Chapter 17

The Reform of Public Procurement Law in the Western Balkans

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INTRODUCTION

The European Union (EU), initially a Western European project, is moving eastwards and into the Balkans where several countries are preparing for membership in the club. This process of "enlargement" will eventually create a Union of more than 30 Member States with over 500 million inhabitants, stretching from the Atlantic to the Euphrates and from the Arctic Sea to the Southern Mediterranean. Enlargement has been a feature of the European integration process almost from its beginnings. Founded as the European Communities in 1951 and 1957 by Belgium, France, West Germany, Italy, Luxembourg, and the Netherlands, the project was joined by Denmark, Ireland, and the United Kingdom in 1973, Greece in 1981, Portugal and Spain in 1985, East Germany through unification with West Germany in 1990, and Austria, Finland, and Sweden in 1995. Although 2004 saw the accession of 10 new Member States (Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic, and Slovenia), the process is far from over. Bulgaria and Romania will join in 2007. Moreover, Croatia, the Former Yugoslav Republic of Macedonia, and Turkey have "candidate" status. In other words, they are currently negotiating membership with the Union. The remaining countries of the Western Balkans, namely Albania, Bosnia and Herzegovina, Serbia, Montenegro, and Kosovo, are also working towards membership. Accession to the Union represents the most important foreign policy objective of all democratic and moderate political forces in the region. EU membership is widely considered as the firm establishment and confirmation of peace, sustainable democratic structures, and economic wealth.

As part of the enlargement process, candidate countries must harmonize their legislation with the requirements of EU law, including EU public procurement law.[1] This harmonization process is aimed at bringing the public procurement systems of the countries preparing for membership in the Union in line with the standards of the Member States before accession. These standards are comprised of clear and transparent public procurement legislation, including modern purchasing techniques, an efficient and independent enforcement and remedies system, competent contracting authorities, and competitive bidders.

The compliance of the national public procurement laws of the candidate countries with the requirements of the EU public procurement law is an important issue when deciding whether a country is ready to join the Union. This growing awareness of the importance of public procurement is not surprising since it is a crucial aspect of the internal market of the EU. It is regulated by the free movement of goods and services regimes of the European Community (EC) Treaty and by specialized and detailed rules stipulated in the EC Public Procurement Directives. The EC Treaty requires public authorities and utilities to conduct their procurement activities in a transparent way, and prohibits discrimination on grounds of nationality. The more detailed EC Public Procurement Directives require the publication of all contracts awarded by government and other public entities above certain thresholds in the Official Journal of the EU; the award of these contracts on the basis of prescribed detailed procedures and criteria; and the operation of effective enforcement and remedies systems for aggrieved bidders. This legal framework is not directly applicable in the Member States but needs to be implemented into their national laws by their respective governments and legislatures. There is pressure on candidate countries to adapt their public procurement systems to these requirements of EU law to improve their chances of accession, and there is also a clear obligation for a compliant national public procurement system to be in place on the date of accession.

This chapter will discuss the public procurement reform process on the Western Balkans initiated by the enlargement process of the EU, namely in Albania, Bosnia and Herzegovina, Croatia, Kosovo, Macedonia, Montenegro, and Serbia. Greece, Turkey, Slovenia, Bulgaria and Romania are also situated on the Balkans. However,

these countries have been excluded from the discussion because they do not share the common characteristics of the other countries which make it feasible to discuss seven jurisdictions in one paper. Greece has been a Member State since 1981, and like Turkey, has never been a socialist planning economy. Slovenia is already a Member State and Bulgaria and Romania will join in 2007. Hence the reform process discussed in this chapter has to be completed since accession has already happened or is imminent.

The chapter is divided into three parts. First, the legal framework for public procurement in the EU which forms the basis of the reform process is outlined. Second, the most crucial common characteristics of the public procurement systems of the seven jurisdictions in the Western Balkans are highlighted. Finally, the impact of the necessary harmonization of the public procurement systems with the Community "acquis" of the EU will be discussed in view of their improvement. It will be argued that the harmonization with the legal requirements of EU law will significantly improve the public procurement systems of the Western Balkan countries preparing for joining the Union.

