published are larger than the average value of all ITTs. This seems possible, as it is likely that CANs for small contracts are more often forgotten than CANs for big contracts. Moreover, ITTs may include a higher proportion of below-threshold contracts than CANs, as authorities might see an advantage in publishing their contract as an ITT (to attract competition) but might after that not publish a CAN if they are not obliged to do so.
- 3.15 The estimated total of public procurement in each calendar year for each country is taken from national accounts data and from utility surveys. The total includes contracts that are exempt from the Directives (for example, some defence spending, fuel for electricity production and some non-procurement social service expenses). Taking this into account would reduce the estimated total procurement by perhaps 20-30 per cent¹¹ (and so increase the percentages shown above correspondingly, e.g. from an EU average in 2004 of 16.5 per cent to a little over 20 per cent).

¹⁰ The 1993 and 1994 EU-15 averages are averages for the 14 countries except Spain.

¹¹ Total military spending is between 1-3 per cent of GDP in the EU-15 member states with at about half of that being procurement (as opposed to staff costs). As total public procurement is at about 16 per cent of GDP this would mean that defence spending is about 10 per cent of total public procurement. The amount of social service is more difficult to estimate but as social spending is normally between 20-30 per cent of GDP and as the majority of it is not procurement related it should be not more than 10-20 per cent of total public procurement.



- 3.16 Whether these estimates are consistent with full compliance depends on the amount of below-threshold procurement.
- 3.17 Member States are accordingly asked by the Commission for provisional estimates of the share in public procurement for projects above the relevant threshold. Some Member States supply the Commission with provisional estimates of the share of the total public procurement value represented by above threshold projects. These data are not complete, have not been formally reviewed and are not provided at the same level of detail by all countries. Table 3.3 shows that the value of procurement recorded in the provisional estimates and compares this with the estimated total value of procurement in 2000 and 2001.

Table 3.3: Estimated Total Procurement in 2000 and 2001¹² in Provisional Estimates and in Eurostat (€billion)

	2000			2001		
	Recorded Procurement Volume of Provisional Estimates	Eurostat Procurement Volume	Share of Recorded Procurement	Recorded Procurement Volume of Provisional Estimates	Eurostat Procurement Volume	Share of Recorded Procurement
Austria	1.7	34.3	5%	2.2	33.2	7%
Belgium	2.3	37.6	6%	3.3	38.2	9%
Denmark	1.2	29.9	4%	1.3	31.4	4%
Finland	0.7	20.1	4%	0.7	20.9	3%
France	29.6	227.3	13%	17.5	224.5	8%
Germany	11.4	349.1	3%	14.6	357.5	4%
Greece	0.8	19.1	4%	1.6	19.4	8%
Ireland	1.2	12.5	10%	1.4	14.9	9%
Italy	8.4	144.3	6%	8.1	148.5	5%
Luxembourg	0.3	2.8	9%	0.2	3.2	7%
Netherlands	5.1	80.9	6%	4.0	90.5	4%
Portugal	10.9	16.7	65%	2.3	16.6	14%
Spain	20.0	79.1	25%	20.0	84.1	24%
Sweden	5.8	49.8	12%	3.2	46.4	7%
UK	33.0	242.1	14%	38.5	259.7	15%

Source: Provisional Estimates; Eurostat

- 3.18 The provisional estimates thus cover only a small proportion of the total as estimated by Eurostat. Moreover, at the time of writing the latest available estimates relate to central government procurement in four countries in 2002, and to another six countries in 2001. These estimates are summarised in the table which follows.

¹² The provisional estimates are not available for all years. The years 2000 and 2001 are the most recent years for which the data were sufficiently complete for this analysis.



Table 3.4: Share in Central Government Procurement Value of Above Threshold Contracts (1996–2002)

	1996	1997	1998	1999	2000	2001	2002	Average
Austria	56%	53%	n.a.	48%	n.a.	44%	n.a.	50%
Belgium	87%	85%	95%	78%	96%	98%	n.a.	90%
France	76%	77%	73%	78%	80%	81%	n.a.	78%
Germany	n.a.	n.a.	76%	90%	86%	65%	55%	75%
Ireland	n.a.	42%	32%	28%	n.a.	55%	n.a.	39%
Luxembourg	89%	94%	89%	97%	100%	97%	n.a.	94%
Netherlands	36%	n.a.	44%	46%	41%	56%	56%	46%
Portugal	15%	n.a.	14%	26%	14%	20%	18%	18%
Spain	69%	75%	n.a.	77%	81%	83%	n.a.	77%
UK	65%	51%	71%	57%	62%	46%	86%	63%

Source: Provisional Estimates

- 3.19 Only France and Spain have provided estimates of the proportion for local authorities and only France has provided an estimate for utilities – see Table 3.5.

Table 3.5: Share in Local Authority and Utilities Procurement of Above Threshold Contracts (1996–2002)

	1996	1997	1998	1999	2000	2001	2002	Average
France local authorities	66%	61%	60%	66%	61%	67%	n.a.	63%
Spain local authorities	48%	50%	n.a.	65%	60%	61%	n.a.	57%
France utilities	85%	90%	79%	70%	97%	97%	n.a.	86%

Source: Provisional Estimates

- 3.20 A full comparison can therefore only be made for France, as in the next table. This shows the comparison between the provisional estimate of France and those of Eurostat.

Table 3.6: Comparison of provisional estimates and Eurostat Estimates in France (the only country estimating figures for all three categories) €billion

	1996	1997	1998	1999	2000	2001
Provisional estimate for France - above threshold	21.7	21.6	14.9	19.3	19.9	12.5
Provisional estimate for France - below threshold	8.6	8.7	8.5	9.1	9.7	5.0
France country reports - Total (sum of the above)	30.4	30.3	23.4	28.4	29.6	17.5
France - OJEU published procurement	14.5	18.0	23.6	26.0	34.2	40.6
France Total Procurement Eurostat	212.5	214.2	214.2	221.7	234.1	241.5

Source: Provisional Estimates for France; Eurostat

- 3.21 The provisional estimates do not appear to be a reliable basis on which to conclude whether or not there is a significant amount of non-compliance with the publication requirements of the Directives.



- 3.22 One additional data source is a report by EuroStrategy dated 1999.¹³ This estimated the amount of public procurement covered by the Directives for the years 1993 to 1998. If one compares these estimates with the estimates for published procurement one gets a compliance rate of 16 per cent in the year 1993 rising to 32 per cent in 1998. An extrapolation of this rising trend would imply overall compliance of about 50 per cent by 2004.
- 3.23 But these numbers have to be taken with extreme caution. According to the EuroStrategy report the estimate for the “total public procurement subject to the Directives” is based on extrapolations from one country to another and we have extrapolated again from these results (using the publication rate and assuming an unchanged proportion between total public procurement and public procurement subject to the Directives). These estimates would suggest that there is still a significant amount of non-compliance especially in Germany and to a lesser extent Denmark, Austria, the Netherlands, Portugal and the UK. But as already noted, these figures are based on extrapolation over time and between countries, and may be wide of the mark.

Table 3.7: Compliance Rate Extrapolations Based on EuroStrategy Report

	Eurostrategy estimates						Extrapolation of Eurostrategy Estimates					
	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004
Austria	0%	5%	13%	21%	19%	21%	18%	34%	37%	39%	41%	49%
Belgium	31%	33%	42%	49%	62%	80%	90%	88%	107%	90%	98%	93%
Denmark	32%	42%	46%	37%	38%	38%	40%	59%	46%	42%	36%	46%
Finland	1%	19%	28%	32%	28%	32%	34%	46%	53%	48%	53%	60%
France	21%	23%	28%	36%	45%	59%	63%	81%	97%	110%	128%	87%
Germany	8%	11%	13%	15%	17%	18%	14%	15%	15%	20%	28%	20%
Greece	76%	124%	95%	103%	118%	121%	100%	75%	83%	107%	95%	98%
Ireland	31%	26%	30%	44%	51%	41%	43%	55%	49%	47%	48%	70%
Italy	21%	26%	31%	32%	37%	34%	42%	56%	51%	63%	72%	52%
Luxembourg	21%	15%	20%	28%	34%	53%	47%	44%	40%	48%	52%	68%
Netherlands	22%	27%	28%	30%	32%	30%	34%	62%	70%	50%	46%	43%
Portugal	39%	35%	54%	58%	45%	45%	42%	42%	53%	58%	54%	49%
Spain			27%	35%	37%	38%	56%	83%	77%	76%	89%	72%
Sweden	2%	28%	37%	34%	35%	39%	42%	61%	83%	68%	64%	64%
UK	23%	27%	29%	29%	33%	29%	26%	36%	35%	34%	61%	38%
EU	16%	21%	25%	27%	31%	32%	32%	43%	45%	46%	61%	46%

Source: EuroStrategy report

- 3.24 In some cases the methodology used here results in compliance rate estimates exceeding 100 per cent.
- 3.25 For Germany and the Netherlands, there are some additional data to be considered. A survey in Germany¹⁴ in 2004 found that only five per cent of all contracts and one per cent of works contracts were above threshold. Although the number of respondents to this survey was relatively low and the value of these contracts is not known, this additional

¹³ EuroStrategy Consultants, Application of Measurements for the Effective Functioning of the Single Market in the Area of Public Procurement, 1999

¹⁴ Wegweiser GmbH Berlin, Öffentliches Auftragswesen Deutschland, 2004/2005.



indicator suggests that the problem of non-compliance may be significant but less than indicated by the other figures reviewed above.

- 3.26 A research company, Significant, estimated on the basis of government accounts in the Netherlands for the year 2002 that only about 35 per cent of the contract value which should have been published was actually published¹⁵.
- 3.27 We explored the question of compliance in our survey and interviews.
- 3.28 In order to establish if our sample of respondents uses the OJEU more or less than average, we estimated the publication or transparency rates for our sample and compared this with the transparency rates from the Eurostat estimate.
- 3.29 The result shows a very slightly higher transparency rate in our sample than in the overall population of the Eurostat estimate. Overall all our authorities would have an estimated transparency rate of 22 per cent while the Eurostat estimate for 2004 is only 17 per cent (slightly over 20 per cent if allowance is made for the excluded defence and other contract types). The comparison is not exact, as the transparency rate of MAPP includes also ITTs that do not lead to a contract award (as a result, for example, of aborted award procedures) while these are excluded from the survey responses, but the order of magnitude is similar.
- 3.30 In general interviews did not reveal any serious issues that suppliers thought arose from failures by the awarding authorities to comply with the requirements for publication; this was the aspect of the tender process that was least likely to attract comment or criticism. There was general agreement in all countries that transparency had increased. There is perhaps an implication that the importance of formal transparency tends to diminish with the complexity of the invitation to tender. A number of consulting companies observed that if an attractive tender was not known to them before its publication in the OJEU then it was already too late to develop a successful proposal as their business is based upon long term relationships and depends upon close understanding of client needs. If they first learn of something in the OJEU it is likely that one of their competitors has acquired earlier knowledge by working with the client.
- 3.31 There was no impression from any of the interviews with awarding authorities that they were failing to publish contracts above the relevant thresholds. Nor did the interviews with suppliers lead us to conclude that a failure of authorities to publish was seen as a general problem, although there were known to be cases in which contracts were artificially divided to bring them below the thresholds.

¹⁵ Significant, Nalevingsmeting Aabesteden 2002 (2002).



Additional international and other comparisons

- 3.32 We turn now to the question whether a more detailed review of international and other differences in publications recorded can throw light on whether or not there is significant overall non-compliance.
- 3.33 A few countries have substantially higher publication rates than the average. From 2000 Greece, having greatly exceeded that level in previous years, published roughly twice the EU average proportion in the OJEU, and the UK was also always consistently above the average. On the other hand, countries often significantly below the average are the Netherlands, Germany, Denmark and Luxembourg. In the Netherlands the publication rate has declined since 2001.
- 3.34 One explanation for the country differences in transparency rates is that all public expenditure paid for by EU funding has to be published in the OJEU irrespective of the size of the contract. The proportion of public expenditure that is financed in this way is highest in Greece, Spain and Portugal. Of these three countries two have a significantly higher transparency rate while Portugal is around the EU average.
- 3.35 Other differences between countries are probably explained by differences in administrative structures in general and the procurement structures in particular. The number of agencies differs between countries as does the administration of central purchasing. The higher the number of agencies the lower the volume published in the OJEU is likely to be, as individual contracts will tend to be smaller in value and hence more of them will be below threshold.
- 3.36 The number of local authorities in relation to population size differs widely by country. The average number of inhabitants per local authority (as indicated in the EC statistics for level 1 LAUs¹⁶ and level 2 LAUs) ranges from 1,100 in Ireland to 88,500 in Portugal. These differences will, as noted above, be reflected in the distribution of contract sizes.

¹⁶ LAU is the official abbreviation for local administrative unit.

**Table 3.8: Number of Inhabitants per Local Authority (2005)**

	Number of Local authorities (LAU 1 and LAU 2)	Inhabitants per local authority
Austria	2,359	3,500
Belgium	589	17,000
Denmark	271	19,900
Finland	528	9,800
France	36,678	1,600
Germany	14,853	5,500
Greece	7,165	1,400
Ireland	3,446	1,100
Italy	8,100	6,800
Luxemburg	118	3,400
Netherlands	489	32,700
Portugal	113	88,500
Spain	8,108	4,900
Sweden	290	30,700
UK	864	69,400

Source: Commission Services

- 3.37 These figures do not explain the difference between the transparency rates for Greece and Portugal. Greek procurement is highly decentralised as compared with Portugal. This would normally imply the prevalence of more contracts below the threshold and lower transparency rates in Greece. However the “inhabitants per local authority” index is not a helpful indicator of the degree of procurement centralisation in Greece. More than one third of the Greek population lives in Athens and consequently the largest part of the country’s procurement budget is either spent on the city of Athens itself (e.g. for the construction of the metro or for the Olympic Games) or is handled by central government authorities. A large number of larger contracts are concentrated in the hands of a small number of awarding authorities.
- 3.38 Large differences are also evident in the MAPP database. The distribution of published contract sizes differs widely in the different Member States, as shown in the following two tables. For example, Table 3.9, relating to services and supplies, shows that in Greece 48 per cent of contracts are for less than €50,000 compared to an EU average of 9 per cent; and, Table 3.10 shows that in Germany only three per cent of all advertised works contracts are above €6 million whereas in the UK 67 per cent are in excess of this figure.



Table 3.9: Distribution of Contract Sizes in 2002¹⁷ (Supplies and Services)

Supplies and Services	under 50,000 Euro	50,000-100,000 Euro	100,000-150,000 Euro	150,000-250,000 Euro	250,000-750,000 Euro	750,000-2,500,000 Euro	2,500,000-6,000,000 Euro	over 6,000,000 Euro	Total
Austria	13%	6%	7%	11%	36%	19%	6%	2%	100%
Belgium	1%	7%	5%	13%	40%	24%	7%	3%	100%
Germany	9%	6%	6%	15%	39%	18%	4%	3%	100%
Denmark	2%	3%	6%	11%	39%	27%	9%	5%	100%
Spain	1%	1%	2%	14%	45%	27%	8%	3%	100%
Finland	2%	1%	2%	7%	36%	31%	13%	8%	100%
France	15%	14%	11%	17%	26%	11%	3%	2%	100%
UK	2%	3%	4%	12%	34%	27%	10%	8%	100%
Greece	48%	0%	0%	0%	29%	5%	5%	14%	100%
Ireland	4%	4%	5%	15%	34%	23%	11%	5%	100%
Italy	2%	3%	4%	11%	37%	29%	8%	6%	100%
Luxembourg	24%	24%	9%	3%	18%	18%	3%	3%	100%
Netherlands	1%	5%	6%	20%	38%	21%	4%	5%	100%
Portugal	1%	5%	11%	18%	40%	18%	4%	3%	100%
Sweden	1%	2%	3%	15%	37%	25%	8%	7%	100%
Total	9%	9%	8%	15%	32%	18%	5%	3%	100%

Source: MAPP

Table 3.10: Distribution of Contract Sizes in 2002 (Works)

Works	under 50,000 Euro	50,000-100,000 Euro	100,000-150,000 Euro	150,000-250,000 Euro	250,000-750,000 Euro	750,000-2,500,000 Euro	2,500,000-6,000,000 Euro	over 6,000,000 Euro	Total
Austria	14%	14%	10%	13%	27%	15%	4%	4%	100%
Belgium	1%	3%	4%	3%	11%	29%	19%	29%	100%
Germany	17%	15%	11%	14%	22%	13%	4%	3%	100%
Denmark	0%	4%	0%	4%	9%	13%	26%	43%	100%
Spain	0%	1%	1%	3%	8%	9%	16%	61%	100%
Finland	5%	0%	8%	3%	5%	13%	35%	33%	100%
France	11%	10%	8%	11%	22%	19%	10%	9%	100%
UK	0%	0%	3%	2%	4%	8%	15%	67%	100%
Greece	17%	0%	0%	0%	0%	0%	0%	83%	100%
Ireland	0%	0%	0%	2%	10%	12%	14%	63%	100%
Italy	1%	1%	2%	1%	4%	17%	21%	53%	100%
Luxembourg	9%	9%	4%	7%	36%	21%	10%	3%	100%
Netherlands	0%	3%	3%	0%	9%	17%	23%	45%	100%
Portugal	0%	0%	0%	0%	0%	11%	39%	50%	100%
Sweden	3%	9%	5%	10%	21%	15%	15%	22%	100%
Total	13%	12%	9%	11%	21%	15%	8%	12%	100%

Source: MAPP

¹⁷ At the time of the analysis the 2002 numbers were the most recent years in which the contract value numbers had been checked and corrected.



3.39 The effect of different publication practices can also be seen in the distribution of below and above threshold contracts in the different EU countries shown in Table 3.11. In Luxembourg, France and Germany the majority of published contracts are below threshold, either because they are published voluntarily or because the number of what would otherwise be small contracts is inflated by being reported separately but then included as part of a bigger project the publication of which is required by the Directives.

Table 3.11: Distribution of Contracts Above and Below Threshold 2002

	Below Threshold	Above Threshold	Number of Contracts	Per 1 million inhabitants
Austria	69%	31%	1319	161
Belgium	31%	69%	499	50
Germany	79%	21%	7031	86
Denmark	21%	79%	387	72
Spain	18%	82%	2764	69
Finland	15%	85%	528	102
France	61%	39%	19067	318
UK	18%	82%	2670	45
Greece	41%	59%	27	3
Ireland	28%	72%	257	66
Italy	24%	76%	3481	63
Luxembourg	84%	16%	102	255
Netherlands	26%	74%	669	42
Portugal	24%	76%	153	15
Sweden	27%	73%	1662	187
EU-15	52%	48%	40616	108

Source: MAPP 2002

Data from Europe Economics' survey, 2006

3.40 We now turn to reviewing the information gathered on compliance in the Europe Economics survey and interviews.

3.41 First, to put publication in the OJEU into context, we asked awarding authorities where they publish invitations to tender other than in the OJEU.

**Table 3.12: Publication of Contracts**

	Local/ Regional Press	National Press	Trade Press	By Phone or Letter	In the OJEU	On own Website	On National Website	Respondents	OJEU Users
AT - Austria	8	5	5		9	5	3	13	69%
BE - Belgium	3	3	3	5	15	2	19	24	63%
DE - Germany	15	5	5	10	16	11	14	42	38%
DK - Denmark	4	3	3	5	11	6	3	16	69%
EL - Greece	4	4	4		5	3		6	83%
ES - Spain	8	3	3	2	19	8	4	19	100%
FI - Finland	5			8	13	6	7	19	68%
FR - France	59	33	33	18	52	26	49	80	65%
IE - Ireland	12	10	10	7	22	8	30	38	58%
IT - Italy	28	27	27	5	38	28	7	42	90%
LU - Luxembourg	3			1	3	1		3	100%
NL - Netherlands		1	1		2		1	3	67%
PT - Portugal	9	12	12	6	10	2	1	17	59%
SE - Sweden	14	5	5	18	40	30	51	79	51%
UK - United Kingdom	10	5	5	1	20	7	3	20	100%
Grand Total	182	116	116	86	275	143	192	421	65%

Source: Awarding authorities' survey

- 3.42 Table 3.12 shows that only around a third of German respondents use the OJEU but in most countries more than two thirds do so, giving an overall utilisation of 65 per cent. The numbers are strongly influenced by the sample. In Spain and Luxembourg the authorities we approached were in part selected because of their use of the OJEU so that in these countries the high proportion of users is partly due to this sample bias.
- 3.43 Responses show that the larger the procurement budget of the publishing authority, the more likely the awarding authority is to publish it in the OJEU.

Table 3.13: Publication of Contracts in the OJEU

	OJEU Users	Grand Total	Proportion of OJEU users
less than €1 million	28	98	29%
€1-25 million	137	204	67%
€25-100 million	63	71	89%
€100+	47	48	98%
Grand Total	275	421	65%

Source: Awarding authorities' survey

- 3.44 Table 3.14 shows the proportion of the 2005 budget published in the OJEU in different countries.

**Table 3.14: Proportion of Budget Published as ITTs in the OJEU**

	No OJEU	No Response	0%	1-10%	11-20%	21-30%	31-40%	41-50%	51-60%	61-70%	71-80%	81-90%	91-99%	100%
AT - Austria	4	4	1	2				1						1
BE - Belgium	9	5		3	1	1	1			1	1		2	
DE - Germany	26	7	2	4	1		1	1						
DK - Denmark	5	5		3	2	1								
EL - Greece	1	1		2				1					1	
ES - Spain		7		4		1		3	2	1		1		
FI - Finland	6	3		2	1	3	1		1		1		1	
FR - France	28	23	1	9	5	3	1		1	2	1	4	2	
IE - Ireland	16	8		2		1	1	2	2	1	3			2
IT - Italy	4	19		5	1	2	3	1	1	3		1		2
LU - Luxembourg		1		1	1									
NL - Netherlands	1	1								1				
PT - Portugal	7	6	2	1			1							
SE - Sweden	39	10		8	1	6	2	4	3	2	1	1		2
UK - United Kingdom		5	1	2	4	3		2	1	1				1
Grand Total	146	105	7	48	17	21	11	15	11	12	7	7	6	8

Source: Awarding authorities' survey

- 3.45 Of the 170 respondents to this question nearly one third (55) used the OJEU for a small part of their procurement while over two thirds (119) used it for less than 50 per cent of their procurement. Only a small portion of the respondents (21 of 170) use the OJEU for more than 80 per cent of their procurement.
- 3.46 Our survey result shows a broadly similar transparency rate in our sample as in the overall population of the Eurostat estimate.
- 3.47 However, the countries in table 3.15 fall into three groups; Belgian, French and British authorities in our sample are not far from the average; authorities in our sample from Austria, Denmark, Spain and Portugal have a lower compliance rate than in the Eurostat figures; responding authorities in Sweden, Italy and Finland and Germany are far more compliant than the average authority in their country. (We cannot say anything about Greece, the Netherlands and Luxembourg based on these figures due to the lack of response).



Table 3.15: Publication Rate of Survey Sample in Comparison to Publication Rate in MAPP¹⁸

	Number of responses	Published Budget (Survey)	Overall Budget (Survey)	Published in OJEU	Transparency Rate (MAPP - 2004)	Over-estimate
AT - Austria	13	€ 30,367,500	€ 430,000,000	7%	20%	-64%
BE - Belgium	24	€ 171,575,000	€ 945,500,000	18%	16%	13%
DE - Germany	42	€ 83,172,500	€ 905,000,000	9%	7%	23%
DK - Denmark	16	€ 7,717,500	€ 381,000,000	2%	17%	-88%
EL - Greece	6	Not enough responses				
ES - Spain	19	€ 50,355,000	€ 620,500,000	8%	22%	-62%
FI - Finland	19	€ 301,835,000	€ 1,068,000,000	28%	17%	63%
FR - France	80	€ 233,055,000	€ 1,609,000,000	14%	16%	-10%
IE - Ireland	38	€ 287,172,500	€ 1,251,000,000	23%	28%	-17%
IT - Italy	42	€ 434,460,000	€ 1,714,000,000	25%	16%	56%
LU - Luxembourg	3	Not enough responses				
NL - Netherlands	3	Not enough responses				
PT - Portugal	17	€ 25,625,000	€ 580,000,000	4%	17%	-74%
SE - Sweden	79	€ 656,390,000	€ 2,255,000,000	29%	19%	54%
UK - United Kingdom	20	€ 412,665,000	€ 1,851,000,000	22%	25%	-12%
Grand Total	421	€ 2,885,887,500	€ 14,338,500,000	20%	17%	22%

Source: Awarding authorities' survey

Information from the interviews

- 3.48 The rate and methods of publication seem to be significantly influenced by the administrative interrelation between national publication practices and the OJEU. For example, awarding authorities in Spain have to pay a fee in order to publish in the national publication journal. However, if they publish in the OJEU the national publication journal will also publish the tender, free of charge. This means publishing in the OJEU is a way of avoiding the charge for the national publication.
- 3.49 The e-tender website of the Irish Government (www.etenders.gov.ie) and the Austrian equivalents (www.liefer.at and www.auftrag.at) were welcomed equally by suppliers and by awarding authorities. The existence of these websites explains Ireland's and Austria's extensive rate of publication in the EU. These websites also ensure that the right tenders are published in the OJEU. The commercial b2b e-procurement platforms like Achilles (Utilities), Eutilia (Utilities), and Gatetrade (all sectors) are similarly effective.
- 3.50 Another example of the effect of administrative rules is the market for the advertisement of small contracts in France. The authorities have to publish the small contracts in specified journals that charge an administratively determined price. Publication in the OJEU can be a way to save money by avoiding the national obligation.

¹⁸ The calculation of the publication rate of our sample is based on the responses to the question about their total procurement budget and on the responses to the question about the proportion of their budget they publish in the OJEU. The answers to both questions were given in bands so the resulting calculation can only give an indication.



Selection of Procedure

3.51 Turning now to the second aspect of compliance, the Directives allow awarding public contracting authorities (as opposed to utilities which have less restrictions) to choose between the restricted and the open procedure. In clearly defined cases the authorities have the additional options of the accelerated restricted procedure (without a formal qualification phase) or the negotiated procedure. We refer to these two procedures as the non-standard procedures.

Data from MAPP

3.52 The MAPP database shows clearly which type of awarding authorities in which countries use the different procedures and to what extent. However since the choice of procedure is based on qualitative assessments about the urgency and complexity of a contract there is no direct way of knowing how the choice of procedure was justified.

3.53 Nonetheless the way in which choices are distributed among the procedures is of interest. Substantial divergence from the average may be an indication of a possible abuse of the procedures.

3.54 The following analysis starts by establishing the proportionate usage of the negotiated and accelerated restricted procedures (non-standard procedures) by Member States. The usage of those Member States in the first quartile was then selected as a benchmark against which to compare the choices made by the other Member States.

3.55 The analysis covers the period 1993 to 2005, and uses five data points: 1993, 1996, 1999, 2002 and 2005. Awarding authorities were divided into two categories: local authorities and central governments. Contracts are divided into works, supply and service. (There is a fourth hybrid category of combined activities but this is relatively small, often zero, and is not considered here. This makes no material difference to the analysis).

3.56 Table 3.16 shows the proportion of local authority contracts that used the negotiated and accelerated restricted procedures (referred to as non-standard procedures), by contract type and by Member State.



Table 3.16: Proportion of Non-Standard Procedures by Contract Type in Local Authorities (1999–2005)¹⁹

Local authorities	1999			2002			2005		
	Works	Supply	Service	Works	Supply	Service	Works	Supply	Service
Austria	0.4%	0.9%	16.8%	0.6%	0.7%	20.5%	0.6%	2.1%	12.2%
Belgium	1.3%	4.2%	6.0%	2.3%	11.0%	9.4%	6.5%	1.3%	9.3%
Denmark	1.4%	1.4%	0.9%	1.5%	1.3%	1.5%	1.5%	1.5%	0.9%
Finland	7.8%	0.5%	2.6%	0.0%	0.2%	2.1%	3.7%	0.2%	2.5%
France	5.4%	3.9%	19.4%	3.4%	3.8%	5.1%	3.6%	2.8%	4.7%
Germany	1.3%	9.6%	23.4%	0.9%	5.6%	27.7%	1.1%	3.6%	22.4%
Greece	0.0%	1.4%	3.9%	0.5%	2.2%	2.5%	0.0%	0.0%	2.0%
Holland	4.0%	0.9%	10.7%	0.0%	0.0%	19.0%	0.8%	1.0%	6.0%
Ireland	2.8%	10.6%	37.9%	4.2%	3.7%	31.5%	3.2%	1.7%	22.8%
Italy	12.0%	19.3%	23.0%	5.1%	12.5%	13.9%	3.3%	12.0%	11.1%
Luxembourg	0.0%	12.5%	25.0%	0.0%	4.0%	6.3%	0.0%	27.3%	6.3%
Portugal	0.5%	0.0%	0.8%	0.0%	0.0%	0.0%	0.0%	0.0%	1.5%
Spain	0.7%	0.4%	1.1%	0.0%	0.2%	1.1%	0.0%	0.2%	0.9%
Sweden	5.8%	0.9%	2.8%	3.2%	0.3%	2.1%	1.2%	0.8%	3.0%
UK	11.3%	4.1%	11.2%	8.7%	4.2%	13.7%	6.7%	2.3%	10.6%
1. Quartile	0.6%	0.9%	2.7%	0.0%	0.3%	2.1%	0.3%	0.5%	2.2%

Calculations by Europe Economics from MAPP database

- 3.57 In order to establish which countries and which types of authorities use the extra procedures significantly more than others, we compared each country's proportion of non-standard procedures to the first quartile among proportions for the year and the contract type.²⁰ The first quartile of 15 Member States is always the middle value between the fourth lowest and the fifth lowest member state. The difference between the country value and the benchmark was then used to calculate a "heavy use" indicator for all countries and awarding authorities weighted by their mix of works, supplies and service contracts.
- 3.58 It is understood that some deviations from the benchmark quartile are not significant. Table 3.17 provides details for local authorities for the period in question.

