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Economic efficiency and legal effectiveness of review and remedies procedures for public contracts

Final Study Report

MARKT/2013/072/C

Written by Europe Economics and Milieu
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Abstract

The objective of this evaluation is to assess whether the review and remedies procedures for public procurement, revised in 2009, have been legally effective and economically efficient across the EU. This is achieved by assessing the implementation of the revised remedies procedures and analysing how they have affected the behaviour of suppliers and contracting authorities.

The study uses evidence from an EU-wide review of the national review and remedies systems, surveys of stakeholders, an analysis of review cases in different Member States, and a database of contracts awarded in the Official Journal of the EU.

The revised review and remedies procedures have been used widely by suppliers to challenge procurement outcomes, although the length and outcomes of review cases vary considerably across Member States. The results of the study show stakeholders' positive perceptions of the relevance of the remedies procedures and of their impact in improving the openness and transparency of public procurement. The cost impacts of the remedies procedures on suppliers and contracting authorities/entities are estimated to be small. Based on a sub-sample of Member States, the study provides evidence that the remedies procedures can lead to savings on procurement contracts and are overall cost-effective.

Glossary of abbreviations

"The Remedies Directives": remedies directives covering the public sector (Directive 89/665/EEC) and the utilities sector (Directive 92/13/EEC).

"The Directive": Directive 2007/66/EC amending the two Remedies directives.

"The Public Procurement Directives": Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors and Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (both being replaced by Directive 2014/25/EU and Directive 2014/24/EU, respectively).

"CAE": Contracting authority/entity.

"VEAT notice": Voluntary Ex Ante Transparency notice.

"TED": Tenders Electronic Daily, the online version of the 'Supplement to the Official Journal of the EU ("OJEU"), dedicated to European public procurement.

Member States:

AT:	Austria	IE:	Ireland
BE:	Belgium	IT:	Italy
BG:	Bulgaria	LT:	Lithuania
CY:	Cyprus	LU:	Luxembourg
CZ:	Czech Republic	LV:	Latvia
DE:	Germany	MT:	Malta
DK:	Denmark	NL:	Netherlands
EE:	Estonia	PL:	Poland
EL:	Greece	PT:	Portugal
ES:	Spain	RO:	Romania
FI:	Finland	SE:	Sweden
FR:	France	SI:	Slovenia
HR:	Croatia	SK:	Slovakia
HU:	Hungary	UK:	United Kingdom

Executive Summary

Introduction

Public Procurement legislation in the EU is aimed at creating a common market by ensuring that public contracts are awarded in an open, fair and transparent manner. Review and remedy provisions, an important part of this legislation, were thoroughly revised with effect from the end of 2009. Four years later the European Commission started an investigation to establish whether those revised provisions have been effective in contributing to economic efficiency through the greater degree of competition which the Public Procurement Directives were intended to secure.

The terms of reference of this study are to assess whether the changes in the implementation of the provision of remedies for infringements of public procurement legislation have:

- led to improved compliance with the rules,
- led to more effective competition for public contracts, and
- whether costs outweigh the benefits of more competition.

The study aims to satisfy two overarching aims:

- Analyse the different measures taken by different Member States to implement the Directive.
- Quantify the impacts of any observed changes in the behaviour of bidders and contracting authorities/entities (CAEs) in the last four years.

Throughout the report we refer to the relevant directives as follows:

- Directive 89/665/EEC and Directive 92/13/EEC as "the Remedies Directives"
- Directive 2007/66/EC amending the Remedies Directives as "the Directive".
- Directive 2004/17/EC and Directive 2004/18/EC as "the Public Procurement Directives".

Evaluation Framework

Our evaluation framework features two key aspects: an intervention logic model, which plots the relationships between the legislation's objectives, the measures taken, the resulting activities and the anticipated outcomes and impacts; and a set of evaluation questions designed to evaluate the envisioned causal relationships between the activities, outcomes and impacts of the initiative.

We created a set of indicators in order to answer the various evaluation questions, represented by the following headings:

- Relevance (Q1)
- Transposition (Q2)
- Usage (Q3)
- Factors affecting usage (Q3)
- Transparency and openness (Q4)
- Non-compliant behaviour (Q5)
- Effectiveness and value-for-money (Q6)
- Additional costs (Q7)
- Efficiency and cost-effectiveness (Q8)
- Impacts on stakeholders (Q9)
- Overall benefits (Q10)

Data Gathering

Several data sources have been used to answer the evaluation questions:

Information on the national review and remedies systems has been provided by the network of legal experts assembled for this study, one for each Member State.

Sample of review cases brought before national courts, tribunals or special public procurement boards across the EU-27. As the availability of this information varies considerably from country to country (both in terms of the number of review cases and in the organisation and presentation of the information) a sample of cases was constructed (using different cases per year and per instance for each Member State).

A dataset of analysis was constructed to be able to clearly differentiate between the contracts which had a complaint and those which did not. The characteristics of such contracts were sourced from Tenders Electronic Daily (TED, the online version of the 'Supplement to the Official Journal of the EU, OJEU). Because of the difficulties in matching complaint data to TED notices, the analysis was undertaken for a sample of Member States that record the OJEU number in their complaints: CZ, DK, SI and SK.

A survey to suppliers and CAEs was used to investigate indicators on relevance, costs of review, and perceptions of transparency, fairness, and openness. A small sample of legal practitioners involved in bringing actions under the Directive was interviewed to provide information and insights on the costs, impacts and outcomes of such actions.

Relevance (Q1)

Many provisions of the Directive are perceived as relevant across suppliers, CAEs, and legal practitioners, with the most relevant provision being the "automatic debrief". Some provisions are perceived as less relevant, such as the Voluntary ex-ante Transparency Notice (VEAT) notices and penalties. Figure 6.2 in the main report presents the details of these findings.

There are perceptions of continuing problems in addressing breaches in procurement law among some participants (for example a perceived lack of trust and lack of transparency in public procurement). These perceptions suggest that continuing efforts are required to achieve the envisaged benefits of the Public Procurement Directives, and imply that the Directive continues to be relevant. The extensive usage of the provisions of the Directive, as shown in indicator U3 (usage) is further evidence implying that the Directive is still relevant.

Transposition (Q2)

The Remedies Directives set out optional provisions which a Member State may or may not have made use of (differences in implementation stem from the application of national rules or procedural law). Our findings are briefly summarised as follows:

We find that the scope and availability of the review procedure differs on some aspects across Member States. All but two Member States (MT and SI) apply a minimum standstill period in accordance with the Directive; a few apply an additional period but one which is not excessive.

Review bodies of very different natures have been established in each Member State: in some, this is a specialised public procurement review body, while in others, an existing judicial or administrative review body is responsible for the review.

In all Member States, provision is made for the main types of remedies, i.e. (a) powers to take interim measures, (b) set aside the decision, and (c) award damages to persons harmed by an infringement.

The provisions for the suspension of the contact vary across Member States, and some have gone beyond the provision of the Directive with the suspension of a contract until a final decision on appeals is reached, rather than just a decision on interim measures. On the other hand, some Member States (AT, BE, BG, CZ, DK, EE, EL, FR, HR, HU, IT, LT, NL, PT, RO and SI) have not provided for an automatic suspensive effect.

The Directive provides for contracts to be declared ineffective under three circumstances. Almost all Member States provide for ineffectiveness in the first and second circumstances, but only around half provide for ineffectiveness in the third circumstance.

The length of review proceedings is very dispersed across Member States. There are no legislative provisions on the duration of the review procedures in 12 Member States, but in over half of Member States there are maximum duration periods for review proceedings.

The fee for applying for review varies widely across Member States: in some countries the application fee for a review procedure is a fixed flat rate, irrespective of the characteristics of the contract; in others the costs are determined by a scale criteria or by a value-range that depends on the size or the type of contract. The great dispersion of review fees is also apparent within country (Figure 5.14 shows this).

Usage and factors affecting usage (Q3)

The provisions of the Directive have been used widely by suppliers across the EU to challenge procurement outcomes:

- Large numbers of requests have been initiated and decisions taken on these requests, as shown in Table 6.1 and Table 6.2.
- Decisions have also been appealed, as seen from the numbers of second and third instance cases shown in Table 6.3 and Table 6.4.
- The use of the VEAT is less widespread across the EU, being concentrated in France, and to a less extent, Poland, the UK and Denmark.

The characteristics of the complaints and decisions are investigated using a review of case law in the different Member States. We find that there is great variation in the length of the reviews in practice. The length of pre-contractual remedies cases appears to be (in part) influenced by whether the Member State has a non-judicial Review Body – Member States with a specialist non-judicial Review Body generally have the shorter review lengths for interim reviews and pre-contractual remedies.

Complaints are more likely to be dismissed than upheld. Where complaints are successful, our results show that the most common outcome of decisions is the contract being declared ineffective by the review body. Our survey results also show that there are a number of reasons for suppliers not making use of the Directive to seek reviews, the two most common reasons being lack of confidence in the success of the complaints and a fear of retaliation by the awarding authority.

Transparency and openness (Q4) and Value for money (Q6)

Stakeholders' views indicate that the Directive has helped to improve the "effectiveness" and "transparency" of the procurement process, i.e. improving the functioning of the procurement market and ensuring information is available to all

participants (70% and 60% of CAEs for each impact respectively, and over 50% of suppliers for both). In contrast, fewer respondents thought that market "openness" improved through the Directive (49% and 35% of CAEs and suppliers respectively).

To assess the impact of the Directive on value for money in procurement we used several regression models to explain awarding authorities' "savings" on the final contract value as a result of complaints lodged within the Member State in the past. Because of the difficulties in accessing the data on complaints and matching them with existing contract information available in TED, our analysis has been limited to four Member States: CZ, DK, SI and SK. We have found that the effects may be different across Member States. A consistently positive effect is found for CZ i.e. that additional past complaints are significantly and positively related to savings; results are weaker for the other three Member States. Our results are limited to the data availability: more comprehensive conclusions could be drawn if information were available to create a larger sample of matched cases.

Our model does not measure other outcomes of better procurement processes, such as improved quality of bids, and thus is likely to understate the benefits. Although our findings are based on a small sample, they nevertheless are a good indication of the potential benefits of the Directive that can be (or have already been) achieved.

Non-compliant behaviour (Q5)

We find that past complaints have a significant negative effect on the probability of having a complaint lodged in CZ; this is evidence of a deterrence effect, although only observed for one Member State in our sample. The effect of the Directive on non-compliant behaviour would be better understood if information were available to analyse more Member States.

