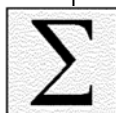


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**SIGMA - A JOINT INITIATIVE OF THE OECD AND THE EUROPEAN UNION,
PRINCIPALLY FINANCED BY THE EU**

**PUBLIC PROCUREMENT IN EU MEMBER STATES: THE REGULATION OF CONTRACT BELOW
THE EU THRESHOLDS AND IN AREAS NOT COVERED BY THE DETAILED RULES OF THE EU
DIRECTIVES**

SIGMA PAPER NO. 45

How do Member States regulate their national public procurement systems below the EU thresholds and in areas not regulated in detail by the EU Directives?

This paper provides the reader with an overview of different national policies, rules and procedures and presents common features and patterns in the regulatory approach of the countries covered.

It will help Sigma partner countries design efficient and sound legal frameworks also outside the scope of the EU Directives. It may as well be of interest to the Member States themselves and to the international procurement community at large.

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Sigma

Support for Improvement in Governance and Management

A joint initiative of the OECD and the European Union, principally financed by the EU

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MAY 2010

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THE SIGMA PROGRAMME

The Sigma Programme — Support for Improvement in Governance and Management — is a joint initiative of the Organisation for Economic Co-operation and Development (OECD) and the European Union, principally financed by the EU.

Sigma supports its partners in their efforts to improve governance and management by:

- Assessing reform progress and identifying priorities for reform against baselines set by good European practice and existing EU legislation (*acquis communautaire*)
- Supporting institution-building and setting up legal frameworks and procedures to meet European standards and good practice
- Facilitating assistance from the EU and other donors by helping to design projects preconditions and implement action plans.

Since 2008 Sigma is supporting the public administration reform efforts of the following partners:

- **EU candidate countries** – Croatia, the former Yugoslav Republic of Macedonia, and Turkey
- **Potential EU candidates in the Western Balkans** – Albania, Bosnia and Herzegovina, Montenegro, Serbia, and Kosovo (under UNSCR 1244/99)¹
- **European Neighbours and Partners (ENPI)** – Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, Moldova, Morocco, Occupied Palestinian Territory, Syria, Tunisia and Ukraine, as well as Russia².

The Sigma Programme supports reform efforts of partners in the following areas:

- **Legal Framework, Public Service and Justice:** Legal framework and Justice; Public Service and Administrative Framework; Public Integrity
- **Management of Financial Resources:** External Audit; Public Expenditure Management; Public Internal Financial Control; Public Procurement
- **Policy and Regulatory Systems:** Policy-making and co-ordination; Regulatory Policy - Better Regulation; Design and Implementation of Reform

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¹ In accordance with UN Security Council Resolution 1244, since June 1999 Kosovo has been governed by the UN Interim Administration Mission in Kosovo (UNMIK).

² As agreed with the European Commission, Sigma activities are being undertaken initially in nine prioritised countries: Egypt, Jordan, Morocco and Tunisia (ENPI-South); Armenia, Azerbaijan, Georgia, Moldova and Ukraine (ENPI-East).

FOREWORD

In all EU Member States, the award of public procurement contracts falling below the EU thresholds is of significant importance and represents a large share of total procurement. Therefore, the effective design of national procurement policies and rules for the award of these contracts is vital to achieving a sound and efficient public procurement system.

The European Directives 2004/17 and 18 provide a set of co-ordinating procedures for public contracts above the EU thresholds. This set of co-ordinating procedures that Member States need to transpose into national law does not cover all aspects of the procurement process. Within the framework of the “*acquis*”, each individual Member State is responsible for organising its procurement system, legally and institutionally, in order to ensure the most effective and efficient use of public resources.

Based on its work with the new Member States and current candidate and potential candidate countries, Sigma has come to the conclusion that countries are generally uncertain about how to design the regulatory framework for the award of contracts outside the scope of the Directives, potentially resulting in inefficient procedures and practices. Unfortunately, a systematic review of how EU Member States have designed their legal frameworks outside the scope of the EU Directives has not been undertaken. A comparative overview, including a presentation of national regulatory models and instruments in EU Member States, will, therefore, be beneficial to all Sigma partner countries.

The study covers the procedures and rules for the award of contracts below the EU thresholds, and also provides an analysis of policies and practices applicable to all contracts above the EU thresholds, which are equally important for the establishment of a complete procedural framework at national level. Areas not specifically covered by the Directives (which deal with the main principles and obligations) include, among others, the organisation of procurement proceedings, preparation and content of tender dossiers, tender validity periods, submission and opening of tenders, tender and performance securities, detailed rules on clarification of tenders, and suspension and cancellation of tenders. Of particular interest for areas below the EU thresholds are the regulatory instruments, national thresholds, procurement methods, publication rules, participation rules, selection and award criteria, technical specifications and available remedies.

Sigma believes that its partner countries will, based on a better understanding and knowledge of existing procedures and practices outside the scope of the EU Directives among EU Member States, be in a better position to design efficient and sound legal frameworks outside the scope of the EU Directives. The study provides information on the situation in Member States without attempting to draw value conclusions or to issue recommendations on preferred procedural models.

Sigma wishes to thank its contact points in the Member States for all kind and valuable support in the completion of this study. Sigma is convinced that the information and knowledge shared will be very beneficial to its partner countries. The overview provided by the study may also be of interest to the Member States themselves and to the international procurement community at large.

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EXECUTIVE SUMMARY

Overall Observations

The award of public procurement contracts falling below the EU thresholds is of significant importance and represents a large share of total procurement in all EU Member States. These contracts are procured through national procedures applicable to the award of contracts below the EU thresholds. The number of contracts below the EU thresholds greatly exceeds those above the thresholds. Public procurement is of specific importance to small- and medium-sized enterprises (SMEs). Consequently, the effective design of national procurement policies and rules for the award of these contracts is vital to the achievement of a sound and efficient public procurement system. EU law requires only that the fundamental principles of the EU Treaty be respected in the award of the contracts outside the scope of the Directives, and leaves to Member States the detailed design of the rules and procedures to be applied for these contracts. However, the study shows that the majority of Member States regulate public procurement above and below EU thresholds within the same act, and require that contracts below the EU thresholds be based on open, fair and competitive procedures. These procedures essentially have similar features to those applicable under the EU Directives. Member States with no regulation still promote the use of competitive tendering below the EU thresholds. The degree of simplification varies between the Member States, but the core objective of ensuring open competition seems consistently adhered to, although Member States may adopt different positions on thresholds for non-application of the public procurement law and when for allowing direct purchasing. The simplification normally includes the shortening of time limits for submission of applications and tenders and less demanding rules for publication and selection of tenderers. In some cases, more relaxed rules apply to the use of negotiated procedures and to the use of direct invitations to tender, but then usually also include requests for either prior publication or a minimum number of tenderers to be invited. Otherwise, the rules on technical specifications, selection and award criteria and the right to file complaints are basically the same for contracts below the EU thresholds as for contract above.

The first part of the paper deals specifically with the rules and procedures that apply for contracts below the EU thresholds. The second part discusses the rules and procedures that apply to all contracts (irrespective of value) not addressed in detail by the EU Directives but which are equally important for the establishment of a complete procedural framework at national level. These areas not specifically covered by the Directives include, among others, the organisation of procurement proceedings, preparation and content of tender dossiers, tender validity periods, submission and opening of tenders, tender and performance securities, detailed rules on clarification of tenders and suspension and cancellation of tenders.

The study cannot determine conclusively to what extent these rules and procedures differ depending on the size of the contract, either above or below EU thresholds, but there are indications that, in the areas studied, Member States, for the purpose of simplification, provide a more relaxed regime for contracts below the EU thresholds.

The fact that a Member State does not regulate a specific area covered by this study does not imply that the operational practice of this procedure is not in place or is unregulated. A good example of this is the issue of conflict of interest which is often regulated in special acts outside public procurement legislation.

In the second part, the study shows that Member States' regulatory approaches on these policies and rules differ more significantly than their approaches on contracts below the EU thresholds. The study does not attempt to explain **why** a Member State has adopted a certain position, as this falls outside its scope, but can conclude that differences in regulatory approaches appear to exist between the Member States. These differences may be explained by differences in policies and traditions governing the legal and administrative systems of Member States, but may also reflect the regulatory position at the time of EU accession. The regulatory instruments of new EU entrants (2004 and 2007) generally display rather detailed provisions for the organisation and conduct of the tender proceedings, which the contracting authorities are bound to follow in the procurement process. This contrasts with the situation in other Member States where contracting authorities and entities seem to be given more discretion on the organisation of tender proceedings.

Detailed Observations

Part I. Rules and Procedures of Specific Relevance for Procurement below the EU Thresholds

The paper identifies the following points as the main characteristics and features of the way Member States regulate public procurement below the EU thresholds:

- 1) A very large majority of Member States regulate public procurement below the EU thresholds by law or regulation, at least in the Classical sector. Only in the UK and Ireland is guidance documentation the exclusive means of instructing contracting entities on their obligations and good practice in procurement below the EU thresholds.
- 2) Most Member States make explicit reference to the EU Treaty principles in their regulations.
- 3) A large number of Member States use the same regulation for the Classical and Utilities sectors in the regulation of procurement below the EU thresholds.
- 4) However, a significant number of Member States analysed do not regulate procurement in the Utilities sector at all.
- 5) Various approaches exist for the regulation of Part B services: some Member States include rules which are similar to those applicable to Part A services while others provide further simplification or just refer to the Treaty principles.
- 6) The majority of regulating Member States have two or even three sub-thresholds below the EU thresholds, which normally differ depending on the type of contract: lower for supply and service contracts, higher for works contracts. The lowest bands determine whether the regulation applies at all or if direct purchasing is allowed. The next band allows for the use of simplified procedures such as requests for quotations or direct invitations for tenders; that threshold is normally fixed between EUR 50,000 to 70,000 for supply and service contracts. Above this national threshold, many Member States apply more or less the same rules and procedures as for contracts above the EU thresholds, except for national publication rules and the shortening of time limits for submission of applications and tenders.
- 7) Direct procurement is normally allowed for low-value contracts, with the threshold generally lying between EUR 5,000 and EUR 15,000. In addition to the simplified variants of procedures in the EU Directives (open/restricted/negotiated), many Member States provide for the use of competitive procedures based on direct invitation with prior publication (e.g. request for tenders

or quotations). Other Member States provide a more relaxed regime including the possibility of negotiation with prior publication or as part of the open competitive procedures.

- 8) The majority of regulations require the publication of contracts below the EU thresholds through central web portals, special bulletins, databases and contracting entities' websites of the contracting entities. The publication requirements apply to contract notices and in some cases to award notices as well. When simplified procedures without publication are allowed, the regulations require that invitations for tenders include a sufficient number of economic operators to ensure competition.
- 9) The shortening of time limits for submission of applications and tenders is a common simplification in Member States. Some Member States do not specify a time period at all and leave it to contracting entities. When a minimum time limit is laid down in regulations, which is usually the case, it tends to range between 10 to 15 days for applications and between 10 to 25 days for submission of tenders. These time limits may often be shortened in the case of electronic submission.
- 10) Interestingly, a number of areas have rules and procedures that are more or less similar to those for contracts above the EU thresholds. They include:
 - the means of submission of applications and tenders;
 - tender evaluation and award criteria, including abnormally low tenders;
 - design of technical specifications;
 - framework agreements;
 - electronic procurement.
- 11) The majority of Member States with regulations apply the same rules for complaints, review and remedies as for contracts above the EU thresholds.

