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Public Procurement

Organising Central Public Procurement Functions

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This Brief analyses the functions, structures, status within the government, and capacity of central public procurement bodies in EU Member States. This analysis can be of special benefit to elected representatives, policy makers and decision makers in national authorities of EU candidate countries and other countries reforming their public procurement system according to EU practice. These countries are considering the establishment, strengthening or reorganisation of their structures, with a view to carrying out functions related to the public procurement system. This Brief does not attempt to recommend particular institutional arrangements. An in-depth review of various models in place in EU Member States, a comparative analysis as well as the background and rationale for the use of a particular institutional model are examined in detail in *Central Public Procurement Structures and Capacity in Member States of the European Union* (SIGMA Paper No. 40, 2007).

Why is an organisational structure needed to carry out public procurement functions?

The Member States of the European Union generally establish central organisational structures to carry out functions related to the public procurement system as a whole. As public procurement represents one of the vital economic activities in all countries, the development of a sound and efficient public procurement system is often a political priority. The establishment of central public procurement bodies constitutes a major contribution to the successful development and favourable overall position of the public procurement system in a country. All of the key stakeholders in a public procurement system rely extensively on the capability of public procurement bodies to support the development of a national procurement system.

To make the public procurement system work at all levels, a set of functions needs to be performed at the central (or regional) level. These functions may include the preparation of national public procurement legislation, advice to contracting authorities/entities and economic operators on the application of legislation, provision of public procurement training, publication of contract notices, and co-operation with the European Commission and other international institutions. In some countries most of these tasks are combined in one central institution; in other countries the tasks are shared between several central institutions, whereas some countries may lack central institutions for the performance of some of these tasks.

Differences in circumstances and conditions under which the public procurement system is formed and developed are reflected in its structure. The implementation of new, competition-driven public procurement legislation, often within a short time frame within the EU accession process, requires an effective and quick mobilisation of support and efforts by the government. It is therefore generally acknowledged that a prerequisite for an effective legal reform process is the availability of a centralised institutional solution, which would be granted the authority and assigned the tasks of co-ordinating, managing and supporting the implementation of public procurement legislation.

Although no explicit EU legal requirement has been set on this issue, the practical experience of recent EU Member States and EU candidate countries proves the importance of central public procurement organisations in performing the respective activities included in the public procurement chapter for EU accession. In those countries a key challenge in the procurement reform process, along with the reform of the legal component, is the issue of how to best organise the central organisational structure for the co-ordination, implementation and monitoring of public procurement. The same challenge is, or will be, equally important for countries reforming their public procurement system according to EU practice. Adequate political support for the achievement of defined prerequisites for the full functioning of the system is the

cornerstone of the reform process in the field of public procurement. The establishment of a strong focal point for public procurement at a high central level, which is given a fairly wide scope of functions and responsibilities, is seen as a vital measure for countries in the process of building their public procurement systems. For the most part, however, the question of managing procurement policy usually emerges in the context of a reform process. It is the issue of reform that gives rise to the need for a mechanism to carry out that reform.

For example, as recent experience has shown, during the pre-accession period Croatia needed to ensure that an **organisation for procurement** would guarantee a coherent policy in all areas related to public procurement, and would steer its implementation so as to facilitate the process of alignment with the EU acquis as well as future negotiations on the chapter dealing with public procurement.

Once the country has gone through the demanding process of reform and strengthening of its public procurement capacity, in which the central public procurement body plays an important and vital role, it can be expected that some of the functions that such a body performs are no longer necessary and are found to be superfluous. However, any government policy, including policy relating to public procurement, will be directed in some way within the government but not necessarily by such strong central bodies dealing exclusively with public procurement.

At the same time, in 15 “old” EU Member States, procurement functions, in particular support tasks, are frequently organised in a decentralised manner. The variation of institutional systems in the area of public procurement in those countries can be explained by the differences in their legal, political and administrative traditions. In addition, public procurement has developed gradually for more than a century, and specific national systems have been formed as a result of continuous developments in society.