¹⁹ In order to cover the whole period we have conducted the analysis every three years from 1993-2005. For the following tables we show all years for this only the latest years for illustration.

²⁰ We use the first quartile as level of comparison as there might be a tendency to overuse the non-standard procedures. If so then a median would already contain some overuse.



Table 3.17: Use of Non-Standard Procedures in Local Authorities 1993–2005 (Deviations from First Quartile)

	1993	1996	1999	2002	2005
Austria	n.a.	2.2%	2.6%	4.1%	2.7%
Belgium	0.5%	3.5%	2.9%	6.9%	5.1%
Denmark	3.2%	0.5%	-0.6%	0.2%	-0.1%
Finland	n.a.	1.5%	0.3%	0.0%	0.2%
France	4.5%	1.1%	9.4%	3.0%	2.6%
Germany	6.0%	4.0%	5.1%	6.4%	5.2%
Greece	0.1%	-0.2%	0.5%	1.3%	-0.3%
Holland	5.5%	5.2%	4.3%	9.2%	2.2%
Ireland	2.8%	6.1%	12.9%	11.2%	9.6%
Italy	23.7%	19.7%	18.6%	10.5%	9.3%
Luxembourg	2.0%	5.5%	2.0%	0.9%	3.3%
Portugal	1.1%	-2.1%	-1.0%	-0.9%	-0.6%
Spain	0.8%	-0.4%	-0.8%	-0.4%	-0.8%
Sweden	0.0%	-0.6%	0.3%	0.2%	0.6%
UK	6.3%	3.5%	6.4%	7.7%	5.7%

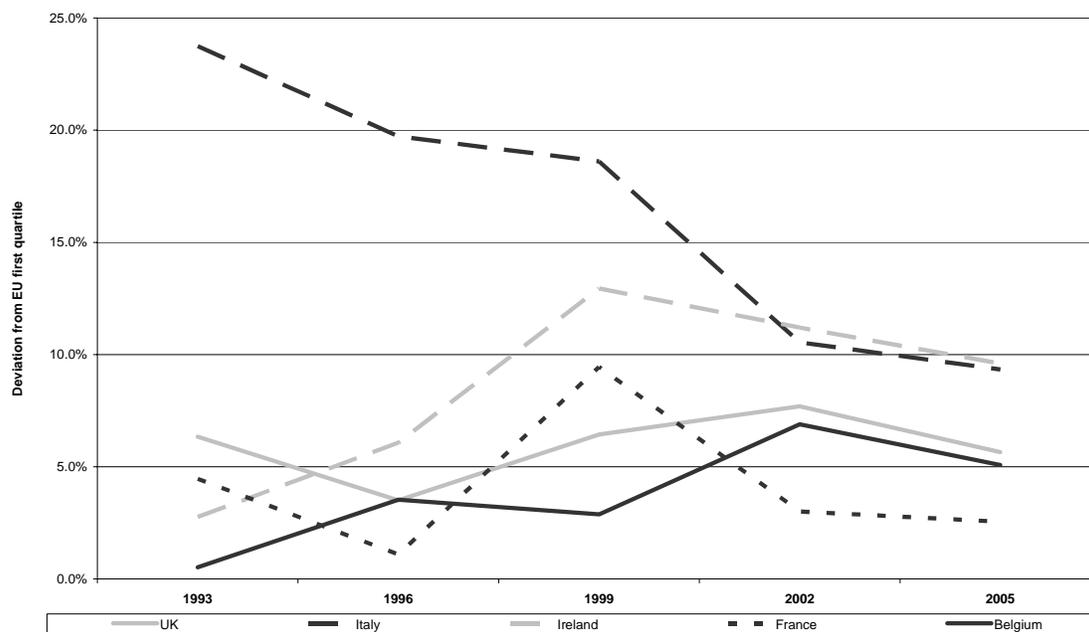
Calculations by Europe Economics from MAPP database

- 3.59 Summarizing all three contract types (works, supplies, services) in one indicator, Table 3.17 shows that in 1996, across all contract types, Belgian local authorities used non-standard contract award procedures at a rate 3.5 per cent above the EU-15 first quartile. In contrast, Portuguese local authorities in 1996 were 2.1 per cent below the EU-15 first quartile.²¹

²¹ It could be argued that a minimal use of the restricted procedures may be an indicator of a failure to make an economically efficient choice of procedure although the impression derived from some interviews was that a lower use is more likely to be appropriate.



Chart 3.4: Use of Non-Standard Procedures in Local Authorities 1993–2005 (Deviations from First Quartile)



Calculations by Europe Economics from MAPP database

3.60 Chart 3.4 shows the results for local authorities in the five Member States with the highest upward deviations from the EU-15 benchmark quartile. Belgium, Ireland, Italy and the UK have deviations higher than 5 per cent (as does France in one year). The Italian authorities seem to have criteria for the employment of non-standard procedures that are significantly different from those employed by other Member States. Nonetheless, over time the behaviour of the Italian local authorities has become more like that of the other countries. On the other hand, in Ireland, resort to non-standard procedures increased until 1999 and did not decrease much thereafter.

3.61 Deviations from the first quartile by central governments, using a similar calculation, are shown in Table 3.18.



Table 3.18: Deviations from First Quartile for the use of Non-Standard Procedures in Central Governments (1993–2005)

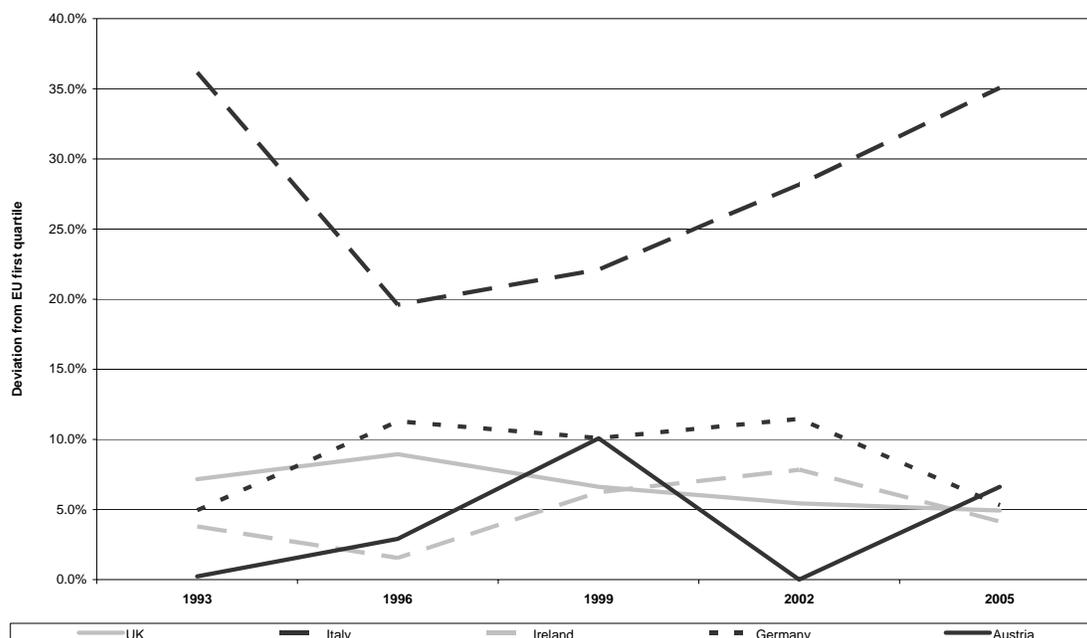
	1993	1996	1999	2002	2005
Austria	0.2%	2.9%	10.1%	n.a.	6.6%
Belgium	-0.1%	0.0%	3.7%	1.9%	4.0%
Denmark	2.4%	2.3%	0.3%	2.2%	-1.7%
Finland	-0.9%	11.4%	-0.1%	0.2%	-1.0%
France	5.3%	1.0%	2.8%	2.8%	0.8%
Germany	5.0%	11.3%	10.1%	11.5%	5.3%
Greece	-0.2%	1.8%	4.9%	5.2%	0.3%
Holland	2.4%	2.0%	0.9%	-0.1%	-1.0%
Ireland	3.8%	1.5%	6.2%	7.8%	4.1%
Italy	36.2%	19.6%	22.1%	28.2%	35.1%
Luxembourg	0.5%	5.1%	5.9%	44.3%	1.0%
Portugal	0.9%	-0.9%	-0.3%	0.4%	3.4%
Spain	-0.1%	-2.3%	-2.0%	-0.5%	-1.6%
Sweden	0.2%	5.9%	3.4%	5.0%	2.8%
UK	7.2%	8.9%	6.6%	5.4%	4.9%

Calculations by Europe Economics from MAPP database

- 3.62 The five central government authorities that use the non-standard procedures the most frequently are those of Italy, Ireland, Austria, Germany and the United Kingdom central government authorities. Three of these five countries have already been mentioned in our examination of local authorities (Italy, Ireland and the UK). Again Italy stands out as a heavy user of the non-standard procedures and the difference in its behaviour from that of other countries is widening. In 2005 over 35 per cent of the Italian central authorities' contracts employed the non-standard procedures.
- 3.63 For all other countries the difference in use in comparison with the first quartile is relatively small and in most cases decreasing over time. Chart 3.5 illustrates the largest deviations from the benchmark by central government authorities. There is no reason to see these results as problematic, other than perhaps in the case of Italy.



Chart 3.5: Selected Central Government Deviations from EU-15 First Quartile



Calculations by Europe Economics from MAPP database

Information from interviews

- 3.64 There was little evidence from interviews that suppliers were concerned about laxity in the application or of deliberate abuse of tender procedures. There were few cases where suppliers felt that they had been wilfully excluded from a tender.
- 3.65 However, there appeared to be agreement amongst the suppliers of complex works and services that the conditions for employing negotiated procedures were too narrow.
- 3.66 There were a number of persuasively reasoned objections to the failure to include reputation and historic performance among the award criteria for awarding tenders (experience can be included as selection criteria in the first step of the restricted procedure). The arguments included contentions that too tightly defined criteria were uneconomic for both the supplier and the awarding authority, depriving the supplier of opportunities to deploy innovations and depriving the awarding authority of “value for money” advantages and service quality.
- 3.67 These types of considerations were regularly mentioned in all sectors where the writing of the proposal is a major undertaking. These are all sectors with a high creative content in their proposals like planning, IT infrastructure projects, and consulting of all kinds. There were also some suggestions that the Directives discourage innovation by encouraging awarding authorities to be over-specific in stating their requirements.



3.68 Generally in these sectors the suppliers complained that the choice of procedure was not made with enough regard to the costs of the suppliers (which we will discuss in more detail in Chapter 4) but suppliers could not tell if this was due to a misuse of the procedures or to errors in their application.

Fair Decision Process

Data from Europe Economics' survey

- 3.69 The third aspect of compliance is the use of a fair decision process. Our survey of suppliers asked “Judging from your experience, which Member States provide especially fair procurement procedures? (Multiple responses possible).” The answers are set out in Table 3.19 below. 60 replies were received from Austrian suppliers and of these, 21 named Austria itself as being particularly fair. Similar expressions of confidence in the parent country were found in replies from suppliers based in Germany, Finland, Luxembourg, the Netherlands, Sweden, and the UK.
- 3.70 The second column of this table shows the total of number of mentions for exceptional fairness for each country. Ignoring those who reported favourably on their own Member States, the countries thought to provide particularly fair procedures are Austria (28) Germany (21) Luxembourg (24) Sweden (27) and the UK (21). Portugal, Greece and Spain received fewest mentions as being particularly fair.
- 3.71 We also asked which countries were regarded as providing especially unfair procurement procedures, and the replies are tabulated below. The third column shows the number of times each country was named as particularly unfair. If replies relating to the parent country of the respondent are excluded, the three countries receiving fewest of these unfavourable mentions were Finland, Luxembourg and Sweden. The countries most widely regarded as unfair by suppliers outside their boundaries are Greece, Spain, and France.
- 3.72 We tabulated the numbers with and without the German replies to check that the results were not unduly influenced by them. Inclusion makes little difference to the ratio of fair to unfair replies.
- 3.73 Given that different countries received a very different number of replies the best measure for a country comparison is the relation between fair and unfair responses. Countries which are thought of unfavourably are Greece, Spain and Portugal while Luxembourg, Sweden, Denmark, Ireland and Finland all enjoy a good reputation.

**Table 3.19: Perceptions of Fairness and Unfairness**

	With German replies			Without German replies		
	Unfair	Fair	Relation	Unfair	Fair	Relation
AT - Austria	13	28	46%	5	10	50%
BE - Belgium	17	15	113%	11	9	122%
DE - Germany	11	21	52%	11	21	52%
DK - Denmark	6	16	38%	4	8	50%
EL - Greece	28	2	1400%	14	1	1400%
ES - Spain	21	6	350%	14	4	350%
FI - Finland	3	16	19%	2	9	22%
FR - France	23	11	209%	12	3	400%
IE - Ireland	7	16	44%	3	11	27%
IT - Italy	15	18	83%	11	13	85%
LU - Luxembourg	4	24	17%	3	8	38%
NL - Netherlands	8	19	42%	4	4	100%
PT - Portugal	13	2	650%	8	2	400%
SE - Sweden	5	27	19%	4	18	22%
UK - United Kingdom	15	21	71%	7	14	50%
Grand Total	189	242	78%	113	135	84%

Source: Supplier survey

- 3.74 More information on the responses to these questions can be found in table A1.1 and table A1.2 in Appendix 1.
- 3.75 We asked those respondents that had observed behaviour by awarding authorities that seemed inconsistent with the objective of ensuring fair and transparent procurement practices for information on the types of behaviour that had caused such these concerns. The options offered in the questionnaire were as follows:
- (a) "Without obvious reasons the contract was only published as an accelerated restricted or negotiated procedure".
 - (b) "Contracts were split into several parts seemingly only to avoid the obligation to publish".
 - (c) "The award of the contract did not seem to follow the published award criteria".
 - (d) "The award criteria were not published, vaguely formulated or incomprehensible".
 - (e) "Onerous small print was used to describe the specification of the contract".
- 3.76 The results are shown in Table 3.20 below. The left hand column shows the national base of the respondent, not the country where the problem was perceived. All five of the potential problems are perceived by respondents.

**Table 3.20: Types of Perceived Unfair Procedures**

	Inadequate Procedure	Contract Splitting	No award Criteria published	Did not follow award criteria	Onerous small print	Total Yes responses
Austria	11	10	13	9	10	33
Belgium	1	0	1	0	0	1
Germany	32	29	29	27	32	82
Denmark	1	2	5	5	0	8
Greece	1	1	2	2	1	4
Spain	0	0	0	0	0	0
Finland	2	1	3	2	0	4
France	2	1	1	0	1	3
Ireland	7	7	7	4	5	17
Italy	3	5	2	1	4	7
Luxembourg	1	1	2	1	0	2
Netherlands	7	7	6	9	1	16
Portugal	2	1	2	0	0	3
Sweden	2	1	8	8	3	13
United Kingdom	9	6	7	2	1	13
Grand Total	81	72	88	70	58	212

Source: Supplier survey

- 3.77 Generally the Directives require the authorities to publish the award criteria either the contract notice or in the contract documentation. But the extent to which this is done differs significantly by respondent authority. While two thirds of the authorities publish the award criteria for all of their procurement, only one third of the German authorities do so. This difference can be attributed partly to differences in national legal frameworks as in Germany the publication of the award criteria is not obligatory for below threshold contracts. (See table A1.3 in Appendix 1).
- 3.78 On the other hand there is no obligation to publish the exact weightings of the award criteria. Nonetheless more than 40 per cent of the authorities do publish the weightings for all their procurement. Again this varies from country to country. While only 19 per cent of the responding German authorities publish weightings for all their procurement 71 per cent of the responding Italian authorities do so. (See table A1.4 in Appendix 1).

Information from the interviews

- 3.79 It would not be surprising if suppliers who failed to secure a tender were sometimes critical of the fairness of award procedures. In interviews these criticisms were of two kinds. The most serious was that the decisions on the weighting of the various criteria for tender awards were not themselves transparent or always entirely comprehensible. The second kind was the straightforward criticism that the published criteria were not always applied. One interviewee had very recently won a judgement against an awarding authority on this basis.
- 3.80 Other complaints made by those being interviewed included an allegation that artificially high requirements for previous turnover were included as a device to prevent small



businesses from having access to the market; and that a state-funded competitor was winning contracts despite being clearly less efficient.

- 3.81 An important complaint is that the technical specification of the authorities may represent an unbeatable advantage for the incumbent (for example the requirement that all traffic guidance equipment must be capable of integration with the general software system used by an awarding authority). Even if some of these extra burdens for newcomers may be unavoidable some suppliers think that potential suppliers may be deterred because the awarding authorities are not prepared, for example, to make the effort to describe an existing system in such a way that a new system can be made compatible with it. Alternatively they simply may not be technically competent to do so. We discuss this further in Chapter 4.
- 3.82 Some evaluation criteria, especially those that are quality related, are necessarily subjective. Suppliers feel that such criteria are sometimes used as cover for unfair awards.
- 3.83 Some suppliers claimed that they have the impression that authorities use ITTs as “fishing expeditions” in order to glean information about suppliers’ ideas without any intention of awarding a contract.

Post Award Transparency

- 3.84 The fourth aspect of compliance to be considered is post-award transparency. This is achieved when a complying awarding authority publishes a Contract Award Notice (CAN) and provides failed bidders with sufficient information about the reasons why they were not selected.

Data from MAPP, Eurostat

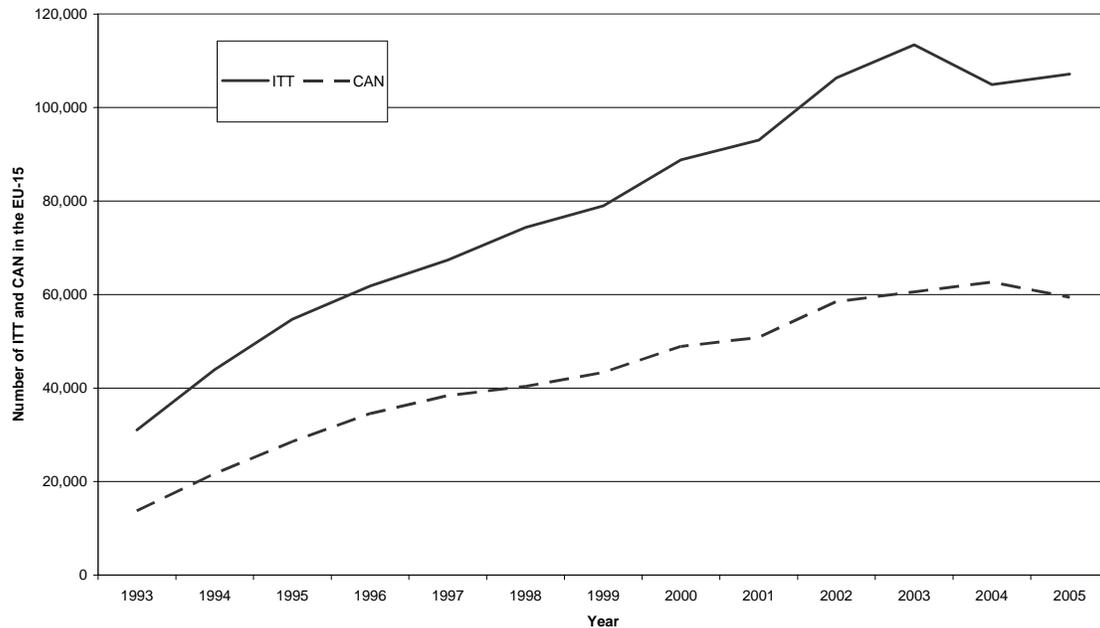
- 3.85 The number of Contract Award Notices published is only about 60 per cent of the number of Invitations to Tender. This relationship is very constant. Overall there are four reasons for this behaviour.
- (a) As the number of ITTs has been growing strongly over time and CANs always relate to an ITT that is on average perhaps half a year old in any given year the number of CANs must be lower than the number of ITTs (if for example the number of ITTs grows by 10 per cent per year and CANs are on average six months old that would mean that the number of CANs is 5 per cent lower than the number of ITTs).
 - (b) Some contracts that are published as an ITT are not awarded when the authorities change their mind, re-advertise or do not find a suitable bidder.
 - (c) Quite a lot of authorities publish ITTs for contracts where they are not required to publish. It well may be that these authorities feel that their voluntarily assumed obligation does not extend to the publication of a CAN for these contracts. On the other hand they may be some CANs published for contracts in exempted sectors



where no ITT was published (as in these sectors only the publication of a CAN is obligatory). (See chapter 7 for more information on exempted sectors).

(d) Additionally some authorities may simply not be compliant.

Chart 3.6: Numbers of ITT and CAN Published in the OJEU



Source: MAPP

- 3.86 This general relationship is not constant over different types of authorities and Member States. While utilities and central government authorities publish only 25 per cent of their ITTs without publishing a corresponding CAN, local authorities publish on average 40 per cent of their ITTs without a corresponding CAN.
- 3.87 The general impression is therefore that the number of CANs is high in all type of authorities where general compliance can be regarded as high (central government and utilities) and less high in local authorities and other authorities.
- 3.88 As local authorities and other authorities are on average smaller than the first two it would be unsurprising if they more often publish ITTs below threshold and so do not publish corresponding CANs. As their procurement departments are on average smaller and less specialised and standardised, it is also reasonable to assume that they more often fail to comply due to lack of knowledge.

**Table 3.21: Number of CANs in Relation to ITTs (2004)**

	Relation between ITTs and CANs				
	Central	Local	Other	Utilities	Total
Austria	32%	39%	44%	60%	43%
Belgium	46%	23%	29%	64%	33%
Denmark	56%	59%	56%	35%	55%
Finland	49%	47%	51%	58%	50%
France	86%	79%	47%	70%	71%
Germany	75%	53%	55%	64%	57%
Greece	73%	15%	16%	32%	27%
Ireland	43%	44%	38%	54%	43%
Italy	55%	52%	59%	92%	58%
Luxembourg	5%	19%	20%	105%	19%
Netherlands	103%	67%	58%	157%	81%
Portugal	19%	28%	7%	27%	14%
Spain	101%	71%	79%	110%	82%
Sweden	72%	57%	45%	38%	55%
UK	62%	44%	51%	86%	51%
EU 15	74%	63%	48%	72%	60%

Source: MAPP database

- 3.89 Overall there are three countries which publish significantly more CANs in relation to ITTs than the average. These are France, the Netherlands and Spain. On the other side countries which publish significantly less than the average are Portugal, Greece, Luxembourg, Belgium and Ireland. All other countries were around average.

Data from Europe Economics' survey

- 3.90 We asked awarding authorities for the proportion of their public procurement budgets published as ITTs and, separately, for the proportion published as CANs. 78 of the 167 respondents published less than 20 per cent of their budget as CANs in the OJEU, while 25 published more than 80 per cent. (See table A1.5 in Appendix 1).
- 3.91 Overall the relationship between the number of ITTs and the number of CANs in our sample differs from that in the MAPP database. Eighty per cent of respondents claimed to publish as many ITTs as CANs.

Information from the interviews

- 3.92 Post-award information was valued by suppliers and the Directives are regarded as having been a material factor in improving its provision.
- 3.93 Performance on this score by awarding authorities was however uneven both within and between countries. Because it is, in the nature of things, the one aspect of the tendering process that is less critical than others, it is one of the more neglected; but this is perhaps the result of carelessness rather than of attempts to evade the provisions of the Directives.



- 3.94 Overall the requirement for post-award transparency is not something the authorities always welcome. This is both because of their cost (to be discussed later) and also because of the possibility of encouraging legal challenges to the award decision. They have an incentive to minimise the amount of information provided in order not to assist with the development of legal challenge.
- 3.95 On the other hand, for authorities confident of their own procurement procedures, the provision of information to failed bidders is part of what they regard as efficient procurement procedure. They see the publication notice and the sending of information on their award decisions to failed bidders as helping to increase the average quality of future bids.
- 3.96 The introduction of the obligation to disclose the award decision and the right to challenge the decision were, in most countries, among perhaps the most important changes brought by the Directives.
- 3.97 The amount of information disclosed by the authorities is generally not judged to be sufficient by the suppliers. In many countries (for example Germany, Denmark and Austria) many authorities do not explain to suppliers why they have failed to win the tender. One reason for this could be legal differences as, for example, under the German national framework awarding authorities are not allowed to publish the assessment results of the winner as this is a matter on which the winner is entitled to privacy. In Italy and Spain, progress has been observed in terms of information exchange after awarding decisions. However, some suppliers find that information is still “bureaucratic” in nature, and the increase in transparency over the decision process is limited.

The Impact of the National Legal Systems on Compliance Behaviour

- 3.98 In many interviews it became clear that the nature of the national public procurement legislation has a significant impact on the compliance behaviour of the awarding authorities. The relationship of the provisions of the Directives to the national requirements in the treatment of tenders below the threshold is apparently important for both the extent and the way in which awarding authorities comply:
- (a) Some below-threshold national legislation has very much the same provisions as the Directives. Where this is so this means that the threshold does not bring any significant, additional restrictions on the behaviour of the authorities. An example is Sweden. In other countries (e.g. Germany) the below-threshold requirements are less extensive so that the existence of the threshold does significantly increase the obligations of the authorities. It is very probable that some authorities react by trying to avoid the additional obligations.
 - (b) The national legislative requirements for below-threshold contracts also differ in the way in which they are integrated with the provisions of the Directives. Some Member States have produced a complete new procurement legal framework in which the Directives are the part that is relevant only for above-threshold contracts. Other



Member States simply introduced the Directives on top of national provisions without integrating the two sets of requirements. Authorities in these countries are faced with the task of ensuring that they understand the provisions of both frameworks and how they relate to each other. Authorities in Member States with two un-reconciled frameworks have more problems in complying as they are uncertain as to how to secure themselves from suit. They are also more likely to avoid using the second EU framework whenever this is possible.

(c) Additionally the legal changes did not come about all at the same time.

3.99 It is likely that these legal differences have a significant impact on the degree of compliance in some Member States. We have therefore ranked the different Member States with respect to the extent to which the national and EC threshold obligations relate to each other. (1) Where the gap is large, (2) where it is average, and (3) where it is small. And we have again ranked them with respect to the degree to which the legal frameworks are integrated. (1) Un-integrated, (2) average integration, (3) closely integrated. These six rankings will be used in subsequent analysis.

(a) Austria introduced a new procurement law in 1997, which was amended in 2002. The national provisions for below threshold contracts are closely integrated (3). The amendments introduced by the 2002 law eased some of the conflicts of obligation so that the ranking for the obligation gap is (2).

(b) The Belgian national law on procurement only changed slightly the legal framework with the implementation of the Directives (1993 Act). But all those interviewed suggested that the Directives had an additional impact by making the awarding authorities (and suppliers) more keenly aware of their obligations for contracts above and below the threshold. The national law is partly integrated with the Directives (2) and the obligation gap is very small (3).

(c) In Denmark the legal framework for works contracts has provisions very similar to those of the Directives while the legal framework for supplies and services is less prescriptive below the threshold. Overall the score for the obligation gap is (1). The frameworks are not integrated and the score for the integration is (1).

(d) Finland has completely amended its legal framework for below and above threshold contracts in the light of the Directives. The two frameworks are therefore integrated (3) and they are very similar and have a low obligation gap (3).