Part II. Common Rules and Procedures not Addressed in Detail by the EU Directives

The main features of how Member States have regulated public procurement in the areas not addressed in detail by the EU Directives and which may apply to all contracts, above as well as below the EU thresholds:

- 1) A large group of Member States regulate within the procurement act, in more or less detail, how the organisation of the tendering process should be conducted within the contracting entities. The regulation normally contains detailed provisions on the responsibilities, composition and working procedures of specially formed Tender Committees or Commissions (TCs). The responsibilities of these TCs usually include: (i) preparing tender documentation and issuing tender invitations with the support of the line organisation; (ii) managing the opening and evaluation of tenders; and (iii) making an award recommendation, binding or nonbinding, to the responsible body of the line organisation.
- 2) A second group of Member States does not regulate the organisation of tender proceedings in their procurement regulations, or addresses it in a very limited way. The design of the organisation and working procedures of procurement operations is normally left to the discretion of the contracting entities. Other administrative acts or internal regulations may provide rules on the organisation of the procurement process. However, this goes beyond the scope of this study.
- 3) The majority of Member States includes detailed information on the content of tender documentation, which is often mandatory, but with no requirement for the use of model or

standard documents for selection/qualification and tender invitations. They also sometimes allow the contracting entities to charge a fee for the provision of tender documents. However, this rule seems to be rarely applied for electronic provision. Another group of Member States doesn't address this area at all, other than as required by the EU Directives.

- 4) A majority of Member States requires the public opening of tenders irrespective of their size, meaning that public opening also frequently applies to contracts below the EU thresholds. Another group of Member States does not regulate this area, and leaves decisions on procedures for the opening of tenders to the contracting authorities.

The majority of Member States include provisions **on tender and performance securities** for contracts above and below the EU thresholds, but in most countries decisions on the implementation and size of securities are left to the discretion of the contracting authority. However, some Member States do not impose the use of securities for contracts below EU thresholds. A further group of Member States does not regulate securities at all and rarely implements them even if permitted.

- 5) The majority of Member States has rules on **cancellation** of tender procedures, but a number have only limited rules or have no rules other than those required under the EU Directives.
- 6) The vast majority of Member States have regulated, in a more or less detailed way, the **period of tender validity** that needs to be included in the contract notice and tender documentation. Some Member States have even included the maximum number of days of the tender validity period, but most countries leave contracting authorities determine the validity period. Finally, a small group of Member States has not regulated this area at all.
- 7) The **two-envelope system** is only rarely used in Member States, as are special provisions on the **procurement of consultant services**. In Member States, these areas are normally regulated through the standard procedures.
- 8) Many Member States have rules on **conflict of interest** in their regulatory framework for procurement, especially those that have regulated the organisation of tender proceedings. Some Member States have regulated the issue of conflict of interest through other acts or regulations.

Only a few Member States have indicated any possible **changes in the regulatory frameworks** in the near future, other than those required by EU law.

METHODOLOGY

The study was carried out by a Sigma Project Team and reviewed by a Peer Team. The data were collected through a detailed questionnaire sent in 2009 to contact points in the twenty seven EU Member States. The study reflects the situation in Member States as at July 2009. All Member States covered by the report were given the opportunity to comment on a draft version of the report to validate the information.

The **Project Team** was composed of Mr Peter Bennett, Mr Peder Blomberg, Mr Yves Allain and Mr Piotr-Nils Gorecki. The **Peer Team** was set up to provide comments on the methodology, the questionnaire and the draft and final reports. The team was composed of Mr Michael Fruhmann (Austria), Mrs Andrea Sundstrand (Sweden) and Mr Peter Trepte (United Kingdom).

The detailed questionnaire prepared by Sigma was sent to the national bodies responsible for the regulation of public procurement in the Member States, with a request for co-operation and answers to the questions. Insofar as possible, the Project Team and the Peer Team analysed the material as a basis for the preparation of the comparative analysis. A total of 22 questionnaires were returned to Sigma between July and December 2009, by Austria, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Romania, the Slovak Republic, Slovenia, Spain, Sweden and the United Kingdom.

A remark need to be made regarding the **limits of this methodological approach**. Not all EU Member States returned the questionnaire. The study therefore does not constitute a complete overview of the regulatory frameworks in all current Member States. However, the return of 22 out of 27 questionnaires represents a positive response rate that can be used as a basis for a meaningful overview.

PART I. RULES AND PROCEDURES OF SPECIFIC RELEVANCE FOR PROCUREMENT BELOW THE EU THRESHOLDS

Introduction

The award of public procurement contracts falling below the EU thresholds is of great significance in all EU Member States.

An evaluation of the Public Procurement Directives carried out by Europe Economics for the European Commission and published in 2006 concluded that only about 20% of the total amount of public procurement was covered by the detailed rules of the Directives, while the remainder would be covered by exceptions to the Directives, such as certain defence procurements and below-threshold procurement.

According to an Interpretative Communication (IC) by the European Commission, these contracts represent significant opportunities for businesses in the Internal Market, in particular for SMEs.

Consequently, the effective design of national procurement policies and rules for the award of below-threshold contracts is vital to the achievement of a sound and efficient public procurement system.

Member States have developed their framework of below-threshold policies, rules and procedures against the background of a number of rulings by the European Court of Justice (ECJ). These rulings state that contracting authorities and entities concluding contracts outside of the scope of the Public Procurement Directives must comply with the fundamental principles of the EU Treaty in general and the principle of non-discrimination on grounds of nationality in particular, where those contracts are of certain cross-border interest. In the *Telaustria* case (case C-324/98), which dealt with service concessions, the ECJ commented on the obligation of transparency, which would enable the contracting authority or entity to ensure it had met the principle of non-discrimination, as follows:

“That obligation of transparency which is imposed on the contracting authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed.”

In 2006, in response to rulings such as *Telaustria*, the European Commission produced an IC on the Community Law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives. The IC clarified that the fundamental principles of the Treaty apply to all public procurement contracts, specifically referring to contracts for Part B services and below-threshold contracts. The main message of the IC was that, in meeting Treaty obligations, the relevance of specific contracts to the internal market should be the key factor in determining the nature of advertising and other procedures to be followed. This was then confirmed by *An Post* (C-507/03, 13 November 2007).

See Annex 1 Summary Table for detailed information.

1.1 Regulatory Instrument(s) or Guidance for the Award of Contracts below the EU Thresholds (Question 1)

This question sought information on how Member States provide a framework of legislation or guidance on how contracting authorities and entities should award contracts below the EU thresholds. Of the 22 Member States that replied, only in the UK and Ireland is guidance the exclusive means of instructing purchasers about below-threshold obligations. The Netherlands has voluntary regulations and guidance. Otherwise, Member States provide a below-threshold regime either through the regulations covering the above threshold requirements or through national regulations, or a combination of both.

The Public Procurement Directives (2004/18/EC and 2004/17/EC) state that the award of contracts is subject to the principles of the Treaty and in particular to the principles of freedom of movement of goods, freedom of establishment, freedom to provide services and to the principles derived thereby, such as the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency. Most Member States refer to Treaty obligations, whether explicitly or implicitly, in their regulations, with the exception of Hungary, Luxembourg and the Netherlands. The Czech Republic includes Treaty obligations only for contracting authorities. The principles most commonly referred to by Member States in their laws are those of equal treatment, non-discrimination and transparency. Finland refers to these three principles but puts them in the context of meeting the needs of proportionality for contracting authorities.

In framing detailed rules for contracts below the thresholds, Member States will have considered how they wanted to cover below-threshold contracts in the Classical sector, the Utilities and Part B services (*i.e.* services not covered by the full rules of the Directives). Most Member States use the Regulations for above-threshold contracts to regulate the award of below-threshold contracts in the public sector. Bulgaria has, in addition, a regulation for low-value contracts, the Small Contracts Ordinance (OASPC). Danish regulations for below-threshold contracts covering works (2005) and supplies and services (2007) are separate from the law implementing the EU Directives. The Netherlands has regulations for Utilities and for covering works in the Classical sector which contracting authorities and entities are advised to follow.

Eight Member States that regulate below-threshold procurement use the same regulation for the public sector and the Utilities: Austria, Bulgaria, France, Hungary, Italy, Lithuania, Luxembourg and Romania. Slovenia, Spain and Sweden have below-threshold rules for the Utilities in their separate Utilities regulations. Eight Member States, the Czech Republic, Cyprus, Denmark, Estonia, Finland, Latvia, Poland and the Slovak Republic, do not have detailed below-threshold rules for the Utilities. These contracts are governed in one or more separate acts. Although Denmark does not have a regulation, contracting entities are obliged to have internal regulations. As already stated, Utilities regulation in the Netherlands is voluntary.

For Part B services, Member States use a variety of approaches, with no Member State having a specific law dealing with Part B services alone. Details on below-threshold procedures for Part B services need to be seen in the context of what has already been stated, *i.e.* that certain Member States only provide below-threshold rules for the Classical sector and that some do not explicitly refer to Treaty obligations in their regulations. Italy follows the above-threshold approach in the EU Directives by providing rules on technical specifications and contract award notices. Part B services can be awarded by negotiated procedure without notice but quotations with a minimum of five tenderers should be requested. A simplified below-threshold approach is also adopted by Austria in what seems a very light regime, by France, where a suitable procedure needs to be followed, by Poland, which disapplies many of the detailed provisions of its law, by the Czech Republic, which allows the use of the negotiated procedure, and by Denmark, which requires advertising followed by negotiation. Member States that provide for a more structured approach include Sweden, where either a simplified open procedure or a simplified two-stage

procedure including the possibility of negotiations under either of the procedures is required, and Estonia, where a public procedure has to be carried out for contracts above the national threshold. Finland, Lithuania and Slovenia apply the same rules for below and above threshold if the value of the contract is above the national thresholds, although Finland allows flexibility concerning the use of the negotiated procedure. Cyprus requires that above-threshold rules for Part B services be followed irrespective of contract value.

1.2 Applicable National Thresholds Other than EU Thresholds and Procurement Procedures below the Thresholds (Questions 2 and 3)

To get a full picture of the obligations placed on contracting authorities and entities, the report considers the answers concerning thresholds and procedures together. Certain Member States have three or more bands below the level of the EU thresholds, whilst most have two, with a single national threshold, below which there is direct procurement and above which the rules are not as rigorous as the full EU regime. The purpose of thresholds and related procedures is well described by Slovenia in the following words: “to frame award procedures to the subject matter of the contract and particularly the estimated value of the contract according to the principle of proportionality.”

The starting point for national thresholds below which direct procurement can take place varies considerably. In Bulgaria, Cyprus, Finland, France, Latvia, Poland, Romania and Slovenia, the limit stands at EUR 15,000 or less, while in Italy, Hungary, Lithuania and the Slovak Republic, it ranges between EUR 20,000 and 30,000. The starting point in Austria stands at EUR 40,000, EUR 40,000 in Estonia, EUR 55,000 in Luxemburg, EUR 67,000 in Denmark and EUR 70,000 in the Czech Republic.