Additional costs (Q7)

The costs to CAEs and suppliers of bringing forward or defending a review case vary widely across the EU, but are in general small.

The median cost of review for suppliers across all Member States is estimated at around €4,100 per review (0.6% of contract size). The median cost estimated for CAEs is just under €4,000 (0.4% of contract size). Median costs to CAEs as a percentage of contract value in individual Member States range from around 0.1% (in EL, PL, SI and SK) to around 2% (AT). Among suppliers, median costs range from 0.3% (ES, LT, RO, SE and UK) to 1.5% (CY, EL, SI).

Costs to third-party suppliers of defending reviews are relatively low (a median cost of 0.2% of contract size). However, the very small number of survey responses in relation to this estimate means that the results must be viewed with high caution. Average one-off and ongoing costs to CAEs of complying with the Directive are estimated to be 0.16% and 0.18% of the annual value of procurement respectively, and the majority of the CAEs spend less than 0.3% on compliance.

Efficiency and cost-effectiveness (Q8)

Using the sample of complaints lodged and tender notices in TED for four Member States (CZ, DK, SI, SK), we estimate the savings attributable to all past complaints. Comparing this to the cost estimates of complaints from our survey of suppliers and CAEs for these Member States shows us that the savings as a percentage of contract value are greater than the median cost estimates for one of the Member States only: CZ. Given that the results relate to only a small sample of Member States, we cannot

generalise to the rest of the EU. However, they are an indication of the *potential* benefits achievable through the Directive.

There is some possibility that the cost effectiveness of the Directive is being undermined in some way by features which increase cost without adding to the benefits, for example through inappropriate use or less relevant provisions. The extent to which these factors may be undermining the cost-effectiveness of the Directive is not measurable. However, even in the presence of these potential 'impediments', the relatively low costs (and some evidence of savings) implies that the overall cost effectiveness of the Directive is likely to be positive.

Impacts on stakeholders (Q9)

The impact of the Directive on improving various aspects of the public procurement process (in terms of effectiveness, fairness, openness and transparency) is viewed differently by respondents of different types (suppliers versus CAEs) and different size. A greater proportion of CAEs than suppliers perceived the Directive to improve transparency and be effective. Smaller suppliers are in general less likely to perceive a positive impact of the Directive – this may be due to these being less able to make use of the provisions for cost reasons.

Conclusions and overall benefits (Q10)

The evaluation of the Directive has simultaneously considered two different aspects: the *direct* effect of the implementation and usage, and the *indirect* effect of the prevention of (or deterrence of) illegal practices in public procurement.

The Directive provides a direct and effective way for rapid action to be taken when there is an alleged breach of the Public Procurement Directives. The quantification of these direct effects has been undertaken with an exhaustive analysis of the transposition and implementation of the Directive and the analysis of how it is being used in the different Member States.

To the extent that CAEs feel there is a credible possibility of being scrutinised, the Directive may also act as a deterrent to breaching procurement laws. The effectiveness of the remedies system in this case is indirect: it corrects any illicit practice *before* such a practice can be observed, and it works through the credibility of the system. This makes it very difficult to estimate the effects of the deterrence role of the Directive.

Our overarching conclusion from the analysis is that the Directive is providing some overall benefits along the intended impacts, both direct and indirect. The prevalent belief is that the provisions are considered relevant by stakeholders: the most relevant provision across both suppliers and CAEs is "automatic debrief", and a number of other provisions are also considered relevant by at least 40%-50% of respondents. Perceptions of relevance among legal practitioners are much higher.

We have also found indications of the Directive being beneficial in the sense of being used extensively by suppliers to challenge unsatisfactory outcomes: we have observed large numbers of successful requests, decisions and appeals. The Directive has also helped to improve the perception of transparency and effectiveness of the procurement process, according to the view of stakeholders.

There is also some evidence of the indirect deterrent effect of the Directive for CZ: past complaints are positively related to savings and negatively related on the probability of having a complaint lodged. Given that the results relate to only a small

sample of Member States, it is difficult to generalise to the rest of the EU. However, they are an indication of the *potential* benefits achievable through the Directive. Removing the possibility of complaints may reduce the efficiency of procurement practices and deteriorate the contracts savings.

In any case, we find that the costs to CAEs and suppliers of bringing forward or defending a review case vary widely across the EU, but are in general small. Hence, even with the uncertainty surrounding the potential benefits of the Directive, the costs are unlikely to outweigh the benefits.

There is some likelihood that the cost effectiveness of the Directive is being undermined in some way by features which increase cost without adding to the benefits. For example, there are perceptions of some inappropriate use of the Directive in bringing forward nuisance complaints. There are also perceptions that some provisions are less relevant (such as the VEAT notice and penalties). Further, the significant variations across Member States in the costs and length of reviews may inhibit the functioning of the Single Market.

The extent to which these factors may be undermining the cost-effectiveness of the Directive is not measurable, and there are number of caveats around the robustness of the evidence of impediments to the efficiency of the Directive. However, even in the presence of these potential impediments the overall benefits of the Directive are likely to outweigh the costs (which have been found to be small). This implies that the overall cost effectiveness of the Directive would still be positive.

In addition, it is possible that some of these 'impediments' are still contributing to the effectiveness of the Directive in an "indirect" sense, as they are reinforcing the monitoring and deterrence mechanism by signalling to the market that any diversion from legitimate practices will be challenged. This is also true for provisions less frequently used: their sole presence may be necessary to signal that they *could* be used if needed and this could be enough to fortify the role of the Directive.

Based on the experience gained in this evaluation, we recommend improved record keeping of legal cases involving the review of public procurement contracts in order to facilitate more comprehensive research. The European Commission could consider, where appropriate, placing a requirement on Member States to collect data on public procurement review cases. This could be accompanied by a requirement to make the details of cases available on a publically available online site, in a suitable electronic format that facilitates interrogation and collection of relevant data (such as dates, remedy sought, decisions, and OJEU identification number).

We note that these obligations may impose a significant burden on some Member States, in particular those where existing judicial procedures are used rather the specialised review bodies (some do not even use computerised systems, and some do not currently collect or publish information on the type of case). The European Commission should consider further the feasibility and administrative burden imposed by such obligations.

1. Introduction

Public Procurement legislation in the EU is aimed at creating a common market by ensuring that public contracts are awarded in an open, fair and transparent manner. The different systems and procedures envisaged in the Public Procurement Directives[1] have been introduced to facilitate domestic and non-domestic firms to compete for business on an equal basis, while at the same time allowing CAEs to obtain the best quality and price for their purchases. To complement the Public Procurement Directives, specific review and remedy procedures were introduced to coordinate national provisions and make sure there were effective and rapid procedures for review of contracts falling within the scope of those directives.

These review and remedy provisions were thoroughly revised with effect from the end of 2009. The revision introduced new provisions. A standstill provision gave bidders time to ask for a review before a contract was signed. National review bodies were given the power to render contracts "ineffective" under certain conditions, or were also allowed to impose alternative penalties, such as fines or cutting short the duration of a contract. A new VEAT notice was drawn up in order to allow CAEs to advertise the justified direct award of a contract and limit the scope for subsequent challenge.

Four years later the European Commission started an investigation to establish whether those revised review and remedies provisions have been effective in contributing to the economic efficiency through the greater degree of competition which the Public Procurement Directives were intended to ensure.

In particular, the terms of reference of this study are to assess whether the changes in the implementation of the provision of remedies for infringements of public procurement legislation have led to[2]:

- improved compliance with the rules,
- more effective competition for public contracts and
- costs outweighing the benefits of more competition.

The study includes an analysis of:

- a sample of relevant review cases (from national courts, tribunals or public procurement boards),
- a sample of judgements and penalties handed down,
- use of the VEAT.

The terms of reference for this study require the development of four work packages (WP) to provide, respectively: a brief description of Member States' review and remedies systems and procedures, including the provisions for the cost of review procedures and to whom they are available, the provisions for alternative penalties, the time-limits for delivering a decision in first instance review cases and the provisions for rendering contracts ineffective (WP1); a model for measuring the cost-

[1] Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors and 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (both being replaced by Directive 2014/25/EU and Directive 2014/24/EU, respectively).

[2] The study did not require provision of recommendations.

effectiveness of national review and remedies procedures (WP2); the data on the number and type of review procedures initiated and concluded in 2009-2012 to be able to measure the cost-effectiveness per Member State (WP3); and an analysis of the cost effectiveness of the review and remedies systems across the EU (WP4).

Our report follows the structure presented in Table 1.1, which also provides information in relation to the work packages and their location in the document (the chapters of the report).

Table 1.1: Study outline and location of work packages

Chapter	Description
1	Introduction (this chapter)
2	Background to public procurement and the Remedies Directives
3	WP2: Methodology (model for cost effectiveness)
4	WP3: Data gathering
5	WP1: Judicial review
6	WP4: Analysis of the review
7	WP4: Summary and conclusions

The report contains useful information in several appendices containing the summary of the review and remedies system and procedure in each Member State and other supporting material.

Throughout the report we refer to the relevant directives as follows:

- Directive 89/665/EEC and Directive 92/13/EEC as "the Remedies Directives"
- Directive 2007/66/EC amending the Remedies Directives as "the Directive".
- Directive 2004/17/EC and Directive 2004/18/EC as "the Public Procurement Directives".

2. Background

Procurement is the purchase of works, goods and services by public and private enterprises. Efficiency in procurement from competing suppliers has long been recognised as a way to obtain the desired goods or services at the lowest price or, more generally, at the best "value for money".[3]

The most common practices of procurement involve some form of tender or auction because it is believed that in situations where there are enough firms in the procurement market to sustain reasonable competition, efficient procurement outcomes can usually be achieved. In cases with a reduced number of firms, more sophisticated arrangements (such as explicit contractual arrangements[4]) are necessary to prevent practices such as collusion, bid-rigging, fraud and corruption, which hinder the achievement of efficient outcomes. Public procurers also face the additional challenge of preventing political favouritism (situations where contracts are allocated according to loyalty or support rather than on the grounds of efficiency).

2.1 Public Procurement Regulation

Public procurement legislation in the EU is aimed at creating a common market by ensuring free movement of goods, persons, services and capital, and promoting effective competition in the Internal Market.[5] The guiding principles[6] by which these aims are sought to be achieved are:

- Equal treatment of all economic operators.
- Transparent behaviour.
- No discrimination based on nationality.

Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors[7] and Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts[8] (the Public Procurement Directives) emphasise the coordination of national procedures in order to guarantee that these principles are achieved. The harmonised rules regarding advertising, procedures, deadlines, selection and award criteria and reporting are thought to lead to greater transparency, participation, objectivity and non-discrimination in procurement markets. It is believed that this would increase competition and cross-border trading, resulting in a better quality/price ratio (value for money) for public authorities, while increasing the productivity in the supply industries and improving the participation and access to such markets by SMEs. A more efficient use of public funds coupled with competitive industries would have obvious benefits for the economy.

[3] See OECD (1998) Competition Policy and Procurement Markets.

[4] These are situations where, the price paid to the supplier might depend upon the profit earned by the supplier (OECD 1998, Competition Policy and Procurement Markets).

[5] These objectives are laid out in Articles 2 and 3 of the Treaty of Rome (1957) and also in the Treaty on the Functioning of the European Union.

[6] These are laid out in Articles 2 and 3 of the Public Sector Directive 2004/18/EC.

[7] OJ L134/1 of 30.4.2004.

[8] OJ L134/114 of 30.4.2004.

2.1.1 Historical evolution of regulation of procurement

The regulation of procurement in the EU has a long history.[9] Initially, regulation was based on Directives 66/683/EEC and 70/32/EEC which disallowed rules giving preferential treatment to national products/supplies, or prohibiting the procurement of foreign products/supplies. These were followed by Directives 77/62/EEC, 80/767/EEC and 71/305/EEC which aimed at coordinating procedures for supply, utilities and works contracts, respectively.

Following the European Commission's 1985 White Paper on the completion of the Internal Market and the Single European Act of 1986, further directives were introduced for setting the rules for award procedures, requiring prior publication of notices and details of awards, making national technical standards mutually recognisable and clarifying exempted sectors, and removing international barriers in the utilities sector while harmonising the rules relating to services.[10]

Following calls for simplification and modernisation, these were updated into the following directives.

- The Utilities Directive 2004/17/EC, which governs utilities procurement.
- The Public Sector Directive 2004/18/EC, which governs works, supplies and services procurement.

In 2009, Directive 2009/81/EC was introduced setting EU rules for the procurement of arms, munitions and war material (plus related works and services) for defence purposes, but also for the procurement of sensitive supplies, works and services for security purposes. It is tailored to the specificities of defence and security equipment and markets.

More recently, a directive on concessions was passed by the European Parliament in January 2014 and adopted by the Council in February 2014.[11] This directive aims to reduce current market distortion and inefficiencies resulting from the lack of legal certainty and law provisions around concession contracts.[12] It also aims to address SMEs' limited access to the opportunities offered by concession contracts. The European Commission has recently evaluated the extent that current directives have achieved their objectives[13] and other social policy objectives (such as innovation and green growth).[14] This led to a revision of the Public Procurement Directives, with the

[9] For a detailed description, see Bovis, Christopher H (2007) *EU Public Procurement Law*, Cheltenham: Edward Elgar Publishing.

[10] See Directive 88/295/EEC, Directive 89/440/EEC, Directive 90/351/EEC, Directive 92/50/EEC, Directive 89/995/EC, Directive 92/13/EC, Directive 93/36/EEC, Directive 93/37/EEC, Directive 93/38/EEC.

[11] Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, OJ L 94/1, 28.03.2014.

[12] European Commission (2011), "Impact Assessment of an Initiative on Concessions ", "Proposal for a directive of the European Parliament and of the Council on the award of concession contracts" {SEC(2011) 1588 final}{SEC(2011) 1589 final}.

[13] European Commission (2011), "Impact and Effectiveness of EU Public Procurement Legislation" Part I and Part II.

[14] European Commission (2011), "Strategic Use of Public Procurement in Europe".

introduction of Directive 2014/24/EU on public procurement[15] and Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors,[16] which cover public sector works and utilities respectively, and repeal the Public Procurement Directives with effect from 18 April 2016. The new Public Procurement Directives aim to simplify public procurement procedures and make them more flexible, provide better access to public procurement markets for SMEs, and strengthen measures to prevent conflicts of interest, favouritism and corruption, amongst other changes.

In addition, the Remedies Directives were revised to improve the effectiveness of national review procedures for the award of public contracts. The Directive focuses on addressing unfair awards of public contracts by setting rules aiming at clear and effective procedures. This is explained in the next sub-section.

2.2 Remedies Directives

There are two original Remedies Directives, one covering the utilities sector (Directive 92/13/EEC)[17] and another covering the public sector (Directive 89/665/EEC)[18] to allow more flexibility in the rules governing the utilities.

Directive 2007/66/EC on improving the effectiveness of review procedures concerning the award of public contracts[19] (the Directive) amended both Remedies Directives and was designed to increase the guarantees of the principles of the public procurement legislation and address and correct any form of breach in public procurement laws. It emphasises the coordination of national procedures in order to harmonise rules regarding review procedures such as standstill periods and pre- and post- contractual remedies in order to lead to greater transparency, participation, objectivity and non-discrimination in procurement markets. At its core is the belief that effective implementation and enforcement of the Directive would increase competition and cross-border trading, resulting in a better quality/price ratio (value for money) for public authorities, while increasing the productivity in the supplying industries and improving the participation and access to such markets across the EU. The ultimate underlying objective is based on the belief that additional flanking measures (as envisaged in the Directive) would ensure that economic operators would have access to clear and effective procedures for seeking redress in cases where they consider contracts had been unfairly awarded. This would consequently help to ensure correct application of procurement rules which would have benefits for the economy.

The Directive allows remedies actions to be brought either before the contract is signed (pre-contractual remedies) or after (post-contractual remedies). Pre-

[15] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L 94, 28.3.2014, p.65

[16] Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, OJ L 94, 28.3.2014, p.243

[17] Directive 92/13/EEC,

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1992L0013:20080109:EN:PDF.

[18] Directive 89/665/EEC,

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1989L0665:20080109:EN:PDF.

[19] OJ L 335, 20.12.2007, p.31.

contractual remedies are intended to be able to correct the infringement of the public procurement rules before the contract becomes effective. These include interim measures (such as a standstill period and suspension of the award procedure) to stop the contract from being awarded whilst the appeal is being investigated. On the other hand, post-contractual remedies aim to provide compensation (mainly damages) to the affected parties after the contract in question has been awarded.

The remedies process varies from Member State to Member State according to how the Directive has been implemented and enforced in national law, and how effective the judicial systems are. Some countries have also developed informal procedures for solving issues of this nature. As such, the effectiveness of remedies in the public procurement area varies considerably across different Member States.

2.2.1 Challenges identified in the (pre-2007) Remedies Directives

A number of challenges were identified in the European Commission's 2006 impact assessment on the remedies in the field of public procurement.[20] The challenges were based on experiences from different stakeholders some of which suggested that the Remedies Directives may not always achieve their objectives. The key problems identified were:

- A number of awards still being awarded directly: this is the most serious case of a breach of public procurement law and in the absence of a transparent and competitive award procedure, can prevent the best value for money being obtained from the contract in question. The majority of complaints and infringement cases in the field of public procurement were related to this problem.
- Contracts being "raced to signature": this happens when a contract is signed despite a complaint has been raised against it. The problem is that remedies actions are limited to post-contractual damages, which are less effective and have no real correction power.
- Limits in the use of "damages" remedies: the post-contractual nature of the damages remedies limits its effectiveness in correcting the illegal contract once it is signed. For damages actions to be successful an aggrieved supplier needs to prove to have genuinely serious chance in winning the contract (which is often challenging in reality). Also, the legal process can sometimes be lengthy and the cost involved high (it may not even be covered by the financial compensation awarded).

2.2.2 The New Remedies Directives (Directive 2007/66/EC)

Following the impact assessment, the European Commission reviewed the two Remedies Directives to improve their effectiveness in 2007. The Remedies Directives were substantially amended by the Directive which introduced five main features:[21]

- Automatic debrief at the time of the contract award decision notice – the rule now requires the CAE to inform candidates who have been unsuccessful in the tender.

[20] Commission Staff Working Document: Impact Assessment Report – Remedies in the field of public procurement, 2006

[21] Directive 2007/66/EC,

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:335:0031:0046: EN:PDF.

- A new definition of "standstill period" – CAEs need to wait for at least 10 days after deciding who has won the public contract before the contract can actually be signed.
- An automatic suspension of the contract award procedure where legal proceedings are brought against a CAE's award decision.
- The new "ineffectiveness" remedies that the Court can impose in relation to the breach of procurement laws.
- Additional remedies including civil financial penalties and contract shortening remedies.

The majority of the new remedies aim primarily at improving the effectiveness of pre-contractual remedies and tackling the widely recognised problem of illegal direct awards. On the whole, the new measures provide clarification for Member States, are expected to contribute to more effective enforcement of the public procurement rules and have a deterrent effect against breaches in procurement procedures. However, it is important to bear in mind the potential considerable differences in the adoption of the Directive by each Member States, as well as differences in judicial systems, and hence the effectiveness of the Directive is likely to remain inconsistent across the EU.

2.3 Purpose of the study

Four years after the review of the Remedies Directives, the European Commission is investigating whether those revised provisions have been effective in contributing to the economic efficiency through the greater degree of competition which the Public Procurement Directives were intended to ensure.

In particular the European Commission wants to see if the introduced measures related to the standstill provision; powers for render contracts "ineffective"; envisaged penalties (such as fines or cutting short the duration of a contract); and new VEAT notice; have had the impact foreseen in the impact assessment.

We understand that the overarching aim of the study is to:

- Analyse the different measures taken by different Member States to implement the Directive.
- Quantify the impacts of any observed changes in the behaviour of bidders CAEs in the last four years.

We understand that the results of this study will provide a factual basis for a review of the implementation and effectiveness of the Directive by the European Commission, if deemed necessary.

3. Methodological framework

In this chapter we establish the intervention logic model,[22] clearly plotting the relationships between the legislation's objectives, the measures taken and the anticipated impacts needed to make sure we identify the "Needs/Problem/Issue", the desired "Objectives", the "Inputs" and "Activities" used and the overall "Outcomes" and "Impacts achieved".[23] It is also important to ensure that any "Unintended" effects on any party are also considered at the set up.

To assess to what extent the intervention logic model reflects the reality we have proposed a series of specific questions aimed at examining the extent to which the cause-effect relationships envisaged in the legislation have in fact happened. The evaluation questions have been formulated openly and in a way as to provoke enquiry, and enable us to assess the relevance of the legislation, and its effectiveness, efficiency, and distributional effects.