EUROPEAN UNION PUBLIC PROCUREMENT LAW[2]

The EC Treaty determines the basic framework for public procurement regulation in Europe. This founding document of the EC[3] is actually an international treaty between the Member States. The Treaty has an economic focus establishing an "internal market." First, this involves the prohibition of all customs duties (tariffs), quotas on goods and measures having equivalent effect to customs duties and quotas between Member States. This regime on the "free movement of goods" is aimed at deleting the borders between the Member States as barriers to trade, thereby creating the EU as a single market for all products. Second, this involves the prohibition of restrictions of the free movement of workers (employees), services, capital, payments, and the establishment of the self-employed and companies. Third, this includes a number of important EU policies, most notably on competition (anti-trust) law, State aids (subsidies), and agriculture. Finally, twelve of the Member States share a common currency, the Euro. The regimes on the free movement of goods and services are the most relevant to the procurement of goods, works (construction), and services. The EC Treaty already

contains the main objective of European public procurement law: to open the national public procurement markets of the Member States to each others' industries, contractors, and service providers. Otherwise, the free movement of goods and services would not apply to an important part of the economy. Recent figures of the European Commission (the EU civil service) for the old pre-2004 Union of 15 Member States show that thousands of contracting authorities and utilities award contracts for about €1,500 billion annually. This was an average 14 per cent of the national GDP in the Member States, or 16.3 per cent of the Union's GDP.[4] In the new enlarged Union of 25, these figures are likely to be even higher. Further and more detailed regulation beyond the basic requirements of the EC Treaty was necessary, as there is a traditional tendency in most Member States to award public procurement contracts to their own national producers and service providers.

The Member States could not determine every little detail of economic law in the EC Treaty itself. Therefore, legal bases for more specialized regulation are stipulated in the Treaty. These legal bases allow the institutions of the EU to pass the necessary legal instruments, for example on public procurement. These legal instruments are normally initiated by the European Commission and passed by the Council of Ministers and the European Parliament. The type of legal instrument chosen for public procurement was the "Directive."[5] A Directive stipulates the results to be achieved by a particular piece of legislation but leaves the choice of form and methods to the Member States.[6] In other words, the Directive is not directly applicable in the Member States. It could be characterized as a compulsory model law which needs to be implemented into the national laws of the Member States. Member States that did not have a public procurement law before the EC Public Procurement Directives, such as the United Kingdom, implemented the Directives by introducing national legislation that followed the Directives almost word for word, the UK Public Procurement Regulations and the Scottish Public Procurement Regulations. Member States that did have a long tradition of public procurement legislation, such as France with its *Code de marchés publics* and Germany with its *Verdingungsordnungen*, had to amend their pre-existing laws to comply with the Directives. This legislative method caused many problems because Member States did not implement the Directives properly or on time. The implementation of the EU Public

Procurement Directives into their national laws is also the central feature of the reform process in the seven Balkan countries investigated in this chapter.

The "old" EU public procurement law was regulated in six different Directives. These can be subdivided into two groups. Four Directives applied to the public sector: the Supplies (goods) Directive,[7] the Services Directive,[8] the Works Directive,[9] and the Public Sector Remedies Directive.[10] The latter instrument sets minimum requirements concerning remedies for aggrieved bidders in relation to the other three public sector directives. The public sector is comprised of contracting authorities on the national, regional, and local level. This includes, for example, the Belgian Ministry of Defence, the Municipality of Paris, or the University of Sheffield. The rules are strict. Above certain thresholds, broadly speaking above €162,000 or €240,000 for supplies and services and €6,242,000 for works, public procurement contracts must be published in the Official Journal of the EU, a now purely electronic database as far as public procurement is concerned.[11] The journal publishes contract opportunities and makes them known everywhere in Europe, and also allows bidders outside the EU easy access to this information.