Bulgaria, Cyprus, Romania, Slovenia and the Slovak Republic have three or more bands for their below-threshold procurement, including the direct procurement band. These countries have a band or bands in which simplified procedures are applied. The following thresholds for supplies and services contracts in the Classical sector are as follows. In Cyprus, simplified procedures apply to two sub-bands ranging from EUR 1,700 to EUR 8,500 and from EUR 8,500 to EUR 85,000 (approximately). In the lower sub-band, written or oral tenders from a limited number of suppliers are required; in the higher sub-band, pre-publication is not required but contract documents should be sent to at least four suppliers chosen on objective grounds. Through the simplified procedure, Cyprus aims to speed up the process and decrease management costs. For a band between EUR 15,000 and EUR 100,000, Romania requires the use of requests for quotations (simplified procedure). For a band between EUR 10,000 and EUR 40,000, Slovenian law requires the reception of 3 offers, without pre-publication, although the authorities intend to require prior advertising for this band of procurement as well. Under Bulgaria's Small Contracts Ordinance (OASPC), at least three offers have to be sought for contracts for supplies and services in a band between EUR 8,000 and EUR 25,000. Romania applies the EU rules above a threshold of EUR 100,000. The EU rules can also be used in Slovenia above a threshold of EUR 40,000, but for a band between EUR 40,000 and EUR 80,000 contracting authorities can use a simplified procedure, which means seeking offers with a prior notice, published on the national portal. The simplified procedure can be a one- or two-phase procedure, but is less onerous for purchasers and bidders alike.

Latvia has two sub-thresholds below which direct purchasing is allowed: EUR 4,500 (supplies and services) and EUR 14,000 (works). Above these sub-thresholds and up to EUR 30,000 and EUR 170,000 respectively, a simplified competitive procedure can be used. Above these second sub-thresholds, the same procedures and rules (except for shorter time limits) apply as above the EU thresholds. Procurement in the Utilities sector is unregulated.

Austria has sub-thresholds up to the level of which particular procedures are available. For supplies and services, negotiated procedure without publication is allowed up to EUR 60,000, a restricted procedure

without publication is allowed up to EUR 80,000 and a negotiated procedure with prior publication is allowed up to the EU thresholds.

Some Member States have a single national threshold for supplies and services. A few of these countries require that EU rules, with limited simplification, be followed above these thresholds, whilst others are not prescriptive about the procedures to be followed. The following countries generally use the EU procedures, with limited variations, above the stated thresholds: Poland (EUR 14,000), Italy (EUR 20,000, where apart from works and for certain contracts listed in the law a request for quotations from five suppliers is permitted) and the Czech Republic (EUR 70,000).

Hungary requires publication for contracts above EUR 27,000 and allows negotiations if indicated in the contract notices. Lithuania requires obligatory advertisement for contracts above EUR 30,000 (for supplies and services) and above EUR 145,000 (for works), but there are no set procedures to be followed. Only Hungary has a threshold (EUR 83,000) for service concessions, Denmark provides for informal procedures to be followed above a threshold of EUR 67,000. In Sweden, when procurement is not of a low value, (low value not being defined by a monetary threshold), contracts need to be advertised and then followed by a simplified open procedure or a simplified two-stage procedure. In Spain, the role of the national threshold is to indicate whether a negotiated procedure can be used, and in the Netherlands the regulations are voluntary. In France, above the threshold of EUR 90,000, an advertisement is required in the Official Bulletin. Below, contracting authorities are free choose a suitable procedure on the basis of the nature and characteristics of needs to be met and the number or location of economic operators likely to meet these needs. The publication and competition procedures have to be proportionate to the subject and value of the contract.

The minimum threshold for works contracts in the Classical sector is usually at least twice higher than the one for supplies and services contracts. Where there are more than two bands, the bands that cover the simplified procedures are usually greater in range. For example in Romania the band in which requests for tenders are required ranges from EUR 15,000 to EUR 750,000 for works, and from EUR 15,000 to EUR 100,000 for supplies and services. This is what could be expected given that the threshold for works contracts in the Directives is EUR 5 million. Only Hungary has a separate threshold (EUR 333,000) for works concessions.

Denmark, Italy and Luxembourg have different approaches to procedures for works contracts and for supplies and services contracts. In Denmark, simplified open or restricted procedures are required under the regulation for works contracts above EUR 40,000. In Italy, a request for quotations (minimum of five) is allowed below EUR 200,000, a negotiated procedure without publication is permitted below EUR 500,000, and a simplified restricted procedure allowed below EUR 750,000. In Luxembourg, the restricted procedure is allowed for contracts above EUR 800,000, below which only the open procedure is permitted.

As already mentioned a limited number of countries have a below-threshold regime in the Utilities. Bulgaria, Lithuania, Luxembourg and Romania have the same approach as in the public sector to thresholds and procedures. For Romania, the higher band extends up to EUR 400,000, reflecting the higher starting threshold of the Utilities Directive. Italy has the same starting threshold. In Austria, the starting point is double that of the public sector, and in Hungary it stands at EUR 167,000, as opposed to EUR 27,000 for the public sector. It is perhaps surprising, given the more flexible rules in the Utilities sector, that there is not much difference in the below-threshold regimes adopted by these Member States. Then again, only a limited number of countries have regulations covering below threshold requirements.

1.3 Rules for Tender Invitation and Publication below EU Thresholds (Questions 4 and 5)

Some Member States answered questions 4 and 5 together. In general, the replies covered publication of notices (question 4), and the use of standard forms or variations of standard forms (question 5).

Contract notices are published in official publications (hard copy) in Austria, Cyprus, Italy, Lithuania and Spain. All of these countries except Spain also publish notices on national portals or websites. Bulgaria, the Czech Republic, Finland, Hungary, Latvia, Luxembourg, Romania and Slovak Republic only publish their notices on national online portals and/or in electronic formats. In Romania, about 66,000 invitations were published by contracting authorities/entities on the electronic system for public procurement (ESPP) in 2008. In Poland, contracting authorities are also required to publish notices on their websites for both contracts above and below the national thresholds.

In Denmark, the regulation sets out requirements for notices for goods and services contracts, but there are no specific rules for publication, which is either online or in newspapers. In France, the contracting authorities/entities can, below a threshold of EUR 90,000, decide how to publish; above that threshold, notices have to be published by public authorities in the Official Bulletin (BOAMP) or in a newspaper entitled to publish legal notices. In the Netherlands, contracting authorities can decide where to publish and usually do so on their own website. In Sweden, publication on “generally accepted databases” with free admission is required.

These rules for the Utilities are similar in Austria, Bulgaria, Cyprus, Estonia, France, Lithuania, Luxembourg and Sweden.

Some countries (Cyprus, the Czech Republic, Estonia and Latvia) use the above-threshold standard forms for below-threshold contracts. In Hungary, standard forms of notices are regulated by decree of the Minister of Justice but are very similar to the EU standard forms. Luxembourg uses simplified standard forms on its portal (the Ministry of Works portal on which all its notices are published). Romania also uses a simplified standard form. Bulgaria uses a standard form approved by the Ministry of Economy, Energy and Tourism similar to the EU standard forms. In France, the standard form required for the suitable procedure is annexed to a 2006 Ministerial Order. In Sweden, only contract notices are required to be published. Along with contract notices, contracting authorities and entities in Lithuania are required to post reports on the public procurement procedure on the central portal.

These rules for the Utilities are similar in Bulgaria, Cyprus, Estonia, France, Hungary, Lithuania, Luxembourg, Romania and Sweden.

Denmark and the Netherlands have limited or no publication rules.

1.4 Time Limits for Submission of Applications and Tenders (Question 6)

In general, Member States reduce timescales for below-threshold contracts significantly in comparison with above-threshold contracts. For the open procedure, the most common time limit for the process is around 20 days, but ranges between 14 to 30 days. For the restricted (and negotiated) procedures, the most common time limit for applications is 10 days. The usual time limit for the receipt of tenders under the restricted procedure is around 15 days. Poland has different time limits for works contracts: 20 days for the open procedure as opposed to 7 days for supplies and services, and 14 days in the restricted procedure to receive works tenders, as opposed to 7 days for supplies and services. Latvia has a limit of 30 days for submission of tenders under the open procedure and 25 days under the restricted procedure. Below this first band the limit is reduced to 15 days. In Lithuania, the time limit for submission of tenders in open procedure is set to 7 days from the date of publication. Some countries shorten these time limits for

electronic transmission. For example, in Romania the time limits can be shortened from 20 to 15 days for the open procedure and from 15 to 10 days for the receipt of tenders in the restricted procedure.

In Bulgaria, the time limits for contracts below threshold under the Public Procurement Law largely follow those of the Directives. Estonia too follows the same limits as above-threshold contracts both in the public sector and in the Utilities. In Slovenia, contracting authorities can decide on the time limits, taking into account the complexity of the project. They can also use the EU time limits, although in practice the time limits are shorter, allowing for the principle of proportionality. In France, it is generally up to the contracting authorities to decide, but the time limits have to be long enough to allow as many economic operators as possible to bid. Finland and the Netherlands do not have rules on time limits.

1.5 Means of Submission of Applications and Tenders (Question 7)

Where rules exist, the submission of applications and tenders can be done by mail, fax or other electronic means. However, the need for the right technical equipment and the provision of security and confidentiality are important. Some countries have separate regulations covering electronic transmission, such as Bulgaria's Electronic and Electronic Signature Law. Authorised e-signatures are required for electronic applications in the Czech Republic. In Spain, documentation is in general delivered in sealed envelopes to a designated address or else sent by mail, unless the tender documents authorise some other procedure. In Romania, transmission is usually done by paper, but the contracting authority/entity can specify electronic means. Latvia practices the same rules for transmission of applications and tenders as for contracts above the EU thresholds.

Denmark and the Netherlands do not have specific legal provisions and it is up to contracting authorities and entities to decide the means of transmission. France does not currently have legal provisions, but authorities can ask for electronic transmission. However, as from 1 January 2010, the documents requested from candidates are to be submitted through electronic means for IT equipment and services contracts exceeding EUR 90,000. From 1 January 2012, contracting authorities will not be able to refuse documents sent electronically for supplies, services or works contracts exceeding EUR 90,000.

1.6 Policies and Rules for Qualitative Selection (Question 8)

The following Member States have essentially the same regulations for below- and above-threshold contracts: Austria, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Hungary, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, the Slovak Republic and Sweden. The main variation from the provisions of the above-threshold regime concerns the provision of proof of qualification requirements. In the Czech Republic, economic operators may provide proof of qualification requirements through a declaration, instead of the provision of specified documents. In Poland, contracting authorities are not obliged to request documents confirming that economic operators satisfy the conditions for participation. Slovenia simplified the presentation of proof in order to reduce red tape. Economic operators are not obliged to provide any evidence for which public authorities hold data. It is up to the contracting authorities to obtain these data.

In Finland, the principles used to frame below-threshold provisions follow those of the above-threshold regime. In France, the law does not have specific provisions but procurement officers are not allowed to request more information than would be the case for above-threshold contracts. In Italy, the level of economic and technical requirements is established by secondary legislation. In Romania contracting authorities and entities should, from a practical point of view, define the qualification criteria. They can introduce one or more of the criteria applicable above the thresholds or not request anything further.