The evolution of key procurement functions also has to be considered in the light of a changing public procurement environment, which is growing in complexity. Public procurement is a multidisciplinary field. Various horizontal policy areas and factors of a changing environment have a strong influence on, and implications for, public procurement systems, particularly in terms of the legislative and regulatory framework, technological development, public sector development, capacity strengthening and performance measurement, integrity enhancement, and international co-ordination and co-operation.

Development and procurement co-ordination functions become important in all EU Member States as a result of an increase in the demand for government initiatives and support in areas that are subject to rapid technological changes. One area that is strongly supported by technological development is **e-procurement**, and many countries are introducing electronic platforms to be used by contracting authorities/entities, thereby replacing the traditional paper-based methods. Numerous examples of successful e-procurement solutions are already in operation across Europe (France, Netherlands, Norway, Portugal, the United Kingdom (Wales), etc).

A number of the developments in the public procurement system are focused on increasing the level of inclusion of **social, environmental and innovative aspects** in the public procurement process. For example, many public authorities in Europe have taken the approach of establishing a policy or including commitments to “green” public procurement implementation as part of other policies.

This process of change needs to be considered and dealt with effectively by governments, since these changes will have implications on how to best organise the institutional structure of the public procurement system in order to achieve efficiency in the delivery of public services. Any procurement structure needs to consider how to best meet an increased need for the professionalisation of the procurement function and the subsequent need to develop, in particular, the procurement support structure. It is therefore vital to find the appropriate global organisational model that strikes an effective and natural balance between the specificities of the functions involved and the requirements of these functions in terms of independence and interaction, taking into account the various aspects of procurement, which also covers concessions and public/private partnerships (PPPs) as well as other horizontal policy areas, while at the same time avoiding conflicts of interest.

The combined effects of regulatory, technological and commercial developments create a demand for the increased professionalisation of the procurement function at operational level, in contracting authorities/entities and in the private sector.

Key central public procurement functions

EU Member States display a considerable diversity of institutional arrangements, although the uniformity of functions performed across public procurement structures is evident. With reference to the nature of the tasks involved, those functions may be classified as either **core functions** or **supplementary functions**¹. This broad classification results in overlaps between the various functions, especially in the context of differences in organisational terms, but it is useful for an overview of the ways in which central public procurement functions are organised in the various countries.

Core functions cover the functions that are regulated by national law, often in direct response to obligations connected to membership in the European Union. These functions therefore need to be dealt with at central government level, and they comprise primary policy and legislative functions, secondary policy and regulatory functions, international co-ordination functions, and monitoring and compliance assessment functions.

All other functions can be classified as supplementary functions, since they are not attributed as an obligation under law for all EU Member States. It should be emphasised that for the functionality of a public procurement system, those supplementary functions are no less important than core functions. Nevertheless, they may be exercised by centrally located procurement bodies within a public procurement structure, but they are just as often shared or provided by various bodies within the public procurement structure or in the wider public administration as well as by the private sector. Supplementary functions comprise advisory and operations support, publication and information, professionalisation, capacity strengthening and development, and procurement co-ordination functions.

Primary policy and legislative functions

Designated bodies at the government level have the task of developing fundamental procurement policies aimed at setting the overall legal framework for public procurement operations. The most important function in this context is to prepare and draft primary public procurement legislation, which includes national legislation implementing the EU Procurement Directives as well as the regulatory or policy

¹ *Central Public Procurement Structures and Capacity in Member States of the European Union* (SIGMA Paper No. 40, 2007).

framework that will apply in areas outside the scope of the EU Directives. The EU Directives are transposed into primary legislation in all EU Member States, but not all of them have regulated in primary law the areas not covered by the Directives. Within this function, the tasks commonly assigned are as follows: to lead the working group in the drafting process; to organise the consultation process with the main stakeholders in the procurement system; and to take part in other legislative activity of relevance to public procurement.