Contracts regarding weapons, those financed by international financing institutions,[12] and a couple of specialized services can be excluded from the application of the national legislation implementing these Directives. According to the Directives, there are three main forms of procedure or procurement methods contracting authorities must follow. The open procedure allows all interested bidders to participate in the procedure. The restricted procedure requires contracting authorities to invite bids from at least four bidders after having received expressions of interest from an unlimited number of companies. Contracting authorities are free to choose between the open and the restricted procedures. Negotiations are prohibited in the context of the open and restricted procedures. The negotiated procedure allows authorities to negotiate with one or more contractors. The use of this procedure is limited to special circumstances such as extreme urgency. The award criterion is the lowest price or the economically most advantageous offer. The latter takes aspects such as quality, delivery date and after-sales service into account.

Two Directives apply to utilities.[13] In the European understanding those are public or formerly State-owned privatized utilities in the water, energy, transport, and similar sectors. The Utilities Directives are generally more flexible, thereby trying to strike a balance between the market pressures these companies have to face on the one hand, and their monopoly position on the other hand.

The EU public procurement legislation has been subject to a major reform process over the last few years. A new Public Procurement Directive[14] to replace the four public sector directives was passed in March 2004 and had to be implemented into the national laws of the Member States by January 31, 2006. Similarly, a new Utilities Directive[15] had to be the basis of the relevant national laws from the same date. The Public Sector Remedies Directive 89/665/EEC and the Utilities Remedies Directive 92/13/EEC will continue to be in force, but it is only a matter of time before this legislation will also be replaced by new instruments of secondary Community law. The two new Directives are an important chapter in the ongoing story of EU public procurement legislation reform, only equalled by the old Directives of the early 1990s.[16] The aim was to modernize the legislation and to make it more user-friendly. The new Directives follow the chronology of a tender procedure and introduced modern purchasing techniques, such as dynamic purchasing systems and electronic auctions. Moreover, they introduced a new approach to technical specifications. Furthermore, there is a now an obligation to weigh award criteria. Specific provisions on central purchasing bodies and references to environmental and social considerations are other innovations of the new legislation worth mentioning.

With regards to the public sector, the legislation abolished the separation of supplies, works, and services in separate instruments. The question of whether the EU legislator has been successful in providing a modern and efficient framework for public procurement in Europe has been and will be the subject of discussion. This internal reform process has caused problems with some of the first cohort of new Member States who joined in 2004. National legislators did not always understand that they had to adapt their national laws to Directives which were in the process of being replaced by new Directives, necessitating yet another set of amendments.

In late February 2006, the majority of Member States had not yet implemented the new Directives.[17] Only eight of the 25 had

implemented on the deadline set by Article 80 (1) of Directive 2004/18/EC and Article 71 (1) Directive 2004/17/EC.[18] The Member States can be subdivided into three broad groups with regards to the timely implementation of the Directives. The first group of Member States had implemented both Directives before or just after the deadline. This group consists of Austria, Denmark, Hungary, Lithuania, Malta, The Netherlands, Slovakia, and the United Kingdom. Denmark had already implemented the new Directives in 2004, the year they were published. The Utilities Procurement Directive was implemented in Latvia, which however forms part of the second group since it did not yet implement the Public Sector Procurement Directive. This is the group of Member States who are just 'running a bit late' and where implementation can be expected within the next few months and might already be accomplished at time of delivering this chapter. Cyprus is somehow between the first and second groups since its implementing legislation entered into force on February 17, 2006, just over two weeks late. Latvia and Cyprus are joined by Estonia, Finland, France, Ireland, and Poland. In the third group of Member States, implementation is delayed considerably and might not even happen this year. These are Belgium, the Czech Republic, Germany, Greece, Italy, Luxembourg, Portugal, and Spain. In some of the Member States which did not yet implement the new Directives, intermediate or provisional measures were adopted in the form of a decree. In Belgium, for example, a decree requires contracting entities to apply the new Directives directly until they are implemented into national law.

Finally, although the EU is basically a codified legal system and there is no rule of precedence, the judgments of the European Court of Justice play an important role in EC public procurement law. They have the ultimate authority to interpret the EC Treaty and the Directives, often filling gaps left by the legislator. Most importantly, they developed legal principles governing contracts below the thresholds based on the EC Treaty. The core principles are non-discrimination and transparency.