1.7 Policies and Rules for Tender Evaluation and Award Criteria, Including Rules for Determining Abnormally Low Tenders (Question 9)

The choice of award criteria in the Public Procurement Directives is based on either the most economically advantageous tender (MEAT) or the lowest price. Most Member States also provide for this choice below threshold. Those that do include Austria, Bulgaria, Cyprus, Estonia, Finland, Hungary, Italy, Latvia, Lithuania, Poland, Romania, Slovenia, the Slovak Republic and Sweden. In Sweden, the weighting of criteria for the most economically advantageous tender is not mandatory; the criteria can be placed in descending order. In Finland, the above-threshold approach is largely followed below threshold, but the scope of evaluation criteria for certain service or works contracts is broader than for above-threshold contracts. The expertise, professional ability and competence of the people responsible for providing the service or executing the works may be used for award criteria as well as for meeting minimum criteria for selection. France does not have specific rules for the suitable procedures used by contracting authorities and entities below threshold, but the procurement officer's actions are circumscribed by case law.

Regarding abnormally low tenders, a majority of Member States either follows the rules of the Directives or omits any specific rules. In Luxembourg, if a tender is 15% below the average price, the economic operator is required to produce a price analysis. If this analysis does not explain the low offer, it can be rejected. Italy provides a mathematical method for determining abnormally low tenders. Furthermore, where more than 10 tenders are submitted, abnormally low ones can be automatically excluded below a threshold of EUR 1 million for works contracts and EUR 100,000 for supplies and services contracts.

1.8 Rules for Technical Specifications (Question 10)

Nearly all countries have the same rules for technical specifications for above and below threshold. In Estonia, additional guidance has been made available by the Ministry of Finance. In Sweden, rules for above and below-threshold are partly similar. Below threshold, their legislation refers to Article 23, paragraphs 6 and 8 of 2004/18/EU. These paragraphs refer to specifications dealing with environmental characteristics and not specifying a particular brand or source.

1.9 Policies and Rules for Electronic Procurement (Question 11)

Austria, Cyprus, the Czech Republic, Finland, Luxembourg, Latvia, Romania, Slovenia, the Slovak Republic and Sweden have identical rules for electronic procurement for above and below threshold.

Bulgaria provides for the use of e-auctions and dynamic purchasing systems in its Public Procurement Law under certain rules and conditions. In addition, the Small Value Ordinance (OASPC) sets out that contracting authorities and entities may perform e-auctions in design contests where the technical specifications are clearly defined. In Estonia, all notices are made available on the central electronic register, and plans are underway for e-auctions and dynamic purchasing systems. France has legal provisions regarding suitable procedures in the use of electronic transmission which have to take into account the characteristics of the contract (particularly the subject matter and the amount of works, supplies or services) and not restrict competition. Procurement officers can request electronic transmission and reject replies which are not sent electronically. This applies to all procedures since the start of 2010. The detailed rules on electronic procedures are set out in a Government Decree that supplements the general rules in the Public Procurement Act. The Lithuanian law on Public procurement obliges contracting authorities to conduct at least 50% of public procurement electronically. Poland provides an option for a special electronic auction procedure but it only applies below the EU thresholds. The procedure is launched by the contracting authority through the placement of a notice on its website and on the website of the Public Procurement Bulletin. Economic operators can then use an online form to submit successive, more advantageous tenders.

Italy adopted an e-procurement regulation in 2002 allowing the public sector to perform below-threshold acquisitions (apart from works) through the e-procurement platform (MEPA) established by the Italian Central Purchasing Body (CONSIP). The marketplace is open to qualified suppliers based on non-restrictive selection criteria. Following qualification, suppliers' catalogues are uploaded on the MEPA and displayed on a dedicated website, which makes them made available to the entire community. Contracting authorities can browse catalogues, compare products and prices, and request quotations or purchase directly from the e-catalogue. The entire transaction process is digital and digital signatures are required.

1.10 Policies and Rules for Framework Agreements (Question 12)

Most Member States apply the same approach for awarding framework agreements for contracts below EU thresholds as for those above. They include Austria, Bulgaria, Cyprus, Estonia, Finland, Italy, Latvia, Luxembourg, Poland, Spain, Romania, the Slovak Republic and Sweden. In Austria, below-threshold framework agreements for works contracts up to a threshold of EUR 350,000 can generally be concluded using a negotiated procedure with prior publication of a notice. This approach is only available for works contracts up to that threshold. In Slovenia, simplified procedures can be used depending on threshold values. In Hungary, the contracting authority has discretion over the award of frameworks. France, Denmark and Lithuania do not have any special provisions. In Denmark, the procedures in the Public Procurement Directives are also available for contracts below the thresholds and for Part B services.

1.11 Available Procedures for Complaints, Review and Remedies (Question 13)

In its section on judicial protection, the European Commission's IC on the Community Law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives sets out that the available remedies must not be less efficient than those applying to similar claims based on domestic law (principle of equivalence), and must not make it impossible or excessively difficult to obtain judicial protection (principle of effectiveness).

Countries with below-threshold regulations do not display any substantial difference in their approach to remedies below and above threshold. Of course, the more detailed the regime below the thresholds is, the greater the potential for complaints. The following countries adopted the same approach to remedies above and below the thresholds: Austria, Bulgaria, Cyprus, Estonia, Hungary, Italy, Luxembourg, Latvia, Lithuania, Spain, Sweden and Slovenia. In France, policies relating to remedies are largely similar above and below threshold. However, the legal nature (public or private) of the contracting authority or entity determines which court deals with the cases. In the Netherlands, infringements for both above- and below-threshold cases are held before the civil courts, where a standstill period of 15 days is applicable (this taking place in a context where the application of the below-threshold law is not mandatory). In Finland, the approach to remedies is largely the same above and below the thresholds, but the non-application of the standstill period below threshold potentially limits the number of complaints.

In the UK (where there are no below-threshold regulations), informal procedures can be used to address concerns about either above- or below-threshold procurement. England's Supplier Feedback Service and Scotland's Single Point of Contact are two informal procedures which aim to assist SMEs.

PART II. COMMON RULES AND PROCEDURES NOT ADDRESSED IN DETAIL BY THE EU DIRECTIVES

Introduction

The second part of the paper provides an analysis of policies and practices applicable to all contracts, both above and below EU thresholds. These policies and practices are as important as the procedures and rules discussed in part I in the establishment of a complete procedural framework at national level. These policies and practices not specifically covered by the Directives include the organisation of procurement proceedings, preparation and content of tender dossiers, tender validity periods, submission and opening of tenders, tender and performance securities, detailed rules on clarification of tenders, and suspension and cancellation of tenders.

The study cannot determine conclusively to what extent such rules and procedures differ with regard to the size of contracts, either above or below EU thresholds, but there are indications that for the purpose of simplification, Member States provide a more relaxed regime below the EU thresholds in the areas studied.

The fact that a Member State has not regulated a specific area covered by this study does not imply that the operational practice of this procedure is not in place. One example is the tender validity period, which many Member States leave unregulated (see below), but where the practical necessity to indicate a tender validity period in the contract notice and the tender documentation effectively makes it a mandatory requirement. Similarly, the omission of regulation in the procurement legal framework does not mean that the area is necessarily unregulated. A good example of this is the issue of conflict of interest which is often regulated in special acts outside the public procurement legislation.

In order to get a better understanding of the rationale behind the questions in Part II, each section starts with a brief background note. These notes should not be seen as reflecting the views of the Sigma Programme, but as remarks based on the programme's experience of how regulatory frameworks in public procurement have been designed in partner countries, both in the past and currently.

2.1 The Organisation of Tender Proceedings (Question 14)

Background

The Directives do not contain any specific provisions on the organisation of tender proceedings except the requirement that tenders be opened after the deadline to make provision for confidentiality, and, for electronic tenders, the requirement that systems and equipment generally available be used. Otherwise, the development of these procedures and practices, which vary considerably, is entirely a national concern. . Some Member States prescribe the public opening of tenders; others make provision for tenders to be opened by a panel or committee. As will be discussed, the use of Tender Committees (TCs) for the opening and evaluation of tenders is common practice in many Member States, especially in the most recent entrants, as required by national legislation. However, there are differences in the functions and mandates attributed to the tender committees.

The regulatory position in EU Member States

The study shows that a large number of Member States regulate contracting entities through Public Procurement Law (PPL), either on an ad-hoc basis for specific tenders or through more permanent

committees. Bulgaria, Cyprus, the Czech Republic, Hungary, Latvia, Lithuania, Poland, Romania, and the Slovak Republic all belong to this group of countries. In the case of Poland, the setting-up of TCs is mandatory above the EU thresholds and voluntary below. The procurement laws of these countries generally contain very detailed provisions on the responsibilities, composition and working procedures of TCs. A TC will normally deal with both the opening and the evaluation of tenders.

A second group of countries provides a more mixed picture. France, for instance, obliges local and regional authorities to establish TCs, but, since December 2008, exempts state authorities from doing so.. The Italian PPL requires the formation of a TC when the MEAT criteria are used. The Slovenian PPL does not require the use of a TC but in practice contracting entities form TCs. This is also true for Estonia where the formation of TCs is not mandated by the PPL but is still common practice. In Spain, contracting entities may use TCs (collegial bodies). Austria requires only the establishment of a tender opening commission.

A third group of countries is characterised by the total absence of regulation on the organisation of procurement operations. Decisions on how to organise the tendering process are left to the contracting authorities. This process may include the formation of committees or working groups but is rarely more formalised. These committees/groups operate only to provide technical or commercial support to the line organisations. Austria (see previous paragraph for exception), Denmark, Finland, the Netherlands, Ireland, Luxembourg, Sweden and the UK are part of this third group.

Where the first part of this question addressed the issue of the establishment of TCs, the second part tried to establish the position of the point of procurement decisions within a contracting entity. In other words, is the TC making decisions, or is it providing recommendations for decisions to be taken by the line organisation?

Member states' governing rules on this issue are hard to define but it appears that the majority of countries that require the setting-up of a TC limit its mandate to making recommendations for procurement decisions, while the formal decisions rest with an authorised person or body of the contracting authority.

2.2 Selection and Tender Documentation (Question 15)

Background

The Directives include detailed rules on the selection and award process and on the elaboration of technical specifications, but essentially leave Member States regulate the detailed content of the documentation for the selection and tender award process. The basic requirements laid down in the Directives are that an invitation to submit a tender, to participate in the competitive dialogue or to negotiate must contain at least:

A reference to the contract notice published, the deadline for the receipt of the tenders, the address to which the tenders must be sent, the language or languages in which the tenders must be drawn up, a reference to any possible adjoining documents to be submitted, support of verifiable declarations, the information on personal suitability and technical and professional suitability for the selection process and the relative weighting of criteria for the award of the contract or, where appropriate, the descending order of importance for such criteria.

Some countries also require the use by contracting entities of certain model documentation for these processes. Also of interest is whether there are any rules, in terms of costs, on the provision of tender documentation.