Finally, evaluations need to make use of information from a wide range of sources to be able to provide answers to the questions. It is important to clearly understand the kind of information that is needed, the tools to be used and the target groups where this information may be sought from.

The first two aspects of our evaluation framework (intervention logic model and design of questions and tools) are described in the next headings. The method for the data collection is presented in the next chapter.

3.1 The intervention logic model

An initial proposal of the intervention logic model for the impacts of the Directive is presented in Figure 3.1, where we define the various elements as follows:[24]

- The "Objectives" is what the initiative aims to achieve.
- "Inputs" are all the resources used in the initiative (the obligations imposed as a result of new legislation).
- "Activities" are the principal enablers of the initiative, established by the different legal implementation in the Member States.
- "Outcomes" are the results the initiative has achieved (include the take-up of the activities envisaged in the "Activities").
- "Intermediate impacts" are the direct benefits and costs derived from the initiative.
- "Overall impacts" include typically wider economic and social outcomes (they may include any "unexpected" effect or secondary effects) and ultimate change in wellbeing.

[22] An intervention logic model is a systematic and visual way to present the causal relationships between the various elements of a piece of legislation, or initiative. It covers the objectives of the intervention, the activities planned and the changes and results the legislation aims to achieve.

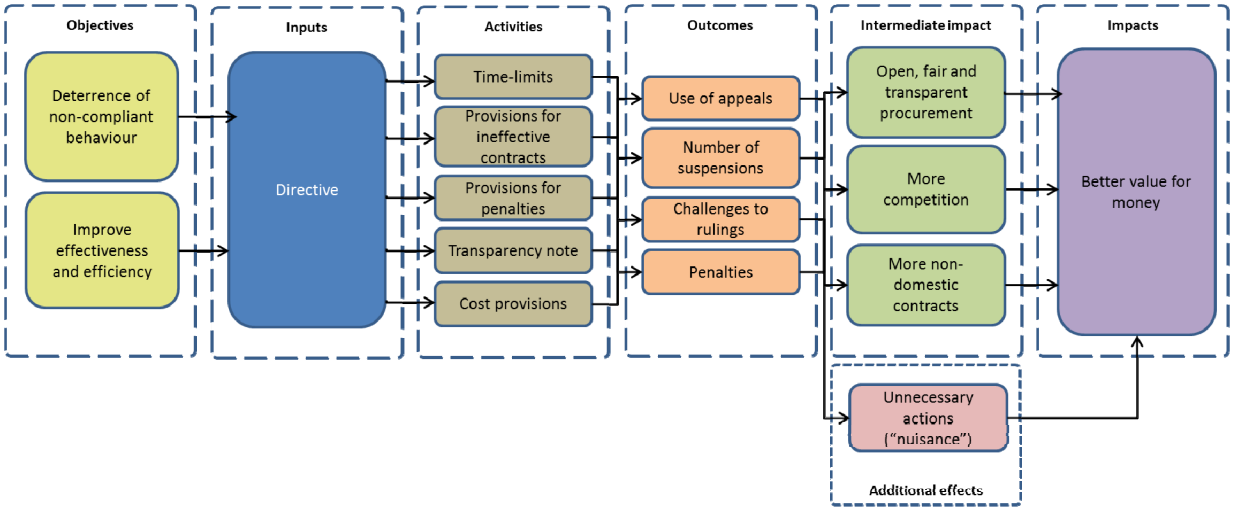
[23] The intervention logic model is based on the descriptions of the problem, objectives, and impacts of the Directive as set out in the Directive itself and in the Impact Assessment.

[24] In developing the intervention logic model, we follow the guidelines from DG MARKT Guide to Evaluating Legislation (2009), as well as the principles set out in DG BUDGET Evaluating EU Activities (2004); WK Kellog Foundation Evaluation Handbook (2004); and HMT Green Book (2003).

The intervention logic model portrays the following dynamics. The Directive ("Input") stems from the need of deterring non-compliant behaviour and to improve effectiveness and efficiency in the public procurement sector ("Objectives"). Transposition of the Directive' provisions resulted in the following measures being established in different Member States ("Activities"): provisions for penalties, costs, powers to render contracts ineffective, VEAT notice and the introduction of specific time limits for complaint procedures.

Consequently, the initiative produced direct results, which can be observed in the form of use of the appeal provision, which can lead to challenging a given ruling or even suspending a procurement outcome ("Outcomes"). The desired impact of the Directive is to make the procurement process more open, fair and transparent; intensify competition; and to increase non-domestic contracts awarded while trying to avoid additional effects such as an excessive amount of unnecessary actions ("Intermediate impact"). These intermediate impacts are expected to lead to final benefits in the form of procurement outcomes that reflect a better value for money ("Impacts"). Because the Directive incur some additional costs for market players and CAEs, it may be possible that there are also some additional or side effects in the form of "nuisance" or unnecessary actions being brought forward.[25] This is shown in Figure 3.1.

Figure 3.1: Intervention logic model



3.2 The evaluation questions

Specific questions are needed to challenge and test the envisioned causal relationships between the activities, outcomes and impacts of the initiative. Evaluation questions typically constitute the backbone of the hypotheses to be tested during the evaluation.

The set of questions proposed for assessing the different dimensions of the evaluation are outlined in Figure 3.2, and have been defined during the course of our work. The

[25] We will refer to "nuisance" complaints, as per the terminology introduced in the European Commission's impact assessment report, to cover a wide range of unnecessary actions, frivolous claims as well as nuisance appeals. Source: European Commission (2006), "Impact assessment report – Remedies in the field of public procurement", COM(2006) 195, May 2006, p.30. In some cases nuisance complaints can be used by economic operators to disrupt and paralyse CAEs as punishment for not awarding them the contract or to inflict costs on competitors by delaying income streams from disrupted contract awards.

questions have been designed to address relevance, transpositions (or take-up of the initiative), effectiveness, efficiency, distributional effects, and net impact.

Figure 3.2: Evaluation questions: hypotheses for testing

Dimension of the evaluation	Evaluation questions
Relevance	Q1: How has the original need for intervention evolved in recent years (this is, the deterrence of non-compliant behaviour and improving procurement outcomes)? In particular, is there any reason to believe that the initiative is no longer justified?
Transposition and take-up	Q2: To what extent is the regulatory framework and objection procedure clear and balances the rights of bidders and CAEs across the EU? What are the differences in the provisions across Member States and what improvements are needed (if any)?
Effectiveness of the intervention	Q3: To what extent are the provisions envisaged in the Directive being used in different regions, sectors and awarding authorities? In particular in relation to the use of: complaints, appeals and damages? What are the incentives and disincentives for claimants depending on the different regions, sectors and type of authority awarding the contract?
	Q4: To what extent does the Directive contribute to transparency, fairness and openness of the market?
	Q5: To what extent are the provisions envisaged in the Directive acting as a deterrent to non-compliant behaviour of bidders and CAEs? Are there factors which are hindering this effect?
	Q6: How much is the Directive contributing to improvements in the effectiveness and value-for-money of the awards? To what extent does the Directive provide direct benefits to bidders and authorities?
	Q7: To what extent does the Directive cause additional and unnecessary costs? Are some of the provisions too rigid? To what extent is the system being used unnecessarily and to what extent is this creating distortions in the market?
Cost-effectiveness and efficiency	Q8: Could the same benefits have been achieved at a lower cost? To what extent could the legislation be simplified?
Distributional effects	Q9: How have the positive and negative effects impacted on the different stakeholders?
Better value for money and net impact of the initiative	Q10: To what extent does the Directive provide benefits to society as a whole? Would these benefits have been achieved in the absence of the Directive?

3.3 Proposed indicators

We have identified a list of indicators to provide answers to the issues identified in the evaluation questions. They have been refined after input received from DG MARKT in the project kick-off meeting and throughout the study (after feedback from work packages).

The proposed indicators are presented for each of the evaluation dimensions and their corresponding questions in the following way:

- Relevance (Q1)
- Transposition (Q2)
- Usage (Q3)
- Factors affecting usage (Q3)
- Transparency and openness (Q4)
- Non-compliant behaviour (Q5)
- Effectiveness and value-for-money (Q6)
- Additional costs (Q7)
- Efficiency (Q8)
- Impacts on stakeholders (Q9)
- Overall benefits (Q10)

The list is presented further below, in turn. Details on the methodological approach for estimating the factors affecting usage (Q3), for assessing deterrence of the Directive (Q5), estimating effectiveness and value-for-money (Q6) and additional costs (Q7) are presented in sub-section 3.4.

- **Relevance (Q1):** The relevance of the initiative is assessed using the perceptions of different stakeholders and exploring the reasons that may explain such perceptions. The following indicators have been proposed:
  - Perception of relevance.
  - Main reasons why the Directive is still relevant/ no longer relevant.

- **Transposition (Q2):** The take-up of the initiative by Member States is assessed with a summary table of the transpositions and main characteristics of the review and remedies systems and procedures in the different Member States. Indicators for take-up include the provisions for:
  - Scope and availability of the review.
  - Time limits for review.
  - Body in charge of the review.
  - Remedies.
  - Ineffectiveness.
  - Length of review procedure.
  - Review application fee.
  - VEAT notice.

- **Usage (Q3):** To assess the extent to which the provisions envisaged in the Directive are being used we analyse a number of indicators related to the number of complaints[26], appeals[27] and decisions which included damages. We also look at the size of the contracts affected. The indicators for usage are:
  - Indicators of usage (numbers of complaints and decisions).
  - Type of remedies.
  - Perceptions by respondents (different aspects of the Directive).
  - Usage of the VEAT notice.

- **Factors affecting usage (Q3):** To investigate how different contracts' characteristics affect the probability of a contract being challenged, we use several econometric regression models. The models are used to estimate the

[26] For consistency, we use the term "complaint" to refer to the initial application for review.