PUBLIC PROCUREMENT LAWS OF THE WESTERN BALKANS

There is common ground and there are also differences between the countries of the Western Balkans with regard to their economies, legal systems, and public procurement systems. The accession

countries are small or medium-sized countries with a population of between 0.6 and 8 million. Their Gross Domestic Products are well below the average of the EU and their economies, legal systems, and public procurement systems are still in a process of transition. However, they are at different stages of this process. Large parts of the economies are still state-owned, but there is also a process of privatization. Most public procurement contracts in these countries are small and below the thresholds of the EC Public Procurement Directives explained below. However, with the modernization of the infrastructure financed through EU funds, the general economic recovery, and with accession in view, this is likely to change.

The legal systems of the Western Balkan countries are based on the continental tradition of codification rather than the "Anglo- Saxon" case law tradition to be found in the USA, the United Kingdom, or Australia. The French, German, and Italian legal systems served as models for the main legal instruments, such as the civil, criminal, and commercial codes, the administrative laws and the court systems. Following the French example, most legal systems differentiate clearly between public and private law and attribute public procurement contracts to either one or the other category. The tradition of codification is a good starting point for the harmonization process since European Community law is also based on such a system, and the French public procurement code, the *Code de Marchés Publics,* was the main model when the first public procurement directives were drafted.

Some problems were caused by the fact that public procurement reform started immediately after the fall of the Iron Curtain around 1990 when EC public procurement law was less developed than it is today. The last major reform of EC public procurement law was only completed in 1993. Moreover, membership in what was then the European Community seemed far away for most of these countries. Therefore, they all based their new legislation on the 1994 UNCITRAL (United Nations Commission for International Trade Law) Model Law on the Procurement of Goods, Construction and Services rather than on EC public procurement law. Various national and international donors and development agencies, such as the US American USAID, the Swedish SIDA, the Danish DIDA, the British DIFID, UNDP, the World Bank, EBRD, and OECD-SIGMA, and the EU became active in the field. Sometimes they gave contradictory advice to the government departments in charge of procurement reform. This

variety of influences let to a common feature of many of these countries: one major public procurement reform followed the other. For example, a country would start with the old Cold War era procurement law, then introduce a modern law influenced by, for example, US American advisors before introducing another law based on the UNCITRAL Model law, followed by yet another law based on the old 1992 and 1993 EC Public Procurement Directives before accession to the EU in 2004, followed finally by another major reform in view of the new EC Public Procurement Directives to be implemented by 2006. In a recent article Jurcik describes this process of one reform after another in the Czech Republic (Jurcik, 2006). These constant changes have an effect on public procurement practice because operators have to familiarize themselves with an ever- changing legislation, never developing public procurement experience. However, it can be assumed that the process of harmonization with EU law will interrupt the series of legislative changes.

The countries of the Western Balkans are all part of the enlargement process of the EU. As part of the requirements of their accession they have to harmonize their laws with the European treaties and 80,000 pages of secondary Community legislation. The seven jurisdictions covered in this chapter were all based on a socialist planned economy until the fall of the Iron Curtain. The legal frameworks of the Western Balkan countries are to different degrees in a process of harmonization with the requirements of European Community law. They can be subdivided into two groups.

Candidate Countries: Croatia and Macedonia

The first group consists of the former Yugoslav Republics of Croatia (SIGMA, 2002; 2004) and Macedonia (SIGMA 2002b). These are already negotiating their accession to the Union as candidate countries, although the date is far from being decided yet.

Croatia has a healthy economy that is yet heavily based on tourism, a population of 4,677 million, and a per capita GDP of US $5,100. In comparison, Greece has a per capita GDP of about US $13,400 and Germany of about US $27,000. About 2,000 contracting authorities award contracts on the basis of the Croatian Public Procurement Law of 2003, to be replaced by a new law based on the EU Public Procurement Directives in early 2007. There is no

preference scheme in favor of national providers. A Public Procurement Agency on the national level prepares the Croatian public procurement policy and legislation and is also in charge of the publication of contracts. A separate Public Procurement Review Board under direct control of the Parliament reviews public procurement decisions.