The fundamental reason for asking these questions is that the tender documentation holds a key role in the tendering process. Tender documents should provide all the information a prospective tenderer needs to

prepare a responsive tender. While the detail and complexity of the documents may vary with the size and nature of the contract, they generally include:

- a) the invitation to tender;
- b) instructions to tenderers;
- c) general and special conditions of contract;
- d) terms of reference/technical specifications.

The regulatory position in EU Member States

Some common features can be summarised as follows:

- No Member State prescribes the use of a special selection/prequalification document, but refers only to the information and documentation that contracting entities should request from the tenderers, in accordance with the EU rules, through the notices and/or the tender documentation. It is normally for the contracting entity to decide whether to issue a special selection document, but this appears to be rarely done in practise.
- The majority of the regulatory instruments of Member States include, to varying degrees, the main content of the tender documentation in terms of invitation to tenders, instructions to tenderers, specifications and draft contracts.
- No Member State compels the use of model or standard tender documentation, but some countries make such documents available through guidelines and best practice documentation.
- The majority of Member States allow, as an exception, contracting entities to charge a fee for the provision of tender documentation, but this is normally limited to the actual cost of the reproduction and provision of tender documents. Electronic transmission is gradually taking over as the main method for tender submission, probably eliminating any need to charge a fee for the provision of tender documents.
- Denmark, Finland, Ireland, the Netherlands, Sweden and the UK do not address these areas at all or do so in a very limited manner in their regulatory instruments.
- Member States do not differentiate between rules on selection and tender documentation on the grounds of contract value, either above or below the EU thresholds.

2.3 Rules on the Opening of Tenders (Question 16)

Background

Whatever procedure is determined by national regulations, the purpose of the tender-opening session is to check that the tenders are complete, that the tender guarantee, whenever required, has been provided, that the documents have been duly signed, and that the tenders are generally in order. The receipt and opening of tenders is done in a manner that ensures the regularity of the proceedings. The opening is often conducted by a TC or alternatively by a panel of at least two people appointed by the contracting authority. The following are usually announced at a public tender-opening session: the names of the tenderers, the unevaluated tender prices, and the provision of any required tender guarantee and fulfilment of any other formality or condition that the contracting authority deems appropriate. Minutes of the tender-opening session are prepared and often released to the participating tenderers. The receipt and opening of tenders are seen as an important element of the procurement process to guarantee transparency and equal treatment.

The regulatory position in EU Member States

A majority of Member States oblige contracting entities (as a requirement of the PPL) to organise the opening of tenders publicly and in the presence of the tenderers and/or their representatives. The obligation to conduct a public tender-opening session applies to all contracts irrespective of value and type. Some variations are found with respect to the type of procedure, such as exceptions for the negotiated procedure with prior publication or for carrying out an e-procurement. This is the case in Bulgaria, the Czech Republic, Estonia, Hungary, Italy, Lithuania, Luxembourg, Poland, Romania and the Slovak Republic.

A second group of Member States includes provisions on the opening of tenders in the regulatory instrument. These provisions may indicate public opening but can have certain limitations or be provided as non-mandatory requirements. In the Austrian PPL public opening is the general rule, but in certain justifiable cases the contracting entities may conduct a closed session. In Cyprus, public opening may be conducted if decided by the contracting entities. In Denmark, public opening of works tenders is mandatory, but closed sessions apply in all other cases. In Slovenia, public opening of tenders is mandatory above the national thresholds but low-value contracts are exempt. Spain also belongs, to a certain extent, to this group, since public opening of tenders should apply when conducting the open procedure, but with special limiting rules when the MEAT criterion is used.

A third group consists of countries where this process is either not regulated at all, made voluntary, or not permitted. In Finland, the decision to use public or non-public opening is entirely a matter for the contracting entities. In France, public opening is not permitted at all. In Finland, the contracting authority decides on whether to open tenders publicly, but the common practice is to hold closed sessions. Ireland and the UK do not regulate this issue, but closed opening sessions is the preferred procedure.

The extent to which the procedures for opening of tenders will be affected by the introduction of electronic procurement and the award of framework agreements is hard to assess.

2.4 Rules on Tender and Performance Securities (Question 17)

Background

Sigma has found that the inclusion of provisions for tender and performance securities in the PPLs has been and is still common practice in many of its partner countries. This practice can usually be traced to the UNCITRAL Model Law and to procurement financing by International Financial Institutions (e.g. The World Bank and EBRD). The decision to apply tender and performance securities is frequently left to the discretion of the contracting entities, but examples of mandatory rules also exist.

When required, a tender security has to be provided by a tenderer as an integral part of its tender submission and should provide the contracting authority reasonable protection against irresponsible tenders.

The amount of the security is specified in the tender documents and is normally in the range of 1-5% of the tender price. The tender security may be forfeited if:

- a) a tenderer withdraws his tender during the period of tender validity;
- b) the successful tenderer fails to sign the contract, furnish a performance security or accept the correction of its tender price.

A performance security (normally 5-10% of the contract price) provides for due performance of the contract and is submitted by the successful tenderer as a condition for entering into a contract. The

proceeds of the performance security are payable to the purchaser as compensation for any loss resulting from the supplier's failure to complete his obligations under the contract.

The regulatory position in EU Member States

The majority of EU Member States includes provisions on tender and/or performance securities in some form or other, but with differences in their application. Only Denmark, Finland, France, Ireland, Luxembourg, the Netherlands, Slovenia, Sweden and the UK do not include specific provisions on securities.

In most countries where tender and/or performance securities are used, the decision to use them and the fixing of their amount is left to the discretion of the contracting authority. However, some countries also prescribe more detailed rules for their application. For example, in Poland, contracting entities *must* request tender securities for all contracts above the EU thresholds and *may* do so for those below; they must also request a performance security for works contracts above the EU thresholds. In some countries (e.g. Czech Republic and Lithuania), the contracting entities may use tender securities above the EU thresholds but not below. In Lithuania, the request for performance securities is obligatory above the EU thresholds. Interestingly, in Italy it is mandatory to request securities for all contracts except engineering services.

As already noted, the use of tender and performance securities is commonly practised in a majority of countries for contracts both above and below the EU thresholds. Their use is made either mandatory or optional by the PPLs. Whenever applicable, it appears that most PPLs leave the decision on whether to use tender and performance securities to the discretion of the contracting entities.

2.5 Rules on the Cancellation of Tender Proceedings (Question 18)

Background

According to EU Directive 2004/18 (Art 41), if a contract award procedure is cancelled, "all tenderers must be notified as soon as possible, with confirmation in writing if requested, together with the reasons for the cancellation. Furthermore, contracting entities should publish in the Official Journal the information on the discontinuation of the award procedure in a specific notice for additional information, information on incomplete procedure or corrigendum."

Under national rules, contracting entities may, before the contract is signed, abandon the procurement or cancel the award procedure without candidates or tenderers normally being entitled to claim any compensation.

The cancellation under national rules may occur where:

- a) the tender procedure has been unsuccessful; when no tender or no suitable tenders have been received;
- b) the economic or technical data related to the tender have been fundamentally altered;
- c) exceptional circumstances or *force majeure* render normal performance of the contract impossible;
- d) all technically compliant tenders exceed the financial resources available;
- e) there have been irregularities in the procedure, in particular where these have prevented fair competition.

Importantly, the rules of cancellation are often laid down in the contract notice or in the tender documents.

The regulatory position in EU Member States

The majority of Member States have rules on the cancellation of the award procedures in a more or less detailed form. Other countries do not have any rules on the cancellation of award procedures other than the mandatory provisions under the Directives. Member States with detailed rules include Austria, Bulgaria, Cyprus, the Czech Republic, Hungary, Poland and Romania. Their legislation provides detailed information on the grounds for cancellation (both obligatory and non-mandatory), and specifies the procedures that have to be followed. The grounds for cancellation in these countries reflect the list of common practices presented above. Austria even practises a standstill period of 14 days for contracts above the EU thresholds and 7 days for contracts below before a decision of cancellation becomes effective. The cancellation decision can be appealed under the Austrian review system. In Lithuania, a cancellation decision requires the prior consent of the Public Procurement Office for contracts above the EU thresholds.

A second group of Member States has less detailed rules on cancellation and sometimes uses other regulatory instruments than the procurement law. Estonia, Italy, Finland (case law), Luxembourg (government decree), Slovenia and Spain belong to this group. In Slovenia, the contracting entity has the right to cancel a tender proceeding for reasons of convenience as long as the notification requirements are fully respected. In Spain, the contracting entities are required to pay compensation to the tenderers if an award procedure is cancelled.

Finally, a third group of countries does not have any other rules than those imposed by the EU Directives. Denmark, France, Ireland, Sweden and the UK belong to this group.

2.6 Rules Regarding the Period of Validity of Tenders (Question 19)

Background

As a rule, the period of validity of tenders should be specified in the invitation to tender through the inclusion of the information in the contract notice and in the tender documents. The period should also be sufficient to enable the contracting authority to complete the evaluation of tenders and conclude a contract with the successful tenderer. In exceptional cases, the contracting entity may ask, before the period of validity expires, the tenderers to extend the period, for a specific number of days.

Subsequently, contracting entities are obliged irrespective of whether the tender validity period is regulated or not in the primary or secondary procurement legislation, to specify the validity period of the tenders in the call for competition, in the contract notice, if one is used for the tender invitation, or in the tender dossiers in the case of a direct invitation of tenders. The validity period should in all cases be stated in the tender dossier.

The regulatory position in EU Member States

The following patterns can be identified:

- a) A group of countries has introduced in their procurement legislations quite detailed rules on the tender validity period, including the number of days that will apply in different circumstances. Austria, Cyprus, Luxembourg, Poland and Spain belong to this group. In Austria, the validity period in normal cases is limited to a maximum of 5 months, and in exceptional cases up to 7 months. If no validity period is specified, a period of 1 month would apply. In Cyprus, the maximum period is 6 months. In Luxembourg, the normal period is 2 months and can be extended to 4 months. When an extension of more than 4 months is needed, the tenderers' agreement is required. In Poland, the validity period for contracts below the EU thresholds is 30

days. Above the EU thresholds, the normal period is a maximum of 60 days. For high-value contracts the period is a maximum of 90 days. In Spain, the award criterion used determines the length of the tender validity period. The award should be done within 15 days if the lowest price criterion is used and within 30 days (unless another period has been stated in the tender invitation) if the MEAT criterion is used.

- b) A second group of countries also regulates the rules on the tender validity period, but in contrast to the first group, the contracting entities may determine the period of tender validity at their discretion. This group, the largest, includes Bulgaria, the Czech Republic, Estonia, France, Hungary, Italy, Lithuania, Romania and the Slovak Republic. Romania also has guidelines recommending a 90-120 day tender validity period. In Italy, if no indication is given in the tender invitation, a 180-day period would apply.
- c) Finally, a third group of countries does not regulate, or does so in a very limited way, the tender validity period. This group includes Denmark, Finland, Ireland, the Netherlands, Slovenia, Sweden and the UK.

2.7 The Use of the Two-envelope System (Question 20)

Background

The two-envelope system, under which technical and financial proposals are submitted in different envelopes to be opened at different times, allows for the separation of quality and price, the purpose of which being to avoid a biased technical evaluation where price considerations might be prejudicial to quality. Sigma has found through its work that a number of its partner countries have adopted public procurement laws prescribing the use of the two-envelope system. It is normal practice for the procurement of consultancy services in projects financed by the International Financing Institutions (*e.g.* the World Bank and the EBRD).