Legislative and policy functions are frequently exercised in the respective central procurement body (Bulgaria, Cyprus, Romania, and the Slovak Republic).

The law-drafting function is frequently exercised by the Ministry of Finance/Treasury, Ministry of Economy, and Ministry of Justice, either organised separately or as a component of a central public procurement body. This is the case, for example, in Estonia, where the Ministry of Finance, of which the Public Procurement Office (PPO) is a part, is responsible for this task.

Countries where the function of drafting legislation is clearly separate from the main central procurement bodies are Estonia, Hungary, Italy, Latvia, Lithuania and Sweden.

Secondary policy and regulatory functions

Secondary policy and regulatory functions relate to regulations that are formally adopted by the government in order to give effect to primary law in specific areas or to provide implementing tools in support of the application of primary law. There are clear differences between countries with respect to the need for, and extent of, secondary legislation. Some countries operate without any secondary legislation at all or to a very limited extent and rely instead, for example, on the recitals (interpretative notes related to the various provisions) for the preparation of primary law in the parliament, on interpretative communications by designated bodies, or on court precedence. Others require by law the adoption, in a varying degree, of a set of secondary legislation, which in some cases is even a condition to ensure the effectiveness of primary law. There are also some countries that further complement primary and secondary legislation with the provision of tertiary legislation (e.g. operational guidelines) adopted by designated central procurement bodies. In that respect, a set of supplementary regulations may include implementing regulations – covering technical aspects of the procurement process, areas not covered by primary law, or areas where clarifying application instructions are needed; operational guidelines; standard formats for contract notices; model tender documents for goods, services and works, including instructions to tenderers, tender forms and technical specifications; and model general conditions, including contract forms for contracts related to goods, services, works and concessions.

International co-ordination functions

The co-ordination of international and intra-EU public procurement activities is an important function of an EU Member State, which normally would cover any or all of the following tasks: responsibility for the national contribution to international regulatory activities, amongst others, in the field, such as the Government Procurement Agreement of the World Trade Organization (WTO), where Member State act as observers in the negotiations carried out by the European Commission, or the Model Law of the United Nations Commission on International Trade Law (UNCITRAL); responsibility for the national contribution to the EU advisory committee and its working groups dealing with public procurement; acting as a national contact point for the European Commission for questions and for enforcement and infringement

proceedings on the basis of the EU Treaty; participation in international networks, such as the European Public Procurement Network (PPN); and co-operation with corresponding institutions in other countries.

In most EU Member States the central public procurement body or the body responsible for drafting legislation exercises the international co-ordination functions, but often these functions are **shared between two bodies**, as is the case in Estonia, Hungary, Latvia, Lithuania and Sweden.

Monitoring functions² and compliance assessment functions

The monitoring of public procurement plays an important role in all national public procurement systems. This monitoring comprises each and any systematic observation of the public procurement system that is conducted in order to assess the way in which this system functions and develops over time and to establish whether the desired (targeted) state of play, as defined by policy makers, has been achieved. The compliance assessment functions include methods and proceedings that are applied in order to detect and remedy irregularities in public procurement. In some countries, public procurement organisations have been given an even more proactive role to play in the initiation of proceedings for judicial review in courts for violations of public procurement law.

In Croatia, for example, the Ministry of Economy, which is the body responsible for the public procurement system, has powers to instigate **misdemeanour procedures** against contracting authorities/entities before the competent misdemeanour court if the ministry establishes violations of the Public Procurement Act.

Some of the recent EU Member States are developing, in addition to national public procurement functions, specific compliance assessment functions for EU funds.

Examples of EU Member States that have in place some form of audit on an *ex ante* basis are: Cyprus, Estonia, France, Hungary, Latvia, Malta, Poland and Romania.