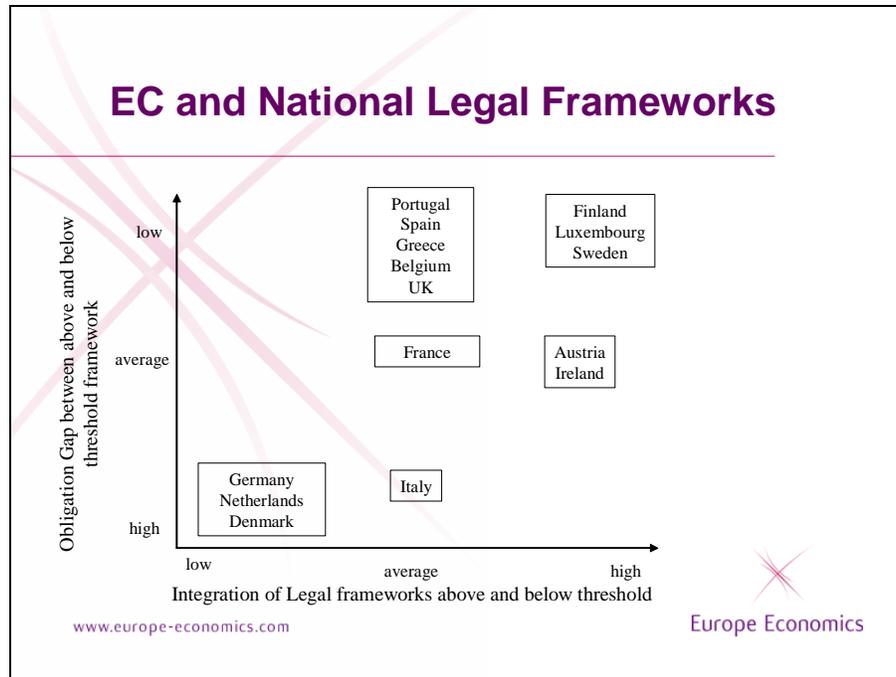
(e) With the introduction of the CMP 2001 France has substantially integrated the frameworks for contracts below and above the threshold. Nonetheless our interviews showed a high number of authorities in France complaining about legal uncertainty. Therefore France is assigned an integration ranking of (2). Generally the below-threshold framework follows relatively closely the obligations of the Directives although not as closely as in other countries: (2).



- (f) Germany has not revised the structure of its public procurement laws (Vergabeordnung) since the implementation of the Directives. The two laws are not integrated (1). The “Vergabeordnung” is in many ways less prescriptive than the Directives and the obligation gap is significant (1).
- (g) The Greek public procurement laws (one for works and one for supplies and services) are in general very similar to the Directives but the Greek government has not fully integrated the two frameworks (2). The obligation gap is very low or non-existent as some authorities consider that the Directives are less burdensome than the national procurement laws (3).
- (h) Irish public procurement laws were mainly revised after the implementation of the Directives. The integration at the level of principle between the Green Book (binding for below-threshold contracts) and the Directives is very high (3). Overall the obligation gap is average as the Irish procurement laws reduce some of the administrative burden for below-threshold contracts (2).
- (i) Italian national public procurement laws were not fundamentally changed following the implementation of the Directives and the laws are not fully integrated (2). The obligation gap appears to be significant (1).
- (j) Luxembourg revised its public procurement law in 2003. The two frameworks are now well integrated (3) and there is a low obligation gap (3).
- (k) The national procurement laws in the Netherlands were not structurally changed after the introduction of the Directives. The two frameworks have not been integrated (1) and the obligation gap is significant especially for utilities and local authorities where only part of the procurement was covered by legislation (1).
- (l) The national procurement legislation in Portugal was very similar to the provisions of the Directives. It was therefore not fundamentally changed after the introduction of the Directives. Overall the frameworks are to a degree integrated (2) and the obligation gap is very small (3).
- (m) The Spanish national legislation is very closely modelled on the Directives but the two frameworks are not fully integrated (2). The obligation gap is nonetheless very small (3).
- (n) Sweden revised its complete legal framework for below-threshold and above-threshold contracts after the introduction of the Directives. The two frameworks are therefore integrated (3) and have a low obligation gap (3).
- (o) The national legislation for the UK is based on Treasury guidelines and legislation applying to local authorities. The provisions are similar to the Directives at the level of principle although they are less prescriptive. The integration of the two frameworks is average (2) and the obligation gap is considered by most interviewees as relatively small (3).



Chart 3.7: Obligation Gap and the Integration of National and EC Legal Frameworks



Source: Europe Economics

- 3.100 This categorisation helps to explain why some countries have higher transparency rates than others. It suggests that Denmark, Netherlands and Germany should have significantly lower transparency rates than the average, that Italy should be slightly below average, that France should be somewhere around the average, that Portugal, Spain, Greece, Belgium, Austria Ireland and the UK should be slightly above average and that Luxembourg, Finland and Sweden should be significantly above average.
- 3.101 This is indeed broadly the picture given by a comparison of national transparency rates in recent years. Germany, Denmark and Netherlands are, as expected, countries with low transparency rates or, in the case of Denmark, with very slowly improving rates. Austria, Sweden, Spain and Greece all, as expected, outperform.
- 3.102 If one additionally takes the centralisation of procurement into account the picture becomes relatively clear for the big countries. If one summarizes the indicators for integration, the obligation gap and centralisation together and compares the results with the publication rates of the Member States between 1999-2004 it becomes clear that the indicator explains the position of four of the five biggest countries (Germany, France, Italy and the UK). For the small countries the indicator is less reliable as it can only explain the position of one of the four small countries (Denmark). For the middle countries it can explain the position of 3 of six countries (Austria, Portugal and, if only just, Sweden).



Table 3.22: Legal Frameworks and Transparency Rates²²

	Obligation Gap	Integration	Decentralisation	Expectation of Publication rate from indicators	Publication Rate Average Relation to EU 15 average 1999-2004	Expectation right
	1 high OG 2 average OG 3 low OG	1 low integration 2 average integration 3 high integration	1 decentralised 2 average 3 centralised			
Austria	2	3	2	around average	95%	yes
Belgium	3	2	3	above average	108%	no
Denmark	1	1	3	around average	109%	yes
Finland	3	3	2	above average	92%	no
France	2	2	1	around average	104%	yes
Germany	1	1	2	below average	42%	yes
Greece	3	2	1	around average	230%	no
Ireland	2	3	1	around average	138%	no
Italy	1	2	2	around average	108%	yes
Luxembourg	3	3	2	above average	89%	no
Netherlands	1	1	3	around average	60%	no
Portugal	3	2	3	above average	110%	yes
Spain	3	2	2	around average	146%	no
Sweden	3	3	3	above average	123%	yes
UK	3	2	3	above average	151%	yes

Source: Europe Economics

3.103 It seems logical that the indicator works better for bigger countries than for smaller countries as the MAPP indicator itself is significantly more robust for bigger countries (as the estimates are based on higher numbers and are because of that more stable).

3.104 There are, in addition, good reasons for some of the outliers. For example Ireland might be far better than the prediction as Ireland has a very efficient e-tender system which facilitates compliance. From interviews we received the impression that Dutch procurement is more decentralised as the number of local authorities suggests (it appears to be decentralised within organisations). Some Spanish authorities for example told us that they can save fees (for the national journal) by advertising in the OJEU and this may be one explanation for their higher than expected publication rate.

The timeline of legal implementation

3.105 Another point of interest is the timing with which the Directives were implemented and the impact of this timing on the observed publication rate over time. For several countries it can be shown that legal changes (or the lack of them) have had a significant impact on the degree of compliance:

- (a) Austria was in the earlier years a country with very low publication rates. However after the introduction of the new "Beschaffungsgesetz 1997" Austrian authorities have continually increased publication and now have one of the highest publication rates.

²² Our judgement was that every result above 90 per cent and below 110 per cent was assessed at around average.



- (b) Denmark was in the early years one of the best performing countries probably as a result of its high degree of centralisation. However the growth of the publication rate has been much slower than in other EU countries and in the most recent years Denmark was more likely to be below average. This is consistent with our knowledge of Denmark's legal system, and our finding that where the legal implementation of the Directives created two distinct sets of legal procedures this created complications for the authorities.
- (c) As in Austria, French publication rates soared after the introduction of the CMP 2001. In the year 2004 the publication rate decreased significantly but this need not be the indication of a trend.

Other legal factors that influence compliance behaviour

- 3.106 The interviews suggested that in countries that have founded special administrative courts both suppliers and awarding authorities were more content with the conduct of appeals. In some countries (for example in France and Sweden) the first appeal has to be made to local or regional courts that are not specialised on public procurement cases. Jurisdictions can have widely different legal predictability. Increased legal predictability makes remedies more effective and less burdensome for the authorities.
- 3.107 We also found that the Alcatel ruling was of great importance in many countries.²³ Respondent authorities mentioned that this ruling has increased the legal risk for them significantly, especially authorities in Germany. Before this ruling the anticipated risks were only of damage claims (and the probability of this was very low due to reluctance to sue on the side of the suppliers), whereas after the Alcatel ruling the courts could more easily halt or even reverse an award procedure. This represents a significantly increased risk, giving the authorities more reasons to ensure legal accuracy.

Conclusions

- 3.108 A study in the Netherlands concluded that in 2002 there was still a significant degree of non-compliance with the requirement to publish invitations to tender, and that the Dutch authorities only published 35 per cent of the contract value that fell under the directives.²⁴ On this basis, the Netherlands should have a "full compliance" publication rate of about 25 per cent as recorded by Eurostat. Unfortunately the Netherlands is the only Member

²³ Alcatel Case C-81/98 – the key issue in this case was the interpretation of a provision in the Remedies directive (89/665/EEC) which requires Member States to ensure that review procedures allow for the setting aside of unlawful decisions. The case before the national court concerned a dispute over a contract, which had been awarded and signed on the same day. The ECJ ruled that Member States must ensure that a contracting authority's decision to award the contract is open to review in a procedure whereby the applicant can have that decision set aside if the relevant conditions are met, notwithstanding that the law provides for a possibility of an award of damages once the contract is concluded.

²⁴ Significant, Nalevingsmeting Aabesteden 2002 (2002).



State that has provided a firm data basis for such a judgement. Our impression is that there is also still significant non-compliance in Germany.

- 3.109 If – purely for illustration - one were to take 25 per cent as an average “full compliance” publication rate, consistently with the estimate for the Netherlands cited above, this would imply that another 9 of the 15 countries do not publish between a quarter and a third of the volume that they should have published (as these 9 countries have publication rates between 16 and 19 per cent).
- 3.110 However, our main conclusion is that on the base of current statistics it is very difficult to tell what level of compliance with the requirement to publish invitations to tender has been reached. The provisional estimates provided to the Commission have too many gaps to allow a firm conclusion. It would be desirable to ask the authors of these estimates to prepare reconciliations with Eurostat data. Depending on the results of this exercise, it might then be appropriate to consider an EU-wide census of procurement, to establish a firmer factual base on this matter.
- 3.111 With regard to the use of special procedures, it would seem appropriate for Italy to review the use currently being made of special procedures.
- 3.112 With regard to fairness of procedures our interviews have shown that the Directives have increased the number of tender specifications in which the award criteria have been specified in writing, sometimes even with formal weightings; and there are relatively few complaints about unfair procedures.
- 3.113 With regard to post-award information, the practice of publishing CANs is much more common in some Member States than in others. Countries with a relatively small number of CANs are Portugal, Luxembourg, Greece and Belgium.
- 3.114 Differences in the means by which the Directives were incorporated into national legislation explain some of the differences in effective compliance.
- 3.115 National legal frameworks differ in the Member States in terms of the integration of the national and the EU framework and in terms of the obligation gap between the below and the above threshold legal framework.
- 3.116 It seems that countries which have integrated the Directives into a new legal framework that includes both below and above threshold contract have higher compliance rates than countries which introduced the Directives without amending the previous national frameworks. Thus for example Austria and France seem to have improved their compliance after the introduction of new legal frameworks.
- 3.117 Compliance is also positively influenced by below-threshold frameworks that impose obligations broadly similar to the EU legal framework. Especially in Germany the EU framework seems to be perceived as very burdensome in comparison to the national framework, and this leads to lower compliance rates. On the other hand, in some countries (Sweden and Finland) authorities complained about below-threshold



frameworks being too similar since this implied unduly high compliance costs for small contracts outside the scope of the Directives.

3.118 Finally, the provision of efficient links between national tender websites and the OJEU seems to help compliance. In Austria and in Ireland many suppliers and authorities commended the e-tender systems for being user-friendly.



4 DIRECT IMPACTS

- 4.1 There are four main impacts, each of which is the subject of a section of this chapter:
- (a) The impact of increased *transparency*. Transparency is achieved when an awarding authority follows the publication rules laid down in the Directives for the chosen procedure. Here we examine evidence of the effects of such improvements in the availability of information.
 - (b) The achievement of *fairness*.
 - (c) The encouragement of *better procurement practices*.
 - (d) The effects of the Directives on *compliance costs* of procurement.
- 4.2 It is through these direct impacts and their influence on the strategic behaviour of awarding authorities and suppliers that the Directives have influenced the competitive process in procurement markets, and thus affected economic welfare.

Transparency

- 4.3 The requirement that contracts above the thresholds should be published has made a major contribution to increased transparency. There have been no suggestions in the literature we have reviewed or from our own research, that the information that has to be published is not in general relevant to actual and potential suppliers. This means that the increase in transparency is a more or less unambiguous benefit of the Directives. The question for evaluation is how important this benefit has been, and how widely is it recognised.

Information from the supplier survey

- 4.4 We asked suppliers whether they used the OJEU to identify bidding opportunities, and if so, for what proportion of their bids to public sector procurers. Overall, 20 per cent of respondents had used the OJ.

**Table 4.1: Usage of OJEU by Country**

	No	Yes	Grand Total	Ratio of Yes
Austria	56	3	59	5%
Belgium	2	2	4	50%
Germany	166	14	180	8%
Denmark	6	9	15	60%
Greece	4	3	7	43%
Spain	2	1	3	33%
Finland	4	1	5	20%
France	4	2	6	33%
Ireland	9	13	22	59%
Italy	5	5	10	50%
Luxembourg	2	1	3	33%
Netherlands	14	12	26	46%
Portugal	3	0	3	0%
Sweden	19	3	22	14%
United Kingdom	16	8	24	33%
Grand Total	312	77	389	20%

Source: Supplier survey

- 4.5 Germany and Austria show lower rates of usage. This is in both cases mainly due to the sample. In these two countries we had an unusually wide sample thanks to the assistance of the tender website www.liefer.at and the BDI and the distribution by some “Auftragsberatungszentren”, of our e-mailed questionnaire. This meant that the questionnaire in Germany and Austria reached not only the suppliers that use the OJEU (as in some other countries) but many who do not. Respondents therefore returned a much higher number of negative answers than elsewhere. Another related issue to that is that the responding companies in Austria and Germany were on average much smaller than those from other countries.
- 4.6 Moreover, as we found out in the interviews, the response to the question on the usage of the OJEU may be understated, as suppliers may benefit from the OJEU without knowing it. Many suppliers receive their tender notices through intermediaries that are either commercial or are organised by the Member States. This means that the numbers from the survey are probably the lower bound of real situation.
- 4.7 The more important determinant of OJEU use is the size of the company. The survey clearly showed that the bigger the company the higher on average the usage of the OJEU.

**Table 4.2: Usage of OJEU by Size of Supplier**

	No	Yes	Grand Total	Ratio of Yes
less than €2	152	14	166	8%
€2-10 million	80	26	106	25%
€10-50 million	43	17	60	28%
€50 million and	37	20	57	35%
Grand Total	312	77	389	20%

Source: Supplier survey

- 4.8 The same is true for the relationship between the number of employees and the usage of the OJEU. The proportion of OJEU users is higher for companies with more employees. EuroStrategy asked the same question in its 1998 survey and reported similar results. In the EuroStrategy survey the ratio of users was three times greater for companies with more than 250 employees than for companies with less than 50 employees; in our survey it was as much as five times higher. Overall our survey shows a significantly increased level of usage. This is as should be expected, since between 1998 and 2004 the publication rate rose by 50 per cent.

Table 4.3: Usage of OJEU by Size in the Europe Economics Survey and EuroStrategy Survey 1998

	less than 50	50-249	250 and more	All companies
EE Survey 2006	15%	40%	82%	23%
Eurostrategy Survey 1998	12%	28%	41%	n.a.

Source: Europe Economics and EuroStrategy

- 4.9 Another question asked was whether the awarding process of public purchasing contracts published in the OJEU was more or less transparent than other public procurement.
- 4.10 Unfortunately most of the respondents did not reply to this question. Of the 67 replies over half thought that procedures following the OJEU were more transparent than other public procurement. (See table A1.6 and table A1.7 in Appendix 1).
- 4.11 Further information on transparency from the awarding authority survey is set out in Chapter 3.

Information regarding transparency from the interviews

- 4.12 The conclusion from almost all the in-depth interviews was that the Directives have improved transparency. The assessment of the awarding authorities was particularly clear cut. Of the 49 respondents to this question, 44 concluded that transparency of the markets had increased while five thought that there was no effect.
- 4.13 However, the opinions of suppliers are even more important, and support a similar conclusion. Nearly all those interviewed stated that it has become much easier to find



out what contracts are being offered for tender. Overall two thirds of the 51 suppliers thought that transparency had increased and only one supplier thought that it had decreased.

- 4.14 A very important differentiating factor was the position of the company in the market. Companies that were well established in the market on average saw fewer benefits from the higher transparency than companies that were actively trying to win new customers or move into new markets. This is entirely as one would expect: the advantages are not evenly distributed among suppliers.
- 4.15 On the other hand, a common complaint was that it has become more difficult to establish exactly the true purpose of a contract. As the authorities are (or at least feel) more restricted in their communication exchange with the bidder, informal discussion on the goals of the contracts has become difficult or impossible. This means that the level of expertise needed by the authorities in order to provide technically satisfactory specifications is greater than previously when authorities could more easily clarify these issues in discussion with suppliers. Many suppliers in sectors where goods or services are not easily standardised complain that transparency is reduced by faulty and imprecise technical specifications.²⁵
- 4.16 The increase in transparency does not appear to be uniform. Some suppliers mentioned that they see a number of pro-forma notices in which the content more or less clearly indicates that there is a preferred bidder. Sometimes this is due to an internal decision by the authority to favour one bidder and sometimes it is due to a lack of technical understanding. It appears that some authorities try to frustrate the purpose of publication while complying with the letter of the law.

Conclusions on transparency

- 4.17 The results of our empirical work showed that suppliers and awarding authorities think that public procurement has become more transparent following the introduction of the Directives.
- 4.18 This is especially true in terms of the ease with which invitations to tender can be found. All suppliers found that this had improved.
- 4.19 There was some criticism that precisely identifying the real purpose of a tender was hampered by the restrictions on exchange of information.
- 4.20 Suppliers also emphasized that authorities differed in the extent to which they attempted to improve transparency.

²⁵ The Commission has now taken steps to address this problem by introducing the "competitive dialogue" procedure with the 2004 Directives. This will be discussed further below.



Fairness

- 4.21 An important purpose of the Directives was to increase the fairness of public procurement, by making it illegal to favour a local or national supplier on non-rational economic grounds, by requiring awarding authorities to specify their requirements in advance and by describing the weights to be given to the criteria used in selecting the winning tenders. These requirements gave rise to little debate in our surveys or interviews. There was a general understanding that they would increase efficiency, make the outcomes of the process more equitable, and strengthen the development of a single European market.
- 4.22 This does not mean that the specific application of those parts of the Directives designed to improve fairness is free from controversy, or that the concept of fairness or a level playing field is unambiguous. There are circumstances in which favouring a local bidder over the lowest bidder is not necessarily unfair or inappropriate. Some contracts cannot be adequately fulfilled without a local presence and in many cases it is an advantage for the awarding authority. Similarly, restrictions requiring a minimum size for suppliers are not necessarily unfair. There may be sound economic reasons for restricting contracts. Each case has to be judged on its merits.

Information from the supplier survey

- 4.23 A question asked in the survey of suppliers was whether they found that, other things being equal, the awarding process of public procurement contracts that are published in the OJEU was fairer or less fair than other public sector procurement. Somewhat surprisingly, relatively few respondents felt able to make this comparison, and of those that were able to reply (62) most thought that the Directives had neither improved nor reduced fairness (45). Size of supplier made no significant difference to the nature of replies. (See table A1.8 and table A1.9 in Appendix 1).
- 4.24 Another aspect of fairness is the extent to which local or national suppliers are unreasonably favoured. We asked respondents what proportion of bids they expected to win when bidding in the home country, and what proportion when bidding in another part of the EU. The expected success rates are different, and more than half of respondents thought they would have no chance bidding in another country. However, the results also show that, remarkably, five per cent of those replying thought that they had no chance of success in their own country. These results are shown in Table 4.4 with and without the very large number of German replies in the sample; the omission of German responses makes no significant difference.



Table 4.4: Expected Success Rates at Home and Abroad

	Expected Success Rate (All replies)				Expected Success Rate (without German replies)			
	Home country	Ratio	Other country	Ratio	Home country	Ratio	Other country	Ratio
0	21	5%	211	54%	13	6%	109	52%
1-10%	124	32%	95	24%	50	24%	51	24%
11-20%	69	18%	33	8%	39	19%	21	10%
21-30%	45	12%	18	5%	26	12%	10	5%
31-40%	31	8%	8	2%	22	11%	3	1%
41-50%	29	7%	8	2%	12	6%	5	2%
51-60%	15	4%	10	3%	11	5%	6	3%
61-70%	15	4%	1	0%	9	4%	1	0%
71-80%	14	4%	2	1%	9	4%	1	0%
81-90%	10	3%	0	0%	8	4%	0	0%
91-99%	5	1%	0	0%	4	2%	0	0%
100%	11	3%	3	1%	6	3%	2	1%
Grand Total	389	100%	389	100%	209	100%	209	100%
Estimated	27%		8%		30%		9%	

Source: Supplier survey

- 4.25 These results also suggest that 19 per cent of respondents expect to be successful in half or more of the bids they make in their home country. One reason for this is that in some areas the amount of work needed to make a proposal (in relation to contract value) is so high that the probability of success must be high in order to make bidding economic.
- 4.26 Another question asked about the chances of foreign bidders in different countries. Most respondents felt unable to say, but those who did reply suggested a lower chance for foreign bidders in most countries.

**Table 4.5: Chances of Success for Foreign Bidders by Country**

	Chances of foreign bidders in comparison to national bidders					
	Lower	Equal	Higher	Don't know	Missing	Grand Total
Austria	3	0	0	0	56	59
Belgium	0	0	0	2	2	4
Germany	6	2	0	6	166	180
Denmark	6	2	0	1	6	15
Greece	1	0	1	1	4	7
Spain	0	1	0	0	2	3
Finland	1	0	0	0	4	5
France	1	0	0	1	4	6
Ireland	7	2	0	4	9	22
Italy	2	1	1	1	5	10
Luxembourg	0	1	0	0	2	3
Netherlands	8	2	0	2	14	26
Portugal	0	0	0	0	3	3
Sweden	1	1	0	1	19	22
United Kingdom	3	3	0	2	16	24
Grand Total	39	15	2	21	312	389

Source: Supplier survey

Information regarding fairness from the interviews

- 4.27 The conclusion from almost all the in-depth interviews confirmed that the Directives have improved fairness; 38 of the 49 awarding authorities interviewed thought that fairness has significantly increased.
- 4.28 The same conclusion was reached in the discussions with suppliers. Many of those interviewed found that the legal remedies made available to them with the introduction of the Directives have made the authorities more concerned to conduct a fair procurement process. 28 of the 51 suppliers believed that fairness had increased while only six thought the opposite.
- 4.29 Additionally many suppliers thought that the obligation to publish the award criteria in advance reduced the ability of awarding authorities to pre-determine their award decisions (even though a number of suppliers commented that, of course, sometimes authorities do know before the process begins that they want to give the contract to certain suppliers and are still able to find a means of doing so).
- 4.30 The use of national or very specific technical standards is a remaining impediment to fairness that is regularly mentioned. Authorities sometimes use technical standards with which only those suppliers who have worked for them in the past are entirely familiar.
- 4.31 The same is true for certificates and other paper forms which create extra work load for newcomers. Some countries (Spain, Italy, Austria and others) have certification systems



for suppliers which reduce the burden of paper filing but these systems can also be an impediment to fairness if they are not sufficiently open to newcomers.

4.32 While overall there was a belief that fairness had improved, some particular issues occurred in discussion;

(a) In one case, a supplier alleged that his large competitors persuaded the awarding authorities (Irish local government agencies) to favour larger suppliers by including in the specification of requirements a level of historical turnover that was inappropriately high. In other cases, the observation was simply that the costs of compliance with the Directives are a significant obstacle for smaller businesses.

(b) Another issue discussed in some interviews was the treatment of incumbents by the Directives. It was argued that the requirement to base decisions solely on what was written in the tenders meant that the knowledge, often very valuable, that the awarding authority and the incumbent supplier have of each other could not be given due weight. Other complaints were the reverse; incumbents could sometimes still be given undue preference. (This issue will be discussed in more length in the competitive process section).

(c) There were complaints about the insistence of some awarding authorities on tenders being in the national language, in circumstances where no natural impediment to an international market for suppliers appeared to exist. Examples given related to air traffic control systems and to weather stations.

(d) It was thought by some of those interviewed that awarding authorities sometimes artificially break down contracts, so the each component falls below the Directive threshold. We are in no doubt that this does happen on some occasions, although all of the awarding authorities interviewed emphasised that this would not be an acceptable practice for them.

(e) One supplier interviewed in the UK was particularly interesting in that he works on “both sides of the fence”, both as a supplier of large and complex contracts to utilities and as an adviser to utilities on, among other things, how best to ensure that the Directives did not lead to sub-optimal economic decisions by the authority. He gave an account of the procurement process in which compliance with the Directives was a residual. The most important aim was to ensure that business objectives were accurately set and that the procurement proposed formed an economically optimal part of the awarding authority's strategy. It was the nature of the business decision that decided the way in which the Directives were satisfied. It was thought the procurement department should be subordinate to the business managers since it was the latter who understood the business; the job of the procurement department was to resolve whatever problems of compliance arose as a consequence of the business solutions chosen by the business manager. For a sophisticated client and a sophisticated supplier compliance with the Directives was seen as neither fair nor unfair but rather as a subsidiary and sometimes very expensive nuisance with the



potential to damage the interests of the client as well as of the supplier. His views were echoed elsewhere.

Conclusion on fairness

- 4.33 Our overall impression was, in spite of the exceptions noted, that in most sectors and in most countries the Directives have helped considerably to achieve the goal of fairness, and a level playing field. The ability of suppliers to challenge the decisions of awarding authorities appears to have had a salutary effect on the behaviour of the latter.
- 4.34 The results in the interview series were clearer than in the surveys. This is perhaps to be explained by the fact that in the interviews we were able to define in great length what we meant by fairness while in the survey the explanation had to be short. Some small suppliers would regard it as unfair if they were excluded from a particular contract by their size or composition. We would not define this as unfair if the authority has rational reasons for doing so. This subjective factor might explain part of the more negative results in the survey.
- 4.35 Another impediment to the construction of a level playing field is the bureaucracy that comes with public procurement, since the increased formality of the process can also form an advantage for incumbents, which may have a significant competitive edge as they already have all the papers and certificates necessary to bid for a contract. All newcomers (for example, most foreign companies) must first identify the certificates and declarations necessary. In this way, the increased administrative requirements of the Directives can also inhibit newcomers.
- 4.36 Like burglary, corruption and favouritism will doubtless always be with us; the question for this evaluation is whether the Directives have been effective in reducing such problems. It seems clear that in the absence of the Directives, the extent to which national or local suppliers were favoured would have been significantly greater. There remains a question whether the system is optimal for smaller potential suppliers, and we will return to this later.
- 4.37 It is clear that suppliers from the home country are often thought to have an advantage; but this does not necessarily mean that the decisions are not objective or rational. Many of those interviewed, including many who found that they had a competitive disadvantage when bidding abroad, felt that there were good economic reasons for this that it had nothing to do with national prejudice.



Spread of Better Procurement Practices

Introduction

- 4.38 The third direct benefit that the Directives might have brought is the encouragement of better procurement practices.
- 4.39 In one sense, all the desired effects of the Directives are indirect rather than direct. The objective of the Directives is to ensure that the public sector is getting the best value for its money in public procurement. This cannot be directly achieved by legislative fiat. This result was thought to be most likely to be achieved if goods are bought competitively and procurement decisions are made efficiently.
- 4.40 The Directives concentrate on prescribing the procedures that can be expected to produce the conditions that, in turn, will have the desired effects. The Directives, accordingly, emphasise the key importance of the classical requisite for competitive markets, the ready availability of all the information required for market participation. Further, in the absence of the profit motive that tends to encourage economic rationality among private enterprises in normally competitive markets, public authorities are required to behave fairly in making awards.
- 4.41 These procedures provide the monitorable controls on the implementation of the Directives. The way in which the relevant information about tenders is disseminated and the extent to which contract awards are made according to the prescribed criteria can be identified and legal sanctions applied in case of non-performance. In all this the Directives have had considerable success.
- 4.42 It is possible to hope, however, that the Directives have a deeper indirect effect by improving the very practice of procurement; the way in which it is carried out. Again, some advance has been made in this respect, but the improvements are far from complete. Indeed, not infrequently, the Directives can be interpreted and applied so as to satisfy legal requirements while frustrating the Directives' economic purpose.
- 4.43 Just as the private procurement market provides the model for establishing the best value for money so procurement in the private sector provides a model against which to judge the procurement practices of the public sector. Increasing importance has been attached to procurement, our impression is that, in the private sector as an important factor in the profitability of a wide range of commercial activities but the public sector has been relatively slow in adopting the principles and techniques that in the private sector have made major contributions to efficiency.
- 4.44 It is, however, important not to exaggerate the extent to which public sector activities can emulate the performance of private enterprise. The public sector must conform to externally imposed, prescriptive rules designed to meet universal objectives and is accountable in terms of discrete, various and substantive effects on public interests. The private sector has one integrating purpose, profit, and its rules of behaviour, within the law, are devised flexibly and *ad hoc*.