Macedonia has a population of 2,023 million and a per capita income of US $1,490. About 2,000 contracting entities award contracts with annual value of about € 123 million (2005) on the basis of the 2004 Public Procurement Law. A Public Procurement Bureau on the national level prepares the public procurement policy and legislation and is also in charge of the publication of contracts. A separate Public Procurement Review Committee reviews public procurement decisions. There is no preference scheme in favor of national providers.

Future Candidate Countries: Albania, Bosnia and Herzegovina, Kososvo, Montenegro, and Serbia

The former Yugoslav Republics of Bosnia and Herzegovina (SIGMA, 2002c, 2004b), and Serbia including Kosovo (SIGMA, 2002d; 2002e; 2002f; 2004c), Montenegro, and the Republic of Albania (SIGMA, 2002g; 2004d) will join in the foreseeable future, Serbia and Montenegro as two separate Member States after a referendum on the separation of the two republics in May 2006.

Moreover, it is possible that the yet Serbian province of Kosovo will soon be an independent republic aiming for membership in the Union. The economy of the latter is almost completely dependent on foreign aid. Serbia has a population of just under 8 million, Kosovo of over two million, and Montenegro of over half a million. With under US $1,000 the earlier has the lowest per capita GDP in Europe. Only 120 contracting authorities award contracts on the basis of the 2004 Public Procurement Law since it has a central purchasing authority.

In Montenegro, about 600 contracting authorities award contracts on the basis of the 2001 Public Procurement Law which was scheduled to be revised after the referendum on secession from Serbia and Montenegro on May 20, 2006. There is no preference scheme in favor of national providers.

Serbia itself has a population of just under 8 million and a per capita GDP of about US$ 2,300. The annual procurement budget of about US$ 1.7 billion is awarded by roughly 12,000 contracting entities. A very strict Public Procurement Law of 2002 allows for an elaborate preference scheme in favour of the about 80,000 Serbian companies.

Bosnia and Herzegovina, with a population of 3,482 million and a per capita GDP of US $1,720, is currently heavily dependent on foreign aid. About 2,000 contracting authorities award contracts on the basis of the 2004 Public Procurement Law. Since December 2005, a Public Procurement Agency on the national level prepares the public procurement policy and legislation and is also in charge of the publication of contracts. Since April 2006, a separate Public Procurement Review Board reviews public procurement decisions. There is a preference scheme of 15 per cent on the tender price in favor of national providers in the 2005-2006 period, to be reduced to 10 per cent for the 2007-2008 period and 5 per cent during the 2009-2010 period.

Albania has a population of 3,365 million, a per capita GDP of US $1,490 and currently has the fewest internal problems of the countries in this category. About 2,000 contracting authorities award contracts on the basis of the 2003 Public Procurement Law to be replaced by a new law in early 2007. Since 1995, a Public Procurement Agency on the national level prepares the public procurement policy and legislation and is also in charge of the publication of contracts. A separate Public Procurement Review Board under direct control of the Parliament reviews public procurement decisions. There is no preference scheme in favor of national providers. The public procurement systems of these jurisdictions are therefore also preparing for EU membership.

COMMON FEATURES OF PUBLIC PROCUREMENT REFORM IN THE WESTERN BALKANS

The last section of this chapter will discuss a number of common features of the public procurement laws of the Western Balkan countries subject to reform in view of achieving compliance with the requirements of EU law. The discussion is based on the requirements of the EC Treaty and the EU Public Procurement Directives with regards to a specific aspect of public procurement regulation, namely

the coverage of legislation including thresholds and exceptions, procedures, publication, qualification and participation, award criteria, small value procurement, and remedies.