Monitoring and compliance assessment functions include the following tasks:

- Preparation of an annual report to the government or the parliament on the functioning of the national public procurement system;
- Collection of statistical and other information on, *inter alia*, public procurement planning, market penetration, awarded contracts, and performance and efficiency of the public procurement system;
- Auditing, control, inspections, checking of legal compliance;
- Where applicable, exercise of an authorising function by granting prior approval to contracting authorities/entities on certain decisions in the procurement process, such as contract documents, technical specification, and the use of less competitive procedures or accelerated procedures;
- Initiation of proceedings for judicial review in courts of law of violations of public procurement law;

²

For more information, see *Monitoring of Public Procurement* (SIGMA Policy Brief 27, June 2013).

- Where applicable, management of an official list of certified economic operators and/or certified procurement officers.

Advisory and operations support functions

These important functions are in place to support contracting authorities/entities as well as economic operators in their respective tasks so as to enable them to act efficiently and in compliance with national legislation, the fundamental principles of the EU Treaty, and good practices. In the initial stages of reform, in particular, the existence of a body that provides advice on the application of the legal framework and other related matters is crucial. Specifically, legal advisory functions are normally the responsibility of centrally placed public procurement bodies, but some of these functions are often shared and exercised by a great number of players within the public procurement community, such as associations for regional and local administrations, large contracting entities and utilities, the private sector (consultants and law firms), chambers of commerce, and associations of small and medium-sized enterprises. Advisory and operations support functions include the following: organisation of a help-desk function to provide legal and professional support to purchasers and economic operators on a daily basis; development of guidance systems and operational tools for managing all phases of the procurement process, e.g. methodologies for tender evaluation; and issuance of publications, commentaries and interpretative communications on various aspects of public procurement.

Publication and information functions

The principle of transparency imposes an obligation on the contracting authority, which consists of ensuring, for the benefit of any potential tenderer, a degree of advertising that is sufficient to enable the opening up of the procurement market to competition, and it is therefore a cornerstone of the public procurement system. In a number of EU Member States, various publication functions are assigned to a central procurement body. It might be in charge of the administration of the national public procurement bulletin, and this task may also include the quality control of notices prior to publication or submission. Regarding contracts above the EU thresholds, the central body may be assigned the responsibility of conducting the communication of notices of contracting authorities/entities to the *Official Journal of the European Union*, which would include the task of rejecting notices that did not fulfil the requirements.

For example, in Hungary and the Slovak Republic, the central procurement offices **check draft notices** before they are forwarded to the Official Journal of the EU. In Croatia, Ireland, Slovenia and the United Kingdom, central procurement institutions have no such function.

The publication and distribution of information on public procurement legislation and policy, including sources of additional information, materials and advice, are other related tasks. This information can include paper versions as well as Internet resources or resources of any other media. In more detail, tasks linked to this function may include issuance of contract notice models and instructions on how to use them; operation of Internet-based publication systems of contract and award notices, including the processing of notices, quality and legality controls of received notices, publication of notices, and submission of notices to *Official Journal of the European Union*; maintenance of public procurement registries or other procurement databases; maintenance of lists of contracting entities; operation of an Internet-based information and guidance system to support the procurement community, including guidance documentation, model tender and contract documentation, interpretative and commentary communications (which are also part of the advisory functions).