- 4.45 Nonetheless, this study shows that the Directives have had two effects on public procurement that can be usefully compared with practice in the private sector. There is no doubt that by focusing public procurement on value for money the Directives have sometimes shielded officials against political influence on the award decision, bringing considerable improvements and producing results in terms of pricing and competitiveness that are more like what can be expected in the private sector.
- 4.46 On the other hand, the Directives were designed to be uniformly applied to all kinds of procurement. Their enforcement by law has, moreover, given procurement officials a new objective – compliance. Public sector practices are necessarily less flexible than those in the private sector but the results of this study suggest that, as presently applied, the Directives may unnecessarily encourage rigidities in procedure and that the results may sometimes be perverse in terms of the Directives' economic purpose.

Evidence from the literature

- 4.47 Some of the literature suggests that at an earlier stage the Directives were not seen as helpful in terms of encouraging the improvement of procurement practice. There is evidence from the United Kingdom (DTLR 2001 Byatt) that by 2001 the Directives were believed not only by suppliers but also by local authorities and central government to be making efficient procurement sometimes very difficult if not impossible. The direct costs of compliance were not the only cause of complaint. There were much more extensive expressions of frustration about the extent to which it was often impossible to observe best practice. In particular, it was impossible to adjust procurement methods to the nature of the supplies procured. The argument ran that commoditised bulk supplies are best procured through maximizing volumes which requires centralized purchasing. It is also economic to maximize volume across time and this requires call-down and framework contracts. At the other end of the supply range high-ticket items often involve risk in their application and are usually sold subject to correspondingly complex terms and conditions involving their customization for purpose, the nature of their after-sales service and warranties about performance that can only be properly established by (expensive) discussion and negotiation. These practices were all discouraged by the Directives.
- 4.48 It is interesting that, just over three years later, again in the UK, Sir Peter Gershon's review of government efficiency (Gershon 2004), which included public procurement as a very important part of the ground covered, makes no suggestion that the rational implementation of procurement practice is impeded by the Directives. This would imply that the ongoing clarification of the Directives has already accommodated some criticisms generated by practice.



- 4.49 Having said that, a study in Austria concluded that the compulsory tendering of services does not lead to more competition and better economic outcomes as the transitory costs for changing the public organisations were too high.²⁶

Information from the supplier survey

- 4.50 In general, procurement under the Directives compared favourably with other public procurement, and, although compared unfavourably with private sector procurement this general view is not inconsistent with the assessment that public procurement procedures have improved.
- 4.51 The answers to the question about the transparency of the various kinds of contract, public and private, suggest that in all countries except Italy (where the sample was very small) private procurement is more transparent (161 respondents find private contracts the most transparent, 93 OJEU contracts and only 24 other public contracts). The tables also show that, within public procurement, contracts advertised through the OJEU are thought to be more transparent than those that are not. Small suppliers and suppliers of works contracts have a more favourable view on the transparency of OJEU contracts. (See table A1.10, table A1. 11 and table A1. 12 in Appendix 1).
- 4.52 A large number of respondents provided a view on whether the award of contracts was more or less likely to be influenced improperly by the personal interests of the officials involved in the public or private sector, and, within the public sector, whether contracts published in the OJEU are dealt with more fairly in this regard than those that are not. Substantially more respondents (190) thought that private contracts were more likely to be influenced by the personal interests of the officials involved than were public contracts, and more thought that public contracts published in the OJEU (75) were likely to be awarded fairly than those not published (111). The result is similar whatever the size of supplier. (See table A1.13 and table A1.14 in Appendix 1).
- 4.53 We asked also for an assessment of which type of procurement was least bureaucratic. Replies suggest that there is not much to choose in this regard between public procurement advertised in the OJEU and that which is not, but that (as indeed one might expect) both are held by nearly 80 per cent of those who responded to be more bureaucratic than comparable procurement in the private sector (See table A1.15 in Appendix 1).
- 4.54 Another question asked for an assessment of efficiency. Here a significant difference was found between public procurement with and without the Directives, supporting the view that the Directives have helped to improve procurement practices. But still the number of respondents that found private procurement the most efficient was the highest (234

²⁶ G. Obermann, T. Kostal, "Public Procurement at the local level in Austria, the Economic consequences of compulsory competitive tendering for public services"



private, 46 OJEU, 15 Non-OJEU). When analysed by size of supplier the results were similar; private procurement is much more often found to be the most efficient and, within the public sector, procurement advertised in the OJEU is more likely to be efficient than when it is not. (See table A1.16 in Appendix 1).

- 4.55 The same conclusion is true for the competitiveness of private and public procurement. Asked to identify the type of contract that bears the highest success rates, most of the respondent suppliers (244) indicated that they expect the highest success rates in private procurement and more respondents found non-OJEU contracts the least competitive (41) than OJEU contracts (33). (See table A1.17 and table A1.18 in Appendix 1).
- 4.56 Overall it is therefore clear that OJEU contracts in nearly all categories fare better than non-OJEU contracts but that the gap with private procurement is still significant.

Information from the interviews

- 4.57 The in-depth discussions left little doubt that overall the Directives have had a beneficial effect on procurement practices. Even awarding authorities that were concerned about the level of compliance costs were likely to feel that the Directives had on balance had a beneficial effect, primarily by improving the professionalism with which procurement tasks were performed (40 of 49 respondents thought that procurement practices have improved).
- 4.58 The same overall conclusion was reached in the discussions with suppliers; 31 of the 51 suppliers thought that procurement practices have improved.
- 4.59 All authorities and nearly all suppliers had found that contract specifications have become more precise and that this generally makes bidding for contracts more attractive.
- 4.60 Interviews revealed the existence of an inherent tension between procurement staff and those with political responsibility for their actions. In many authorities staff reported that in the past they could, as a matter of routine, be subjected to pressure from their directors with a view, for example, to favouring a local supplier or to refuse tenders from unionised firms. The Directives made it possible for them to resist such pressure by pointing out that actions of this kind could be subjected to action in the courts.
- 4.61 Against this overall assessment of progress a large number of the criticisms concerned sheer inefficiency, careless or indifference in administration. There were a significant number of allegations that the authorities get poor value for money as a result of mistakes in the execution of award procedures.
- 4.62 Perhaps the most important complaint made by many suppliers was that the level of efficiency among procurement officers remained very low. Examples were given of the weights applied to different aspects of the product being clearly inappropriate (one memorable example involved the quality of a submitted photograph of the product counting for a substantial weight in the evaluation by a Portuguese Health Authority of



copier machine toner) and of an excessive concern as to whether the already voluminous documentation submitted in support of a tender complied with the regulations.

- 4.63 A further and related charge was that of inadequate coordination within and between awarding authorities. There were different requirements from different parts of the government, not with regard to the product, but for the accompanying documentation, without apparent rhyme or reason.
- 4.64 Other striking examples of official incompetence concern attempts to award complex contracts using procedures chosen because they appear to offer the best legal protection to the authority. Decisions can be distorted by an excessive regard for compliance. In their anxiety to avoid challenge, detailed discussion with suppliers may be neglected and opportunities to take advantage of innovations may be lost. One important example from Germany was of a contract for the implementation of a new IT structure awarded on the basis of an open procedure with an insufficiently well-defined tender. The invitation excited responses from over 100 suppliers. Many of these would not have applied if they had a fuller understanding of what was required. Consequently, bids were of poor quality, an excessive amount of time was spent in their consideration, the time of the awarding authority and suppliers was wasted, the whole exercise was expensive and the outcome is unlikely to have been optimal for the authority. It was, however, fully compliant.
- 4.65 Complaints about administrative incompetence coupled with an insistence on unnecessarily detailed compliance with the chosen regulations were especially frequent in Austria, Denmark, France and Germany but were heard in nearly every other country. The overall impression is that awarding authorities often compound a lack of professionalism on the part of their officials by an excessive concern for the letter of the regulations.
- 4.66 Another significant complaint echoed those noted above in Byatt's review of procurement by UK local government, to the effect that too little regard was given to the fact that as circumstances vary, so too does the efficient form of procurement. This view was widely held. A highly sophisticated and successful consultancy with clients on both sides of the procurement function made no bones about its assessment that there are circumstances in which the only economically efficient course of action is to find a way around the intention of the Directives.
- 4.67 Others interviewed had been involved in UK PFI contracts, for both sides. There was no general complaint that the Directives had prevented what were seen as efficient decisions from having been made, but it was clearly understood that there is tension between the PFI objective of negotiating a very long term contract and the danger of entrenching a supplier in a substantial stream of work (one contract we examined was for road repair and street cleaning for a large city for a term of 25 years).



Criticisms: extraneous criteria

4.68 Some of the awarding authorities were exercised by the question of the extent to which they are entitled to require contractors to comply with social or environmental requirements that really have nothing to do with the products or services being purchased. The requirements imposed included for example, stipulations by an English water authority that its suppliers should not pollute the environment; and the requirement by a city authority that its suppliers should have “responsible” employment practices, in both cases beyond what is otherwise required by law. The authorities were concerned that this was possibly an infringement of the requirement that the criteria for awards should be limited to those relating to the most economically advantageous offer. As with PFI, there appears to be at least potential tension between the objectives of the Directives in requiring procurement practices that will lead to the “economically most advantageous” contracts, and other policy objectives that are being pursued through procurement.

Comparison of public procurement with private procurement

4.69 From observation and discussion with those we interviewed it was put to us that public and private procurement differed from each other in three fundamental ways:

- (a) prescriptiveness of the procedures;
- (b) vulnerability to litigation;
- (c) objectives.

4.70 For the public sector the most important difference for their procurement activity lies in the fact that private organisations are constrained only by the fiduciary responsibilities of their directors and the internal rules of procedure laid down by their Board whereas public procurement agencies are constrained by external regulations which have the force of law.

4.71 This does not mean that procurement managers in all private companies are necessarily given very wide powers of discretion. While a manager in a very small company may be able to act very freely the complexity of the internal rules governing procurement tends to increase with the size of company. In very large corporations where procurement decisions can have very important financial implications procedures will be prescribed in detail, transparent, very well documented and subject to careful analysis and discussion at all levels in the company. Procurement will be an integral part of strategy and, like all financial decisions, subject to audit.

4.72 The differences between private and public procurement thus become less distinct as the organisation for which they are carried out become larger. The constraints on public organisations set by the need to be able to explain and document every decision will probably always make the management of public procurement less agile than in the private sector but there is probably less difference between a big central government



authority and a big multinational company than there is between a small local authority and small privately owned company.

- 4.73 For a public authority scale is therefore an important determinant of the extent to which the Directives represent a serious additions to its administrative burden. The relative simplicity of communications and directness of financial control within a small private company makes it possible to have swift and simple procurement procedures. The small local public authority is, however, subject to regulatory requirements which are, in principle, as elaborate as those imposed on a large public authority.
- 4.74 The other key factor determining the size of the extra costs of public procurement is the extent to which contracts for any particular authority are diversified by size and type. For all sizes of authority diversity adds to cost. Again, it will bear most hardly on the smaller authority because of its lack of scale.
- 4.75 The suppliers to authorities have a right to fair treatment that suppliers to private companies have not. A procurement manager in a private company will be working within rules designed to maximize his ability to exercise his discretion in pursuit of company objectives and is answerable only to an internal authority. An official engaged in procurement for an awarding authority is aware that any failure to comply with the regulations will render the authority liable to suit.
- 4.76 Public officials are appointed in order to minimize unnecessary risk and risk aversion is their *deformation professionnelle*. They are, in the nature of things, obliged to be much more sensitive to the consequences arising from the infringement of rules and this sensitivity will increase when these consequences have legal implications. Although private companies have their own concerns about rule observance, especially where infringements are likely to attract adverse publicity, they are nonetheless subject to fewer regulations. Legal vulnerability can generate large costs without going to court. Again, this is likely to bear more heavily on small authorities, but it is a concern also to large organisations.
- 4.77 Another difference can be the more complex function of objectives that a public procurement official has to follow. The objective function of a private procurement management is clear; he is charged with profit maximisation and compliance with public obligations is seen as simply conditioning his choice of action. A public official may be instructed that other objectives - social welfare, positive discrimination or employment – have also to be served as well as value for money. Pursuit of social objectives can lead to outcomes that are economically sub-optimal and not necessarily socially optimal.

Conclusion

- 4.78 The evidence suggests that procurement practice has improved and is improving. The fact that suppliers are often critical of the public management of procurement should not be allowed to outweigh the suppliers' own opinions that the Directives have produced a situation superior to that which would otherwise have been expected.



- 4.79 The greater managerial difficulty that attends public procurement is derived principally from the fact that public objectives tend to lack the precision of the drive for profit. But the various initiatives taken by Member States to provide some sort of co-ordinating and educational facility aimed at improving public procurement and driven by a concern for fiscal efficiency is a very encouraging outcome to be associated with the promulgation of the Directives.
- 4.80 Some of the unintended effects of the Directives stem from the perverse motivation that may sometimes arise from an unthinking dedication to the application of the minutiae of the rules. This is, in turn, exacerbated by the fact that the Directives were, especially in the period under study, themselves necessarily only an approximation to the controls that would be applied where much greater discretion was allowed to managers. For some authorities this has almost certainly caused their procurement processes to look less like those practised in the private sector.
- 4.81 This suggests that a possible barrier to the effectiveness of the Directives in improving the effectiveness of public expenditure in the future lies in the quality of the administrative staff. Improved performance here would support arguments for delegating greater discretion to procurement officers and bringing them closer to the behaviour expected of private companies.

Compliance Costs of Awarding Authorities

- 4.82 The fourth of the direct impacts is the cost of compliance with the Directives, compared with the cost of complying with the regulations that would have been in place in the absence of the Directives (i.e. in the counterfactual).
- 4.83 The analytical framework explained in Chapter 2 draws a distinction between the ways in which compliance costs for awarding authorities and those for suppliers enter the analysis. Suppliers' costs affect their strategies, and ultimately the prices and qualities they offer. Costs falling on the authorities may not significantly affect the quantities or the specification of what they require, but will generally be borne by taxpayers or consumers more directly. However, it is convenient to review all the available evidence concerning compliance costs together, in this section.
- 4.84 As explained earlier, there is an important distinction to bear in mind when assessing compliance costs. In the interviews we were able in discussion to define with care and reach a common understanding of the most probable legal situation without the Directives. In the questionnaires such an exact definition could not be established and we simply asked the respondents to estimate the difference between the current below-threshold framework and the Directives framework. In Austria, Finland and Sweden the counterfactuals are therefore different for the survey and for the interviews. Here we found that the below-threshold framework had changed substantially due to the Directives. In the interviews therefore the situation now was compared with the situation before the enactment of the Directives.



Information from the awarding authority survey

- 4.85 We asked awarding authorities to estimate the number of man-days they expected to be required for the award of a typical contract (typical that is for the authority concerned) if the contract was not published in the OJEU and how many would be required for the award of a similar contract that is published in the OJ. The authorities could choose which type of contract (works, supplies or services) and which size of contract they would find typical.
- 4.86 Obviously this question is a hypothetical question as for some sizes of contracts (small contracts) they would always use the national framework and for bigger contracts they would always use the OJEU framework. We asked them for a comparison of the two types of contracts in order to find how much more work would be incurred if the chosen type of contract would be covered by the Directives.
- 4.87 Some authorities had no familiarity with the OJEU and they therefore only answered the questions relating to non-OJEU contracts. There were 185 usable replies for both contracts and 36 additional replies which related only to non-OJEU contracts. (See table A1.19 in Appendix 1).
- 4.88 The respondents could choose from nine contract sizes and from three contract types (works, supplies and services) the type of contract for which they found it easiest to estimate the number of days required for an award. They were expected to select an example which they regarded as representative as possible of their general experience.
- 4.89 Responses for both types of contracts were distributed in the following way.

Table 4.6: Number of Replies (for Both Contracts)

	Service contract	Supplies contract	Works contract	Grand Total
around €10,000	5	3	2	10
around €25,000	10	7	3	20
around €50,000	7	17	2	26
around €100,000	3	1	5	9
around €150,000	10	9	3	22
around €250,000	18	23	10	51
around €750,000	9	8	7	24
around €2.5 million	1	3	8	12
€6million or more	1	4	6	11
Grand Total	64	75	46	185

Source: Awarding authority survey

- 4.90 The table which follows compares the number of man-days needed for contracts under the Directives and other contracts by size of contract. The average number of days for contracts under national regulations (i.e. outside the scope of the Directives) was about 10 for the smaller contracts, rising to about 50 for the largest ones.



4.91 In all categories the award of a contract under the procedures of the Directives requires more days of work than the award of contracts under national regulations. This extra amount of days does not rise proportionally. The number of extra days needed rises only slightly. In the lower categories the number of days is around 5 while in the higher categories it is around 7. Consequently the additional number of days decreases with increasing contract size. In the lowest contract sizes the number of days increases by more than 50 per cent, while in the highest contract sizes the number of days increases only by around 20 per cent.

Table 4.7: Number of Days Required to Award a Contract (for Different Contract Sizes)

	Non-OJEU contracts	OJEU contracts	Additional number of days for OJEU	Additional number of days in per cent
around €10,000	10.5	16.4	5.9	56%
around €25,000	8.3	13.2	4.9	59%
around €50,000	12.8	17.2	4.3	34%
around €100,000	10.9	15.6	4.7	43%
around €150,000	18.4	18.8	0.5	2%
around €250,000	18.9	26.7	7.9	42%
around €750,000	15.5	25.8	10.3	66%
around €2.5 million	21.0	26.7	5.8	27%
€6million or more	48.8	57.0	8.2	17%
Average of all contract sizes	17.5	23.5	6.1	35%

Source: Awarding authority survey

4.92 The award of service contracts needs more working time than the award of supplies and works contracts, while supply contracts generally need the least time. In terms of number of days the increase in required working time for works contracts is the highest followed by supply contracts and service contracts but in relation to the required number of days supply contracts have higher increases of expenses than service contracts.

Table 4.8: Number of Days Required to Award a Contract (for Different Contract Types)

	Non-OJEU contracts	OJEU contracts	Additional number of days for OJEU	Additional number of days in per cent
Service contract	22.3	28.0	5.7	26%
Supplies contract	12.2	16.4	4.2	34%
Works contract	19.3	29.0	9.7	51%
Average of all contracts	17.5	23.5	6.1	35%

Source: Awarding authority survey

4.93 For all the number of days rose on average by 6 days or 35 per cent.

4.94 By comparing the number of days needed to award a Non-OJEU contract with the number of days needed to award an OJEU contract it is possible to estimate the additional workload necessary for an OJEU contract.



- 4.95 In our sample the cost increases of works contracts (50 per cent) are higher than those of supplies and service contracts. This comparison would probably have shown an even more significant difference had the Commission not decided to differentiate between works and other contracts by setting a much higher threshold for works contracts.
- 4.96 The following table analyses the data in terms of countries. It shows in which countries the increase in administrative costs for awarding authorities is most marked. Considering only those countries from which there were 20 or more replies, there are substantial increases for Germany, France, Ireland and Italy. Sweden showed only a very small increase. This corresponds with our impressions from the interviews since Sweden has a below threshold legal framework very similar to the Directives while Germany's framework differs substantially from the Directives.

Table 4.9: The Extra Burden by Member State and Regulation

	Number of responses	Number of responses (Works)	Number of responses (Supplies)	Number of responses (Services)	Average working Days Non-OJEU	Average working Days OJEU	Extra Burden OJEU
AT - Austria	9	2	7	0	11.3	13.1	16%
BE - Belgium	10	4	6	0	28.1	35.8	28%
DE - Germany	20	3	15	2	12.9	20.0	55%
DK - Denmark	10	0	8	2	8.3	11.4	37%
EL - Greece	4	2	2	0	-	-	-
ES - Spain	9	2	0	7	24.0	42.0	75%
FI - Finland	14	2	6	6	5.4	7.6	41%
FR - France	28	12	8	8	11.4	16.6	46%
IE - Ireland	22	6	5	11	13.8	20.3	47%
IT - Italy	17	9	2	6	26.8	39.1	46%
LU - Luxembourg	2	1	1	0	-	-	-
NL - Netherlands	1	0	1	0	-	-	-
PT - Portugal	3	1	1	1	-	-	-
SE - Sweden	39	3	17	19	17.7	20.1	14%
UK - United Kingdom	8		1	7	42.8	46.9	10%
Grand Total	196	47	80	69	17.4	23.5	35%

Source: Awarding authority survey

- 4.97 To help put these figures into context, the additional costs in relation to contract value were roughly calculated using the average national earnings and allowing for overhead costs of 100 per cent.²⁷ This makes it possible to go from the estimates of additional man-days required as a result of the Directives to an amount in euro; and then to express this as a fraction of the value of the contracts concerned. The results are shown in the following table. It can be seen that the extra financial burden is much the same for different contract sizes, so that increased cost is much more significant in relation to small contracts. Overall, on these calculations it represents some 0.2 per cent of the total value of contracts for which the costs have been estimated.

²⁷ Generally we took Eurostat figures. Only for Austria and Ireland these figures were not available and so we used figures from the national statistical offices.



- 4.98 For small contracts around €10,000 the extra burden would be much higher at about 20 per cent.

Table 4.10: The Extra Burden by Contract Value²⁸

	Total Extra Burden	In relation to contract size
around €10,000	2,058 €	20.6%
around €25,000	1,223 €	4.9%
around €50,000	1,348 €	2.7%
around €100,000	1,525 €	1.5%
around €150,000	94 €	0.1%
around €250,000	2,382 €	1.0%
around €750,000	2,666 €	0.4%
around €2.5 million	1,138 €	0.0%
€6million or more	2,338 €	0.0%
Average of all contract sizes	1,734 €	0.2%

Source: Awarding authority survey

- 4.99 A similar calculation was made for works, supplies and service contracts. This suggests that the costs are more significant in relation to service contracts. This is in part due to their generally smaller average value but primarily it reflects the fact that the average number of days needed for each procurement procedure is longer in service contracts.

Table 4.11: The Extra Burden by Type of Contract

	Total Extra Burden	Average contract size	In relation to contract size
Service contract	€ 1,805	€ 346,875	0.5%
Supplies contract	€ 1,297	€ 610,067	0.2%
Works contract	€ 2,419	€ 1,410,761	0.2%
Average of all contract sizes	€ 1,759	€ 718,108	0.2%

Source: Awarding authority survey

- 4.100 For service contracts, these estimates suggest an additional compliance cost of around 0.5 per cent of contract value, compared with around 0.2 per cent for supplies and for works contracts.
- 4.101 Taking into account the fact that the Directives only apply to supplies and service contracts above roughly €250,000 and to works contracts above €6 million (we used all contracts of € 2.5 million and more in order to increase the sample), the extra cost would

²⁸ Several authorities which chose the size of €150,000 as typical contract size had very favourable opinions on the extra burden of the Directives. Therefore this class is the only class which had an extra burden which was barely positive while all other sizes had an extra burden between €1,000 and €2,500.



fall to 34 per cent for services, 29 per cent for supplies and 27 per cent for works. (See table below.)

Table 4.12: The Extra Burden for Above Threshold Contracts

	Service contract	Supplies contract	Works contract	All contracts
Average number of days Non-OJEU	28	14	24	21
Average number of days OJEU	37	18	31	27
Extra Burden	34%	29%	27%	31%

Source: Awarding authority survey

4.102 In relation to contract value the extra cost would fall to 0.4 per cent for service contracts and 0.1 per cent for supply contracts.

Table 4.13: The Extra Burden for Above Threshold Contracts in Relation to Contract Value

	Service contract	Supplies contract	Works contract	All contracts
Average extra Burden	€ 2,875	€ 1,309	€ 1,211	€ 1,853
Average Contract Size	€ 681,034	€ 1,138,158	€ 4,000,000	€ 1,469,136
Ratio	0.42%	0.12%	0.03%	0.13%

Source: Awarding authority survey

4.103 Overall this means that the extra burden of the Directives is higher the smaller the contract size and higher the more service contracts an authority has to award.

Table 4.14: Percentage Additions to Awarding Authorities Costs in Contracts Subject to the Directives

	Service	Supply	Works	Average
Man-days: all contracts	26%	34%	51%	35%
Man-days: contracts above thresholds	34%	29%	27%	31%
As % of contract values: all contracts	0.5%	0.2%	0.2%	0.2%
As % of contract values: contracts above thresholds	0.42%	0.12%	0.02%	0.13%

Source: Awarding authority survey

Information from the interviews

4.104 In the in-depth interviews with awarding authorities we approached the issue of compliance costs by first discussing and agreeing the relevant counterfactual, and then by inviting the interviewee to make a qualitative assessment of how their costs would differ in the different phases of the procurement procedure. The following table summarises the outcome of these discussions. It can be seen that for a clear majority of those interviewed, compliance costs were judged to be higher under the Directives than they would otherwise be, and this is true for publication, for award, and for post-award phases. The additional costs were greatest for the publication phase.

**Table 4.15: Qualitative Assessment of the Authorities on Cost Impact of the Directives**

	Cost down	No difference	Cost up	Balance
Publication Phase	1	14	34	33
Assessment Phase	7	24	18	11
Post-award Phase	1	26	22	21

Source: Interviews with awarding authorities

- 4.105 Increases were found in the publication phase in all countries. (See table A1.20 in Appendix 1).
- 4.106 Cost increases in the evaluation phase were common although there were also examples of cost reduction. In Spain, Portugal, Greece and Italy the balance between positive and negative assessments was relatively small. (See table A1.21 in Appendix 1).
- 4.107 In the post-award phase half of the interviewees had experienced increases, while the other half had found no material difference. (See table A1.22 in Appendix 1).
- 4.108 The following table provides a comprehensive picture of the interview results on the cost impact of the Directives in each country. Negative assessments were especially common in Sweden and Germany.

Table 4.16: Qualitative Assessment of the Authorities on Cost Impact of the Directives (Overall by Country)

	Two positive Assessments (net)	One positive Assessment (net)	As many positive as negative Assessments	One negative Assessment (net)	Two negative Assessments (net)	Three negative Assessments (net)	Number of interviews
Austria	0	0	1	0	1	1	3
Belgium	0	0	0	2	1	0	3
Denmark	0	0	2	1	0	0	3
Finland	0	0	0	1	1	0	2
France	0	0	0	2	2	1	5
Germany	0	0	0	1	2	2	5
Greece	0	1	2	1	0	0	4
Ireland	0	0	1	0	1	0	2
Italy	1	1	1	0	0	3	6
Luxembourg	0	0	1	0	0	0	1
Portugal	0	0	1	0	1	1	3
Spain	0	1	1	0	2	0	4
Sweden	0	0	0	0	2	1	3
The Netherlands	0	0	0	0	0	1	1
UK	0	0	1	1	1	1	4
Grand Total	1	3	11	9	14	11	49

Source: Interviews with awarding authorities

- 4.109 Negative assessments are as common among authorities with large budgets as among those with lower expenditure. (See table A1.23 and table A1.24 in Appendix 1).
- 4.110 There do not appear to be any very significant differences between the qualitative assessments made by different types of authority. Central and local authorities come to very similar conclusions but the assessment by utilities is perhaps more positive.



- 4.111 In the interviews respondents were asked to describe a contract that would give a representative picture of the detailed costs of compliance and compared them with the counterfactual situation. We asked for set-up costs and for ongoing costs. Many respondents were not able to provide data for set-up costs and interviewers were briefed not to spend too much time on this as they are less important than ongoing costs.
- 4.112 None of the interview partners mentioned the set-up costs of the Directives as an important issue; it was water under the bridge. The costs that were acknowledged most often were additional training cost for their employees in order to ensure compliance. But only a small number could quantify these additional costs. Most of these respondents said that a large part of these costs were only partly additional as the normal training program was adjusted to the new legal framework.
- 4.113 The following table summarises the results from this part of the interviews. The numbers refer only to the respondents who have given responses to both types of contracts.
- 4.114 Compliance in the publication phase added on average nine per cent to the time needed. For the assessment phase compliance with the Directives added about 5 per cent. The additional time needed in the post-award phase was estimated at 68 per cent. The total extra number of days required as a result of the Directives was estimated at about 9 per cent.