The Coverage of Public Procurement Laws

The old and new EC Directives require national laws to cover not only central, regional, and municipal governments but also all "bodies governed by public law." This notion describes, in short, all entities established for the specific purpose of meeting needs in the general interest not having an industrial or commercial character financed by the most part by the State. Moreover, it covers contracts financed at least 50 per cent by public funds. Furthermore, public and privatized utilities operating in the transport, water supply, electricity, and other similar sectors must apply a special and more flexible Utilities Directive. Many accession countries had different approaches to the coverage of their procurement laws. For example, in many jurisdictions the same strict law would apply to both public entities and utilities because the process of privatization was or is not very advanced and public utilities were or are "managed" like government departments. There is often no regulation of utilities procurement in national procurement law, or utilities have to follow a set of rules which is almost as strict as the public sector regulations. While this is not violating the Directives, since Member States are always allowed to introduce stricter rules than required by secondary legislation, international best practices suggest a separate and more flexible regime for privatized utilities where they exist.

The old and new EC Public Procurement Directives apply only above certain thresholds, which in the case of supplies (goods) and services are several hundred thousand Euro, and in case of works (construction) several million Euro. The background is that for small value contracts the costs of EU wide tenders can outweigh the benefits of EU wide competition, and bidders are probably not interested in these contracts in other Member States. The thresholds are a kind of *de minimus* rule of reason for EU public procurement regulation. However, according to the European Court of Justice, even below the thresholds the general principles of the EC Treaty apply. These require some form of regulation or binding practice that ensures transparency and non-discrimination on grounds of nationality. Many of the Western Balkan countries also apply their procurement laws to procurement below the thresholds or introduced

regulation imposing requirements which are just as complex, onerous and time-consuming as those of the procurement laws for contracts above the thresholds. While this *prima facie* often ensures transparency and non-discrimination, the costs and administrative burden created by the fulfilment of these requirements needs to be balanced with the benefits created in the context of contracts with a low value. A flexible framework with only a few requirements safeguarding transparency and equal treatment appears to be preferable to strict and detailed regulation of contracts below the thresholds.

Exceptions to the EC Public Procurement Directives apply in relation to certain services, goods and situations. Most importantly, the Directives provide for exemptions for armaments and other contracts affected by national security or secrecy considerations, especially in relation to procurement conducted by the 25 Member State ministries of defense. The European Court of Justice ruled that exceptions to EU law in general have to be interpreted narrowly as otherwise the functioning of the internal market as a whole could be undermined. Similar to many of the "old" Member States, most South Eastern European countries interpret the exemptions in the Directives very widely and introduced exemptions in their national laws that reflect this interpretation. A number of countries introduced regulations for the special contracts excluded from their public procurement laws. These regulations often exclude any kind of publication and judicial control, thereby accommodating the special nature of these contracts. The only way to limit the effect of these special rules is the narrow interpretation of the exceptions. A crucial issue is that even the old Member States are not using the exemptions within the appropriate limits.

The Procedures of Public Procurement Laws

The old and new Directives provide for the open procedure, the restricted procedure, the negotiated procedure with prior publication, and the negotiated procedure without publication. The new Directives introduced modern purchasing techniques through "framework agreements" and a "competitive dialogue." Contracting authorities in the public sector can choose freely between the open and restricted procedures but have to justify the use of the negotiated procedures on the basis of specifically stipulated circumstances such as extreme urgency or intellectual property constraints. Both the open and the

restricted procedures provide for a high level of transparency since contracts and contract awards have to be published in the Official Journal of the EU.

Moreover, in many national laws which implemented the Directives, bid openings must be conducted in public. However, in many countries the restricted procedure is viewed with suspicion because after an initial public call for requests to participate, a short-listing process decides on the limited number of bidders who will eventually be invited to bid. This requires discretion exercised by the contracting officer or tender committee, and this is seen in many countries on the Western Balkans as facilitating corruption. Therefore, because public procurement regulation is considered by many in these countries as a tool against corruption, the legal frameworks and public procurement practices of these countries indicate a clear preference for the open procedure. The practice in some accession countries shows an almost exclusive use of the open procedure. However, in the context of a Europe-wide internal market hundreds of bids for individual contracts are possible. Therefore, the positive effect of the use of the procedure on competition, value for money, transparency, and non-discrimination has to be weighted against the high administrative and financial costs of conducting open procedures. The restricted procedure appears to strike this balance. Previously, the EC Public Procurement Directives limited the use of the restricted procedure. After pressure from contracting authorities the free choice between the open and restricted procedures was introduced. Today contracting authorities in the 'old' Member States, with the possible exception of municipal administrations, show a clear preference for the restricted procedure.