Professionalisation and capacity-strengthening functions

Professionalisation of procurement personnel and capacity strengthening of procurement operations are seen as crucial functions in increasing the efficiency of any national public procurement system. Contracting authorities/entities face a more complex procurement environment, with a wider set of functions and responsibilities or at least a significantly different situation compared with traditional procurement tasks, which affect required competences and the choice of organisational and co-operative solutions. Therefore, there is a continuing demand for higher education as well as specialised training in public procurement in various disciplines and professions. To be efficient, public procurement structures need to be sensible to a changing procurement environment and take adequate steps for building appropriate institutional solutions for public procurement. In particular, a stronger support structure is required, providing professional advice and capacity strengthening. These functions can be assigned to central procurement bodies and may include the initiation and co-ordination of national training programmes for contracting authorities/entities; facilitation of independent teaching and research in universities and training colleges and through private companies; organisation of a research programme on public procurement law, economics and policy; and participation in national and international academic and other events on public procurement law, economics and policy. Training is a key activity within this function, but the central body acts more in the capacity of *initiator* (which includes responsibility for defining training policy), *facilitator and co-ordinator* of procurement training for public purchasers and economic operators rather than acting as the implementer of training programmes. The practical involvement of central procurement bodies is usually limited to the organisation of conferences and seminars of an informative nature, with presentations of legislation and other connected areas that are an important responsibility of these bodies. This involvement may include the preparation of training programmes and material, but universities, research institutions and the private sector usually conduct the more comprehensive, specialised and long-term capacity-strengthening activities. In some EU Member States, central bodies are responsible for various accreditation schemes of public procurement officials or procurement consultants. However, professionalisation and capacity strengthening are not limited to training and research. This function comprises a much wider approach and challenge, namely to:

- Broaden the concept of public procurement beyond the tendering phase and compliance with the regulatory framework to cover all phases of the procurement cycle;
- Put the procurement function on the political map, so that it is recognised as a key strategic factor in the provision of efficient services to the public at lowest possible cost;
- Ensure that procurement is mainstreamed into the centre of the budget and public expenditure process;
- Attract adequate professional procurement expertise and raise the status of the procurement profession;
- Determine how best to organise and manage procurement operations at the contracting level;
- Design decision-making structures in such a way that the right balance is found between discretionary power and control.

Development and procurement co-ordination functions

Development and procurement co-ordination functions have become important in all EU Member States as a result of the steady increase in the demand for central government initiatives and organisational and operational support in areas subject to rapid technological and significant legislative changes. In some Member States these functions have become the responsibility of the main central procurement bodies, while in others these functions have been assigned to specialised bodies. Development and procurement co-ordination functions cover, among other tasks, the co-ordination and support of concessions and PPP projects, introduction of systems for performance measurement of public procurement, and launching of initiatives for the elaboration of contract models to be used in the public sector. One important function is the development of procurement techniques, such as performance-based technical specifications. Procurement bodies have also become active in establishing an electronic procurement system, by providing the electronic platform to be used by contracting authorities/entities. A number of the developments in the public procurement system are focused on raising the level of inclusion of social, environmental and innovative aspects in the public procurement process. The importance of adequate co-ordination is also emphasised in the EU integration process as well as the development of a public procurement system in line with set requirements. The multidisciplinary nature of public procurement and its direct link with various horizontal policy areas also require adequate co-ordination activities and adequate political support in order to achieve cross-sectoral coherence.

What kind of structural models exist?

In EU Member States the existing public procurement structures can be separated into three broad groups:

- A **centralised** procurement structure is characterised by a high concentration of procurement functions that are allocated to a few centrally placed institutions (normally one or two institutions).
- A **semi-centralised** procurement structure has a mixed concentration of procurement functions that are allocated to a limited number of institutions placed at various levels within the public administration (normally three or four institutions).
- A **decentralised** procurement structure is characterised by a dispersed concentration of procurement functions that are allocated to several institutions placed at various levels within the public administration and it is often comprised of private and public companies (usually more than five institutions are involved).

Core functions are organised as a rule in a centralised manner, while supplementary functions may be carried out by a broad spectrum of bodies, including bodies in the private sector, at both central and decentralised levels of the public administration.

In some systems, legislative and policy functions are exercised by the ministerial structure, while other important procurement functions are assigned to a special procurement body, which may be part of the government or subordinated to the legislature.

In public procurement structures with one dominant procurement institution, the same institution normally exercises legislative and policy functions. Hence legislative functions are only carried out in dominant institutions that are part of the government.