Table 4.17: Number of Days Needed Overall

	Number of responses	Average Directives	Average Counterfactual	Extra Burden
Publication Phase	26	56.1	51.4	9%
Assessment Phase	26	34.2	32.6	5%
Post Award Phase	26	2.1	1.3	68%
Sum	26	92.4	85.2	9%

Source: Interviews with awarding authorities

- 4.115 These numbers are significantly lower than those found in the electronic survey. This may partly be because the survey sample contained a higher number of smaller authorities. Moreover the examples provided were of larger contracts and we know that the additional burden of administration decrease as contracts become bigger. Given this the two datasets provide comparable results. Additionally it is probable that the more exact definition of procedures and costs in the interviews might have led to more precise figures.
- 4.116 Respondents described seven types of extra burdens:
- (a) Extra burden due to duplication of work: Some authorities complain that they need to do some of the work twice due to differences in the national and the EC legal framework. Notices have to be drafted according to the EC format and then again according to the national format.



- (b) Extra burden due to lack of experience with EC procedures: Some very small authorities need to use the EC procedures only infrequently, in some cases, about once in every two years. This means that they lack expertise in compliance and that they have to do much more checking and research in order to ensure that they are behaving correctly. This seems to be an especially common problem in countries with below-threshold frameworks that are substantially different from and not integrated with the Directives as, for example in the Netherlands, Denmark and Germany.
- (c) Extra burden due to greater standardisation of procedures: Overall the Directives force the authorities to use procedures even if they confer no advantages in a particular case. If, for example five potential suppliers are well known to the authority and simple letters would ensure competition the authorities have to draw up a full Invitation to Tender in order to get the bids that could be obtained by simple invitation.
- (d) Extra burden due to risk of litigation: The additions to cost were not limited to the extra man-days involved, and a point emphasised by some of the awarding authorities was the increased risk of litigation. For example, one very large utility, which took pride in the fact that its procurement practices were as good as best private sector practice (the head of procurement, whom we interviewed, had recently been recruited from a similar post in a major oil company, and is a noted figure in the world of procurement professionals) thought that it spent no more or less time on procurement as a result of the Directives. It found nothing in them that was different from what it would have been doing in any case. However, it was clear that as a result of the Directives, there was a substantial legal risk on them that would not otherwise have been present; and that this represents a significant cost. (For this reason, they had been actively lobbying for the exclusion of one of their markets – the UK energy sector- from the scope of the Directives, as the Utility Directives has foreseen a procedure to opt out.)
- (e) Extra burden due to increased documentation: The risk of litigation forces the authorities to consider how the whole process would be seen by a judge and to provide much more detailed documentation. Formerly, the administrative control authorities to whom they were responsible would ask for additional information only if they did not understand the documentation. However, now a lawyer representing the supplier may exploit even unintended infractions of the regulations in the interest of his client. Consequently documentation has to be much more, and arguably, unnecessarily circumstantial than before. (In some cases – e.g. Belgium – it can lead to a desire to be as brief as possible in the specification as this was seen as the best means of minimising legal risk but this clearly does not assist suppliers to be efficient).
- (f) Extra burden due to increased number of bids: Some authorities claim that additional costs are caused by the increased number of bids since the cost of the assessment of bids is directly proportional to the number of bids.
- (g) Extra burden due to foreign bids: Some authorities mentioned that the assessment of foreign bids is more burdensome than the assessment of national bids as the



checking of certificates and technical standards is often much more difficult. The authorities are less familiar with the certificates supplied and the standards cited than those which are the practice in their own country. On the other hand, in Austria, where bids from Germany are common, the authorities know the German standards almost as well as their own.

Conclusions on compliance costs for awarding authorities

- 4.117 The extra administrative cost of compliance for the authorities has increased substantially. Both the survey and interviews show that the amount of work necessary to award a contract has increased.
- 4.118 The amount of work required has risen by 10-50 per cent. In relation to the contract sizes, however, the resulting cost increases are relatively small, probably amounting to less than 0.5 per cent of overall contract value and less than this for the largest contracts.
- 4.119 The extra burden for service contracts is higher than the extra burden for works and supply contracts.
- 4.120 The increase in costs is a larger proportion of contract value for small contracts and a very small proportion of the value of large contracts.
- 4.121 One important factor is the additional work the authorities have in order to assess foreign bids and certificates. There may be scope for further work to develop more uniform certification schemes that are clear and accessible to foreigners and national companies.

Compliance Costs for Suppliers

Information from the supplier survey

- 4.122 Suppliers may also face increased costs as a result of the Directives, and our survey therefore sought information about the number of man-days needed to bid for and secure a contract under the Directives by comparison with the requirements for national regulations. The numbers of responses are shown in the following table. (The number of responses for non-OJEU contracts is shown in table A1.25 in Appendix 1).



Table 4.18: The Number of Responses for Both OJEU and Non-OJEU Contracts by Value and Type of Contract

	Service contract	Supplies contract	Works contract	Grand Total
around €10,000	9	3	5	17
around €25,000	12	7	1	20
around €50,000	12	14	3	29
around €100,000	19	10	6	35
around €150,000	15	7	5	27
around €250,000	32	18	11	61
around €750,000	20	16	7	43
around €2.5 million	6	3	6	15
€6million or more	1	3	4	8
Grand Total	126	81	48	255

Source: Supplier survey

4.123 It can be seen that the effect of the Directives is to increase the number of man-days needed by suppliers from 7.8 days to 11.1 days (an increase of 42 per cent) on average, with larger increases for the large contracts.

Table 4.19: The Extra Burden of the EC Procedures (Size of Contracts)

	Non-OJEU contracts	OJEU contracts	Additional number of days for OJEU	Additional number of days in per cent
around €10,000	5.8	6.1	0.3	5%
around €25,000	3.8	4.9	1.1	29%
around €50,000	4.9	6.0	1.1	22%
around €100,000	7.3	8.9	1.7	23%
around €150,000	11.6	13.9	2.3	20%
around €250,000	7.5	11.5	3.9	52%
around €750,000	10.0	14.4	4.4	44%
around €2.5 million	12.2	26.7	14.5	119%
€6million or more	3.5	4.5	1.0	29%
Average of all contract sizes	7.8	11.1	3.3	42%

Source: Supplier survey

4.124 The increases are higher in services than in supplies and works.

Table 4.20: The Extra Burden of the EC Procedures (Type of Contracts)

	Non-OJEU contracts	OJEU contracts	Additional number of days for OJEU	Additional number of days in per cent
Service contract	8.0	12.2	4.2	52%
Supplies contract	6.3	8.3	2.0	31%
Works contract	9.6	12.6	3.0	31%
Average of all contracts	7.8	11.1	3.3	42%

Source: Supplier survey



4.125 Significant increases are reported by suppliers based in all countries. Increases are especially marked in Austria, the Netherlands and the UK, while the additional burden seems to be smaller in Germany, Denmark and Sweden. (We have not shown the countries with less than 10 responses.)

Table 4.21: The Extra Burden in the Different Member States

	Number of responses (OJEU)	Average working Days Non-OJEU	Average working Days OJEU	Extra Burden OJEU
AT - Austria	39	6.5	10.2	56%
BE - Belgium	1	-	-	-
DE - Germany	114	6.8	8.7	27%
DK - Denmark	12	5.8	7.3	26%
EL - Greece	4	-	-	-
ES - Spain	1	-	-	-
FI - Finland	5	-	-	-
FR - France	3	-	-	-
IE - Ireland	15	8.2	12.7	54%
IT - Italy	8	-	-	-
LU - Luxembourg	1	-	-	-
NL - Netherlands	24	8.7	13.5	55%
PT - Portugal	2	-	-	-
SE - Sweden	14	5.5	5.6	1%
UK - United Kingdom	12	8.7	20.3	135%
Grand Total	255	7.8	11.1	42%

Source: Supplier survey. Averages not computed where response numbers are small.

4.126 In relation to contract value, however, the increases are similar in overall magnitude to the additional costs for awarding authorities, at about 0.2 per cent of the value of the contracts concerned. As for awarding authorities, the extra burden is higher for small contracts but the correlation is weaker than is the case for authorities.

**Table 4.22: The Extra Burden in Relation to Contract Value²⁹**

	Total Extra Burden	In relation to contract size
around €10,000	€ 114	1.1%
around €25,000	€ 401	1.6%
around €50,000	€ 422	0.8%
around €100,000	€ 575	0.6%
around €150,000	€ 843	0.6%
around €250,000	€ 1,447	0.6%
around €750,000	€ 1,491	0.2%
around €2.5 million	€ 4,749	0.2%
€6million or more	€ 300	0.0%
Average of all contract sizes	€ 1,143	0.2%

Source: Supplier survey

4.127 Again as in the case of awarding authorities, suppliers' cost increases are significantly marked for services contracts.

Table 4.23: The Extra Burden by Contract Type and Value

	Average Contract Size	Total Bidding Costs (OJEU)	Total bidding Costs in relation to contract size	Total Extra Burden	Total Extra Burden in relation to contract size
Service contract	€ 390,000	€ 4,225	1.1%	€ 1,480	0.4%
Supplies contract	€ 555,000	€ 2,959	0.5%	€ 720	0.1%
Works contract	€ 1,011,979	€ 4,121	0.4%	€ 967	0.1%
Grand Total	€ 559,490	€ 3,672	0.7%	€ 1,143	0.2%

Source: Supplier survey

4.128 One has to take into account the fact that the Directives provide thresholds and so the extra burden should only be calculated for service and supply contracts above €250.000 and works contract above €6 million. Taking into account the different levels of threshold for service and supply contracts on the one hand and works contracts on the other the extra burden is greater for service contracts than for supply contracts. (We have not displayed the full results for works contracts as we did not get a sufficient number of responses).

²⁹ Several suppliers that chose the size of €6 million as typical contract size had very favourable opinions on the extra burden of the Directives. Therefore this class is the only class which did not fit into the rising tendency as the corresponding extra burden was only €300.

**Table 4.24: The Extra Burden for Above Threshold Contracts by Type of Contract**

	Service contract	Supplies contract	Works contract	All contracts
Average number of days Non-OJEU	11.0	6.5	5.5	8.9
Average number of days OJEU	18.2	9.3	12.5	14.4
Extra Burden	65%	43%	-	63%

Source: Supplier survey

4.129 The extra costs are naturally lower when expressed as a proportion of contract value.

Table 4.25: The Extra Burden for Above Threshold Contracts in Relation to Contract Value

	Service contract	Supplies contract	Works contract	All contracts
Average extra Burden	€2,530	€989	€1,936	€1,910
Average Contract Size	€745,763	€1,050,000	€3,900,000	€1,146,789
Ratio	0.34%	0.09%	-	0.17%

Source: Supplier survey

4.130 The additional costs incurred by suppliers as a result of making a greater number of unsuccessful bids are not included in these numbers. We have no information about the average success rates of suppliers but it has clearly been reduced as competition for contracts has increased. An increase in the average number of bids per contract awarded from, say, three to five would imply a proportionate increase in the costs per winning bid.

Table 4.26: Average Cost of Bidding in Relation to Contract Size

	Average Contract Size	Total Bidding Costs (OJEU)	Total bidding Costs in relation to contract size	Total Extra Burden	Total Extra Burden in relation to contract size
Service contract	€390,000	€4,225	1.1%	€1,480	0.4%
Supplies contract	€555,000	€2,959	0.5%	€720	0.1%
Works contract	€1,011,979	€4,121	0.4%	€967	0.1%
Grand Total	€559,490	€3,672	0.7%	€1,143	0.2%

Source: Supplier survey

4.131 The numbers from our sample suggest that average bidding costs are less than one per cent of contract value. These costs are again higher for service contracts than they are for contracts combining services and works.

Information from the interviews

4.132 We now turn to the in-depth interviews with suppliers, in which we first sought a qualitative assessment of whether costs had increased or reduced relative to the counterfactual, in relation to each of the phases of a tender. The outcome was that more suppliers found their costs had been increased than reduced, particularly in the preparation of bids. The “balance” in Table 4.27 is the difference between the numbers for whom costs have



increased and those for whom they have been reduced. (See table A1.26, table A1.27, table A1.28 and table A1.29 in Appendix for more detail).

Table 4.27: Qualitative Assessment by Suppliers of the Cost Impact of the Directives

	Reduced	%	No effect	%	Increased	%	Balance
Market research	9	18%	31	61%	11	22%	2
Preparing bids	4	8%	13	25%	34	67%	30
Holding capacities free	1	2%	39	76%	11	22%	10
Contract conclusion	4	8%	38	75%	9	18%	5
Debriefing	3	6%	37	73%	11	22%	8

Source: Interviews with suppliers

- 4.133 We compared the results for each phase of the procurement process for suppliers in each country, as reported below. The balance of cost reductions was unequal in the different stages of a bidding procedure. For market research, there were nearly as many reductions as increases, while for bid preparation, two thirds of the interviewees judged that cost had increased. In the contract conclusion phase most interviewees thought that the Directives had not significantly changed costs, while a small number found costs increased in the debriefing phase (note that it is costs that are being considered here, not the balance of costs and advantages).
- 4.134 The bidding costs for suppliers have in general increased. The main reasons for this were:
- Extra burden due to the necessary review of tender publications: While some suppliers said that they could reduce their direct sales staff as most contracts were now published other suppliers said that the new need to review the tender notices in order to find work represented an increased cost to them. It can be said that for established firms (who can rely on a continuing working relationship with clients) marketing costs have increased (previously they were informed by phone or by letter) but for firms trying to establish themselves in new markets the marketing costs have decreased.
 - Extra administrative burden due to form-filling: Many suppliers complain that the amount of paper work has increased significantly. The standardization of the paperwork outweighs this increase for only a minority. Overall this issue seems to be more of a concern for smaller companies (as these have smaller economies of scale) and it seems to be more relevant in countries which do not have a system of certification of suppliers like that which operates in, for example, Italy, Austria and Spain.
 - Extra burden due to more detailed contract specifications and the consequent requirement for more detailed proposals. Suppliers assert that the extra amount of work needed for the preparation of a tender increases as the specifications in the invitation are more detailed. They sometimes accept that to a certain extent this helps them to write better proposals but it nonetheless adds to their costs.



- (d) Extra burden due to longer award procedures: A few suppliers think that longer award procedures, including the time for contract conclusion, cause significant costs by extending the time for which capacity has to be kept free.
- (e) Extra burden due to more debriefing work: Suppliers report that they are now required to expend more effort in finding out the reasons for their success or failure of their tenders. However, we assume that only suppliers who found it worthwhile would incur the extra costs of making these enquiries.

4.135 Suppliers whose proposals have a very large intellectual component particularly complained of increased compliance costs. These included large scale system integrators, sophisticated engineering consultants and research and planning consultants like large scale system integrators. The costs of bidding are generally a higher proportion of the contract value in this sector. Suppliers frequently complained that the authorities were not able to organize efficient procurement processes because they were handicapped by their lack of technical expertise and the way in which the Directives hampered their ability to acquire it from suppliers in the tender process. Authorities frequently adopted inappropriate procedures that could increase bidding costs by very large amounts.

Conclusions on compliance costs for suppliers

- 4.136 All the evidence we gathered supported the conclusion that compliance costs had risen for suppliers. This increase was significant in terms of total bidding costs (20-40 per cent) but relatively small in relation to the contract value (less than half of 1 per cent).
- 4.137 It is very likely that these compliance costs are not evenly distributed among suppliers. Compliance costs tend to be higher:
 - (a) If the company bids for service contracts.
 - (b) If the company is small.
 - (c) If the ratio of total costs incurred over the contract against costs incurred in the bidding phase is particularly high (like in IT-systems bids or in research or in other contracts with a large intellectual input).
 - (d) If a very large part of the tender is sub-contracted as the bidding costs are then a much larger part of the supplier's margin.



Excursion: Comparison with the Estimates for Compliance Costs by the Dutch Government

4.138 The Dutch Government has calculated compliance costs for the conduction of public procurement procedures following the provisions of the Directives and compared this with the costs for a call for tender of a private company.³⁰

Costs of implementing one call for tender – Assumptions and Results of the Dutch Government

4.139 The implementation of a procurement procedure involves costs for both the contracting authority and the companies that participate in the procedure. Several companies participate in the implementation of a single procedure. The costs of implementing one procedure have been determined on the basis of the following assumptions:

- (a) Scanning of announcements 1,040 (20 companies scan 52 weeks in order to participate in 1 procedure).
- (b) Companies requesting information: 20 (applicable to open and restricted procedures).
- (c) Participants in selection phase: 10 (not in the case of restricted procedures).
- (d) Companies submitting a tender: 6 (3 companies submit tenders in the case of a private procedure).
- (e) Contractors: 1 (applicable to all procedures).

4.140 The costs of calls for tenders issued by the central government and local authorities incurred by the contracting authority as well as the companies that participate in a procedure are shown in the tables below.

Table 4.28: Central Government

Nature of call for tenders	Costs incurred by contracting authority	Costs incurred by companies	Total costs
Restricted call for tender	€ 17,500	€ 77,000	€ 94,500
Open call for tender	€ 14,500	€ 68,000	€ 82,500
Private call for tender	€ 2,500	€ 2,500	€ 5,000

³⁰ Response from the Netherlands to document CC/2005/11 EN, 14 November 2005, reference EP/MW 5715360.

**Table 4.29: Local Government**

Nature of call for tenders	Costs incurred by contracting authority	Costs incurred by companies	Total costs
Restricted call for tender	€ 17,500	€ 78,000	€ 95,500
Open call for tender	€ 15,000	€ 70,500	€ 85,500
Private call for tender	€ 2,750	€ 2,750	€ 5,500

4.141 On these estimates, procurement under the Directives imposes costs of between €82,500 and €95,000 compared with private sector procurement costs of about €5,000 to €5,500.

Europe Economics comparable estimates

4.142 Using the same assumptions as the Dutch Government (20 companies asking for information and 6 companies bidding) we estimated the costs occurred on companies and authorities in an open procedure.

4.143 From the interviews we knew that the companies estimate their costs of market research as about 5 to 10 per cent of total costs of a bid under the Directives and at about 10 to 20 per cent of the costs under the national frameworks. We estimated that for the 14 companies that showed interest in the tender and did not bid, costs of this scale arose.

4.144 We only used the responses for contracts above €150,000 as these contracts are most relevant for the costs of the Directives.

Table 4.30: Estimates for Total Costs of Procurement Process (Open Tender)

	OJEU Contracts	Non-OJEU Contracts	Additional Costs of Directives
Average costs for Authorities (all contracts above €150,000)	€ 8,638	€ 6,344	36%
Average costs per bidder (all contracts above €150,000)	€ 4,789	€ 3,009	59%
Costs per non-bidding companies	€ 359.19	€ 451.38	-20%
Overall Costs (6 tendering companies, 20 interested companies)	€ 42,401.89	€ 30,718.44	38%

4.145 The costs per non-bidding company are calculated as 7.5 per cent of the OJEU costs or as 15 per cent of the Non-OJEU costs. The overall costs are calculated as the cost for the authority plus six times the cost per bidder and 14 times the costs per non-bidding company.

4.146 Overall our result shows an average cost per OJEU contract of about half the value of the estimate of the Dutch Government (at €42,000 compared to their estimate of €85,500). Moreover, our comparator result for national frameworks is €30,700 whereas the Dutch calculation uses a comparator of €5,500 from private procurement.



4.147 We think that our comparator (public procurement under national framework) is closer than a private sector comparator as used by the Dutch Government as there are intrinsic differences between public and private purchasing.



5 STRATEGIC RESPONSES

- 5.1 We now review the strategic responses made by awarding authorities and suppliers in response to the changes brought about by the Directives.

Awarding Authorities

- 5.2 The Directives prescribe the procedures to be followed in procurement and also strongly support the objective of securing the most economically advantageous contracts (as distinct from other possible ancillary objectives of procurement). National governments and individual awarding authorities subject to the Directives were faced with alternative possible strategies. We have already seen that the direct effects of the Directives were to increase administrative costs, particularly for smaller contracts, and to increase the penalties that might be faced if the legal requirements were not followed. We have also seen that transparency in the procurement markets had been increased, so that more potential suppliers were likely to be aware of opportunities to tender. In these circumstances, governments and authorities might have followed one of two broad strategies:
- (a) To obey the law, but otherwise make as little change as possible to the objectives and process of procurement. This might have seemed natural to those authorities that were satisfied that their previous policies were optimal, or at least that they did not need outside help in developing those policies.
 - (b) To endorse the underlying objectives of the Directives, and to use them to help improve the overall effectiveness of procurement as well as contributing to the objectives of EU single market policies.
- 5.3 In either case, authorities would rationally seek to develop ways of minimising compliance costs, and maximising the potential benefits relevant to their goals.
- 5.4 This was an issue which could best be explored in the in-depth interviews, from which we formed the clear conclusion that the dominant strategy has been the second. Awarding authorities were found generally to have endorsed the principles on which the Directives are based, seeing them as reflecting best practice. The consequent increase in the extent of “churn” of suppliers, and a more arms-length relationship, were generally found acceptable. There were however differences between countries in the extent to which central government appears to have taken the occasion, so to speak, to attach priority to the objective of improving procurement practices.
- 5.5 It is appropriate at this point to refer to the evidence for official statistics relating to import propensities, reviewed (see chapter 6). In the eight countries for which data are available there was by 2000 little evidence that public sector procurement favoured national suppliers over those from other countries in a significant way.
- 5.6 In developing their strategic responses to the Directives, awarding authorities have adapted their procedures in a number of ways, examined in detail below. These included:



- (a) increasing the use of framework contracts;
- (b) centralising procurement; and
- (c) reducing the number of award procedures by bundling contracts (other than the already mentioned framework contracts).

Use of central purchasing and framework contracts

- 5.7 The use of both central purchasing and framework contracts has been developed in order to reduce compliance costs and to reduce the risks of legal challenge from accidental breaches of the Directives. These arrangements are aimed at increasing the efficiency of procurement, in ways that are compliant with the Directives.
- 5.8 In the electronic survey we concentrated on obtaining information about the use of central purchasing bodies and framework arrangements.
- 5.9 We asked about the use made of central purchasing bodies, which are now employed by 31 per cent of authorities responding to the survey. An additional 10 per cent of the respondents are central purchasing bodies so that in total nearly 40 per cent of the responding authorities are involved in central purchasing bodies. Respondents from Austria, Portugal, Finland and Denmark use central purchasing bodies more than other countries, while in Belgium and Ireland respondents seems to make less use of central purchasing. (See table A1.30 in Appendix 1).
- 5.10 For nearly half of the respondents the use of the central purchasing body is compulsory, for at least some contracts. In Germany for most of the respondents (17 of 20) the use was obligatory while in France it was the other way around (only four of 20). (See table A1.31 in Appendix 1).
- 5.11 For most of the respondents, central purchasing bodies were the procurement channel for only a minority of their contracts. About 40 per cent of respondents use central purchasing for under 10 per cent of their contracts and two thirds used it for less than half of their procurement contracts. (See table A1.32 in Appendix 1).
- 5.12 The result did not change significantly when we asked what share of the procurement budget is awarded using central purchasing bodies. Of 90 respondents 33 used it only for less than 10 per cent of their budget and 47 for less than 50 per cent. (See table A1.33 in Appendix 1).
- 5.13 The next interesting question was why the authorities choose to use central purchasing bodies as most of the usage is voluntary.
 - (a) We asked the awarding authorities whether use of the central purchasing body made compliance easier or more difficult; a very clear majority (122 of 150) of those replying found that they made compliance easier. This result was common to awarding authorities of different sizes but small awarding authorities (up to 10 employees) were



particularly likely to conclude that the use of the central purchasing body facilitates compliance. (See table A1.34 and table A1.35 in Appendix 1).

(b) We then asked whether the use of central purchasing bodies led to better value for money. The results were slightly positive in each country (overall, 72 of 136 replies gave this answer). But the result was less clear than when respondents were asked about the facilitation of compliance. Interestingly in Germany most respondents stated that purchasing through central purchasing bodies is more expensive. As Germany was also a country where more of the authorities are obliged to use central purchasing this seems to show a low level of satisfaction with central purchasing. Different types and sizes of awarding authorities did assess prices provided by central purchasing in much the same way. (See table A1.32, table A1.37 and table A1.38 in Appendix 1).

5.14 We now turn to the use of framework arrangements, which are employed by 43 per cent of respondents on average but with wide national differences. None of the six Greek respondents used these arrangements, and fewer than 20 per cent did so in France Ireland, or Portugal. On the other hand, over half did so in Germany, Denmark, Finland, Netherlands, Sweden (89 per cent) and the UK (95 per cent). (See table A1.39 in Appendix 1).

5.15 Authorities using framework agreements do not use them for all contracts. 42 of 149 respondents use them for less than 10 per cent of their contracts and 98 use them for less than 50 per cent. (See table A1.40 in Appendix 1).

5.16 The same is true for the proportion of the procurement budget that is awarded through framework contracts. Of the 142 respondents 32 only used framework contracts for less than 10 per cent of their procurement budget while 77 used it for less than 50 per cent. From these numbers we can derive that authorities use framework contracts more often for below-average contract sizes than for big contracts as the share of the budget seems to be slightly smaller than the share of the number of contracts. There were no differences in this respect between different types or sizes of awarding authorities. (See table A1.41 and table A1.42 in Appendix 1)

5.17 We asked why authorities use framework practices.

(a) A clear majority (98 of 143 respondents) of those using framework arrangements find that they facilitate compliance with the Directives. This view was particularly marked in the UK and Sweden while German authorities were more negative. There were no differences in attitudes between different types or sizes of awarding authorities. (See table A1.44, table A1.45 and table A1.46 in Appendix 1).

(b) A clear majority (99 of 136 respondents) of those using framework arrangements find that they give better value for money, particularly in Sweden the UK and in Germany. There were no differences in attitudes between different types or sizes of awarding authorities. (See table A1.47, table A1.48 and table A1.49 in Appendix 1).



- 5.18 The overall impression is that both central purchasing and framework arrangements are quite widely used, and provide clear benefits for the awarding authorities: they can provide better value for money (although they do not always do so) and facilitate compliance. As noted, most awarding authorities use both strategic options for only a minority of their procurement.
- 5.19 Our survey asked whether suppliers found that the use of central purchasing bodies made procurement more or less transparent. 115 of 243 respondents found central purchasing bodies to be less transparent than other authorities (81 neutral, 48 positive). The assessment of small companies was particularly negative while bigger companies were relatively neutral. Companies that provide supplies are much more positive than companies providing service or works contracts. (See table A1.50, table A1.51 and table A1.52 in Appendix 1).
- 5.20 A similar question found that 115 of 242 respondents regard central purchasing bodies as less fair than other public procurement (32 positive, 95 neutral). Austrian suppliers in particular regard the use of these procedures as unfair. Smaller suppliers and suppliers conducting works or service contracts were more likely to find procurement of central purchasing bodies to be less fair. (See table A1.53, table A1.54 and table A1.55 in Appendix 1).
- 5.21 The responses regarding bureaucracy of the process were even less favourable for central purchasing bodies. 150 of the 283 found the central purchasing arrangements to be more bureaucratic with only 28 positive replies. Again Austrian suppliers and small suppliers were more negative than the average. Works suppliers found central purchasing bodies more bureaucratic than companies providing services or supplies. (See table A1.56, table A1.57 and table A1.58 in Appendix 1).
- 5.22 In answers to the question of whether purchasing by central purchasing bodies is more or less competitive, 106 of the 269 respondents thought that procurement by central purchasing bodies was more competitive with the positive replies outnumbering the negative replies by two to one. Suppliers of all countries, all sizes and all types of contracts made this assessment. (See table A1.59, table A1.60 and table A1.61 in Appendix 1).
- 5.23 Finally in this run of questions, we asked whether, other things being equal, purchasing by central bodies is overall more or less efficient than other public procurement. Perhaps surprisingly, on balance respondents found central purchasing to be less efficient (124 negative, 70 neutral, 53 positive). Again Austrian suppliers and small suppliers were more negative. There was no marked difference between suppliers of different types of contracts. (See table A1.62, table A1.63 and table A1.64 in Appendix 1).
- 5.24 A similar set of questions explored suppliers' experience of framework arrangements. In Germany and Austria these were viewed less favourably than in other countries but overall there is no great difference. Framework arrangements were thought to be less



- transparent whether analysed by country, size or type of contract. (See table A1.65, table A1.66 and table A1.67 in Appendix 1).
- 5.25 133 of the 309 respondents found framework arrangements to be less fair as opposed to only 28 who found them to be fairer. Framework arrangements were thought to be less fair whether analysed by country, size or type of contract. (See table A1.68, table A1.69 and table A1.70 in Appendix 1).
- 5.26 Framework contracts were on balance found to be less bureaucratic, but by a relatively small majority (except in Sweden). The findings concerning bureaucracy were not greatly different for different sizes of supplier but works contractors were notably more positive regarding framework contracts. (See table A1.71, table A1.72 and table A1.73 in Appendix 1).
- 5.27 A balance of respondents in each country thought that, other things being equal, the use of framework contracts was less competitive than other public procurement (117 negative to 51 positive responses out of a total of 296). This finding was similar for different sizes of supplier but again works suppliers thought framework contracts to be as competitive as other contracts while suppliers of contracts for both works and supplies found them more competitive. (See table A1.74, table A1.75 and table A1.76 in Appendix 1).
- 5.28 Overall opinion on the efficiency of framework contracts was evenly balanced. Respondents in Germany were slightly more negative (40 positive and 52 negative out of a total of 136). Larger suppliers were more likely to find framework practices to be efficient, while there were no differences between suppliers of different types of contracts. (See table A1.77, table A1.78 and A1.79 in Appendix 1).
- 5.29 In the interviews we were able to go in more detail into other aspects of the strategies followed, including how awarding authorities maintain relations with current and potential suppliers. Most had moved as a result of the Directives to a less close relationship, but there were a few exceptions for whom relationships seemed closer and a larger number for whom things remained much as before. There were no clear differences in this respect regarding size or type of authority. (See table A1.80, table A1.81 and table A1.82 in Appendix 1).
- 5.30 Nearly all suppliers found that relationships had to be much more formal in order to ensure legal security of the procurement process. Some authorities explained that because they now deal with more newcomers they have to spend more time and effort in informing suppliers about their needs.
- 5.31 We also found that a large number of authorities (26 of 49) had moved to being more prescriptive in their contract specifications. Many authorities mentioned that the Directives have forced them to improve their practice in that respect and welcomed the increased rigour that brought to their purchasing practice. (See table A1.83, table A1.84 and table A1.85 in Appendix 1).