According to the publication requirements of the EC Public Procurement Directives, all contracts above the thresholds have to be published in the Official Journal of the EU. Moreover, all contract awards have to be published. Finally, the planned contracts for a particular period have to be published in Periodic Indicative Notices before the publication of the actual contracts. These requirements ensure competition and equal-treatment since knowing about a contract opportunity is the most important condition for market access. Moreover, publication ensures transparency. The procurement laws of the relevant countries require publication in the national official journals or gazettes. They have to ensure publication in the Official Journal of the EU by the time of accession.

Qualification and Participation in Public Contracts

The qualifications and the financial and economic standing of bidders need to be checked. The focus of the EC Public Procurement Directives is to prevent discriminatory rules as barriers to market entry. Many of the relevant countries have to reform their procurement laws to ensure these principles. Operators have complained about excessive documentation which is burdensome and time-consuming to compile, thereby discouraging participation. This is due to the fact that the procurement laws and practices of many accession countries require documentation regarding qualifications and the economic and financial standing that go well beyond the requirements of the Directives. While a comprehensive discussion of this issue would go well beyond the limits of this chapter, it is safe to say that many accession countries have to reduce the documentation required by their procurement laws as this documentation can represent a restriction to market access in violation of the EC Treaty.

Award Criteria for Public Contracts

The award criteria prescribed by the EC Public Procurement Directives are the lowest price on the one hand and the economically most advantageous tender on the other. The later allows taking considerations other than price into account. This includes economic factors such as delivery date, after sales service, or quality. As many of the accession countries understand public procurement legislation as a tool against corruption, there is often a clear preference for the lowest price as the only award criterion, combined with the preference for the open procedure outlined above. While the open procedure combined with the lowest price criterion and public tender openings allow for a maximum level of transparency they also have their limits. First, as outlined above, in an internal market of over 450 million inhabitants and hundreds or even thousands of bidders for many products and services, the use of the open procedure and the lowest price criterion can become an almost unmanageable burden on the contracting authorities. Second, the lowest price criterion is only suitable for relatively simple and well known products and services. The more complicated and new the product or service, the more additional criteria such as quality or delivery date become important. The relatively recent public procurement laws of the

Western Balkan countries therefore include the 'economically most advantageous tender' criterion.

The Regulation of Small Value Contracts

Many of the Western Balkan countries who introduced public procurement legislation for the first time or reformed their legal frameworks after 1989 did not only pass laws for contracts above the thresholds of the EC Public Procurement Directives. They also introduced laws and regulations for smaller value procurement, for contracts outside the scope of the EU Public Procurement Directives. The principles of the EC Treaty, such as non-discrimination and transparency, apply to these contracts. This also requires some form of publication, non-discriminatory rules on participation, and objective award criteria. However, as outlined above, the legal requirements of the EC Treaty are far from being as detailed as those of the EU Public Procurement Directives. Many of the laws and regulations introduced by the accession countries from lower value procurements were almost or exactly as detailed as the rules for contracts above the thresholds. This is not an uncommon practice; "old" Member States such as Austria even have the same rules for contracts above and below the thresholds (the "mirror principle"). This degree of detail will normally fulfill the requirements of EC law and provide a high level of transparency. However, it also imposes a considerable administrative and financial burden on the contracting authorities, which can be disproportionate to the value of the contract and its relevance for the internal market. Moreover, a different coverage, different thresholds, procedures, and even award criteria apply in the context of these rules. Many rules have to be considered before even relatively small items and services can be procured, in countries where the general knowledge on public procurement is either limited or, due to the numerous changes, not up to date. Therefore, over-regulation might cause frustration. This frustration might lead to contracting authorities deliberately ignoring the rules in practice.