[27] We use the term "appeal" to refer to an appeal made against the decision of the review body at first or second instance.

relationship between the usage variables (complaints) with other potential influencing factors. Indicators used for factors effecting usage are:

- Number and sample share of contracts challenged by type of CAE.
- Number and sample share of contracts challenged by type of contract (work, services and supplies).
- Number and sample share of contracts challenged by type of procedure.
- Number and sample share of contracts challenged by award criteria (lowest price or "most economically advantageous tender", MEAT).
- Aggregate size of challenged contracts.
- Probability of receiving a complaint by estimated contract value.
- Probability of receiving a complaint by contract type.
- Probability of receiving a complaint by type of competition.
- Probability of receiving a complaint by award criterion.
- Probability of receiving a complaint by type of awarding authority.
- Probability of receiving a complaint by 2-digit CPV code.[28]

- **Transparency and openness (Q4):** The Directive aims at promoting transparency, fairness and openness of the market. One first approach is based on stakeholders' opinion on the perceptions of the impact of different provisions on outcome variables related to the opening of markets:
  - Perceptions of transparency/fairness/openness/effectiveness due to provisions.
  - Vale for money.

- **Non-compliant behaviour (Q5):** The deterrence effect could be estimated as the difference in various procurement indicators for CAEs that received some complaint compared to CAEs receiving none. The proposed indicators for the deterrence effect are measured, for each awarding authority, as the
  - Difference in savings as a result of past complaints within a Member State.
  - Difference in probability of receiving a complaint.

- **Effectiveness and value-for-money (Q6):** We explore the effectiveness and value-for-money as the additional "savings" that can be realised due to different dimensions of the Directive. The indicators for effectiveness and value-for-money are:
  - Stakeholders' perceptions about the effectiveness and fairness of the remedies system.
  - An estimate, for each awarding authority, of the "savings" (or difference between the initial estimated value and final contract value) as a result of having received complaints.

- **Additional costs (Q7):** The impact in cost of review and remedies is measured by considering the compliance, litigation, administrative and operating costs, and financial penalties incurred by awarding authorities, winning bidders or complainants and includes the following indicators:

[28] The Common procurement vocabulary (CPV) establishes a single classification system for public procurement contracts.

- Net Costs incurred to the complainant: Total costs; costs by Member State (totals and disparity); costs by sector; total costs breakdown by internal and external costs.
- Net costs incurred to procuring and review authorities: Compliance costs (one off and on-going); total costs, costs by Member State (totals and disparity); costs by sector; total costs breakdown by internal and external costs.
- Net Costs incurred to a company as a result of third party challenge.

- **Efficiency (Q8):** Efficiency is evaluated through considering the following:
  - Cost-benefit analysis.
  - Costly impediments.
  - Unused features.

- **Impacts on stakeholders (Q9):** Impacts on stakeholders will be assessed trough the observed differences between the costs and benefits for each of the different groups of stakeholders.

- **Overall benefits (Q10):** The overall benefits will be evaluated by adding the different dimensions of previous indicators.

3.4 Analytical tools

The use of indicators obtained from the estimates of different econometric models presents some challenges. In the following paragraphs we present the approach we use for the estimation of the factors affecting usage, assessing deterrence, estimating the value-for-money and estimating the additional costs of the Directive. These are presented below, in turn. The results of this section will very much depend on the data availability of the constructed set which will draw information from matching the review of cases to the different contract's characteristics obtained from the publication of contracts in TED (the matching process is described in the next chapter).

3.4.1 Models for estimating the factors affecting usage

As part of the measurement of usage (for Q3) we have proposed indicators that use the outcomes of several econometric regression models. The models allow estimating the relationship between complaint and other potential influencing factors.

The analysis of the *likelihood of complaint* would postulate a relationship between a dependent variable (y) as a function of other potential explanatory variables (summarised in vector $\mathbf{X}$):

$$y = \alpha + \boldsymbol{\gamma}'\mathbf{X} + \varepsilon, \quad (1)$$

where, y is a constructed dichotomous variable coded as 1 for contracts that had some type of complaint, and 0 for those that did not. $\mathbf{X}$ is a column vector of contract-specific variables as recorded in Tenders Electronic Daily (TED)[29] which relate to the size of the contract, the type of awarding authority (ministry, federal agency, regional, body governed by public law), the activities of the awarding authority (defence, environment, education…), the type of services required (as summarised by the CPV code attached to the contract), α is a parameter for the constant term, and $\boldsymbol{\gamma}$ is a

[29] The website version of the supplement to the Official Journal of the European Union, which publishes public procurement business opportunities.

vector of parameters associated to the variables X which need to be estimated, and ε is an error term. Estimates of the relevant parameters will give an indication as to how much such variables are contributing to the probability of complaint (hence highlighting if complains are likely to be associated to certain sectors or the size of the contract).

Because the dependent variable is binary, discrete choice models should be used (Logit or Probit).

3.4.2 Models for assessing deterrence of the Directive

By its very own nature, the measurement of deterrence of non-compliant behaviour (Q5) is a very difficult matter. In principle, with increased facilities for objection and closer monitoring of award procedures we would expect to observe fewer complaints. This is because a system working effectively would tend to see increasingly fewer cases of non-compliant behaviour (and hence complaints) as the deterrence effect of the system prevents this from happening. On the other hand, the simple observation of a reduction in the number of complaints cannot always be directly attributed to the success of the system. This is because it could be signalling a change in the conditions of access so that objection procedures have become more difficult (it may even be indicative of a loss in confidence in the remedies system altogether).

Inferences from the change in the behaviour of all awarding authorities solely may be difficult to obtain, as a wide range of parallel factors may be at play. However, we believe that looking at the complaints at a contract level could lead to robust conclusions if the following approach is used.

One would first need to select a wide sample of contracts throughout a reasonably long period of time and classify the contracts into two different groups:

- Group I: contracts that did not receive any complaint
- Group II: contracts that have received a complaint.

The separation can easily be understood as a "treatment" group (Group II) and "control" group (Group I), typically used in impact evaluation studies.

A probabilistic model such as the one described in (1) should be estimated to establish the probability of receiving a complaint based on the characteristics of the contract (size, sector, type of awarding authority, CPV code, …). In a further step, we would include a variable indicating the number of complaints that have been received in the past. By comparing the estimated probabilities for contracts that received a complaint in the past with those that did not, one could establish whether receiving a complaint in the past reduces by any means the future probabilities of complaint. The hypothesis behind this reasoning is that complaints exert monitoring pressure and correct non-compliant behaviour of authorities, so that CAEs reduce their non-compliant behaviour (and hence the complaints received) after they have been subject to a complaint or a penalty.

3.4.3 Models for estimating value-for-money

The value for money indicators (Q6) look at the benefits of the Directive. Following the methodology in some previous work (Europe Economics, 2011), we propose a model postulating a relationship between the value of the winning bid as published in the OJEU (y) and several explanatory variables. Hence, we propose to estimate the following model:

$$y = \alpha + \gamma' \mathbf{X} + \varepsilon ,$$

where y is the value of the winning bid as published in the OJEU, $\mathbf{X}$ is a column vector of contract-specific variables to control for size, sector, etc., α and γ are parameters to be estimated, and ε is an error term. Regression methods can be used to obtain estimates of the parameters (α for the constant term, and γ for the parameters associated to the variable $\mathbf{X}$) to be able to understand the influence of variables on the final prices of the winning bids.

One problem with such an approach is that estimates would probably give a misleading result due to the huge disparity in the values of y. In such case, the estimate of the parameters will not be showing the effects of the Directive on the bids but would instead be picking up the variation accrued due to the different sizes of the bids. One possible solution would be to use the dependent variable as a percentage such that all observations are expressed on a similar scale.[30] The obvious and appealing transformation would be to relate the dependent variable to the initial budget estimate, this is, the maximum threshold usually provided by awarding authorities as a reference in each contract. The equation would be explaining the difference (or "savings") between initial budget estimate and the total final value of published contracts. We would use TED dataset for this analysis. Because of the number of variables and noise in the data being analysed it seems reasonable to limit the approach to a "treatment" and "control" group, as is done for the previous indicators (defining as "treatment" those CAEs that have received corrective measures in the past).

Again this method is very much dependent on data availability.

3.4.4 Models for estimating the additional costs

Business and industry are subject to a range of different requirements and obligations imposed by government regulation. Whether related to processes for obtaining legal approval (in the form of licenses or permits) or imposing expenses or administrative regulatory requirements, they all translate into additional costs of running a business. Because these are typically non-monetary costs, their measurement is a challenging matter.

Our approach for measuring the additional costs (Q7) follows the general approach from the Doing Business index and the Standard Cost Model, the most commonly used methodologies for estimating the costs of regulation.

The costs related to the regulation of entry are typically estimated following the guidelines established by the Doing Business project (a Joint publication and project by the World Bank and the IFC) which follows the methodology in Djankov, La Porta, Lopez-de-Silanes and Shleifer (2002).[31] This methodology identifies first all the procedures officially required (or needed in practice) for an entrepreneur to start up

[30] This is akin to the problem of spurious regressions commonly encountered in time series when both endogenous and exogenous variables are trended. The solution in the case of spurious regressions is to estimate equations in time differences (i.e. increments with respect to the previous period).

[31] Djankov, La Porta, Lopez-de-Silanes and Shleifer 'The Regulation of Entry' *Quarterly Journal of Economics*, Vol CXVII Issue 1, February 2002.

and formally operate an industrial or commercial business.[32] After the detailed list of procedures is obtained, the time and official expenses to comply with each procedure is recorded.[33] A full cost measure is then constructed by adding up all the official expenses and an estimate of the value of entrepreneur's time (valuing his time at the country's per capita income per working day).

The Standard Cost Model (SCM) is a widely used method for determining the administrative burdens for businesses imposed by regulation.[34] This is measured as the time and resource consumption that the businesses require to comply with a given regulatory requirement. The principles are the same as the Doing Business indicators, and involve identifying first the administrative activities to be performed by businesses in order to respond to the regulatory obligations. The administrative burdens are then calculated multiplying the time required to fulfil each activity by a tariff and adding any other types of costs (outsourcing, equipment or supplies' costs, etc.). The use of the tariff is one aspect that differs from the Doing Business indicators. In the SCM there are two types of tariffs: internal and external. The internal tariff is the hourly rate of the persons in the business who deals with the information obligation[35]. The external tariff is made up of the costs of contracting out (accountants, legal workers, …) using a national average salary (excluding the taxes and social insurance premiums). Internal and external tariffs are estimated using hourly wages from the harmonized ISCO tariff covering all 27 member states.

Our methodology for estimating the additional costs of the Directive follows the principles of these two approaches by establishing:

- The various components of implementing and using the Directive.
- The time each component requires to implement.
- The relevant labour cost associated with each component.[36]

The costs of the Directive need to include all direct costs of implementation, but also the indirect costs arising from the delay of a project as a result of a review procedure being carried out on the contract in question.