In addition, among its “core functions”, the dominant institution is normally responsible for government advice, procurement policy development, international co-operation, and certain monitoring functions. The tasks related to training and research, development and business administration, publication and information, and administrative and monitoring tasks are often carried out outside the dominant institution.

In EU Member States that have a public procurement structure with one **key procurement institution**, the relevant tasks may be divided between several institutions and organisations, while one institution has a more significant position. Examples in this group are Austria’s Constitutional Service of the Federal Chancellery (BKA-VD), Germany’s Federal Ministry of Economy and Technology (BMWi), Hungary’s Public Procurement Council (PPC) and Luxembourg’s Ministry of Public Works.

A common characteristic of semi-centralised or decentralised procurement structures is the division of relevant tasks between various institutions and organisations. While some institutions, most notably the respective ministries, are always in charge of regulatory functions, there is not always a focal point of organisation with a strong emphasis on a specific institution or organisation, in particular in more decentralised structures. This category is the opposite of the centralised procurement structure, which is characterised by a high concentration of functions assigned to a few institutions.

Finland is the most evident example of a procurement structure with a **decentralised system**, characterised by procurement functions that are clearly dispersed between several institutions and by the absence of a dominant procurement institution. Important tasks are accumulated in the Ministry of Finance (policy development and elaboration of standard documents) and in the Ministry of Trade and Industry (drafting of legislation and some monitoring). However, the other functions are divided between the Ministry of Foreign Affairs, Governmental Board of Procurement, Public Procurement Advisory Unit, Association of Finnish Municipal and Regional Authorities, State Audit Office, and the privately organised (but mainly publicly owned) HAUS Ltd., Efeko Ltd. and Hansel Ltd. Moreover, the country is vertically decentralised, since regions and municipalities have a strong role, partly through their national association.

No matter which organisational model is in place, several organisational solutions are available with regard to the location of the central procurement body or bodies. Central bodies exercising public procurement functions may be organised with a variety of reporting lines. Usually these central bodies are organised within, or subordinated to, the Ministry of Finance or the Treasury, the Ministry of Works, the Ministry of Regional Development, the Office of the Prime Minister/Chancellor/ President, the Council of Ministers, the Parliament, the Competition Authority or another public body.

In some cases a multitude of units may cover one or more public procurement functions and may be organised in a combination of institutional environments. Frequently policy and primary legislative functions are located in a ministry such as the Ministry of Finance or the Ministry of Justice, while advisory and publication functions are more often found in central bodies with a different location and reporting line.

In some EU Member States public procurement offices or agencies have been given a more independent status under the parliament or directly under the government, while in other Member States these offices act as departments within ministerial structures.

The **status** of the procurement body is another important issue to address, since this status determines the role and potential influence that this body may have within the public procurement system. The status refers to the following elements:

- Position or location of the procurement body within the public administration;
- Decision-making power, mandate and functions designated to the body and legal foundation for its authority (e.g. public procurement law);
- Independence of the management, as expressed by the conditions and procedures for their appointment and dismissal (e.g. chairman, director, head of unit);
- Organisational design, composition and personnel resources granted to the body;
- Financial means and amount of resources for staff and operational costs (e.g. general budget, special funds, and own financing);
- Means of supervision over the activities of the procurement body.

Administrative capacity of a central public procurement structure

The availability of sufficient administrative capacity, whatever organisational model or system is in place, has proved to be a very important issue for recent EU Member States and EU candidate countries, and it is just as important for countries reforming their public procurement system according to EU practice. It is not sufficient for a candidate country to simply comply with the *acquis*; it is expected to set up in a broader sense a fully safe and efficient system of public procurement. Acceding countries must demonstrate that they have a satisfactory degree of administrative capacity at central government level to implement national legislation transposing the EU Directives, to monitor public procurement operations effectively, and to meet all other obligations under the EU Directives and the EU Treaty. These obligations imply establishing appropriate institutions and mechanisms, including those dealing with remedies, and ensuring that these institutions are adequately staffed and have the capacity to exercise all of their functions efficiently, which may consist of a wide range of both core and supplementary functions, as indicated above. In terms of the Directives, EU Member States are therefore required to take the necessary measures in order to give full effect to their provisions in national law and to ensure that no other national provisions undermine their applicability.