- 5.32 We also found that most or nearly all of the authorities have increased the size of their contracts in the last years. Contract bundling was conducted in every possible dimension. Authorities told us that they were prolonging their service contracts and were bundling objects in one contract or trying to bundle the needs of several authorities and many more possibilities. The most often cited reason for this behaviour was savings in administrative costs. Most of the interviewees also mentioned possible savings because of the increased scale of purchase.
- 5.33 Awarding authorities have formalised their procurement. They award more contracts following formal tender procedures and define the contract in more detail than they would without the Directives. The significance of this change differs from country to country and from sector to sector. In sectors where the formality was already high (e.g. as for works contracts in many countries) the change is relatively modest, while in other areas like the service sector and in some countries the change is more radical (for example in Denmark the procurement of services was only very lightly regulated before the introduction of the Directives).
- 5.34 Awarding authorities have taken steps to organise their information exchange so as to reduce the chance of being criticised for improperly favouring particular suppliers. However they are sometimes forced to help suppliers in the preparation of their tenders, if, for example, they wish to encourage a small supplier who finds the costs of legal advice prohibitively expensive. One interview discussion in France provided an example where the awarding authority had tried in this way to make sure that the appropriate price and quality were achieved.
- 5.35 We have seen that awarding authorities have over time made increased use of centralised purchasing bodies. Countries leading this trend include Ireland, the UK, Sweden and Finland while other countries, such as Germany, France, Italy and Spain, appear to be more cautious. It is notable that the amount of centralisation varies greatly by sector as well as by country. We found examples of procurement departments at every level in authorities with decentralised structures, and, also examples of highly centralised structures in the same country.
- 5.36 The use of central purchasing bodies is influenced by the legal provisions in the different countries. Some countries (like Belgium, Denmark, Finland and Spain) had previously established provisions for central purchasing while other countries (like Austria, France, Italy and Portugal) did not clarify the legal situation until after 1999. This explains some of the differences in attitudes and some of the differences in usage of central purchasing across the EU.
- 5.37 There is a general tendency over time to make increased use of framework contracts and other contract bundling methods. The trend seems to be much stronger in the Scandinavian countries, the UK, Ireland and Austria than in southern and central European countries.



- 5.38 Again the legal situation can be regarded as one reason for these differences. While in Belgium, Denmark France and Germany these types of contracts were legally codified only after 2000, while in Austria, Italy and Portugal only codified the rules after 2000 and in Finland, Ireland, Luxembourg, Netherlands and Spain there are still no specific legal provision. This is an important reason for the differences in usage and attitudes.
- 5.39 At the higher level of government policy, a full pro-active, strategic response by central government might involve emphasis on the fiscal importance of procurement through for example:
- (a) the designation of a member of government with responsibility for the effectiveness of procurement;
 - (b) the establishment of a government agency with responsibility for ensuring the education and training of government agencies in procurement best practice.;
 - (c) the establishment of monitorable programmes for improvements in efficiency by all awarding authorities.;
 - (d) arrangements for the systematic review of the effectiveness of public procurement and the generation of the appropriate policy recommendations.
- 5.40 There are signs in some (but not all) Member States that such full responses have been developed or are in prospect. Organisations designed to improve the efficiency of public procurement have been established in Finland, France, the UK, Ireland and Sweden. The UK has for example an agency within HM Treasury, the Office of Government Commerce, that produces a range of literature and advice as well as consultancy services aimed at improving procurement processes. In reports on central and local government, procurement has been identified as a most important economic activity and large-scale programmes with meaningful targets for procurement improvement have been established.
- 5.41 France also provides assistance to awarding authorities through, for example, the Cellule d'Information Juridique aux Acheteurs Publics (CIJAP) and, for local authorities, the Fédération Nationale des Collectivités Concédantes et Régies. In Germany, associations of local authorities provide some training and opportunities for informal exchange of best practices but a general government drive to improve procurement was not visible.

Strategic responses of awarding authorities - conclusions

- 5.42 Awarding authorities have generally endorsed the strategies that are encouraged by the Directives and have moved to more open and competitive tendering, accepting an increased churn of suppliers.
- 5.43 Nearly all authorities say that they have increased the prescriptiveness of their tender specifications and overall the relationship between suppliers and awarding authorities has



become more formal. Most authorities did this in order to ensure legal certainty, which was in their view one of the most important changes the Directives have brought.

- 5.44 The use of central purchasing bodies and framework contracts has increased and is now quite widespread.
- 5.45 Some countries have started to define policies to improve procurement practices in the public sector. Some of them have founded new government organisations for this purpose, but this drive does not seem to be universal.

Suppliers

- 5.46 The strategic responses of suppliers are key to the economic effects of the Directives. They have access to more easily available information, in a more standardised form, about possible contracts throughout the EU, and at the same time have to accept greater competition including from potential new entrants to many markets. The administrative costs of bidding have been increased; and less value can be attached to a continuing, strategic partnership with long-established customers or clients. Increases in costs fall most severely on those tendering for smaller contracts; and at the same time, some contract bundling has taken place; the potential economies of scale have been increased. Against this background, suppliers may be expected to consider changed strategies for marketing, changes in target markets and in consequence perhaps changes in outputs, investment, or structure.
- 5.47 In order to examine how far suppliers had responded by increasing their efforts to win business outside their home country, our survey asked for information about the extent to which suppliers were bidding more in other Member States as a result of using the OJEU. Only 68 suppliers responded to this question and of these only 16 thought they are bidding more due to the Directives (See table A1.86, table A1.87, table A1.88 and table A1.89 in Appendix 1).
- 5.48 However, when exploring the issue in more depth in the interviews, we confirmed that a significant minority of suppliers have adopted a more international focus for their business strategies as a result of the Directives. (See tables A1.96, A1.97, table A1.98 and table A1.99 in Appendix 1). The companies that expanded only nationally cited either cultural reasons or logistical reasons (in areas where local presence is necessary in order to deliver a contract).
- 5.49 Suppliers also confirmed that the Directives have resulted in relationships with clients becoming less close, in almost every case. (See table A1.90, table A1.91 and table A1.92 in Appendix 1) and as a result have had to reorganise their marketing policy, placing greater reliance on published tender notices in identifying opportunities. (See table A1.93, A1.94 and table A1.95 in Appendix 1).
- 5.50 The higher standardisation of procurement procedures brought about by the Directives has led to other organisational changes. Some big suppliers in specialised markets have automated their bidding processes, and some have created specialised public contract



teams, taking the view that as the similarity of public and private bidding has decreased such specialisation became necessary. (This is possibly an unintended consequence of the Directives, part of whose purpose might have been to bring public procurement closer to the levels of efficiency of the competitive market sector).

- 5.51 In reviewing the strategic responses, it is clear that the stronger the more subjective elements in supply – aesthetic appeal, design, service, integration – the more irksome for the supplier are the provisions for keeping the supplier at a distance from the awarding authority.
- 5.52 A minority of those interviewed thought that the effect of the Directives may therefore include, over a wider range of suppliers than might at first be supposed, a disincentive for innovation by the supplier and the encouragement of sub-optimal choices by the awarding authority. This would clearly be an unintended consequence of the Directives.
- 5.53 Some suppliers with very longstanding working relationship with authorities said that the publications were not of great use to them as they still normally find out about contracts by direct contact. In some areas suppliers said that, without the suppliers' technical advice, awarding authorities would have difficulty in specifying tenders since their own technical capability is inadequate. Where there was significant intellectual content in a proposal some suppliers said that if they only find out about a contract from the tender notice it would already be much too late to write an adequate proposal. Nearly all of the companies that said that they did not use the tender notices more as a result of the Directives came from high value sectors like the implementation of IT-structure or planning of plants. The way in which the Directives affect a business clearly depends in part on the nature of the activity in which the business is engaged. For some businesses where the intangible and intellectual content of what is provided is relatively high the Directives may prevent the full realisation of their value to the public sector and reduce the profitability of the businesses concerned. The strategy of such companies is likely to be to maintain their close relationships with clients and potential clients, and find ways of minimising any extra costs caused by the Directives.
- 5.54 Despite the additional standardisation of procurement process affected by the Directives, the complexity of the legal system and the importance of local knowledge continue to provide an advantage to local/national suppliers over their foreign competitors (as in private sector normally competitive markets). It may be too expensive to enter a market as a first tier supplier while offering to sub-contract is still profitable. In France, for example, an important awarding authority noted that foreign suppliers had never won a prime contract except in a much specialised area (metallic cladding) while sub-contracting by foreign firms was very common.
- 5.55 For a small minority of the companies such problems were enough to change their company structure in order to be able to compete more effectively for more business (either abroad or at home). Thus 12 of the 51 suppliers with whom we had in-depth interviews had altered their company structure, and attributed this at least in significant part to the Directives. (See table A1.100 in Appendix 1). Some of the companies



(especially smaller ones) did this by forming partnerships with foreign companies, others by setting up new branches.

- 5.56 Only a small number of suppliers had changed their market focus substantially, and only a small number of the interviewed companies (10 of 51) had increased their degree of product or service specialisation, as a result of the Directives. (See table A1.101, table A1.102 and table A1.103 in Appendix 1). The increased potential economies of scale resulting from the Directives, including the increased administrative burden on smaller relative to larger contracts, has discouraged some smaller suppliers from competing for public procurement contracts, so the companies complaining about the Directives were more often small than big.
- 5.57 We met two companies that were near monopolists before the Directives came into place and expanded after the implementation into neighbouring product markets in order to compensate for their shrinking share of the existing market. In both cases these were privatised companies and their transition from the public to the private sector was partly responsible for their attempt at diversification.

Strategic responses of suppliers - conclusions

- 5.58 The majority of suppliers have changed their marketing strategies. They rely much more on identifying formal invitations to tender than before. Personal contact remains of paramount importance in sectors where contracts are particularly complex and where requirements are particularly nuanced.
- 5.59 Some suppliers (but only a minority) have adopted a more international marketing strategy, aided by the increased transparency in the public sector.
- 5.60 A smaller minority of companies have changed the structure of the company and attributed this to the effects of the Directives.
- 5.61 One of the effects of the Directives has been to make access to the public procurement market more difficult for small firms and may have led some of them to exit from this market despite the assistance offered by some awarding authorities.
- 5.62 Taken as a whole, the evidence suggests that the strategic response of suppliers to the Directives has not been striking but has been consistent with their purpose.



6 THE COMPETITIVE PROCESS

- 6.1 This chapter draws together the evidence concerning the effects of the Directives on the competitive process. It does not repeat information reviewed in previous chapters concerning the direct effects of the Directives, or of their effects on strategic behaviour, but concentrates on information relevant to what happens in competitions for procurement contracts.
- 6.2 There is a generally clear and consistent conclusion, that as a result of the Directives invitations for tenders are likely to attract rather more bids than they would otherwise have been likely to attract. Moreover, the increase includes bids that are taken seriously. It is safe to conclude that there has been an increase in the extent of effective competition as a result of the Directives. (We reiterate that throughout the analysis the comparison is with our best estimate of the counterfactual situation that would have obtained in the absence of the Directives).
- 6.3 We also review data from the input/output tables compiled by eight of the national statistical offices and Eurostat which relate to the propensity to import in 1995, before the Directives can have had much effect, and in 2000 which is the latest year available. A detailed comparison, which takes account of the different sectors in which purchases are made, suggests that by 2000 the difference is hardly significant. If it were possible to confirm this assessment in the other seven countries, a major objective could be seen to have been achieved.

Results from the Survey

- 6.4 In order to establish what effect the publication requirements may have had on the competitive process, awarding authorities were first asked if they felt that they could compare the effects of publishing invitations to tender in the OJEU as opposed to publishing them elsewhere. In most countries between one third and two thirds of those who replied were able to make this comparison. (See table A1.104 in Appendix 1).
- 6.5 When asked if the number of their suppliers had increased the overwhelming majority reported that they had (120 increased, 50 no change and 8 decreased). In Spain, Finland, Ireland and Italy particularly large numbers of respondents reported increases. Changes in the supplier base appeared to be smaller in France than elsewhere but even here the number of those reporting increases, while not much larger than those reporting no change, was very much larger than those reporting a decrease.

**Table 6.1: Effects of Directives on the number of suppliers**

	Number of suppliers has increased	Number of suppliers has not changed	Number of suppliers has decreased	don't know	No response	Grand Total
AT - Austria	5	3	0	0	5	13
BE - Belgium	8	1	1	1	13	24
DE - Germany	7	3	2	2	28	42
DK - Denmark	2	0	1	3	10	16
EL - Greece	3	2	0	0	1	6
ES - Spain	14	2	0	2	1	19
FI - Finland	9	1	2	0	7	19
FR - France	9	16	1	6	48	80
IE - Ireland	16	2	0	2	18	38
IT - Italy	18	5	1	6	12	42
LU - Luxembourg	0	1	0	0	2	3
NL - Netherlands	2	0	0	0	1	3
PT - Portugal	5	0	0	2	10	17
SE - Sweden	14	12	0	7	46	79
UK - United Kingdom	8	2	0	3	7	20
Grand Total	120	50	8	34	209	421

Source: Awarding authorities' survey

- 6.6 The increases in the number of suppliers was particularly marked for authorities awarding service contracts and for authorities awarding both services and supply contracts, but all types of awarding authority experienced an increase in suppliers. No correlation was found between size of procurement budget and increase in the number of suppliers. (See table A1.105, table A1.106, table A1.107 and table A1.108 in Appendix 1).
- 6.7 Respondents were also asked about the effect of publication in the OJEU on the number of bids attracted. A significant minority of respondents reported that contracts published in the OJEU attracted more bids than other public contracts.
- 6.8 This relationship was relatively constant over countries, types of contracts, types and sizes of authority. For smaller authorities the number of bids has increased by less than for bigger authorities. (See table A1.109, table A1.110, table A1.111 and table A1.112 in Appendix 1).
- 6.9 The number of bids received is not necessarily a good indicator of the intensity of competition, for example, if some bids are quickly set aside as too weak for serious consideration. We therefore asked about the numbers of bids that "are seriously taken into account". The results confirm that publication in the OJEU has led to a worthwhile increase in competition for contracts.
- 6.10 A significant minority overall (35 of 163 replies against 9 negative and 119 neutral replies) reported an improvement in the number of bids that are seriously taken into account. Italy and Finland seem to be again the most positive countries, while Sweden, France and Spain and Germany mostly report no differences.



- 6.11 This benefit was experienced by authorities with all sizes of budget, for most types of contract, and for all types of authority. (See table A1.113, table A1.114, table A1.115 and table A1.116 in Appendix 1).
- 6.12 Turning to another dimension of competition, responses suggest that bidders attracted through the OJEU are on average larger (76 larger, 107 no difference, 3 smaller). Larger bidders were noted in all categories, country, size, type of contract and type of authority. For utilities (20 of 31 replies) and bigger authorities (40 of 74 replies) the effect seems to be slightly stronger. (See table A1.117, table A1.118, table A1.119 and table A1.120 in Appendix 1).
- 6.13 As to whether suppliers tended to be more specialised – as theory would predict might happen – replies suggested that again for a minority of authorities (35 positive, 126 neutral, 9 negative) this was true. (See table A1.121 in Appendix 1).
- 6.14 We then asked whether companies bidding for OJEU contracts are more or less international (meaning that they are likely to have their headquarters in other countries) than bidders for other contracts. A larger minority (70 respondents with 101 neutral and 5 negative) found that bidders responding to contracts advertised in the OJEU were more international. All sizes of authorities had similar experience. (See table A1.122 and A1.123 in Appendix 1).

Information from the Interviews

- 6.15 The in-depth discussions confirmed that the composition of the bidder field has been significantly affected by the introduction of the Directives. Over half of the authorities and suppliers told us that the size of the bidders has been increased. On the other hand, only a minority of authorities think that the specialisation of suppliers has increased, and hardly any suppliers shared this view. (See table A1.128, table A1.129 and table A1.130 in Appendix 1).
- 6.16 Overall the majority of awarding authorities and suppliers found that competition has increased and that this is partly due to the Directives. We found that about 40 per cent of authorities (19 of 49) and (20 of 51) suppliers think that the number of international bidders has been increased by the Directives. (See table A1.126 and table A1.127 in Appendix 1).
- 6.17 International competition has increased more in areas that can be traded over large distances (e.g. supplies without service content) than in other areas. In many sectors a local presence is a necessary or advantageous precondition of bidding. This is true of most of the service contracts, most of the works contracts and all supply contracts that have a service component - which means all supply contracts with some advanced technical input where the maintenance is done by the supplier. Direct bidding from abroad (or from other regions in a bigger country) in these areas is not generally feasible for companies without either local partners or local subsidiaries.



- 6.18 This finding is consistent with the results of the earlier COWI study which found that the average number of bids abroad differs over the different economic sectors.
- 6.19 Some suppliers also have reservations about the ability of authorities to select the right procedure for handling tenders. The use of the open procedure for technically complex contracts obliges suppliers to expend resources unnecessarily in writing complex tenders. Thus the effectiveness of competition is affected by the technical competence of the awarding authorities.
- 6.20 More generally, suppliers complain that too many of the authorities either do not know or fail to take account of the bidding costs consequent for suppliers when a particular procedure is chosen. Suppliers complain that too many of the authorities are excessively concerned with compliance without regard for the financial consequences for suppliers. This suggests that a presumably unintended consequence of the Directives has been to increase the emphasis on legal compliance relative to economic purpose.
- 6.21 A significant number of suppliers maintain that too many contracts are awarded on price alone and this behaviour is again ascribed to a fear that reliance on complex quality criteria will expose their awards to challenge. This claim was made nearly in every country but especially forcefully in Germany and Denmark. Nearly half of the suppliers think that the awarding behaviour has become more price-oriented. On the other hand many authorities seem to cope with the increased demands on them very well as one third think that procurement has become more quality oriented. (See table A1.132 in Appendix 1).
- 6.22 Another complaint is the authorities' apparent lack of market knowledge. Some small and specialised suppliers in particular complain that the contracts are bundled without a proper understanding of the size of the market and the capacity of suppliers to deliver combinations of services and supplies. This can deter suppliers and decrease competition.
- 6.23 Some suppliers faced with enlarged and heterogeneous demands from authorities react by enlarging their portfolio of upstream suppliers, although this has some disadvantages. One large supplier in France reported that he was bidding only for contracts where he was able to supply at least 50 per cent of the products needed, because contracts where more than 50 per cent of products have to be subcontracted tended to be unprofitable.
- 6.24 An important factor explaining the effects of the Directives on the degree of competition was the previous legal framework. For example, in Denmark the national legal framework for works contracts was (and is now for below threshold contracts) very prescriptive while the legal framework for service contracts was very open. So the changes in the service market were much more distinct than in the works markets. In other countries with relatively prescriptive national frameworks for works contracts similar results were visible even if not as clearly as in Denmark.



- 6.25 Overall, the interviews showed clearly that the more formal procedures of the Directives have increased the need for the authorities to understand the technicalities of the product they are buying and to understand the competition in the markets they are buying. Where authorities are found to be falling short of these goals (especially in sectors where technical specifications are complex) this impedes the effectiveness of competition.
- 6.26 We reached the view from a number of the interviews that among the factors influencing this development is the extent to which the awarding authority takes an active or more passive role. Indeed, at the extreme, both what we may call the “active” and the “passive” authority may benefit relatively little from the Directives. The following box gives a stylised account of these ideas.

The Active Authority

Before the implementation of the Directives the active authority was mainly concerned with getting the best possible value for money with efficient levels of administrative costs. This meant that it could choose any procurement method it liked subject to the national legislation and the Treaty provisions and use that freedom in order to choose the procedure which would guarantee enough competition in order to achieve the best value for money. Accordingly it would have published a tender in whichever medium it thought most likely to be effective and tried to educate failed bidders in order to increase the long-run quality of the bids received. Overall it was well aware of the competition in its purchasing markets.

In placing large contracts the maximisation of competition was more important than the minimisation of administrative costs because these were small in relation to the total cost of the contract. For small contracts very lean procurement procedures were used.

The Directives introduced an additional objective, the need to ensure that contract awards were compliant with the specified procedures. The active authority revised its procedures in order to ensure compliance. This caused a rise in the administrative costs, as it had to follow procedures which were not necessarily functional for its purposes. It was also constrained in its choice of procedures, while the Directives provided incentives for the centralisation of procurement and the bundling of contracts.

Overall the authority, constrained by the requirements of compliance which had absolute priority over the need to control administrative costs, still sought to maximise competition.

The overall balance of costs and benefits for this authority is ambiguous but probably slightly positive. Competition and with it value for money might have increased only slightly as the OJEU allowed more potential suppliers to become aware of the contracts. However, the competitive and value effects are likely to be small as the active authority would have been reaping most of these benefits in the absence of the Directives.

The Passive Authority

Before the Directives were enacted the passive authority made its procurement mainly by direct and individual contact. By arranging a maximum of two or three suppliers for each contract it

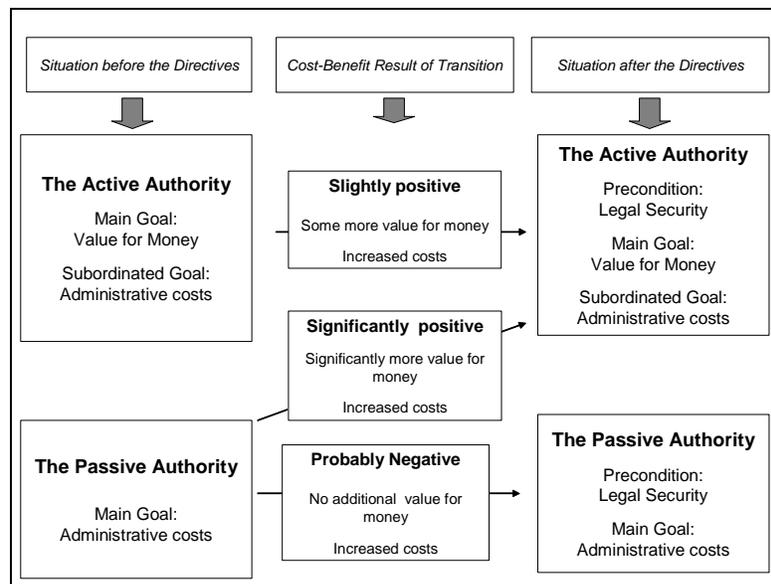


ensured that it could minimise its administrative costs. The passive authority was less concerned with competition although it may have thought that it was achieving value for money. Procurement was decentralised and the officials responsible were unlikely to be particularly expert. Overall the administrative costs were very low but there was a risk that the value for money received by the authority received was in fact poor.

After the Directives the authority was obliged to change its behaviour. In order to reduce the chance of legal challenges it might have chosen the open procedure and award contracts largely on price alone. In general, however, the actions of the awarding authority will not be informed either by close knowledge of the market or by an understanding of suppliers' costs. Contract sizes may be increased or reduced without reference to their effect on competition.

Competition is unlikely to increase except where supplies are standardised, and the authority is unlikely to get better value for money, the quality of supplies is unlikely to improve, while the administrative costs of procurement will increase. The overall cost-benefit effect may be negative, as this kind of authority fails to adopt good procurement practice. This discussion suggests that the overall cost/benefit result of the Directives depends partly on the number of authorities that have moved from being a passive authority under the old framework to being an active authority under the new framework – these authorities are the most important beneficiaries of the Directives and the most probable producers of a general net benefit for all.

Chart 6.1: Cost-Benefit Effects of the Directives for the Active and Passive Authority



Source: Europe Economics

Import Ratios in 1995 and 2000

- 6.27 One important objective of the Directives was to encourage public authorities to increase what was believed to be an unduly low propensity to import supplies from other Member States reflecting political pressures in favour of national or local suppliers.



- 6.28 There are a number of possible reasons for differences in public and private import shares. The most important is the structure of purchases by sector. Some goods and services have specific characteristics which make them less tradable than others. In general, services and every sort of works or supply in which large parts of the value added have to be produced locally are less tradable.
- 6.29 These differences can be illustrated by reference to the trade statistics for Germany for the year 2000. If one ranks by the proportion of their volume consumed by the public sector the 59 sectors for which disaggregated data are published, the result shows that the products with the highest share of purchasing coming from public sector consumers have very low private import shares while products with the lowest public purchasing share have the highest import shares when sold to private sector.

Table 6.2: Private Import Share of Different Groups of Sectors

	Average public purchasing share	Private import share
Products with highest public purchasing share	33 %	8 %
Products with middle public purchasing share	4 %	13 %
Products with lowest public purchasing share	1 %	26 %

Source: Europe Economics based on Eurostat Data

- 6.30 This suggests that at least a part of the difference in public and private import shares is the result of the differences in the structure of purchases by sector.
- 6.31 The input/output tables compiled by some national statistical services and Eurostat provide information on the extent to which differences in purchases by sector are responsible for the low import content of public purchases.³¹ These data allow us to compare the import penetration for eight Member States public and private sectors in 1995 and in 2000. (For a further five countries it was possible to compare the import shares of the public sector with the rest of the economy for specific years, but not to identify changes over time).

³¹ The data are taken from the ESA 95 Input-Output Tables 1700 and 1900, total column on right hand side.



Table 6.3: Comparisons of Public (including utilities) and Private Sector Import Shares in 1995 and 2000

	Column A	Column B	Column C	Column D	Column E	Column F	Column G	Column H
	1995	2000	1995	2000	1995	2000	1995-2000	last available year
	Overall Import share	Overall Import share	Public Import share	Public Import share	Recalculated Public Import share	Recalculated Public Import share	Relative increase public-Overall	Difference public and Overall
AUSTRIA	16%	19%	6%	8%	16%	17%	-0.6%	-2%
BELGIUM	23%	27%	5%	7%	19%	21%	0.7%	-5%
DENMARK	15%	18%	4%	4%	11%	13%	-1.1%	-5%
FINLAND	13%	15%	4%	6%	15%	18%	3.3%	3%
GERMANY	11%	15%	3%	5%	9%	14%	2.7%	0%
ITALY	11%	12%	4%	6%	7%	9%	0.4%	-3%
NETHERLANDS	21%	24%	5%	6%	19%	20%	-0.8%	-4%
SWEDEN	14%	16%	5%	5%	15%	18%	1.9%	1%
UK-1995	12%	-	6%	-	13%	-	-	1%
SPAIN-1995	11%	-	5%	-	7%	-	-	-4%
PORTUGAL-1999	-	17%	-	6%	-	13%	-	-4%
IRELAND-1998	-	27%	-	15%	-	45%	-	18%
FRANCE-2000	-	13%	-	4%	-	10%	-	-2%

Source: Europe Economics from Eurostat

- 6.32 Column A shows total imports as a percentage of “total use” (table 1900) in 1995 for the 59 economic sectors reported in Eurostat. The percentage is found by dividing the total import figures (table 1700) by the total use figures.³² Column B gives the corresponding figures for 2000.
- 6.33 Comparing column A and column B shows which countries increased and which countries reduced overall import penetration between these years. Sweden, for example, increased imports from 14 per cent to 16 per cent of total use. All eight countries providing data for each year recorded increases.
- 6.34 Columns C and D show the corresponding figures for public sector import penetration. In order to make them comparable between countries, this defined public sector (for use and imports) as final government consumption plus sewage and refuse disposal, sanitation and similar services, plus health and social services, plus educational services, public administration, defence and compulsory social security services, plus collection, purification and distribution of water, plus electricity supply, gas, steam and hot water supply, plus 50³³ per cent of post and telecommunications services (the exclusion of post

³² These percentages are less than imports as a percentage of GDP, since the input – output tables are not intended to correct for double-counting in the same way as national income estimates.