We have accounted for the different components of implementing and using the Directive for CAEs, suppliers (including winning bidders and complainants), review bodies and the public in general, as we explain in the next paragraphs. For each cost

[32] These include obtaining all necessary licenses and permits and completing any required notifications, verifications or inscriptions for the company and employees with relevant authorities.

[33] Time is recorded in calendar days using official figures or median duration indicated by specialised lawyers. Official expenses include fees, costs of procedures and forms, photocopies, stamps, legal charges, etc.

[34] For example, see the European Commission Standard Cost Model http://ec.europa.eu/smart-regulation/refit/admin_burden/scm_en.htm.

[35] It and covers the gross wage (calculated as the mean statistical wage) the wage costs (include costs of holiday allowances, employer's insurance premiums and sometimes the 'thirteenth month' allowance) and material and overhead costs (any materials purchased in order to satisfy the administrative obligations). Material and overhead costs are typically estimated using a mark-up percentage (25-30%) on the internal tariff of the gross wage costs.

[36] We draw on Eurostat sources for labour costs to complement the labour cost information gathered through the survey. This was the approach used in a recent study on the costs of public procurement in Europe (DG MARKT, 2001, study commissioned to PricewaterhouseCoopers, London Economics, and Ecorys).

component we have estimated the costs, in full-time equivalent days (and, where possible, for different staff levels) using the responses from our survey exercise. Using hourly wage data from Eurostat, we convert the number of days for junior and senior levels of staff into monetary value by multiplying the days by the corresponding indicative wages.[37]

Suppliers

Suppliers would incur costs if they either seek a remedies action (where they would be the 'complainants') or when they are the proposed winning bidder of a contract which is subject to remedies action (this is, a complaint is being launched against a contract awarded to them).

The main costs to the complainant would be the costs of litigation which could comprise of opportunity costs of internal resources dedicated to preparing the case, and external costs of legal advice, representation and any court fee. This complaint process could be lengthy and costly to the complainant but its costs may be partially or fully offset by the benefits of the Directive if the challenge is successful. Suppliers would also incur costs in understanding the Directive regulation (where this is not carried out for them by legal advisers). These costs to complainants are gathered through our suppliers' survey; the questions gather information on the relevant activities as well as the grade of employee for internal resources (e.g. junior or senior) and any external costs.

The costs to the proposed winning bidder could again entail both direct and indirect costs. The firm might find it necessary to prepare for the case, incurring direct costs of preparation, or seeking legal advice and representation in court. In case of delay of the contract (i.e. a standstill period or automatic suspension), the winning bidder could incur opportunity indirect costs from delayed profits or from needing to keep the required resources for the project available and not employed in other profitable activity. Costs to proposed winning bidders are gathered in our suppliers' survey.

CAEs

The costs of complying for CAEs include the one-off costs relating to implementing revised rules (including understanding the requirements of the remedies regulation, seeking legal advice, training staff, and setting up new administrative systems and IT development costs) and also on-going costs (such as regularly training staff, maintaining systems or responding to challenges and reviews brought by suppliers); all of which have been included in the questionnaire.

But CAEs will also incur costs if remedies actions are brought against them in the form of litigation costs and administrative burdens (internal resources dedicated to the case preparation and external costs for legal advice, representation and a court fee), or any

[37] We used hourly wages of managers and clerical support workers reported in Eurostat as the indicative estimates for senior and junior staff salary levels in each Member States. Two sets of wage information were used to represent the market rates in: the private and public sectors. There were missing values in the public sector for some Member States and they have been imputed using the private-public sector ratio of the average wage rate in the same country or a comparator country. The updated works include: Belgium: wages for senior and junior staff have been computed using the private-public wage ratio of Netherlands. Bulgaria: the estimate for junior staff has been computed using the private-public wage ratio of Bulgaria. Italy, Luxembourg and Austria: all wages were estimated with reference to the private-public wage ratio of Germany. Malta: both the senior and junior wage rates were calculated as the average rate of the remaining EU 10 new Member States. Portugal: the wages of senior and junior staff were estimated using Spain as the comparator country.

financial penalties if the authority incurred in breach of procurement laws. In addition, indirect costs may occur in the form of delays to the start of contracts resulting from actions taken under the Directive, these may derive from productive activities forced into suspension because of the delay (regardless of whether the Directive action is upheld or not) and from starting the tender processes again (if contracts were declared as ineffective).

Independent review authorities

Independent review authorities will also incur in costs of operation (one-off and on-going) in a similar fashion as CAEs (the costs of review authorities are not included in our analysis due to the low response rate in the survey for review authorities).

Society and the general public

The delay in services provision or projects not being realised at the original time planned may cause indirect social loss to the general public due to the delay in the commencement of the contract. These costs depend on the scale and nature of the project or service, as well as on the length of time of the delay. It is possible that societal costs from such delays could be significant. There is no evidence explicitly relating to costs from procurement delays associated with issues relevant to the Directive. However, other examples of the costs of procurement delays caused by other factors illustrate the potential impacts. For example, the National Audit Office in the UK found that delays in the Department for Transport's procurement of trains cost the taxpayer approximately €42 million;[38] and the Supreme Audit Office of the Czech Republic found that procurement delays were in part responsible for the delays in implementation of nation-wide service delivery IT systems.[39] On the other hand, it is also possible that delayed benefits could be offset by the improved efficiency or cost effectiveness of the new contract. Given the case-by-case nature of the potential costs of delayed procurement contracts, and the difficulty in establishing whether the delays were in fact caused by remedies procedures, it is not feasible to quantify such costs in the context of this study.

[38] The delays were not caused by a remedies procedure, but nevertheless illustrate the potential costs of delays to large infrastructure projects. See National Audit Office: 'Procuring New Trains', 9 July 2014 http://www.nao.org.uk/wp-content/uploads/2014/07/Procuring-new-trains.pdf.

[39] See Supreme Audit Office press release 'The SAO audited the national registers system: one register partially inoperative due to late implementation of related projects' 13 January 2014 http://www.nku.cz/en/media/the-sao-audited-the-national-registers-system:-one-register-partially-inoperative-due-to-late-implementation-of-related-projects-id7086/.

4. Data gathering

Several data sources are used to measure cost-effectiveness and test the hypothesis in the evaluation model. This chapter reviews the process used to gather data and discusses the potential biases from each source in relation to:

- Member States' review and remedies systems.
- Collection and analysis of review cases.
- Construction of the dataset for analysis.
- Stakeholder engagement regarding cost and duration of review cases.

This is explained in the following headings. The two last headings of this chapter present an evaluation matrix summarising the data sources used for each indicator evaluated in our analysis; and a summary of the data gathering process. Additional supporting material can be found in the appendices.

4.1 Member States' review and remedies systems

Information on the national review and remedies systems has been provided by the network of legal experts assembled for this study, one for each Member State. Each national expert was asked to complete a country fiche providing information on Member States' review and remedies systems and procedures, including initial information on the availability and accessibility of review cases in each Member State.

Prior to the data collection, the national researchers were provided with a template to complete the country fiche for each of their respective Member States. The template provided guidance text within each section of the country fiche in order to guide national experts in filling out the information for their Member State (the country fiche for the United Kingdom was also provided as an example).

By way of background, national experts were also provided with a copy of the OECD report on "Public Procurement Review and Remedies Systems in the European Union" (2007), and the Comparative Survey on the national public procurement systems across the PPN, December 2010. These provided information on the review and remedies systems and procedures in the Member States, though it was emphasised that in all cases information contained within these reports had to be checked and supplemented with additional data, where appropriate.

Based on the national research, each national expert completed the country fiche, providing an introduction to the legal and institutional framework in each Member State, as well as an overview of the national provisions for review of public contracts within the context of the Directive. This included the following information:

- An introduction and brief overview of national law transposing the two original Remedies Directives.
- An overview of the national law transposing the Directive.
- Preliminary information on the availability and accessibility of case-law.
- A description of the review procedure, including information on the review procedure and eligibility, time limits, standstill period, remedies,

ineffectiveness, time limits for delivering a decision (first instance), rights of appeal, and any instances of gold-plating.[40]

Following completion of the country fiche by the national experts, these were reviewed by the Milieu management team for any inconsistencies or gaps, as well as to check the clarity of the explanations. The country fiche for each Member State can be found in the appendix.

In order to facilitate the comparative analysis of the national review, remedies systems and procedures based on the provisions of Directive 2007/66/EC, each national expert was also asked to complete a simplified questionnaire based on the provisions of their national law transposing Directive 2007/66/EC. The information from the questionnaires and the country fiche has been used to provide an overview across the EU-28 of key items of information, allowing for a comparison of aspects such as the standstill period applied across the EU-28. The analysis of the Member States' review and remedies systems, based on the information collected from the questionnaires and country fiche, is presented in Chapter 5.

4.2 Collection and analysis of review cases

One of the key challenges of the project has been the collection of information on review cases brought before national courts, tribunals or special public procurement boards across the EU-28. One of the findings of our work has been that the availability of this information in the public domain varies considerably from country to country, both in terms of the number of review cases and in the organisation and presentation of the information.

In the preliminary research for a sub-sample of cases, we observed that the organisation of the information differs significantly across Member States. In some countries a search function is available which allows delimiting the outcome of the search (narrowing the results by year or type of complaint). In some other cases (especially where a specialised body is in charge) the information is summarised in some way in the form of a list, where all the cases are displayed in the form of a table. Some Member States provide a link to the decision in the form of text, but in some of these cases there is a preliminary screen where some summary characteristics of the case are shown (such as the date or type of decision).

The presentation of such information is also important in determining the analysis that can be undertaken. In some cases, bits of information can be extracted easily if provided in some form of table. In some other Member States, however, the review of information can only be done after reading the decision in text format. We have focused on three types of information which are required for the analysis: information needed to calculate the *length* of the review procedure in each Member State;

[40] Throughout the report, we refer to gold-plating as the situation where the implementation by Member States goes beyond the minimum necessary to comply with a Directive. This could be by:

- extending the scope, adding in some way to the substantive requirements, or substituting wider national legal terms for those used in the Directive; or
- not taking full advantage of any derogations which keep requirements to a minimum (e.g. for certain scales of operation, or specific activities); or
- retaining pre-existing national standards where they are higher than those required by the Directive; or
- providing sanctions, enforcement mechanisms and matters such as burden of proof which are not aligned with the principles of good regulation; or
- implementing early, before the date given in the Directive.

information needed for understanding the *type* of remedy sought; and, finally, information that allows proper *identification* of the remedy to be able to match each case with the information from TED (e.g. values, sectors, and type of awarding authority, …). In our preliminary research we piloted the feasibility of extracting the data for one Member State only: the UK. The results of the exercise evidenced the difficulties of the gathering of data, as information is often provided in separate files all of which require individual examination to be able to populate the different variables required for the analysis. Given the complexity of the exercise, we concluded that a careful reading of the text of the decisions was required to complete the information on the legal cases (otherwise the analysis risks relying on incomplete information). This was done in agreement with the Commission services. The reasoning for choosing the sample size and the information to be extracted as well as the justification of our approach is discussed in the next two sub-sections.