The administrative capacity of central public procurement bodies comprises human resources, including staff size, composition of staff and their educational backgrounds; financial resources; and management status.

The central issue in the context of administrative capacity concerns human resources. The staff size – the number of people working for the main central procurement body and other relevant institutions – is the starting point. If these institutions are continuously understaffed, their human resources capacity is not sufficient to carry out their numerous functions effectively. Moreover, the educational background of the staff is important. The number of lawyers, economists, political scientists, former practitioners, engineers or accountants is as important as the training of support staff.

In addition, continuing education, provided either internally or externally, plays an important role.

The relation between the size of the national public procurement market and the complexity of tasks attributed to the central procurement organisation and its staff size are other relevant considerations. The staff sizes of central procurement bodies vary in EU Member States. Moreover, since many of the relevant bodies deal with several other issues in addition to the public procurement functions outlined above, it is not always clear how many people are actually working on core and supplementary central public procurement functions.

Financial resources concern the budget of the central public procurement institutions as well as the sources of their income. Many institutions receive their income from the general budget, for example from the budget allocations of the ministry to which they are attached. Other offices may have their own financial resources, for instance from fees payable for the publication of contract notices or even from some form of “tax” on every contract. The size of the budget is not the only crucial issue here. The size of the national public procurement market and the complexity of the tasks attributed to the central procurement organisation are other relevant considerations.

Assets and shortcomings of functions carried out by central public procurement structures

As presented above, central public procurement bodies in the different systems are responsible for exercising various functions reflecting the needs of the specific system. The status of the procurement body within the public administration is dependent on the functions that the body will be expected to carry out. The consequence of this connection is that the decision concerning the location of the body can realistically be made only after a decision has been made with regard to its functions. If those functions, for example, require a certain degree of independence, then the procurement body must be established in such a way as to assume that independence. If it is not, then trying later to assign it a particular function that requires independence could easily fail, as it will be unable to exercise that function or stakeholders will have no confidence in its supposed independence.

In some countries, public procurement bodies exercise compliance assessment functions by granting prior approval to contracting authorities/entities for certain decisions in the procurement process or even by granting them prior approval to use less competitive procurement procedures. By having one or more institutions within the central public procurement structure carry out these functions certainly yields positive results in terms of a decreased risk of formal irregularities in the public procurement procedure. The efficiency of such assessments depends considerably on how *ex ante* audit is defined and at which stage in the procedure it is applied.

In Poland, for example, **ex ante audit** is applied immediately after termination of the procurement procedure and before the contract can be undertaken. If any irregularities are detected, the auditing body gives its opinion to the contracting authority on irregularities and on the means to remedy them. It remains, however, the sole responsibility of the contracting authority to carry out the procurement procedure in line with applicable rules.

Nevertheless, practice has also shown that the negative effects of such competencies often prevail and as a result abolish their added-value of limiting the risk of irregularities. Granting prior approval represents an additional step in the public procurement process, and therefore it has a negative effect on the efficiency and length

of that process. As one goal of an efficient procurement system is to eliminate unnecessary administrative steps, the imposition of compliance assessment mechanisms that increase administrative burdens needs to be carefully assessed. Such mechanisms have to be put in place in a restrictive way so that their negative effects do not override their positive effects.