The regulatory position in EU Member States

The two-envelope procedure is only exceptionally regulated in the Member States. It is possible that it may be practised by contracting entities but in such cases the decision rests with the contracting entities.

The only countries that have included rules on the two-envelope procedure are Bulgaria, Italy and Lithuania. Bulgaria has made it mandatory to use the two-envelope system for all contracts concluded as a result of a tendering procedure. If the MEAT criterion is used, the price offer is opened only after the evaluation of the other criteria. In Italy, case law makes it mandatory to use the two-envelope system, while secondary legislation prescribes the use of the procedure for works contracts. In Lithuania, the use of the two-envelope procedure is obligatory for contracts above the EU thresholds and where the MEAT criterion is used.

2.8 Rules Regarding Conflict of Interest (Question 21)

Background

Conflicts of interest in procurement may occur in different ways capacities and at different levels of the process. This is a complex issue to deal with in the context of procurement. Policy on conflict of interest is developed to guarantee a level playing field based on equal and fair opportunities for all participants. Some conflict of interest situations may easily be defined. Others are less obvious and often rest on the principle of unfair competitive advantage, which is far more difficult to prove.

Therefore, procurement rules will also seek to reduce instances of potential conflict by including provisions on impartiality and confidentiality. Provisions used to ensure that no conflict of interest arises include:

- prohibiting participation in contract award procedures where procurement officers have any connection (family, social or financial) with any of the tenderers;
- requiring that these officers declare themselves ineligible;
- requiring that these officers sign declarations to that effect;
- prohibiting the participation of any government employee as part of any tender (*e.g.* as an expert).

Regarding tenderers, conflicts of interest arise mainly from relationships and connections that could give certain tenderers an unfair advantage. Importantly, as long as the level playing field is maintained, both the Directives and the Government Procurement Agreement do not allow the exclusion of firms on general grounds. Exclusion needs to be determined on a case-by-case basis whether conflict of interest actually exists. This view has also been taken by the ECJ in the *Fabricom* case.

It should also be noted that the issue of conflict of interest is not only a matter for procurement legislation, but is also often regulated in other acts, including special laws on conflict of interest. In some procurement laws, conflict of interest is not addressed in its own right but inserted under, for example, the organisation of tender proceedings (membership of tender committees).

The regulatory position in EU Member States

Many Member States have rules on conflict of interest in their regulatory framework for procurement. To guarantee the impartiality of the organisations, a majority of countries provide rules to deal with situations that may occur inside contracting entities, such as the composition of a tender committee and relationships. A smaller number of Member States have rules addressing the tendering side.

Countries with procurement regulations providing clear rules on conflict of interest include Bulgaria, Cyprus, Estonia, Hungary, Italy, Poland, Romania, the Slovak Republic, Slovenia and Spain.

The other Member States do not have rules on conflict of interest in their procurement regulatory framework, but may well have such rules in other acts.

2.9 Special Rules for the Award of Consultants and Other Intellectual Services (Question 22)

Background

Sigma has, in its support in the preparation of procurement legislation, observed a common issue relating to the way in which the award of consultancy or intellectual services should be organised. It has been argued that there is a need to include special provisions for the procurement of such services, because of the specific nature of those contracts, in which quality frequently plays a more important role than price and other cost-related factors. When procurement regulation provides special procedures for consultancy services, the two-envelope system (see 2.7) is normally also used. The concept of special procedures for consultancy services can be traced to the UNCITRAL Model Law and the procurement rules of International Financing Institutions (IFI) such as the World Bank and the EBRD.

The EU Directives offer both procedures (the restricted, or, when justified, the negotiated) and an evaluation methodology (MEAT) which, when combined, allow contracting entities to design the procurement procedure in a manner where the need for such special procedures could appear limited.

The regulatory position in EU Member States

The way Member States address this issue confirms the tentative conclusion above. A very large majority of countries have not included any specific provisions on the award of intellectual services and leave contracting entities design the procedures within the framework provided by the EU Directives as implemented in national law.

Only three countries, Austria, Italy and Spain, have procurement regulations that include specific rules for the award of architectural and engineering services.

2.10 Planned Regulatory Changes (Question 23)

A the time of writing, only a few Member States seem to have planned any changes to their regulatory framework in addition to what is required under alignment with EU law, such as transposing the new amended Remedies Directive.

Austria, Finland, Lithuania and Slovenia have planned changes to the legal framework outside the scope of the Directives. Sweden will in 2010 introduce a threshold for the use of direct procurement in the law.. The Netherlands intend to make their procurement law more SME friendly by explicitly mentioning the principles of non-discrimination and proportionality. It will include guidance on the principle of proportionality with practical examples.

Because of the economic crisis, Austria will introduce, as a temporary measure and until the end of 2010, the possibility of direct awards up to EUR 100,000 for goods and services and up to EUR 1 million for works. Finland intends to introduce a system of service vouchers for II B services, group 25, with the use of special competitive procedures. Lithuania will introduce new publication requirements for its central web portal, covering annual procurement plans, procurement reports, and tender documentation. Finally, Slovenia will introduce new publication rules on contract notices for goods and services (between EUR 10,000 and 40,000) and for works (EUR 20,000 and 80,000).

ANNEX 1: SUMMARY TABLE

PART I: RULES AND PROCEDURES BELOW THE EU THRESHOLDS

Member State	Regulatory Instrument	Thresholds	Methods	Tender Invitation Rules	Time Limits	Other Rules (Selection criteria, award criteria, technical specifications and complaints)
Austria	BVerG 2006 covers Classical and Utilities sectors above and below EU thresholds.	<p>< EUR 40 000: direct purchasing for Classical sector.</p> <p>< EUR 60 000: direct purchasing in the Utilities sector.</p> <p>< EUR 120 000 (works) and EUR 80 000 (supplies and services): restricted tendering without publication (Classical sectors).</p>	<ol style="list-style-type: none"> 1. EU Procedures. 2. Negotiated procedures with or without prior publication up to certain national thresholds. 3. Restricted tendering without prior publication. 4. Direct purchasing. 	Publication is required for negotiated procedure up to EUR 350 000 (works) and EU thresholds (supplies and services).	<p>Submission of application: 14 days.</p> <p>Submission of tenders: 22 days.</p>	Basically the same rules apply below the EU thresholds as above.

Member State	Regulatory Instrument	Thresholds	Methods	Tender Invitation Rules	Time Limits	Other Rules (Selection criteria, award criteria, technical specifications and complaints)
Bulgaria	<p>Public Procurement Law covers Classical and Utilities sectors (PPL).</p> <p>Government ordinance on the award of small contracts (OASPC).</p> <p>Ordinance on the award of special purpose procurements (defence and security).</p>	<p>Thresholds are the same for Classical and Utilities sectors.</p> <p>PPL applies with EU procedures.</p> <p>> EUR 1 075 000 (works).</p> <p>> EUR 90 000 (supplies).</p> <p>> EUR 50 000 (services).</p> <p>OASPC applies with simplified procedures below the above thresholds and</p> <p>> EUR 100 000 (works).</p> <p>> EUR 25 000 (supplies and services).</p> <p>< EUR 22 000 (works).</p> <p>< EUR 7 500 (supplies and services).</p>	<p>EU procedure above the first band</p> <p>Open contest and negotiated procedure with invitation (justification needed) within the second band.</p> <p>Collection of tenders with minimum three tenders within the third band.</p> <p>Below last band direct purchasing.</p>	<p>Publication in State gazette and national procurement register above the first band of national thresholds.</p> <p>Public procurement register below the first band of thresholds.</p> <p>The invitation under collection of tenders may include publication in different media.</p>	<p>Time limits above the first band follow the EU rules and below 33 days which can be reduced to 22 days in certain cases. Further shortening when using electronic means.</p>	<p>Basically the same rules apply below the EU thresholds as above.</p>

Member State	Regulatory Instrument	Thresholds	Methods	Tender Invitation Rules	Time Limits	Other Rules (Selection criteria, award criteria, technical specifications and complaints)
Cyprus	Public Procurement Law L.12 (I) 2006 for Classical sector covers contracts above as well as below the EU thresholds. Public Procurement Law 11 (I) 2006 for Utilities does not cover contracts below EU thresholds. Internal regulations for such contracts similar to rules under the PPL.	> EUR 85 000: the EU procedures apply. < EUR 85 000: simplified procedures apply. < EUR 1 700: direct award.	In addition to EU procedures competitive simplified procedures apply below the national threshold EUR 85 000.	Above national threshold publication in the Official Gazette.	Time limits for submission of tenders are 14 days and 10 days under open procedure and 14 days under restricted procedure below EU thresholds. The same time limits apply for the simplified procedure (10 and 14 days).	Basically the same rules apply below the EU thresholds as above.
The Czech Republic	Public Procurement Law (137/2006) for Classical and Utilities sectors applies to contracts below EU thresholds in the Classical sector but not in the Utilities sector. Utilities contracts are not regulated below EU thresholds.	> EUR 70 000 for supplies and services EU procedures with some simplification > EUR 210 000 for works: EU procedures with some simplification. Below these national thresholds the Treaty principles apply.	Above national thresholds same procedures as in EU Directives or a competitive simplified procedure with prior publication (minimum five tenderers invited).	Publication on central web portal for tenders above the national thresholds. Same contract notice format as for above EU thresholds. Publication of contract notices on own website under the simplified procedure.	Time limits for submission of tenders are under open procedure 22 days and 15 days in restricted and simplified procedures. In the latter case the time limit can be shortened to 7 days in case of urgency. The time limit for submission of applications shall be 15 days or 10 days in case of urgency.	Basically the same rules apply below the EU thresholds as above.

Member State	Regulatory Instrument	Thresholds	Methods	Tender Invitation Rules	Time Limits	Other Rules (Selection criteria, award criteria, technical specifications and complaints)
Denmark	<p>The award of works contracts below EU thresholds and above the national threshold in the Classical sector are governed by Act on Tender procedures for Public Work Contracts Law 338/2005. The award of supplies and services above the national threshold in the Classical sector are governed by Act on tender procedures for Public Work Contracts Law 1410/2007.</p> <p>The award of contracts is also governed by government and ministerial orders.</p> <p>Utilities are excluded.</p> <p>Treaty principles apply.</p>	<p>EUR 67 000 for goods, works and services (government authorities).</p> <p>EUR 40 000 for works.</p>	<p>May use any procedure but central government authorities are obliged to invite tenders and to publish a contract notice above the national thresholds.</p>	<p>Publication of contract notice. Any media can be used.</p>	<p>When using the restricted procedure the time limit for applications is 15 days.</p>	<p>EU Directives but left to the contracting authorities to decide.</p> <p>Contracts below EU thresholds are subject to the same complaints procedure as above EU thresholds.</p>

Member State	Regulatory Instrument	Thresholds	Methods	Tender Invitation Rules	Time Limits	Other Rules (Selection criteria, award criteria, technical specifications and complaints)
Estonia	Public Procurement Act/2007 applies to contracts below the EU thresholds in the Classical and Utilities sectors. EU Treaty principles apply.	EUR 40 000 for goods and services and EUR 250 000 for works contracts in the Classical sectors plus special thresholds for specific cases. Below these thresholds Treaty principles apply. No thresholds for Utilities. Have to ensure effective competition.	All procedures (open, restricted and negotiated) can be applied freely with prior publication.	Publication of notices on central publication web portal for both Classical sector entities and Utilities.	Time limit for open procedure is 22 days for works and 15 days for goods and services. Time limit for applications is 7 days .	Basically the same rules apply below the EU thresholds as above.
Finland	Public Procurement Acts (348/2007) for public contracts and (349/2007) for Utilities apply for contracts above and below EU thresholds. However, contract awards in the Utilities are not regulated. A decree specifies the publication requirements in both sectors. Treaty obligations apply.	PPA for public contracts doesn't apply: < EUR 15 000 for goods and services and < EUR 100 000 for works. Negotiated procedure with prior publication can be used <EUR 50 000 for goods and services and EUR 500 000 for works.	The EU procedures are simplified used above the national thresholds. Direct awards can be allowed subject to justifications similar to those of the Directives.	Publication on central web portal plus other media.	No time limits stipulated; should allow for reasonable time for tender submission.	Basically the same rules apply above below the EU thresholds as above. However no standstill period.