Sample size

We have examined closely the numbers of complaints lodged in every Member State, the feasibility of extracting the different pieces of data, and their relevance to different parts of the analysis. The number of complaints in each Member State found through the review of case law is presented as part of our analysis in Table 6.1.

To construct our sample, we split Member States into three groups: small, medium and large number of cases. We then created a sample of 30/40/50 cases respectively per year and per instance for each Member State depending on its size group.

The selection process was as follows. We first selected cases from the 3rd instance cases and moved back in time searching for 2nd and 1st instances by tracking back the history of the case. Where there were not enough cases at 3rd instance to make up the sample, we worked back to supplement the numbers with 2nd instance. Table 4.1 and Table 4.2 show the number of sample cases for each Member State.

The size of the sample in many Member States is smaller than the total number of cases per year. There is some potential positive bias in the estimates of length using this selection approach. Because we start at the higher instance, the sample includes the more complex cases (it disproportionately covers those cases that were unsuccessful at 1st instance and continued to a 2nd or 3rd instance). This approach is consistent with the methodology of the Consumer Protection Law Study[41] and the Competition Law Study[42].

Another source of potential bias could come from the inclusion of anomalous or outlier observations: errors in the dates recorded could potentially distort the results. To correct for this our results present a corrected mean-average which is calculated after removing outlying observations (defined as values greater than three times the standard deviation of the values in each Member State). For comparison purposes the results also show the median value in each Member State (because the median is calculated using the list of ordered values it is not affected by the presence of outlier observations and will not give an arbitrarily large result). Both methods provide robust statistics (or not affected by outliers), however, it is possible that the variation and

[41] CSES, Final report, 'Pilot study on the Functioning of the National Judicial Systems for the Application of Consumer Protection Law Rules', 14 March 2014.

[42] ICF GHK/Milieu, "Pilot field study on the functioning of the national judicial systems for the application of competition law rules", Final report, DG Justice under Multiple Framework Contract JUST/2011/EVAL/01.

dispersion of the observations presented (i.e. statistics related to the variance or range) will be inefficient. Although we do not provide statistics of dispersion, this should be taken into account when reading the different graphs presented in the figures of Chapter 6.

Table 4.1: Case law by Member State[43]

Austria	30 per year. Covers decisions at 1st and 2nd instance, as well as decisions on interim measures. Legal Information System of the Republic of Austria - https://www.ris.bka.gv.at/
Belgium	30 per year. Covers decisions at 1st instance only as there is no right of appeal from the Council of State. Council of State - http://www.raadvst-consetat.be/
Bulgaria	40 per year. Covers decisions at 1st instance (Commission on Protection of Competition), 2nd and final instance, as well as decisions on interim measures. Commission on the Protection of Competition - http://reg.cpc.bg/
Croatia	Not covered.
Cyprus	30 per year. Covers decisions at 1st instance, as well as decisions on interim measures in most of those cases. Tenders Review Authority of Cyprus - http://www.tra.gov.cy/
Czech Republic	30 per year. Covers decisions at 1st, 2nd and 3rd instance, as well as decisions on interim measures in a number of cases. Office for the Protection of Competition - http://www.uohs.cz/cs/uvodni-stranka.html
Denmark	30 per year. Covers decisions at 1st, 2nd and 3rd instance, as well as decisions on interim measures. Complaints Board for Public Procurement - http://www.klfu.dk/sw21702.asp
Estonia	30 per year. Covers decisions at 1st, 2nd and 3rd instance. No information was available for decisions on interim measures. Public Procurement Review Committee - https://riigihanked.riik.ee/register/
Finland	40 per year. Covers decisions at 1st and 2nd instance. Only a small number of these included a decision on interim measures. Finlex Database - http://finlex.fi/fi/oikeus
France	Data on the overall numbers of decisions in France is not available. The transposing provisions only apply to proceedings which concerned an invitation to tender issued after 1 December 2009. There are no cases to report in either the Administrative or the Judicial branch for the period 1 to 31 December 2009. Of the published cases, a sample of 6, 16 and 18 decisions was all that could be found for 2010, 2011 and 2012, respectively. In many cases, the date of application at 1st instance is not available. Legifrance - http://www.legifrance.gouv.fr/
Germany	40 per year. Covers decisions at 1st, 2nd and 3rd instance. No information was available for decisions on interim measures. VERIS database (requires subscription) - www.vergabedatenbank.de
Greece	30 per year. Covers decisions at 1st instance (there are no 2nd or 3rd instance decisions), as well as decisions on interim measures in most of those cases. Most cases are resolved already at the stage of deciding on interim measures. In considering an application for interim measures, the Court takes into account the proposals of the applicant, and may impose any measures it considers suitable and effective for each case. Thus, in a case concerning exclusion of the applicant from the tendering procedure, the Court may not order a standstill period until the judgment on the main application is delivered, but can order the CAE to continue the procedure with the participation of the excluded applicant. Thus, in a number of cases, the decision on interim measures resembles a decision on the main application and in cases where the CAE complies with the ruling, it resolves the dispute already at this early stage. The overall number of decisions per year (interim measures and 1st instance) is not available since there is no authority registering this information at a central level. The decisions are spread across 9 regional Administrative Courts of Appeal and the Council of State. The only way to find information on the exact number of relevant cases would be by reviewing in person the paper archives of each Secretariat. Decisions of 9 Administrative Court of Appeals and Council of State searched using legal databases and

[43] In most Member States, the main source of data for case law has been the first instance review body for which the name of organisation and URL is provided below. However, for data on decisions at higher instances, or in those Member States which do not have a specialised review body, other sources have also been used to access the relevant decisions such as websites of the national judiciary and legal databases, some of which are only accessible by way of subscription.

	search-engines.
Hungary	40 per year. Covers decisions at 1st, 2nd and 3rd instance. Only a small number of these included a decision on interim measures. Public Procurement Arbitration Board - http://www.kozbeszerzes.hu/jogorvoslat/hatarozatok-listaja/
Ireland	The Court Services confirmed that there had been a total of 21 cases in the years 2009 to 2012 regarding breach of procedures under the European Communities' (Award of Public Authorities Contracts) Regulations 2006, with 1, 1, 11 and 8 in each of the years, respectively. However, the decisions in only 7 of these cases are publicly available so the sample covers 4 cases in 2011 and 3 in 2012. Court Service of Ireland - www.courts.ie, and other databases
Italy	30 per year. Covers decisions at 1st and 2nd instance, as well as decisions on interim measures in a number of cases. Administrative Courts portal http://www.giustizia-amministrativa.it/ Observatory of Public Contracts - http://www.avcp.it/portal/public/classic/
Latvia	40 per year. Covers decisions at 1st, 2nd and 3rd instance. Information on decisions on interim measures is only available for a few cases in 2011 and one in 2012. Complaints Review Commission - http://www.iub.gov.lv/iubsearch/pt/complaint/
Lithuania	30 per year. Covers decisions at 1st, 2nd and 3rd instance. No information was available on decisions on interim measures. Regional courts' portal LITEKO - http://liteko.teismai.lt INFOLEX database – www.infolex.lt
Luxembourg	The annual reports of the administrative courts, which contain statistics on public procurement cases show that there were 4, 4, 4 and 2 decisions at 2nd instance before the Administrative Court of Appeal in 2009, 2010, 2011 and 2012 respectively. Data is not available on the overall number of decisions at 1st instance in Luxembourg. While approximately 266 entries for public procurement were identified on the website of the courts and tribunals of Luxembourg, many of these relate to the same case at different instances and in many cases all the relevant data were erased or only a decision on interim measures was available. Of the published cases, 54 cases that were relevant to the study, giving a sample of 13, 15, 12 and 14 cases for 2009, 2010, 2011 and 2012 respectively, which in some cases include decisions at interim, 1st instance and 2nd instance. Courts and tribunals of Luxembourg - http://www.justice.public.lu/fr/jurisprudence/

Table 4.2: Case law by Member State (continuation)