Furthermore, compliance assessment functions, especially those giving to central public procurement bodies the authority to grant prior approvals for the use of less competitive procedures also raises the question of ownership of, and responsibility for, the procurement process. Exercising such functions may result in decreased ownership and diluted responsibility of contracting authorities/entities for the specific public procurement process and in the transfer of this responsibility to bodies performing such controls. This issue is also of special importance in the light of the competencies of other bodies, such as review and audit bodies that have been established in countries with a view to reviewing, detecting and remedying irregularities in public procurement.

These issues are further emphasised in the context of the restricted administrative capacities of central public procurement structures in comparison with the large number of contracts to be controlled, but also in the context of the expert competencies of these structures given the large number of different items procured by contracting authorities/entities, especially with respect to technical or functional specifications.

Regarding those negative effects, good practice in some countries is related to the narrowed or random performance of compliance assessment functions, which are limited to a portion of the procurement procedures based on their value and significance or to designated contracting authorities/entities based, for example, on the results of risk assessments.

There are examples where central public procurement bodies have specific and additional compliance assessment functions concerning **EU-funded contracts**, such as control functions with regard to only the contracts co-financed by EU funds; a separate department to control the award of these contracts; or increased ex ante audits of all contracts co-financed by EU funds that are above the EU thresholds.

Advisory functions are put in place to support contracting authorities/entities as well as economic operators in their respective tasks so as to enable them to act efficiently and in compliance with national legislation, the fundamental principles of the EU Treaty, and good practice. Particularly in the initial stages of reform, due to requirements for assistance, the existence of a body that provides advice on the application of the legal framework is crucial. However, in many reforming countries, especially those with a history of more centralised government, public procurement bodies are seen and used as supplementary control mechanisms rather than reform and development drivers. Although such an approach has obvious benefits, the likely effects in countries with procurement bodies that perform control activities requiring excessive administrative capacities are the introduction of additional, superfluous rigidity into the public procurement system and the deceleration and decreased efficiency of the reform process. As a consequence of their performance of such supplementary control mechanisms, public procurement bodies often fail to realise the benefits of a monitoring function that is exercised as a mechanism for collecting statistics and information on the whole system and for identifying systematic problem areas and trends.

In addition, such a control function could be in conflict with any advisory function that the public procurement body may also have been given. The possibility of these two functions being assigned to the same body gives rise to concerns about the proper location and independence of the public procurement body.

The evaluation of assets and shortcomings is important in determining the scope of some other listed functions, such as the standardisation of tender documents. The standardisation of tender documents for different types of contracts (supplies, works or services) and procurement items or standard contract clauses could in general minimise the risk of irregularities in the contract award procedure or in contract execution. However, the imposition of obligatory standard documents without any flexibility for their modification to suit the specific circumstances of a specific contract, the needs of the contracting authority, or other factors relevant to the contract often results in comprehensive practical problems at the level of the specific procurement procedure. In that respect, examples of good practice usually provide for standard documents, not as a fully or partially mandatory element but rather as a form of implementing guidance tool for contracting authorities that has been developed and dispatched by central public procurement bodies.

The function of central public procurement structures regarding the management of official blacklists of economic operators that violated public procurement rules did not fulfil their contracts or misrepresented information raises a number of questions from a practical point of view. Although these types of lists have been praised by contracting authorities, tenderers and the general public as an element to promote transparency, the maintenance of official blacklists is not recommended. These lists should be radically changed or abolished, especially in the light of the recent case of the Court of Justice of the European Union C-465/11. A number of open issues related to blacklists, such as the legal aspects of providing adequate evidence for blacklisting or the availability of legal protection for blacklisted companies should all be carefully evaluated. The limited capacities available for carrying out all of the administrative procedures preceding the blacklisting of a specific economic operator, combined with the legal risks related to challenges of such decisions, raise important questions as to the positive effects of the use of blacklists in public procurement systems.

Further reading:

- [Central Public Procurement Structures and Capacity in Member States of the European Union](#) (SIGMA Paper No. 40, 2007);
- [Monitoring of Public Procurement](#) (Public Procurement Brief 27, June 2013).