Member State	Regulatory Instrument	Thresholds	Methods	Tender Invitation Rules	Time Limits	Other Rules (Selection criteria, award criteria, technical specifications and complaints)
France	Code of public contracts, Ordinance 2005/649, Decree 2005/1742, Decree 2005/1308.	<p>< EUR 90 000: modalities for publishing notices determined by the procurement officer depending on the subject-matter of the contract, its amount and the degree of competition.</p> <p>Between EUR 90 000 and the EU thresholds: notices to be published in the <i>Official Bulletin</i> or a newspaper entitled to publish legal notices.</p> <p>> EU thresholds: notices to be published in the <i>Official Bulletin</i> as well as in the <i>OJEU</i>.</p>	<p>< EUR 4 000: no obligation at all.</p> <p>< EU thresholds: the procurement officer freely defines the procedure according to the needs, number or location of the economic operators likely to be meeting them.</p> <p>> EU thresholds: procedures laid down by the Directives.</p>	<p>< EU thresholds: specific standard forms, modalities for publishing determined by the contracting authority (see “thresholds”).</p> <p>> EU thresholds: modalities laid down by the Directives.</p>	<p>< EU thresholds: time-limits laid down by the contracting authority (see “thresholds”).</p> <p>> EU thresholds: time-limits laid down by the Directives.</p>	<p>< EU thresholds: modalities determined by the contracting authority (see “thresholds”) in accordance with the EU Treaty principles.</p> <p>> EU thresholds: rules laid down by the Directives.</p>

Member State	Regulatory Instrument	Thresholds	Methods	Tender Invitation Rules	Time Limits	Other Rules (Selection criteria, award criteria, technical specifications and complaints)
Hungary	Act CXXIX on public procurement.	Classical sectors < EUR 26 700 (supply and services) and < EUR 50 000 (works): no obligation. Utilities < EUR 166 700 (supply and services) and < EUR 333 300 (works): no obligation.	< EU thresholds: open or restricted procedure but the contracting authorities are allowed to negotiate if they indicate their intention in the invitation to tender.	Obligation to publish a notice through the Public Procurement Bulletin. Standard forms for contracts < EU thresholds very similar to EU standard forms.	< EU thresholds: time-limit to submit tenders determined by the contracting authority but not less than 25 days . It can be shortened by 5 days provided that the tender specification and the additional information were provided electronically.	Basically the same rules apply below the EU thresholds as above.
Ireland	No regulation below EU thresholds. National guidelines on public procurement can be accessed on the national public procurement website www.etenders.gov.ie	Under national guidelines, the general rule is that contracts > EUR 50 000 are published on the national public procurement website. Internal procedures of many authorities require publication of contracts lower than this.	No prescribed procedure but open procedures most used for sub EU threshold contracts.	N/A	N/A	N/A

Member State	Regulatory Instrument	Thresholds	Methods	Tender Invitation Rules	Time Limits	Other Rules (Selection criteria, award criteria, technical specifications and complaints)
Italy	Presidential Decree 163/2006 (“Code of public contracts”).	<p>Classical sectors < EUR 20 000 (supply and services) and < EUR 40 000 (works): direct purchasing permitted. < EUR 500 000 (works): negotiated procedure without notice permitted. < EUR 750 000 (works): simplified restricted procedure permitted.</p> <p>Utilities Contracting entities that are contracting authorities too: similar thresholds. Public companies, as well as private entities acting on the basis of special or exclusive rights: rules provided in their regulations.</p>	Same procedures below and above the EU thresholds.	<p>Publication of contract notices and award result notices mandatory.</p> <p>Works contracts > EUR 500 000 and for supply and services contracts: publication in the National Official Journal and the website of the Authority for the Supervision of Public Contracts.</p> <p>Works contracts < EUR 500 000: publication on the notice-board of the contracting authority.</p>	<p>Open procedure: 26 days (works) 15 days (supply/services).</p> <p>Restricted or negotiated procedure with a notice: 15 + 20 days (works) 7 + 10 days (supply/services).</p>	Basically the same rules apply above as below the EU thresholds.

Member State	Regulatory Instrument	Thresholds	Methods	Tender Invitation Rules	Time Limits	Other Rules (Selection criteria, award criteria, technical specifications and complaints)
Latvia	Public Procurement Law for Classical sector contracts above and below EU thresholds and a Law on procurement in the Utilities sector but the latter is not applicable below EU thresholds.	Direct purchasing: < EUR 4 200 for goods and services and EUR 14 000 for works. Simplified procedure: < EUR 30 000 for goods and services and EUR 170 000 for works.	Simplified EU procedures above the national thresholds. Simplified national procedure below the national thresholds	Publication rules equal to the requirements above EU thresholds for contracts above the national thresholds. Publication on central web portal. Below the national thresholds simplified invitation rules apply.	Time limit for open procedure is 30 days and time limit for submission of applications is 25 days in case of restricted and negotiated procedure. Time limit for submission of tenders is 25 days . Below the national threshold the time limit is 15 days .	Basically the same rules apply below the EU thresholds as above. No complaints can be filed below the national thresholds (EUR 30 000 and 170 000) nor for all contracts below EU thresholds in the Utilities sector.
Lithuania	The Law on Public Procurement regulates public procurement in the Classical and Utilities sectors above as well below the EU thresholds. Contracting entities in the Utilities sector and contracting authorities in the Classical sector have to prepare their own regulations to be published on the central web portal.	EUR 30 000 for goods and services and EUR 145 000 for works. EUR 3 000 Direct purchasing.	Recommended simplified EU procedures above the national thresholds. Utilities and Classical sector entities will set their own procedures by internal regulation.	Publication of contract notices on the central web portal and official gazette. Contract notices also in the Utilities sector.	Seven days from publication of a contract notice.	Basically the same rules apply below the EU thresholds as above.

Member State	Regulatory Instrument	Thresholds	Methods	Tender Invitation Rules	Time Limits	Other Rules (Selection criteria, award criteria, technical specifications and complaints)
Luxemburg	Act on Public Procurement 2009.	<p>< EUR 55 000: negotiated procedure without publication.</p> <p>< EUR 100 000: negotiated procedure without publication provided that at least 3 economic operators are asked to make a tender.</p> <p>> EUR 100 000: open procedure mandatory, except when the negotiated procedure with or without publication is allowed by the EU Directives.</p> <p>> EUR 800 000: restricted procedure permitted too for works contracts.</p>	<p>Negotiated procedure without publication (see threshold).</p> <p>Negotiated procedure (see threshold) without publication provided that at least 3 economic operators are asked to make a tender.</p> <p>Open procedure (see threshold) mandatory, except when the negotiated procedure with or without publication is allowed by the EU Directives.</p> <p>Restricted procedure (see threshold) permitted too for works contracts.</p>	<p>Publication of a notice required on the internet portal hosted by the ministry of public works and two national newspapers for contracts</p> <p>> EUR 100 000.</p> <p>Simplified standard forms for notices below the EU thresholds.</p> <p>Standard forms different for the Utilities.</p>	<p>Open procedure: 42 days. This time-limit can be reduced to 21 days.</p>	<p>Basically the same rules apply below the EU thresholds as above.</p>

Member State	Regulatory Instrument	Thresholds	Methods	Tender Invitation Rules	Time Limits	Other Rules (Selection criteria, award criteria, technical specifications and complaints)
The Netherlands	A Framework Act statutory instrument for implementing EU Directives. No regulatory instrument for contracts below EU thresholds. Guiding regulations (not mandatory) are issued for both Classical (only works) and Utilities sectors. A new public procurement law is planned for implementation in 2011.	N/A	Restricted tendering with direct invitations is practised. Contracting entities determine their own policy and rules for competitive procurement.	N/A	N/A	N/A
Poland	Public Procurement Law (29 January 2004) regulates procurement in Classical and Utilities sectors above EU thresholds as well as below the EU thresholds for contracts in the Classical sector.	The PPL doesn't apply to contracts below EUR 14 000.	Simplified EU procedures apply below the EU thresholds.	Contract and award notices have to be published at the central procurement web portal.	Applications: 7 days . Open procedure: 20 days works and 7 days for goods and services. Restricted procedure: 14 days for works and 7 days for goods and services. Competitive dialogue and negotiated procedure 10 days .	Basically the same rules apply below the EU thresholds as above. Complaints can be filed for all contracts by the PPL (not Utilities below EU thresholds). However, there are limitations below the EU thresholds for lodging appeals with reference to the nature of the complaint.

Member State	Regulatory Instrument	Thresholds	Methods	Tender Invitation Rules	Time Limits	Other Rules (Selection criteria, award criteria, technical specifications and complaints)
Romania	<p>Public procurement law adopted through GEO 34/2006 and law 337/2006 and secondary legislation by GD 925/2006.</p> <p>The PPL covers contracts in the Classical and Utilities sectors above as well as below the EU thresholds. EU Treaty principles must be observed.</p>	<p>< EUR 15 000: direct purchasing.</p> <p>< EUR 100 000 for supply and services contracts and EUR 750 000 for works contracts: simplified procedures.</p> <p>Above the thresholds for simplified procedure, the EU procedures apply except for time limits and publication in the Official Journal.</p>	<p>Simplified procedure with request for tenders below the national thresholds.</p> <p>Otherwise basically the procedures of EU Directives.</p> <p>Same rules for Utilities.</p>	<p>Publication of contract and award notices on the central web portal (ESPP) in a simplified manner.</p> <p>Above the national thresholds the EU notice forms are used.</p>	<p>The time limit for submission of tenders under the simplified procedure is 10 days which can be reduced to 6 days under electronic submission.</p> <p>Above the national thresholds the time limit under open procedure is 20 days (15 days in electronic form). Under restricted procedure the time limit for application is 10 days and tenders 15 days which could be reduced in case of electronic submission. Competitive dialogue 20 days and negotiated procedure 10 days.</p>	<p>Basically the same rules apply below the EU thresholds as above.</p> <p>Standstill period is 6 days below EU thresholds while 11 days above.</p>

Member State	Regulatory Instrument	Thresholds	Methods	Tender Invitation Rules	Time Limits	Other Rules (Selection criteria, award criteria, technical specifications and complaints)
The Slovak Republic	The Public Procurement Act 25/2006 amended with 232/2008 and 442/2008 governs contracts below EU thresholds in the Classical sector. Utilities are unregulated. II B services are governed by the provisions applicable to contracts below the EU thresholds.	EUR 65 000 for goods and services and EUR 360 000 for works. EUR 30 000 for goods and services and EUR 120 000 for works. Below the latter thresholds small value contracts.	Above the first band the EU procedures with shortened time limits apply. Between the high and low bands, simplified procedures apply. Direct purchasing is allowed below the lower band.	Above the first band, the publication of contract and award notices identical to those above the EU thresholds to be in the e-journal of public procurement managed by the PPO (mandatory). Publication in other media encouraged. The e-journal as well as other media can be used for the simplified procedure.	First band: open procedure for submission of tenders is 36 days and in restricted and negotiated procedure 22 days . Between the high and low bands, contracting authorities may determine the reasonable time limits.	Basically the same rules apply below the EU thresholds as above. However, appeals cannot be lodged for contracts below the second bands.