³³ We include only 50 per cent of post and telecommunications in the public sector as telecoms was exempted in 2000 and therefore the impact was disrupted at some stage.



and telecommunication services made no difference to the results). The full list of activities (sectors) from which these were selected is given in the tables referred to.³⁴

- 6.35 In all cases the public sector import shares are much lower than for the economy as a whole.
- 6.36 Comparison of columns C and D shows increasing public sector import penetration between 1995 and 2000.
- 6.37 Columns E and F re-calculate the public sector imports for 1995 and 2005 in order to compare import penetration between public and private sectors on a more consistent basis. These figures assume that the 'public' sector purchased the same distribution of products as the overall economy and in each of these product categories continued to import the same proportion. All sectors are combined using the same weights; the whole economy weights being used. These are the data given in columns E and F.
- 6.38 Once the figures have been re-calculated using the same import penetrations for each sector but weighting according to the distribution of all demand in the economy the public sector is shown to have a higher propensity to import.
- 6.39 Using the re-calculated figures, in all countries the recorded public sector import penetration has increased substantially in both years. This can be seen by comparing column E with column C, and column F with column D.
- 6.40 Using these recalculated import shares two further comparisons of interest can be made.
- (a) The increase in the public sector rate of imports between 1995 and 2000 can be compared with the increase in imports for the whole economy over this period. This is done in column G, using constant 2000 weights for the comparisons. When this figure is positive it means that the rate of imports has risen more in the public sector than the private sector. Finland shows the largest relative increase on this measure. Overall public imports have increased faster than private imports in five of the eight countries and slower in three countries. The average is significantly positive as the positive values are much bigger on average than the negative values.
- (b) In the final column H the remaining difference between the public sector import share and the whole economy imports is reported. Where this figure is positive it means that when both public and private sectors are purchasing the same items, on average the public sector was importing a higher proportion in 2000. The resulting figures suggest that, when allowance is made for the differences in the nature of the economic activities performed by the public and private sectors, in 2000 the public

³⁴ The public sector is defined by adding the columns listed and so organisations that carry out the activities listed are considered public sector bodies'



sector import propensity was greater than that of the private sector in four of the thirteen countries, less in eight, and the same in one. An average for the eight countries as a whole would show greater import propensities in the private sector but not by much.

- 6.41 However, these results are partly from earlier years (and as is shown in column G public sector imports seem to have increased at a faster rate).
- 6.42 These results do not change significantly but become less clear-cut if one only takes changes in the public administration into account (if one excludes utilities, post and telecoms from the calculation). This indicates that the results are attributable at least in part to the effects of the Directives (rather than the more general liberalisation in the telecommunications, energy or water sectors).
- 6.43 The results of the eight Member States with complete data sets gave us the impression that by 2000, public sector procurement in the EU had become significantly more open to competitors from outside the home country and that in most countries it is now very close to private sector procurement openness and in some countries even above. If one excludes the utilities from the calculation the tendency of the result stays the same but the catching up process is slower and the remaining gap is wider.
- 6.44 Of course this visible catching up process of public purchasers is not only related to the public procurement Directives but it is consistent with the other results of this study and – if it reflect the overall position in the other seven countries it would indicate that at least one possible objective of the Directives had been substantially achieved.

Conclusion

- 6.45 The various results from all four sources, interviews with suppliers, interviews with authorities and the electronic surveys with suppliers and with authorities all point in the same direction, and are generally in line with expectations based on theory and previously available information. A significant increase in competition for public procurement contracts can be attributed to the effects of the Directives.
- 6.46 On the other hand complaints of increased bidding costs and inefficient procedures (leading to less competition) were common particularly in areas where the weight of the bidding costs was high (in technically or organisationally complex contracts) and where the need for intellectual input into the proposal is high, and particularly among smaller suppliers. The increase in effective competition was less in those cases.
- 6.47 Overall we found the impacts on competition in works to be less than in supplies. This can be explained by the higher degree of formality that was characteristic of works contracts in most countries before the introduction of the Directives and by the fact that most works contracts are less tradable than most supply contracts.



- 6.48 The mixed reactions of suppliers to the use of framework contracts are a consequence of the diverse effects of their adoption. Such agreements tend to reduce administrative costs while they may reduce or increase competition.
- 6.49 The use of central purchasing bodies tends to be viewed especially critically by small suppliers. This is no doubt that where awarding authorities bundle their contracts this deters competition.
- 6.50 Although this message was quite clear this does not mean that small and medium enterprises are excluded from public markets. In 2004 a study of the commission showed that still 78 per cent of all contracts are won by small and medium enterprises.³⁵ Even though this might be less than it might have been, it does not represent an exclusion.
- 6.51 Analysis of input/output data for 1995 and 2000 for eight of the Member States affected by the Directives shows that although the public sector on average imports significantly less than the private sector this is partly due to the nature of the sectors in which public authorities are active. When adjustment is made for this, the difference between the propensity of public and private sector purchasers to import is much less.

³⁵ 30 European Commission (2004a), *The Access of SMEs to Public Procurement Contracts*.



7 CONCLUSIONS: WELFARE IMPACTS

- 7.1 This chapter assesses the effects of the Directives on overall welfare, seen as the net effect on the prices and quality of works and services purchased under the Directives after allowing for the increases in administrative costs of the awarding authorities.
- 7.2 We conclude by discussing whether there are ways in which the balance of advantage from the Directives could be improved.

Value for Money

General data from the surveys

- 7.3 The main potential benefit of the Directives is a reduction in prices (at constant quality) or an improvement in quality (at constant prices) compared to what would otherwise have existed.
- 7.4 Unfortunately only a minority of the respondents (105 of 421) expressed an opinion as to whether the use of the OJEU has a price impact. Of these 105 most thought that there is no difference, with the positive replies being marginally more numerous than negative responses. (See table A1.133 in Appendix 1).
- 7.5 We also asked for a comparison of quality levels. The number of results was also very low and most of the respondents did not perceive a difference with only slightly more positive than negative numbers. (See table A1.134 in Appendix 1).
- 7.6 Awarding authorities that had identified an effect on either price or quality were asked which effects were more important. Necessarily the number of results did not suffice to identify a tendency but the responses received were evenly balanced. (See table A1.135 in Appendix 1).

Survey data: compliance and the price of selected items

- 7.7 In order to investigate possible effects on price in more detail, we asked respondents to the awarding authority survey for information about the prices they had typically paid in 2005 for a list of items which they were asked to study before completing the survey. This included a specification of the unit of each product e.g., for envelopes the unit was defined as “100 C4 envelopes (120 g/m2)”.
- 7.8 We made comparisons where more than 20 respondents provided price data for the same products. This made analysis possible for 18 products.



- 7.9 In particular, we were interested in whether there was evidence that compliance with the Directives was associated with lower prices. This involved calculating a “compliance indicator” for every awarding authority using five data items from the questionnaire:
- (a) Proportion of Budget published as ITTs in the OJEU (ranked 0 for 0 per cent and ranked 11 for 100 per cent).
 - (b) Proportion of budget published as CANs in the OJEU (ranked 0 for 0 per cent and ranked 11 for 100 per cent).
 - (c) Proportion of contracts where award criteria were published (ranked 0 for 0 per cent, ranked 6 for 80-100 per cent).
 - (d) Proportion of contracts where weightings (for award criteria) are published (0 for 0 per cent, 6 for 80-100 per cent).
 - (e) Feedback to failed bidders (awarding 1, 2 and 3 for the positive replies and 0 for the negative reply).
- 7.10 We used the sum of all five indicators and all the indicators individually as compliance indicators. Missing values were counted as zero since these were all consequent upon the response stating that the OJEU was not used.
- 7.11 It is important to note that this is not a legal but an economic compliance indicator. The indicator measures how far the authorities are using procedures that are consistent with the Directives. It does not measure how many contracts the authority has published in comparison to the obligation imposed by the Directives.
- 7.12 As a first step the correlation between the estimated compliance indicators and prices paid were examined using scatter diagrams. (See chart A1.1 to chart A1.18 in Appendix 1). In each of these charts, the vertical axis shows the prices paid per defined unit and the horizontal axis the compliance indicator. Each observation was taken from the replies to the awarding authority survey by those authorities which had purchased the item in question and which could say what the typical price was in 2005.
- 7.13 In the charts a downward sloping regression line indicates that lower prices are associated with a greater degree of behaviour consistent with the Directives; an upward sloping regression line shows the reverse.
- 7.14 On average over the 18 items, an awarding authority scoring highly on our compliance indicator paid 5 per cent less in 2005 than an authority complying less fully. Overall, in 14 of the 18 items the prices paid by authorities with a high compliance indicator were lower than the prices paid by authorities with a low compliance indicator.
- 7.15 If the 15 supply items are considered without the three service items the correlation between the compliance indicator and lower prices is stronger. The average price



decrease is then 10 per cent and “more compliant “authorities paid lower prices than “less compliant authorities” for 13 of the 15 items.

- 7.16 In the table below the columns refer to the values in the equation for a line, $y = mx + c$, where the first column is c , the intercept with the axis of prices, i.e. the lowest price; the second column is m , the gradient of the line, i.e. the steepness of its slope; the third and fourth columns are the values of x associated with particular values of y , i.e. the prices associated with a low level of compliance and a high level of compliance; and the last column is the percentage difference between the prices in the third and fourth columns.

Table 7.1: Change in Price and Compliance

	Constant of Trendline	Coefficient of Trendline	Value for compliance indicator of 5	Value for compliance indicator of 25	Price difference
Envelopes	7.44	-0.0408	7.24 €	6.42 €	-11%
Paper	3.09	-0.0213	2.99 €	2.56 €	-14%
Good paper	9.03	-0.1324	8.36 €	5.72 €	-32%
Batteries	0.72	-0.0048	0.69 €	0.60 €	-14%
Toner	66.19	-0.0496	65.94 €	64.95 €	-2%
PC	858.10	-3.5311	840.44 €	769.82 €	-8%
CDROM	5.47	-0.0068	5.44 €	5.30 €	-3%
Floppy Disks	2.33	-0.0180	2.24 €	1.88 €	-16%
Bulbs	0.67	-0.0094	0.62 €	0.44 €	-30%
Electricity	0.09	-0.0008	0.08 €	0.07 €	-19%
Diesel	0.95	-0.0013	0.95 €	0.92 €	-3%
Unleaded petrol	1.12	-0.0090	1.07 €	0.89 €	-17%
Heating oil	0.58	0.0031	1 €	0.66 €	10%
School chair	56.24	-0.3444	55 €	47.63 €	-13%
School table	109.03	1.6255	117 €	149.67 €	28%
Building cleaning	7.54	0.1729	8 €	11.86 €	41%
Window cleaning	1.32	0.0145	1 €	1.68 €	21%
Guard services	23.47	-0.0595	23 €	21.98 €	-5%
Average	-	-	-	-	-5%
Average Supplies	-	-	-	-	-10%

Source: Awarding authorities' Survey

- 7.17 It is important to state that these mostly positive relationships do not necessarily reflect a causal relationship. Other influence factors like size of the contract, size of the authority or Member State of authority could be correlated with the compliance indicator and could help to explain the price effects found.
- 7.18 Similar diagrams for the relationship between price and number of units and between compliance indicator and number of units did not have so clear cut results as the number of units differed so widely that they were difficult to interpret.



Econometric testing

- 7.19 An attempt was made using econometric techniques to derive a statistically significant relationship between the price paid by awarding authorities and a number of other variables.
- 7.20 This proved impossible for a number of reasons. Chief among them was the limited size of the sample, the large number of missing observations and a number of observations that were clearly outside the probable range due to misunderstandings with the reporting unit.
- 7.21 For a number of items and countries there were only a handful of observations. This severely restricted the degrees of freedom for the regression analysis. The lack of control variables further restricted the analysis and is further exacerbated by endogeneity between the variables.
- 7.22 A number of possible correctives were attempted to address data deficiencies. For example a new variable, *relative price* (price paid by the authority compared to the average price), was created so that the number of price observations could be consolidated across all procured items and thereby increase the dataset. None of these methods were successful.
- 7.23 More details of the econometric exercise can be found in the appendix.

Ideas and information from the interviews

- 7.24 Rather more than half of the authorities (25 of the 49 awarding authorities) found that the Directives had improved (i.e. reduced) the prices they paid. Evidence from interviews with suppliers suggested that their impression that prices had fallen was even stronger.

Table 7.2: Price Effects as Judged in Interviews

	Worsening	No effect	Improvement	Balance
Awarding authorities	7	17	25	18
Suppliers	2	17	32	30

Source: Suppliers' Interviews

- 7.25 In the discussions, examples of price savings up to 50 per cent were noted by a Belgian purchaser of legal services who had not felt the need to test market rates for many years, but in general, the savings noted were much more modest. It is unlikely that changes in prices would have been noted if they had fallen by less than a few percentage points but we found few cases where the savings were thought to have been more than 25 or 30 per cent.
- 7.26 In very broad terms, if 25 of 48 awarding authorities experienced price declines, and 6 increased prices, a balance of 19, or 40 per cent, had reduced prices. If these authorities



had on average achieved reductions of 10 per cent, this would imply a reduction for the authorities as a whole of the order of 4 per cent.

- 7.27 Suppliers were more likely to conclude that prices had fallen. This was the conclusion in a balance of 29 cases or 60 per cent. Again, if the average reduction were 10 per cent, then for the sample as a whole the reduction would have been 6 per cent.
- 7.28 Price effects have been observed in all three categories of contract.

Table 7.3: Relative Assessment of Price Development (Suppliers – by Type of Contract)

	Decreased	No Difference	Increased	Balance	Balance in Percent
Works	5	3	1	4	44%
Supplies	13	5	0	13	72%
Services	14	7	1	13	59%
Grand Total	32	15	2	30	61%

Source: Suppliers' Interviews

Table 7.4: Relative Assessment of Price Development (Authorities – by Type of Contracts)

	Decreased	No Difference	Increased	Balance	Balance in Percent
Works	10	6	2	8	44%
Supplies	8	3	2	6	46%
Services	7	8	3	4	22%
Grand Total	25	17	7	18	37%

Source: Awarding authorities' Interviews

- 7.29 Thus overall we have three different sets of indicators (interviews, general survey results, and some specific survey results) for the effect of the Directives on prices in the public procurement markets. None of them suggests that there was no price impact or that there was an overall increase in prices. Our conclusion is that prices have very probably been lower as a result of the Directives than they would otherwise have been.
- 7.30 Very strong price effects appear to have been unusual. Therefore in considering the likely overall effects of the Directives on welfare, it has been assumed that there had been an overall price benefit of between 2.5 and 10 per cent. We cannot rule out the possibility that the true effect is outside this range, but the conclusion that there has been some significant positive effect seems safe, particularly when the benefits of improvements in quality are taken into the reckoning (an improvement in quality at a constant price is equivalent in consumer benefit to a reduction in price at constant quality). On the other hand, it would be hard to reconcile the results of the 100 in depth interviews, and those of the electronic surveys, with an overall effect bigger than about 10 per cent. It has to be borne in mind that in the counterfactual in many countries in that there would have been effective legislation or other controls, and that policies encouraging effective procurement would have continued to be developed in the absence of the Directives.



- 7.31 The price effects may have been stronger in supplies than in services. This would be consistent with the responses relating to the competitive process. Competition seems to have increased most where standardisation and transport is possible and these factors are more important in determining the prices of supplies than of services.
- 7.32 It has been assumed therefore that the Directives had a price impact on supplies that was higher than on services, while the effect on works is somewhere between the two.
- 7.33 This broad conclusion appears to apply in most countries, except perhaps in France where most awarding authorities were more negative and believed that the effect of the Directives has been to raise prices, as the increased formality of the process served as deterrent for some companies to bid.³⁶
- 7.34 The overall effect of these price changes was perhaps to reduce the cost of public procurement subject to the Directives by between 2.5 and 10 per cent by the end of the period under study.³⁷
- 7.35 In considering the order of magnitude of this effect, the best estimate for the value of public procurement affected by the Directives is the volume of public procurement published in the OJEU. As noted earlier the volume of public procurement published in the OJEU rose from €59 billion in 1993 to €245 billion in 2002.
- 7.36 A 2.5 per cent to 10 per cent price drop would therefore mean economies of between about €6 billion and €24 billion in the year 2002. If one assumes that the price declines were continuous from 1993 to 2002 the total savings might have been between €25 billion to €95 billion³⁸
- 7.37 If price declines are calculated for the three main types of contract, a very similar picture emerges. For works, the economies in 2002 appear to have been between €3 billion and €7 billion (1993 to 2002 €10 to 30 billion), for supply contracts between €3 and 7 billion (1993 to 2002 €17 to 28 billion) and for service contracts between €0 and 5 billion (1993 to 2002 €0 to 17 billion). We stress that these are broad indicative estimates; that is all that is possible.

³⁶ Most authorities in France were buyers of very sophisticated good and services which could be another reason for the negative assessment.

³⁷ We are aware that, while significant, this finding does not indicate price reductions as substantial as those of 30 per cent which were claimed in COWI, "Monitoring Public Procurement in the European Union using Firm Panel Data", Final report July 2003

³⁸ We assumed that ten percent of price declines were achieved in 1993 and 100 percent of them by 2002.



Table 7.5: Economies Attributable to the Directives (in €billions)

	Economies in 2002	Economies 1993-2002
General calculation		
2.5 per cent price drop	6	25
10 per cent price drop	24	95
Sector calculation works		
2.5 per cent price drop	3	10
7.5 per cent price drop	7	30
Sector calculation supplies		
7.5 per cent price drop	3	17
12.5 per cent price drop	7	28
Sector calculation services		
0 per cent price drop	0	0
5 per cent price drop	5	17
Sum of Sector calculations		
lower bound	5	27
upper bound	19	74

Source: Europe Economics

- 7.38 The increases in competition and in value for money have been highest where goods, services and works were standardised.
- 7.39 Thus larger awarding authorities with bigger volumes have naturally achieved greater cost economies than smaller authorities with smaller volumes. Larger authorities with bigger procurement departments and more specialised staff are better able to apply the required procedures to more complex goods and services. Smaller awarding authorities with less specialised staff will be less able to deploy a comparable level of skill.
- 7.40 This means that the countries that should have gained the most were the countries where the centralisation of procurement, and hence the exploitation of economies of scale, was already high or where it had made great progress in the last 10 years. Such countries are likely to include the UK, Ireland, Greece, Denmark and Austria. Other countries with much decentralised structures might have gained less; for example Germany and probably Italy.

Cost of Compliance for Awarding Authorities

- 7.41 We now need to weigh against the cost savings discussed above the compliance costs incurred by awarding authorities. We reported earlier the following estimates of these compliance costs as a percentage of contract values.



Table 7.6: The Extra Costs for Above Threshold Average Contracts by Type of Contract

	Service contract	Supplies contract	Works contract
Average extra Burden	€ 2,875	€ 1,309	€ 1,357
Average Contract Size	€ 681,034	€ 1,138,158	€ 6,000,000
Ratio	0.42%	0.12%	0.02%

Source: Awarding authorities' Survey

- 7.42 If we multiply these percentages by the overall value of public procurement published, total compliance costs were €470 million in 2002 (€2.5 billion for 1993-2002), plus any initial set-up costs which have not been estimated. Most of the costs arose in the service sectors while the totals for the works and supplies sectors were lower. The overall compliance costs were probably between about €0.25 billion and €0.75 billion in 2002. The fact that the sample on which this estimate is based included more sophisticated and better informed organisations probably means that this estimate is too low.

Table 7.7: Compliance Costs for Awarding Authorities (in €billions)

	Additional Costs in 2002	Additional costs in 1993-2002
Works	0.02	0.12
Supplies	0.06	0.42
Services	0.39	1.98
Sum of Sectors	0.47	2.52
lower bound	0.25	1.25
upper bound	0.75	3.75

Source: Europe Economics

- 7.43 Another possible method to calculate the total compliance costs would be to multiply the extra burden per awarded contract with the number of ITTs published. As we have shown earlier the extra burden per contract is surprisingly constant (between €1,500 and €2,000) and does not rise with the size of the contract. If one multiplies this number with the number of ITTs (106,000 in 2002) the compliance costs would be between €150 million and €220 million. Additionally one could take into account that one ITT on average probably means more contract awards as authorities publish one ITT often for a multitude of contracts. If one for example sets an average of 2 contracts per ITT the result would double to €300 to €440 million. So on this account the compliance costs would be a bit smaller than in the previous calculation but for sure within the same range.
- 7.44 The differences between the costs for different countries have been estimated by supplementing the survey results with evidence from interviews where the survey data was insufficient. (The Member States with insufficient data are not shown, Austria and Spain have 9 answers, which is one below our threshold therefore we have marked them with italics.)



Table 7.8: The Extra Burden by Member State³⁹

	Number of responses	Extra Burden	Average contract size	Extra burden in per cent of contract size
AT - Austria	9	545 €	862,222 €	0.06%
BE - Belgium	10	2,490 €	530,000 €	0.47%
DE - Germany	20	2,649 €	794,474 €	0.33%
DK - Denmark	10	1,285 €	128,889 €	1.00%
EL - Greece	4	-	-	-
ES - Spain	9	2,924 €	938,889 €	0.31%
FI - Finland	14	647 €	861,154 €	0.08%
FR - France	28	1,564 €	823,958 €	0.19%
IE - Ireland	22	2,206 €	516,818 €	0.43%
IT - Italy	17	3,658 €	1,071,875 €	0.34%
LU - Luxembourg	2	-	-	-
NL - Netherlands	1	-	-	-
PT - Portugal	3	-	-	-
SE - Sweden	39	748 €	251,316 €	0.30%
UK - United Kingdom	8	1,547 €	1,114,286 €	0.14%
Grand Total	196	1,759 €	718,108 €	0.24%

Source: Awarding authorities' Survey

- 7.45 Germany, Spain and Italy have a higher extra burden than the average. The same is true for Belgium, Ireland, Denmark and Sweden but the results are distorted by the fact that the sample for these countries included very small contracts (which have a higher extra cost per contract value).
- 7.46 The UK, France and Finland and perhaps Austria are below average, while the samples for the Netherlands, Luxembourg and Greece and Portugal are too small to make it possible to draw a definitive conclusion.
- 7.47 Putting this together with the evidence from interviews countries can be grouped as follows:
- (a) higher than average compliance costs: Belgium, Germany, Italy, Denmark, Sweden⁴⁰ and the Netherlands;
 - (b) average: Ireland, Portugal, Luxembourg, Finland (see footnote Sweden), Austria (see footnote Sweden) and Spain (the interview results suggested lower compliance costs for the Directives than the survey did);

³⁹ One has to take into account that the samples of respondents for the different countries do not consist of respondents with equally sized contracts. As we have shown that small contracts have a higher extra burden it is logical that countries with a lower average contract size (like Denmark and Sweden) have higher extra burdens and countries with higher average contract sizes (like Italy and United Kingdom) have lower extra burdens. In our later assessments we have taken this factor into account.

⁴⁰ In Finland, Sweden and Austria, the correct counterfactual is the situation before the Directives but the survey respondents were asked to respond to a comparison with the below threshold contracts. The compliance costs are therefore higher than assumed in the survey.



- (c) lower than average compliance costs: Greece, UK, France.
- 7.48 Otherwise, the strongest relationship is between the size of contracts and the extra burden. It is therefore not surprising that the UK and Greece, two countries with a relatively centralised structure of procurement, feature in the group with below average compliance costs.
- 7.49 This also means that small authorities with a higher share of small contracts are more affected by the rising administrative costs. This effect is reinforced by the less extensive experience of smaller authorities which, as already noted, are likely to be affected by the obligations of the Directives less frequently.
- 7.50 We did not find any indication that different types of authorities are less or more affected by cost increases. On average, local authorities seem to be more affected than central authorities but in our opinion this is because they are on average smaller. Central authorities with smaller procurement budgets appear to have the same problems as small local authorities.
- 7.51 There is a clear relationship between the types of contracts an authority awards and its administrative costs. The extra burden is higher where service contracts form a large part of expenditure. This is especially true for more complex contracts as the authorities find it difficult to define their requirements with sufficient precision in their invitations to tender.

Enforcement Costs

- 7.52 One additional cost attributable to the Directives must be the consequent enforcement costs falling on the European Commission and the Member States.
- 7.53 The estimation of these costs is necessarily difficult as the counterfactual is difficult to define. The Member States would have needed to enforce their national procurement laws even without the Directives.
- 7.54 Additional costs are created by the department in the Commission devoted to public procurement that would not otherwise have been needed. This currently employs around 55 managerial, administrative and clerical staff, but we have not sought information on the overall costs involved. Additionally the OJEU employs 18 people.
- 7.55 Assuming that the direct costs of an average Commission employee are €50,000 to 100,000 per year and overheads are calculated at 100 per cent this gives a cost of €100,000 to 200,000 per year per employee. For all around 75 employees this would add between €7.5 million and €15 million, which would clearly not change the direction of the general benefit.
- 7.56 Additionally the OJEU incurs €25-45 million per year in non-staff costs.



7.57 One could also argue that this division generates work for civil servants and others Member States. Between 2005 and 2006 the Commission has taken 180 published actions in enforcing the Directives.

Table 7.9: Actions of the Commission

	2000	2001	2002	2003	2004	2005	Grand Total
asking to comply (with ECJ judgement)	0	1	0	0	1	1	3
formal notice- requests info (2 months to reply)	0	2	0	0	4	5	11
letter asking how complied	0	0	0	1	0	2	3
reasoned opinion (2 months allowed)	14	18	7	22	19	23	103
refer ECJ	11	4	0	14	6	17	52
Grand Total	25	25	7	37	30	48	172

Source: Website of the European Commission

7.58 If it is assumed that actions by the Commission generates twice as much work for Member States as the Commission carries out itself this would amount to €15-30 million a year.

7.59 Additionally the evidence from the interviews suggests that the number of procurement cases relating to the Directives brought before the Courts has increased. Estimates of the average costs of patent litigation in Germany suggest that the overall costs of cases in patent litigation was about 38 per cent for a claim of €500,000 and about 18 per cent for a claim of €10 million.⁴¹ On that basis the average cost of a procurement case might be between 10 per cent and 20 per cent of contract value.

7.60 Clients are reluctant to object to awards because this is likely to damage their relationship with the awarding authority. An impact assessment report on remedies showed that that around 2.5 per cent of ITTs lead to litigation. If one case costs 10 to 20 per cent of contract value, the total costs of this litigation might be between 0.25 per cent and 0.5 per cent of contract value.

7.61 But these costs are not necessarily the additional enforcement costs the Directives have caused. There would have been some litigation even without the Directives. As in many countries the legal rights were significantly increased with the Directives we would estimate that the additional enforcement costs are probably 50 to 75 per cent of the total costs. This would add up to between 0.125 per cent and 0.375 per cent of contract value. For the year 2002 that would have brought costs of €0.3 to €0.9 billion.

7.62 If we add together the direct costs of commission staff (€7.5-15 million), the costs incurred in the member states (€15-30 million), the costs of the OJEU (€25-45 million) and the costs of litigation (€300 to 900 million) the enforcement costs would ad up to €347.5 to

⁴¹ Uexkull & Stolberg, Hamburg, 2001.



990 million, or rounded between €0.35 and €1 billion. Overall enforcement costs therefore although probably substantial do not change the balance of costs and benefits of the Directives.

- 7.63 We should also note that there are additional costs the authorities have to bear because they have to change their procedures in order to achieve legal security and to insure themselves against litigation. These costs are indeed not included in this estimate but they are included in the estimate for compliance costs. Many authorities stated that this part is the most onerous part of the Directives and that a large part of the additional costs is due to the additional documentation necessary to try to ensure legal security.

Net Welfare Effect of the Directives

- 7.64 The welfare benefits of the Directives are estimated as being in excess of €6 billion for the year 2002 (2.5% of published value) and the welfare costs of the Directives as being less than €1.75 billion (maximum compliance costs of 0.3 per cent of published value plus maximum enforcement costs of €1 billion). (As already explained the increase in the administrative costs of suppliers is assumed to be reflected in the prices charged).
- 7.65 This range is sufficient to establish that the overall benefits are almost certainly significantly greater than the costs so that there has been an overall improvement in welfare as a result of the Directives.
- 7.66 The margin between likely cost and benefit is sufficient to mean that our conclusion that there has been a net benefit as a result of the Directives is unlikely to depend on the simplifying assumptions noted above that savings to awarding authorities represent savings to consumers or taxpayers and that price reductions will mainly reflect efficiency improvements from more competitive markets, rather than transfers from company profits to consumers or taxpayers.

Table 7.10: Overall Net Welfare Benefit of the Directives in 2002 (in €billion)

	Most negative estimate	Most positive estimate
Price decrease (including quality increases)	6	24
Compliance costs of awarding authorities	-0.75	-0.25
Enforcement costs	-1.0	-0.35
Net benefit of Directives	4.25	23.4

Source: Estimate Europe Economics

- 7.67 Clearly, these results are not accurate to the decimals point shown, they should be read as “between a little under €5 billion and almost €25 billion”.