Enforcement and Remedies

As a requirement of the EU Public Procurement Directives and as a matter of international best practice, a public procurement system needs to provide a framework for enforcement and remedies. This is necessary to ensure that the rules are actually followed in practice and also to generate trust in the system as a condition for

competition. Various aspects of such a system need to be distinguished. First, the EC Treaty provides for a general procedure allowing the European Commission to enforce Community law against the Member States in Article 226 EC Treaty. This instrument, which can lead to a judgment and even penalty payments against the Member State in question, is also used in public procurement cases. Second, there should be administrative control of public procurement decisions within the Member States. Third, the EC Remedies Directives for the public and utilities sectors require a set of rapid and effective remedies against public procurement decisions for aggrieved bidders through independent review bodies and a last instance review through a court of law. Finally, as part of the requirement of "effective remedies," the national system needs to decide on the types of remedies. These can include the suspension of procurement procedures or their set aside, before or after the award of the contract, a set aside including an order to re-commence a procedure, or the award of damages. Enforcement and remedies systems in general need to strike a balance between the private interests of the aggrieved bidders and the public interest in a proper procurement system on the one side, and the private interests of the successful bidder and the public interests in an undisrupted procurement process, and in the case of damages, the interests of the taxpayer on the other side. In early May 2006, the European Commission presented a first draft for a new Directive amending the Public Sector and Utilities Sector Remedies Directives. Hence the remedies directives are the next chapter of the ongoing story of EU public procurement reform. However, it would be too early for the countries of the Western Balkans to take the suggested changes in to account since it will take years for them to enter into force and changes to the draft can be expected.

As part of their national public procurement systems, the enforcement and remedies systems of the Western Balkan countries are in the middle of a process of transition. Many accession countries recently established national public procurement offices in charge of public procurement policy, the preparation of primary and secondary legislation, public procurement training, registration, and information. These institutions are usually a part of the government, often as an agency of the ministry of finance or economics. However, in many of these countries the public procurement offices would also be a review body for public procurement decisions, in some cases the only one.

This arrangement does not comply with the requirement regarding changing independent review bodies. According to the current directives, at least the last instance review body must be independent.

Another problem in many accession countries is that magistrates or judges making the decisions are new to the subject matter of public procurement and therefore lack experience. In some accession countries this is caused by the fact that public procurement legislation and remedies are a new subject. In other accession countries this is caused by the fact that public procurement cases were recently moved from the administrative court system to the civil or ordinary court system. In all Central and Eastern and South Eastern European countries, this problem is aggravated by the ever-changing legislation. Some of these countries, for example Bulgaria, at one time intended to offer arbitration as an additional remedy procedure, but there is little or no experience in conducting arbitration.

Finally, in many Western Balkan countries, court proceedings in public procurement cases can take years. This is not a satisfactory situation, since suspension through court proceedings can block a public procurement procedure for years, thereby delaying or even preventing the project and causing considerable extra costs.

CONCLUSIONS

The jurisdictions of the Western Balkans are preparing for EU membership. They need to bring their legal and economic frameworks in line with those of the Union. This process has to start long before accession and has to be well advanced when the country eventually becomes a full Member State. An important part of this process concerns the reform of the public procurement laws of the accession countries. Public procurement forms an important part of the internal market created by the EC Treaty. The main objective of EU public procurement policy and regulation is to open the public and utility procurement markets of the Member States. Therefore, both the EC Treaty and the more detailed EU Public Procurement Directives require public bodies and public and privatized utilities to publish all their contracts above certain thresholds in the Official Journal of the EU; to follow certain competitive procedures; to award contracts on the basis of prescribed economic criteria; and to provide for efficient remedies awarded by independent review bodies. The transparent

and competitive public and utility procurement laws created by this legal framework do not only serve the objectives of the internal market. EU wide publication and competitive procedures facilitate maximum participation, competition, and ultimately value for money. Modern purchasing techniques and other measures and practices facilitate efficiency. Finally, effective remedies through independent review bodies ensure fairness and create trust in the system. The EU Public Procurement Directives have been criticized as being too strict and as lacking behind modern purchasing techniques employed in the private sector. However, there is reason to believe that the efficiency of the public procurement countries of the accession countries on the Western Balkans will have considerably improved after the enlargement process has been completed.

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