Member State	Regulatory Instrument	Thresholds	Methods	Tender Invitation Rules	Time Limits	Other Rules (Selection criteria, award criteria, technical specifications and complaints)
Slovenia	Public Procurement Act (ZJN-2) for contracts in the Classical sector and Public Procurement Act (ZJNVETPS) for contracts in the Utilities sector. EU Treaty provisions apply. Both acts regulate contracts below the EU thresholds. The award II B services are covered by the PPA and should be implemented with the publication of a contract notice.	<p>EUR 40 000 for goods and services and EUR 80 000 for works.</p> <p>EUR 10 000 for goods and services and EUR 20 000 for works.</p> <p>Below this lower band, small value procurement applies.</p>	<p>The EU procedures may be applied below the EU threshold or simplified procedures (one or two phases) with prior publication.</p> <p>In the second band of thresholds a simplified procedure with direct invitation is possible (minimum 3 offers).</p> <p>Below the low band, direct purchasing is allowed.</p> <p>These thresholds and methods apply to the Utilities sector as well.</p>	<p>Publication on the web portal for all contracts where publication is mandatory. Above the first band both contract and award notices should be as for the EU requirements, but simplified.</p>	<p>If the EU procedures are used below the EU thresholds the time limits should basically be the same.</p> <p>Otherwise contracting authorities have the right to determine the time limits for submission of applications and tenders depending on the complexity and nature of the contracts.</p>	<p>Basically the same rules apply below the EU thresholds as above.</p>

Member State	Regulatory Instrument	Thresholds	Methods	Tender Invitation Rules	Time Limits	Other Rules (Selection criteria, award criteria, technical specifications and complaints)
Spain	Law 30/2007 (public sector contracts) Law 31/2007 (Utilities). Royal Decree 1098/2001. Royal Decree 817/2009.			Specific standard notices for contracts below the EU thresholds. No regulation for special sector contracts below Dir. 2004/18 thresholds.	For public sector contracts below the EU thresholds, at least 15 days for submitting tenders (open or restricted procedure).	Basically the same rules apply below the EU thresholds as above.
Sweden	Public Procurement Law (LOU) for the Classical sector and Public Procurement Law (LUF) for the Utilities sector. These acts cover contracts below the EU thresholds. EU Treaty obligations are observed. II B services are covered by the simplified regime of LOU and LUF.	No national thresholds. Direct purchasing is allowed for low value contracts at the discretion of the contracting authority (same in Classical and Utilities sectors).	Either a simplified open or restricted procedure with prior publication is used.	Mandatory publication of contract notices in generally accepted databases (private operators under accreditation).	The time limit for application should be minimum 10 days and for submission of tenders reasonable time as decided by the contracting authority.	Basically the same rules, but simplified, apply below the EU thresholds as above.

Member State	Regulatory Instrument	Thresholds	Methods	Tender Invitation Rules	Time Limits	Other Rules (Selection criteria, award criteria, technical specifications and complaints)
The United Kingdom	Public Contracts Regulations S1 2006/5 and Utilities Contracts Regulations S1 2006/6 implement the EU Directives above the EU thresholds. No regulatory instrument below the EU thresholds. EU Treaty obligations shall be observed.	N/A	As guidance “value for money” requirements imply the use of open competitive procedures.	N/A	N/A	N/A

ANNEX 2: QUESTIONNAIRE

SIGMA SURVEY: HOW EU MEMBER STATES REGULATE PUBLIC PROCUREMENT OUTSIDE THE SCOPE OF THE EU DIRECTIVES

Part I. Rules and procedures of specific relevance for procurement below the EU thresholds

Question 1. *Regulatory instrument(s) or guidance for the award of contracts below the EU Thresholds*

- Firstly, for the purpose of completeness, please specify the regulatory instrument(s) for the award of contracts covered by the EU Directives 2004/17 and 2004/18 (above the EU thresholds).
- Does the regulatory instrument set out that EU Treaty obligations should be observed when awarding contracts below the EU thresholds?
- Is the same regulatory instrument used for contracts below the EU thresholds? If not, please specify the regulatory instrument(s) for the award of contracts below the EU thresholds (e.g. the public procurement law, separate regulation or other administrative acts).
- Is the same procurement regulatory instrument used for contracts below the EU thresholds in the Classical sector as in the Utilities sector?
- Is there a regulatory instrument for II B Services below the EU thresholds? Please specify, and outline the main characteristics of the award procedures for this category of services.
- If the award of contracts below the threshold is principally or exclusively governed by guidance (e.g. the UK) rather than regulatory instruments, please give details of where such guidance can be accessed. (If this is the case, please put not applicable (N/A) for the subsequent questions related to regulatory instruments, where appropriate.)

Question 2. *Applicable national thresholds other than the EU thresholds*

- In addition to the thresholds which trigger the application of the EU rules, do you use any national thresholds? Please specify the role of these thresholds (e.g. use of simplified procedures, direct purchasing, request for quotations). Are these national thresholds the same for Classical and Utilities sectors?

Question 3. *Procurement procedures below the EU thresholds*

- Please specify the procurement procedures (e.g. open or restricted tendering, request for quotations, direct purchasing and other simplified procedures) that are permitted below the EU thresholds and what are the conditions or thresholds for their use?
- Are these the same for the public sector and the Utilities?

Question 4. *Rules for tender invitation below the EU thresholds*

- What are the rules for tender invitations below the EU thresholds in terms of publication requirements or the possibility of making direct invitations of tenders without prior publication?
- In case of publication requirements which media shall be used?
- For the above, are there any differences between the public sector and the Utilities?

Question 5. *Publication rules*

- In case of open tenders, what notices are required (e.g. prior information notice, tender notice, and award result notice)? Are standard forms for notices different from those provided for by the EU Directives?
- Are these the same for the public sector and the Utilities?

Question 6. *Time limits for submission of applications and tenders*

- Please specify the time limits for submission of applications and tenders under the procurement procedures listed under question 3 (Procurement procedures) above.
Applications=
Tenders=

Question 7. *Means for submission of applications and tenders*

- Are there rules for the submission of applications and tenders (e.g. by mail or electronically)? If yes, please specify.

Question 8. *Policies and rules for qualitative selection*

- Are there policies, rules or procedures for determining a tenderer's qualifications to perform a contract? If different from the rules above the EU thresholds, please specify.

Question 9. *Policies and rules for tender evaluation and award criteria*

- Are there policies, rules or procedures for tender evaluation and the application of award criteria? If different from the rules above the EU thresholds, please specify.
- Are there any rules for determining abnormally low tenders?

Question 10. *Rules for technical specifications*

- Are there rules for defining technical specifications? If different from the rules above the EU thresholds, please specify.

Question 11. *Policies and rules for electronic procurement*

- Are there policies or rules for conducting electronic procurement? If different from the rules above the EU thresholds, please specify.

Question 12. *Policies and rules for framework agreements*

- Are there policies or rules for the award of framework agreements? If different from the rules above the EU thresholds, please specify.

Question 13. *Available procedures for complaints, review and remedies*

- What are the available procedures for complaints, review and remedies? If different from the rules above the EU thresholds, please specify. Please specify the bodies competent to review the appeals. Do the same bodies deal with procedures above the EU thresholds?

Part II. Common rules and procedures not addressed by the EU Directives (but frequently included in the procurement regimes of EU Member States)

Question 14. Organisation of tender proceedings

- Are contracting authorities obliged to form permanent or ad-hoc Tender Committees for managing the tender process? If the answer is yes, what are the main functions and mandate of the tender committees? Is composition and responsibility of such committees regulated by law or secondary legislation?
- Which person/body is authorised to make an award decision on behalf of the Contracting Authority? Is this regulated by law or secondary legislation?

Question 15. Qualification and tender documentation

- Does the applicable regulatory instrument prescribe the detailed content of any separate pre-qualification/selection documentation? If the answer is yes, please specify the main rules.
- Does the regulatory instrument prescribe the use of standard or model tender documentation for the procurement of goods, works and services? If the answer is yes, please specify the main rules or make reference to the relevant section of the applicable regulatory instrument.
- Following an invitation for tenders, does the tenderer have to pay *a fee* for the tender documentation? If the answer is yes, please specify the rule.

Question 16. Opening of tenders

- What are the rules for the opening of tenders? Should tenders be opened *publicly*? If so, who may attend the opening, or should it be done in *closed* session?
- Are there any differences in the opening procedures with respect to the procedure applied and the size or nature of the contract (goods/services/works)?

Question 17. Tender and performance securities

- Does the regulatory instrument allow for the contracting authorities/entities to request that the submission of a tender should be accompanied by a *tender security*? If the answer is yes, what are the rules and what is the amount?
- Does the regulatory instrument allow for the contracting authorities/entities to request that entering into a contract with a tenderer should be accompanied by a *performance security*? If the answer is yes, what are the rules and what is the amount?

Question 18. Cancellation of tender proceedings

- Does the regulatory instrument cover cancellation of a tender proceeding? If yes, please specify these rules?

Question 19. Period of validity of tenders

- Does the regulatory instrument prescribe any time period for the validity of tender, including any possible extension(s) of the period of the tender validity? If yes, please specify the rules.

Question 20. *Use of the two-envelope system*

- Does the regulatory instrument prescribe the use of the two-envelope system (technical and financial offers submitted in different envelopes)? If yes, please specify the rules.

Question 21. *Conflict of interest*

- Does the regulatory regime lay down any rules applicable to public procurement on the issue of conflict of interest? If yes, please specify the rules.

Question 22. *Special rules for the award of consultants or other intellectual services*

- Does the regulatory instrument lay down any specific rules and procedures for the award of consultant/intellectual services? If yes, please specify the rules.

Question 23. *Changes or initiatives planned in the regulation of public procurement outside the scope of EU Directives (Part I and II of the questionnaire)*

Apart from required legislative alignment with EU law and national initiatives on concessions/PPP law, do you envisage any changes to the regulatory framework outside the scope of the EU Directives? If yes, please specify.