Differences between types of authorities, sectors and countries

- 7.68 It remains to be considered how these likely net benefits have been distributed between different types of purchaser and supplier, different countries, and over time. The



extensive tabulations and discussion comprising the main part of this report provides detailed information relevant to these questions. Here we draw together some of the characteristics of the authorities and suppliers that have benefited less than the average. Of course the converse applies; if small purchasers benefited less than the average this implies that big purchasers benefited more.

Table 7.11: Organisations with Lower Benefits and Higher Costs (than the Average)

	Higher Costs	Lower Benefits
Type of Authorities	Purchasers with low average contract value Small Purchasers Purchasers of Service Contracts Purchasers of non-standardised Goods and Services	Purchasers with low average contract value Purchasers of non standardised goods and Services Purchasers of Service Contracts Purchasers of non-tradable Goods and Services
Type of Company	Suppliers in sectors with high average bidding costs Suppliers of non-standardised goods and services Small suppliers Incumbents	Small suppliers Specialised suppliers Suppliers with low overall competitiveness
Member States	MS with decentralised procurement structures MS with very informal procurement legislation before the Directives MS with national legal system that are not integrated with the procurement framework MS with small average company size	MS with decentralised procurement structures MS with public procurement not focused on value for money MS with no or only rudimentary systems in place to qualify their public procurement officials MS with small average company size
Member States Examples	Germany, Netherlands, (decentralised Procurement) Germany, Netherlands, Denmark, Sweden, Finland (informal procurement regime – pre Directives) Germany, Netherlands Denmark (not sufficiently integrated procurement frameworks)	Germany, Netherlands (decentralised Procurement) All member states except the UK, Ireland, Sweden, France and Finland (lack of capability building for procurement officials) Italy (small companies)

Source: Europe Economics Assessment

- 7.69 It is clear that the cost benefit effect for small authorities is less favourable than for large authorities. Their contract sizes are smaller and the administrative burden is higher as a proportion of contract size.
- 7.70 This also means that the gains for local authorities are on average smaller than for generally larger central authorities.



- 7.71 The Directives appear to have the most favourable cost benefit effect where contracts relate to standardised goods, services and works contracts governed by correspondingly standardised procedures so that:
- (a) Administrative costs increased less than average.
 - (b) Prices increased more than average.
 - (c) It was easier to write invitations to tender that were sufficiently detailed to ensure that competition would be sufficiently great and awards could be made on price and transparent quality criteria.
- 7.72 This was especially true for goods that were easily tradable where there was no service component and local presence was not an important advantage.
- 7.73 Sectors where the effects appeared less favourable include:
- (a) Planning.
 - (b) All types of consultancy.
 - (c) IT services (especially system installation).

Costs and Benefits over Time

- 7.74 It is clear that while the costs of compliance were felt as soon as the Directives were enacted by Member States the benefits, were only generated as adjustments in the markets as they produced more competition and lower prices. This suggests that the balance of costs and benefits was probably more favourable in 2004 than in 1993.
- 7.75 Moreover, many of those we interviewed felt that the main changes in the markets have occurred in the last five years. This partly reflects the fact that in many countries as for example in Germany, there was a prolonged discussion between the Commission and Member States over the way in which the Directives should be enacted in national legislation. These debates were often resolved only in the late 1990s.
- 7.76 Other countries failed to implement the Directives in good time. Greece, for example, formally adopted Council Directive 93/38/EEC only in 2000, after the expiry of the extension period of five years that they had been granted.
- 7.77 It is however not certain that the net benefit will continue to grow over time. There are some reasons for supposing that the future advantages attributable to the Directives may decrease.
- (a) The freedom of information legislation being introduced by many countries has requirements that exceed the transparency requirements of the Directives. So in countries like Sweden, Finland, Ireland and the UK even without the Directives the



transparency obligations would not fall as the freedom of information act requires even more transparency than the Directives. Many countries (e.g. Germany) are preparing similar legislation.

- (b) The adoption of electronic technology also tends to make some of the Directives' requirements redundant. We expect that these systems will continue to be used and to improve, irrespective of the requirements of the Directives.
- (c) As time passes, and procurement practices improve, the requirements of the Directives in inculcating more professional behaviour become less important. At some point the Directives may have fulfilled their purpose.

The Costs of Non-Compliance

- 7.78 The costs of non-compliance are defined as the difference between the costs created by the actual situation, and those which would obtain if there were complete compliance with the Directives. It is very difficult if not impossible to assess the likely orders of magnitude, partly because (as discussed in Chapter 3) we do not know with sufficient accuracy the scale of non-compliance.
- 7.79 Even if this were more certain, serious problems would remain in assessing the costs of non-compliance. It would be necessary to understand the reasons for non-compliance, and to distinguish those circumstances in which compliance would bring economic benefits from those in which this would not be the result. For example, an awarding authority that divided up a contract in order to bring it below the relevant threshold might thereby avoid costs that in the circumstances would bring no benefits (unless compliance were assumed to be a benefit by definition.). The effects of compliance clearly depend on the particular circumstances, and it is possible that those authorities not fully complying are those for which compliance would be least beneficial.
- 7.80 It is, of course, also entirely possible that a non-complying authority would gain greatly if obliged to comply. This can be the case if the perceptions of the authority are wrong about their cost-benefit balance. As we have explained earlier, costs have gone up by 20-40 per cent (see the section on compliance costs for awarding authorities in Chapter 4, Direct Impacts) in relation to total administrative costs. This can nonetheless be compensated by a price drop of only one or two per cent (see section on the balance of costs and benefits). Authorities are surely able to recognise a substantial rise in their administrative costs, but may not be confident about attributing a price drop to the Directives.
- 7.81 With all these cautions spelled out we do want nonetheless try to say something about the possible cost of non-compliance, if only to sketch in the ground. We know from the results of chapter 3 that a "full compliance" publication rate for the Netherlands would be about 25 per cent of total public procurement. This rate might not be directly applicable to other Member States. But judging from indicators for centralisation the Netherlands



might be around the average in this respect. (They are more centralised in terms of number of authorities but probably less centralised within the authorities.)

- 7.82 This does not mean that we assume that for every single Member State the “full compliance” publication rate is 25 per cent. The rate is probably higher for example in the UK and probably lower for example in Germany. We just assume (for lack of better knowledge) that these deviations will balance each other out.
- 7.83 So assuming that overall 25 per cent would be the “full compliance” publication rate in the year 2002, the EU-15 member states reached with a publication rate of 16.6 per cent representing exactly 67 per cent compliance. In other words if on average the EU-15 had reached 25 per cent publication rate the benefits and the costs would have been some 50 per cent higher than they were in 2002.
- 7.84 Using this number one would estimate that the benefits of the Directives would increase from €6 billion to around €9 billion in the lowest estimate (a 2.5 per cent price decline), while the costs would increase from €1.65 to 2.5 billion in the highest estimate. On this basis the overall net benefit still available but unachieved would therefore be at least more than €2 billion.
- 7.85 However, such a calculation should not be taken as more than the broadest indication of the possible costs of non-compliance. For the reasons explained, an accurate measure is impossible.

Costs and Benefits: Exempted Sectors

- 7.86 A number of services were freed from the full provisions of the Directives as they were regarded as less tradable than other services. Additionally military supplies were exempted in so far as national security aspects were concerned (meaning that all middle and high technology supplies would be exempt but not the low-tech supplies) and fuel for power generation was exempt for political reasons.
- 7.87 One question in the terms of references asked whether these services can still be regarded as less tradable than other sectors and if the exception on these reasons continues to be justified.
- 7.88 From our analysis on the costs and benefits of the Directives we found that overall competition has increased most in sectors that were more tradable (as local structures do not have to be built up before competing) but we also found out that the net benefits were also dependent on the complexity of the tender specification and the average size of the contracts.
- 7.89 The bigger a reasonable and practicable contract size and the lower the complexity of the tender specifications, the higher the probability that a formal tender process might bring significant net benefits. We have evaluated the different exempted sectors following those criteria.



Table 7.12: The Exempted Sectors

	Complexity of tender specification	Tradable	Size of contracts	Cost-Benefit Ratio⁴²
Hotel and restaurant services	Low	Low	Small	-1
Rail transport services	Low	Low	Potentially large	+1
Water transport services	Low	Low	Potentially large	+1
Supporting and auxiliary transport services	Medium	Low	Medium	-1
Investigation and security services	Very diverse	Low	Very diverse	-2
Legal Services	High	Low	Small	-3
Personnel placement and supply services	Medium	Low	Small	-2
Education services	High	Low	Small	-3
Health and social Services	High	Low	Potentially large	-1
Recreational, cultural and sporting services	Very diverse	Medium	Very diverse	?
Military Supplies	Very diverse	High	Potentially large	+3
Fuel for power generation	Low	High	Potentially large	+3

Source: Europe Economics

- 7.90 The two exempted supplies sector are both tradable while all the exempted service sectors are rated as being of low tradability which was, of course, one of the reasons for exempting them. However, against the other criteria we have selected as important they rate differently.
- 7.91 The complexity of the tender specifications is high in education, legal services and health and social services. The complexity of tender specifications for hotel and restaurant services, rail transport services, water transport services and auxiliary transport services but also for fuel for power generation is relatively low.
- 7.92 Most contracts in hotel and restaurant services and education services are relatively small while contracts for rail transport services, water transport services, health and social care services, military supplies and fuel for power generation can be very large. The size of contracts for supporting and auxiliary transport services is somewhere between the two.

⁴² For every favourable criteria (specification of low complexity, high tradability, big contracts) we awarded one plus point and for every unfavourable criteria we awarded -1 point.



- 7.93 Looked at in this way it appear that:
- (a) The inclusion of some military supplies and fuel for power generation into the scope of the Directives should have a positive cost-benefit result.
 - (b) There is no reason to exclude rail transport and water transport services from the full provisions of the Directives.⁴³
 - (c) A case can easily be made for the continued exclusion of education services, legal services and personnel placement services on the grounds that the formulation for tender specifications requires considerable skill on the side of the awarding authorities while the average contract size is relatively small.
 - (d) For all other services the argument is not so clear. In restaurant and hotel services the net benefits to be derived from compliance with the Directives would probably be relatively small. In social and health services the outcome might be the reverse.
- 7.94 On the other hand, there is nothing to prevent those awarding authorities purchasing these services from following the practices that would apply under the Directives, and – because of limited tradability – the argument that requiring them to do so would promote the development of the Single Market is not a strong one. The purpose of the Directives is, after all, to require awarding authorities to behave in ways that are in their own proper interests. If the Commission or Member States were to be attracted by the possibility of extending the Directives to these sectors, an *ex ante* impact assessment would be appropriate.
- 7.95 A lot of authorities do publish the contracts in these sectors in any case. In the year 2004, for example, 3,729 ITTs were published in six of the exempted sectors (investigation and security service, legal services, hotel and restaurant services, personnel placement and supply services, education services, health and social services).
- 7.96 The extent to which the countries used the OJEU without being obliged to do so differs from country to country. In Germany, Sweden and Spain the usage was below average while Italy, Austria and Portugal made much greater use of the OJEU for the exempted sectors.

⁴³ The Commission has already undertaken steps in the proposed direction as it has proposed a regulation on public passenger transport services by rail and by road which, if adopted, would require public authorities entering into a contract with a third party for (among others) rail passenger services to do so on the basis of a competitive tendering procedure.



Table 7.13: Publications of ITTs in Some Exempted Sectors in 2004

	Education Services	Health and Social Services	Hotel and restaurant Services	Legal Services	Investigation and Security Services	Personell Placement Services	Sum of all six
Percentage of total number of publications							
Austria	6.5%	0.3%	0.2%	0.1%	0.2%	0.4%	7.6%
Belgium	0.6%	0.3%	0.5%	0.6%	0.4%	0.3%	3.0%
Germany	0.2%	0.2%	0.2%	0.0%	0.4%	0.0%	1.0%
Denmark	0.4%	0.4%	1.1%	0.1%	0.2%	0.1%	2.3%
Finland	0.1%	1.6%	0.5%	0.1%	0.2%	0.1%	2.5%
France	0.4%	0.3%	1.0%	0.1%	1.0%	0.1%	2.8%
Greece	1.0%	0.1%	1.5%	0.7%	1.3%	0.1%	4.8%
Spain	0.1%	0.5%	0.4%	0.0%	0.6%	0.0%	1.5%
Ireland	0.8%	0.2%	0.4%	0.4%	0.6%	0.2%	2.6%
Italy	1.2%	3.9%	4.7%	0.0%	0.7%	0.3%	10.8%
Luxembourg	0.2%	0.2%	0.2%	0.2%	0.0%	0.4%	1.2%
Netherlands	0.6%	1.2%	0.9%	0.0%	0.2%	1.8%	4.7%
Portugal	0.0%	0.7%	3.5%	0.0%	3.8%	0.0%	8.0%
Sweden	0.2%	0.3%	0.2%	0.1%	0.3%	0.2%	1.2%
UK	0.6%	1.1%	0.6%	0.2%	0.6%	0.4%	3.6%
EU-15	0.6%	0.8%	1.1%	0.1%	0.7%	0.2%	3.6%

Source: Mapp database

Potential for Improving the Balance between Costs and Benefits

7.97 The conclusion that the net effect of the Directives has almost certainly been beneficial in the period that has been the subject of this evaluation does not of course imply that they have been ideal instruments, and our work has suggested a number of issues for consideration in any assessment of how the balance of advantage could be improved. It is important to bear in mind also that the counterfactual is changing all the time; and that it does not follow from the fact that the Directives have had a significant beneficial effect hitherto that they will necessarily continue to do so. We see several areas where public policy (of the Commission and the Member States) might significantly improve the balance of costs and benefits by:

- (a) Improving the flexibility of the legal provisions where possible.
- (b) Improving the integration between the Directives and the national legal frameworks.
- (c) Distributing the knowledge of how to get value for money more efficiently within the legal framework of the Directives.

7.98 Obviously there cannot be a detailed legal framework which caters optimally for the whole range of types of contracts that are awarded all over the EU. So it was entirely predictable that we found that authorities and suppliers complained about areas where the contracts were especially complex and where there appear to be tensions between the Directives' purpose of ensuring that procurement achieves the economically most advantageous outcome and other policy objectives. Examples of such tensions to which



the Commission Services are known to be paying attention include PFIs; and the use of procurement to promote ancillary objectives such as non-discriminatory employment practices or responsible environmental policies by suppliers. We speculate that another example may be in the field of procurement of patented pharmaceuticals.⁴⁴

7.99 The most efficient method of procurement depends on the particular circumstances, and the procedures required by the Directives are more suited to some than to others. They are best suited to products and services that can be clearly specified and purchased from a range of potential suppliers, but they are not well suited to complex services (or products) for which there are relatively few potential suppliers and for which the experience a purchaser has had of previous supplies is particularly relevant.

7.100 Two critical points of inflexibility were very often mentioned.

(a) The prohibition of using the experience of prior working relationships between awarding authority and supplier as an award criterion. Authorities complained that they could neither favour an incumbent (because they found his experience so valuable) nor discriminate against him (if they wanted to ensure future competition). Sophisticated authorities may manage to reach the same goals by a clever partitioning of contracts but nonetheless the legal provisions hinder them from making decisions based on sound economic criteria. The optimal balance between incumbents and potential new suppliers may in some cases not be achieved through open competitive tendering.

(b) Another frequent claim was that the time limit that it is appropriate to allow between publishing an invitation to tender and closing the competition varies and may be significantly shorter than prescribed by the Directives, making tendering as prescribed by the Directives less flexible (the provisions allowing accelerated decisions in emergencies do not meet the point). Most authorities claim therefore that the average time needed to conclude a contract has risen by far more than the extra working time that is entailed by complying with the Directives. The Commission has already shortened the time limits for some contracts (published by e-tendering) with the 2004 Directives and it remains to be seen if that move was sufficient.

7.101 The levels of administrative cost imposed by the Directives, although small in relation to the total value of purchases, are large in relation to the administrative costs that would be

⁴⁴ The arrangements for the purchase of pharmaceuticals vary from country to country, and are themselves the subject of complex regulatory systems. There are significant price differences between countries for the same (often patented) products, leading to the controversial phenomenon of so-called parallel trade which has led to a number of court cases about the appropriate application of EU trade and competition law. It is clear that some purchasing authorities have other objectives than short-term price minimisation, so that there is a possibility that the Directives might be applicable.



incurred without the Directives; moreover, these costs are very unevenly distributed, adversely affecting smaller firms much more than larger firms and some sectors more seriously than others. Two possible measures could be contemplated in order to improve this situation.

- (a) These costs could be reduced by allowing awarding authorities to use less formal methods more in line with private sector practice. If, for example, some sectors with especially non-standardised goods or services (consultancy, IT-services, planning) were to be allowed to use the negotiated procedure a substantial part of the costs of compliance could be shed without much risk to the benefits that they produce. The principles of equal treatment independent of country of origin, and of decisions based on a fair application of objective criteria calculated to give best value for money would continue to apply.
- (b) An even more radical approach would be, at some point, to phase out or abolish the Directives. As all Member States have now transposed the Directives into their own law, changes would only occur if the Member States change their law. In time one would have a legal system that would, in every Member State, comply with the principles of the Directives (as set out in the EC Treaty) but would be better adapted to the needs of every country.

7.102 We have found that the integration of the legal system has a significant impact on the extent of compliance with the Directives and the costs that the Directives impose. Member States have significantly differed in their approaches to implementation. Some have produced complete new laws embodying the requirements of the Directives (Austria, Finland, Sweden, Ireland) some have just amended their existing laws to accommodate the provisions of the Directives. Some Member States may wish to review their national frameworks and to eliminate the inconsistencies and obscurities that arise where the national and European frameworks have not been harmonised.

7.103 Equally, an over-enthusiastic adoption of the requirements of the Directive can also lead to difficulties. Where national legislation has been used to extend the provisions of the Directives to contracts that would otherwise be below threshold, as in Finland and Sweden, unnecessary administrative costs may be created.

7.104 The Directives have necessarily been expressed in legal terms. Nonetheless the full benefits of the Directives can only be reaped if the authorities go beyond legal compliance and adopt policies designed to ensure procurement staff have as their overriding objective the achievement of the best value for money as opposed to merely ensuring that the Directives are followed to the letter.

7.105 In all countries there is still scope for a significant improvement in the effort devoted to ensuring the widest possible dissemination of best procurement practices. As time and circumstances change, it will surely be appropriate for the balance of policy effort to change from the enforcement of legal requirements to the encouragement of improvements in the economic efficiency of procurement.



Conclusions

7.106 The overall effects of the Directives in the considered views of the 100 expert practitioners with whom we conducted in-depth interviews may be summarised as follows:

Table 7.14: Relative Assessment of Cost and Benefits (Authorities)

	Worsening	No Development	Improvement	Balance
Transparency	0	5	44	44
Fairness	1	10	38	37
Better procurement practices	1	8	40	39
Compliance Costs	36	12	1	-35
Competition	3	19	27	24
Price	7	17	25	18
Quality	5	25	19	14

Source: Awarding authorities' Survey

Table 7.15: Relative Assessment of Cost and Benefits (Suppliers)

	Worsening	No Development	Improvement	Balance
Transparency	1	14	36	35
Fairness	6	17	28	22
Better procurement practices	5	15	31	26
Compliance Costs	27	22	2	-25
Competition	2	18	31	29
Price	2	17	32	30
Quality	16	17	18	2

Source: Suppliers' Survey

7.107 The Directives have improved transparency, fairness and the professionalism of procurement practices. They have however imposed significant compliance costs, and some other inefficiencies. The interview programme suggests that there would be wide support for a measure of deregulation to address these problems.

7.108 The Directives have increased effective competition in procurement markets significantly and as a result the value for money achieved by purchasers (a combination of lower prices and better quality than would otherwise have been available) has improved, probably by between 2.5 and 10 per cent of the overall procurement budget subject to the Directives or between about €6 and 24 billion a year by 2002.

7.109 This comfortably exceeds the likely order of magnitude of the increase in administrative costs for awarding authorities and possible enforcement costs, which we estimate to have been not more than about 0.7 per cent of the value of contracts or €1.65 billion. There still would be a significant net gain even if this estimate were doubled and if the gain in prices and quality were at the bottom of the range suggested.



Table 7.16: Overall Net Welfare Benefit of the Directives (in €billion)

	Most negative estimate	Most positive estimate
Price decrease (including quality increases)	6	24
Compliance costs of awarding authorities	-0.75	-0.25
Enforcement costs	-1.0	-0.35
Net benefit of Directives	4.25	23.4

Source: Estimate Europe Economics

- 7.110 These conclusions are presented as point estimates so that the reader can see how they have been derived, but of course are subject to a range of uncertainty as explained in the text. They should be summarised as “between a little less than €5 billion and almost €25 billion” a year by 2002.
- 7.111 The authorities and suppliers that have gained least or suffered the largest increases in costs are those concerned with small contracts, and those whose contracts are not for relatively homogenous works or supplies.
- 7.112 The terms of reference ask for an assessment of the costs of non-compliance. It has only been possible to make a very rough estimate of such costs, both because the extent of non-compliance is not known, and because it is not known whether the costs and benefits resulting from wider compliance would be similar to those from the already compliant contracts. With these provisos, we estimate the forgone net benefit of non-compliance might be around €2 billion for the year 2002; but we repeat that this rests on heroic assumptions and is not a reliable figure.
- 7.113 This is an evaluation of the effects the Directives have had hitherto, since 1992. It does not follow that they will continue to have the same benefits in the future, or that their application should be extended. That would depend on the result of an ex ante impact assessment, taking account not only of the experience hitherto but also the relevant future counterfactual.
- 7.114 The balance of advantage of the Directives might be improved by carefully considering the circumstances in which the disadvantages of compliance, costed and uncoded, are high in relation to the benefits that they can be expected to produce.



8 RECOMMENDATIONS

- 8.1 The positive overall evaluation described in earlier chapters does not, of course, imply that the balance of advantage could not have been greater, or that it could not now be improved. Overall we see several areas where the Directives or the policy of the Commission can probably be improved.

Improving the data collection on compliance and import penetration

- 8.2 Better data with regard to compliance should be collected, by asking the Member States to complete and up-date their estimates of the proportion of procurement that falls above the relevant thresholds, and to reconcile them with the Eurostat estimates that we have cited.
- 8.3 Depending on the results of this reconciliation exercise, another option would be to analyse a sufficient sample of accounts in every category of public procurement authorities to provide a complete picture of procurement throughout the EU in one year. (This would be an extension of the method used in the Netherlands, as explained in the Significant company's report to which we have referred). Of course, such a study would require significant resources and could not be repeated every year. But if a reliable data set for one year existed it would be relatively easy to extrapolate from it. Such a study could then be used to identify compliance gaps and inform future enforcement policies.
- 8.4 Further investigations into public sector import penetration would also be worthwhile. As our most recent data were from 2000, and for this year included only eight of the EU-15 member states, and for most of those countries the, we think that this analysis should be repeated and extended when datasets from new countries for 2000 or from more recent years become available.

Tailoring the provisions to different cases

- 8.5 The provisions of the Directives have very different impacts on award procedures of different sorts. We think that there might be further scope for tailoring of the provisions to different situations and types of contracts.
- 8.6 There is a danger in the provision of too many exceptions and variations as this might make the system more complicated and increase the scope for vexatious litigation. Nonetheless we see some scope for tailoring and increased flexibility in the following areas:
- (a) Time limits: Many authorities and suppliers complain that the time limits are too long for many types of goods (e.g. bulk goods and other standardised supplies) and do not really prevent misuse in other cases as for technologically advanced supplies and services the time limits are much too short. The German national law simply prescribes that the time between publication and award has to be appropriate. A solution like that could provide a similar legal security as the current framework. The



Commission could publish a table suggesting guidance, but not as a requirement, what “appropriate” time limits for different goods and services might be.

- (b) Information exchange: A source of great insecurity for the awarding authorities seems to be the areas of information exchange. Especially in sectors where the specifications include complicated technical details the authorities regularly have the problem that they feel they cannot organise informal discussions to develop suitable specifications. The Commission has already taken some account of this problem with the introduction of a new procedure called “competitive dialogue” in the new 2004 Directives. We propose that the Commission closely watches the implementation of this procedure into national law and in how far the procedure is used following this implementation. Its use should be encouraged.
- (c) Thresholds: At the moment service and supply contracts are subject to the same regime (with minor differences). Our research has shown that compliance costs for service contracts are much higher than those for supply contracts, while the benefits in terms of more competition and lower prices are probably lower. We suggest that the Commission should consider whether to address this problem and, if so, how best this should be done, taking into account the widespread perceptions of purchasing officers.

8.7 Some of these issues have been addressed in preparing the 2004 Directives, and the Commission should evaluate how far the new Directives solve the problems that have been identified.

Promotion of better procurement practices

8.8 One of the main findings of our interview series was that the level of professionalism differed amongst awarding authorities and that suppliers think that this difference is very large indeed. While some understand the nature of the competition and the market very well others seem much less efficient in their procurement procedures.

8.9 The introduction of the Directives has significantly increased the necessary level of professionalism as the authorities must understand the technicalities of the products and the situation of the markets much better than they had to in an informal environment. We think therefore that there may be scope for the Commission to assist the Member States more in their work to increase the professionalism of the public procurement agencies in Europe.

- (a) The Commission Services could organise workshops or seminars on which the different Member States present their policies to improve the procurement behaviour of their authorities.
- (b) The Commission Services could also commission or themselves conduct a best-practice study on this subject in order to collect the different policies and to analyse which policies work best.



Encouraging a focus on economic as distinct from legal aspects of compliance

- 8.10 The most important aspect of such a promotion would be the encouragement of authorities to concentrate on achieving value for money in the transactions. Many suppliers in our interviews found that the increased legal threat caused authorities to focus on ensuring legal security, choosing procedures that minimised the legal threat rather than procedures that maximised value for money.
- 8.11 This change in focus could be partly brought about by helping to increase the professionalism of procurement officers, and by promoting changes to the Directives that would increase the flexibility and the options open to awarding authorities.

Discussion of the national legal frameworks

- 8.12 The interviews have shown that awarding authorities tend to have fewer problems with compliance if the national legal framework is well integrated with the Directives. Authorities in for example Sweden, Austria and Finland complain less about the extra burden of the Directives than their counterparts in for example Germany and Denmark. In these countries the Directives were implemented on top of existing national legal frameworks. Authorities complain about ambiguities between the legal frameworks that increase legal insecurity.
- 8.13 The Commission should therefore hold discussions with the Member States which have not yet reorganised their procurement laws into a single framework which includes provisions of the Directives for above threshold contracts, to see if they can increase the integration of the two frameworks.
- 8.14 We are not proposing that there should be a similar or even identical legal framework for above and below threshold contracts as this would increase compliance costs significantly. In countries where the frameworks seemed to be very similar like Sweden or Finland many authorities complained about the administrative burden for small contracts.

System of Remedies

- 8.15 An important concern of both authorities and suppliers was the system of remedies. In the interviews we found that the legal security of the system is very important for awarding authorities, and that legal risk can be a strong incentive to concentrate on the formal aspects of the procurement process rather than on the economic aspect. Suppliers also expressed concern about legal security. As they are naturally reluctant to sue possible clients they will only do so if the system provides legal security, or from their view predictability, of the legal outcomes. The Commission should review whether its own recent work on the security and efficiency of legal remedies has proved effective.



Deregulation

- 8.16 As we have mentioned before there are many reasons why the benefits of the Directives might decrease in the future. The context in which the Directives are operated is by now very different from that in which they were conceived, and there may be opportunities for a measure of deregulation that would improve efficiency in the procurement markets. Options for such deregulatory measures could be:
- (a) The Commission should continue its policy to exempt markets where there is enough competition from the obligations of the Directives (the most recent example was the energy market in the UK).
 - (b) In general the Directives prescribe procedures (like publishing) in order to ensure certain outcomes (like competition). Even though this method helps to ensure legal certainty it has the disadvantage that the prescription of procedures might not be appropriate for all types of award procedures and produces sub-optimal outcomes. The Commission should therefore analyse which prescribed procedures can be exchanged for the setting of principles without unduly reducing legal security.
 - (c) Some provisions of the Directives might lose some of their relevance in the future. For example, “freedom of information” legislation is making some restrictions unnecessary, and by reducing the transaction costs involved in publication the development of e-procurement techniques is making it less necessary to mandate wide publication. The Commission should regularly look into the legal frameworks in order to ensure that no obligations have become obsolete and with that unnecessarily burdensome.
- (a) One more advanced solution might be a principle based on the Treaty and Directives that would apply to all Member States where the Commission is satisfied that the national legal framework is sufficient to ensure the application of the principles of the Directives. Member States would then be able to apply for their national legal framework to be exempted from the prescriptive Directives. The Commission could decide if the national legal framework and the compliance with this framework is enough to ensure the principles, in a way analogous to its decisions that sectors are sufficiently competitive to be exempted from the scope of the Directives.
- 8.17 In summary, it should not be concluded from the fact that the Directives have had a significantly beneficial net effect in the past that their scope should be extended or that they should be continued in force indefinitely. As circumstances change, the need for the prescriptive requirements of the Directives may reduce, and a more generally deregulatory approach may become more appropriate.