Malta	30 per year (2011 and 2012). Covers decisions at 1st instance (Public Contracts Review Board). No information was available for decisions on interim measures. Case statistics of the Public Contracts Review Board show that there were 5, 83 and 152 decisions in 2010, 2011 and 2012, respectively. The 5 decisions in 2009 concerned below-threshold contracts and therefore are not included. Public Contracts Review Board – individual decisions requested directly from the Department of Contracts as not yet published on their website.
Netherlands	30 per year. Primarily covers decisions at 1st instance, and a few cases in which these decisions have been appealed to 2nd or 3rd instance. No information was available on decisions on interim measures since any request for interim measures is made as part of the summary proceedings challenging the preliminary contract award decision, i.e. the 1st instance case. Within the sample there are cases where the date of application at 1st, 2nd and 3rd instance is not provided. A decision at 1st instance can be appealed within 4 weeks. A decision at 2nd instance can be appealed within 3 months of the decision at 2nd instance. The estimated date of application at 2nd instance has therefore been calculated as 28 days from the date of decision at 1st instance, while the date of application at 3rd instance has been calculated as 90 days from the date of the decision at 2nd instance. Website of the Netherlands Judiciary - http://uitspraken.rechtspraak.nl PIANOo – information centre on public procurement - http://www.pianoo.nl/actueel/actuele-uitspraken-ibr
Poland	50 per year. However, for 2012 a sample of 25 cases is provided since the database only covers the first 3 months of 2012, as there are no decisions uploaded yet for April to December 2012. The sample selected covers decisions at 1st instance only, and two cases in 2012 at 2nd and 3rd instance respectively. No information was available on decisions on interim measures. The sample could not be selected from the highest instance, 3rd instance, since details of the case name and number are required in order to search decisions at the higher instances. A list of those cases that had been appealed to 2nd or 3rd instance was requested from the national authorities, in order that the search could be made from the highest instance. However, due to overall number of cases in Poland, and the time it would take to produce such a list, the national review authority indicated that it would only be able to provide this information by the end of December. As a result the case sample has been selected from 1st instance decisions. From the sample selected, information on appeal to the higher instance was only available for two cases in 2012. It has not been possible to check whether an appeal was made against the 1st instance decisions in the remaining cases. Public Procurement Office - http://www.uzp.gov.pl/cmsws/page/KioOrzeczenia.aspx
Portugal	Data on the overall numbers of decisions in Portugal is not available. The authorities have confirmed that they have no information on the total number of cases. Of the published cases, a sample of 16, 18, 30 and 22 decisions could be found for 2009, 2010, 2011 and 2012 respectively. There are numerous data gaps since 1st instance decisions are not published so where possible information has been extracted from the higher instance decisions. Also, in many cases, the date of application and decision is not available, and without the date of decision at 1st instance, an estimation of the date of application at 2nd instance cannot be made. Institute of Financial Management and Equipment of Justice database (decisions of Supreme Administrative Court and three Central Administrative Courts) - http://www.dgsi.pt/jtca.nsf/
Romania	30 per year. Covers decisions at 1st and 2nd instance, and one case in 2009 at 3rd instance. No information was available for decisions on interim measures. National Council for Solving Complaints - http://www.cnsc.ro/en/decisions/
Slovakia	30 per year. Covers decisions at 1st, 2nd and 3rd instance. No information was available for decisions on interim measures. Office for Public Procurement - https://www.uvo.gov.sk/informovanie-o-namietkach
Slovenia	30 per year. Covers decisions at 1st and 2nd instance. Information for decisions on interim measures was only available in 4 of these cases. National Review Commission - http://www.dkom.si/odlocitve_DKOM/2011/
Spain	Decisions were selected from the 3rd and highest instance, the Supreme Court. In Spain there are two main databases, the Spanish jurisprudence database (CENDOJ) and the database of the Special Court for Public Contracts. However, in order to search in these databases, the details of the individual decisions, i.e., a specific reference number is required. A search was made therefore using information on the jurisprudence of the Supreme Court which is compiled in a report by the Administrative Chamber of the Supreme Court, covering the years 2009-2013. Within this, 46 decisions were found covering the years 2009-2012. Of these, 37 were relevant to the study, and therefore a sample of 3, 1, 19 and 14 decisions could be found for 2009, 2010, 2011 and 2012, respectively. The review of these cases, provided the reference number in order to search the decisions in these cases at 2nd instance (either the Audiencia Nacional (National Appeal Court) where the State Administration is the CAE, or the Tribunales Superiores de Justicia (Appeals Court) where the CAE is an Autonomous

	Region). There are numerous data gaps since, in some cases, 1st instance decisions are not published but resolved within the Administration, so, where possible, information has been extracted from the 2nd or 3rd instance decisions. As a result, in some cases, the date of application or decision is not available at 1st instance. No information was available for decisions on interim measures in these cases. Central Administrative Court for Contractual Review procedures - www.minhap.gob.es
Sweden	50 per year. Covers decisions at 1st, 2nd and 3rd instance. No information was available for decisions on interim measures. Swedish Competition Authority - http://www.kkv.se
United Kingdom	Data on the overall numbers of decisions in the United Kingdom is not available. The authorities have confirmed that they have no information on the total number of cases. Of the published cases, a sample of 5, 13, 16, and 13 decisions could be found for 2009, 2010, 2011 and 2012 respectively. Westlaw (requires subscription) – http://legal research.westlaw.co.uk BAILII - http://www.bailii.org/ew/cases/EWHC/TCC/

The legal experts were asked to extract the relevant information by filling the following table for each reviewed decision.

Table 4.3: Decision data extraction fiche

Identification of contract - CAE: - Dates notice: - Deadlines: - Description: - OJEU reference number: - Lot in complaint:
Identification of case - Number: - Case name:
Third Instance complaint - Date of application: - Remedy sought*: - Date decision: - Decision:
Second Instance complaint - Date of application: - Remedy sought*: - Date decision: - Decision:
First Instance complaint - Date of application: - Remedy sought*: - Date decision: - Decision:
Interim measures - Date of application: - Date decision: - Decision: - Appeal (yes/no): - Date of application for appeal: - Date of decision on appeal:

Note: * Responses aggregated into three main categories: “Removal of discriminatory specifications”; “Set aside of contract award decision”; “Damages”. Length of the decision is constructed using the difference between dates of application and decision.

4.3 Construction of the dataset of analysis

The dataset of analysis was constructed in a way to be able to clearly differentiate between the contracts which had an initial complaint and those which did not (what have called before the "treatment" and "control" groups). The characteristics of such contracts were sourced from TED (Tenders Electronic Daily, the online version of the 'Supplement to the Official Journal of the EU, dedicated to European public procurement).

Because all OJEU notices (including prior information notices, contract notices and contract award notices) are available in TED, the treatment group is by definition a subset of all contracts in TED. The difficulty is how to identify those that received a complaint. In our revision of case law we have seen that the legal text often mentions some information about the contract which is subject to the complaint. This may include the deadline of the tender, a description verbatim of the object of the contract or the name of the authority tendering the contract. All this information is presented in different formats and is often incomplete so it is not possible to use it as an identifier in TED. In a few Member States, however, the legal text makes a reference to the OJEU number. The OJEU number is a unique identifier of the notices published in TED, such as 2010/S 166-255076 or 2011/S 153-254884. In cases where this is available it provides a way to link each judicial case with the notice provided in TED, and hence identify the observations from the treatment group in TED (so that they can be associated with other characteristics of the contract and tender). All remaining notices are then identified as the control group.[44]

The search on the available on-line databases of case law review showed a huge disparity in the reporting practices. We observed that in some cases the contract is only referred to as a description in the text and in others it is provided in the form of pdf documents. In three Member States (Czech Republic, Slovenia and Slovakia) the documents are provided in an HTML page with reference to the OJEU number. In Denmark there are a few number of cases so extraction of the cases could be done manually. These four Member States were selected as a basis of our analysis. Details on the data extraction process are provided in the appendices.

4.4 Stakeholder engagement

A range of different stakeholders have been surveyed to gather their views in relation to the relevance of the Directive, their perception of transparency and openness, and the costs incurred as a result of the Directive and/or using the review and remedies procedures.

Suppliers and CAEs were surveyed using a 'short form questionnaire'. A wide range of organisations across the EU28 were invited to complete the questionnaire which was available through online survey software. A smaller sample of legal practitioners across the EU28 was also surveyed in more depth using a 'long form survey', which took the form of structured interviews.

[44] One problem with the construction of the dataset is that the treatment and control groups should be mutually exclusive sets (all observations in the dataset should be in either one of the two groups). This means that in order to avoid duplications, the exercise requires the identification of the entire population of observations in the treatment group (i.e. it requires identifying all contracts having received complaints).

4.4.1 Short form questionnaire: suppliers and CAEs

We developed separate questionnaires for suppliers and CAEs[45]. The questionnaires were used to obtain answers to indicators on relevance, costs of review, and perceptions of transparency, fairness, and openness. In order to ensure the consistency of the responses and to maximise the response rate we used, wherever possible, 'closed' questions with options for respondents to choose from.

Both questionnaires followed a similar structure and included: an introduction to the study and background to the Directive to ensure all respondents were familiar with the relevant provisions; profiling questions (size, sector, Member State and involvement in public procurement or reviews); qualitative questions (on the perceptions of relevance and impacts of the Directive); quantitative questions on costs (for complying with the Directive requirements). Details on the survey exercise are provided in the appendices.

4.4.2 Long-form survey to legal practitioners

Legal practitioners involved in bringing actions under the Directive are well-placed to provide information and insights on the costs, impacts and outcomes of such action. We gathered information for the indicators of relevance, transparency and openness, and total costs of bringing forward review cases through a long-form survey administered by our national experts.

The sample consisted of five legal practitioners in most Member States. Respondents were identified by the national experts from those law firms and companies that had been involved in review cases in their Member State. The survey was complemented by email and supported by telephone discussions to explore questions in more depth, where relevant and appropriate.

4.4.3 Representativeness of the samples

A total of 616 and 832 responses were collected from the surveys to suppliers and CAEs, respectively. The responses cover all major EU countries (with around 50 respondents or more, Table 4.4). However, there are some countries from which we obtained few or no responses (Latvia, Luxembourg and Croatia). A total of 112 responses from legal practitioners were received across all Member States except Poland and Portugal.

[45] We also surveyed review bodies but received only four responses. The results are not included in the study.

Table 4.4 Distribution of responses (number) by Member States

	MS	Count	MS	Count	MS	Count	MS	Count
Suppliers	AT	25	EE	42	IE	10	PL	15
	BE	21	EL	18	IT	25	PT	12
	BG	19	ES	36	LT	13	RO	26
	CY	15	FI	13	LU	0	SE	29
	CZ	12	FR	49	LV	2	SI	3
	DE	72	HR	0	MT	8	SK	7
	DK	34	HU	22	NL	33	UK	55
CAEs	AT	23	EE	0	IE	14	PL	21
	BE	56	EL	12	IT	48	PT	12
	BG	5	ES	58	LT	8	RO	11
	CY	5	FI	24	LU	2	SE	134
	CZ	13	FR	70	LV	2	SI	19
	DE	86	HR	0	MT	4	SK	11
	DK	85	HU	6	NL	48	UK	55
Legal Practitioners	AT	5	EE	5	IE	5	PL	0
	BE	3	EL	4	IT	3	PT	0
	BG	5	ES	3	LT	5	RO	6
	CY	5	FI	5	LU	5	SE	4
	CZ	5	FR	1	LV	5	SI	3
	DE	3	HR	5	MT	4	SK	2
	DK	5	HU	5	NL	5	UK	6

Source: Surveys of suppliers, CAEs and legal practitioners. No responses to the legal practitioner long-form survey were received in Poland and Portugal, despite the best efforts to encourage legal practitioners to participate.

The table above shows that the survey responses represent mainly the large Member States (which is to be expected as this reflects the likely distribution of entities across the EU), as well as the Western and Nordic Member States. Eastern and smaller Member States are less well represented. Whilst this may well reflect the distribution of entities, our results should nevertheless be viewed with this in mind. It is not clear whether particular biases might be introduced by this representation (e.g. if entities in large Member States might be more/less likely have a positive view of the Directive). Where possible we break our analysis down by Member State to identify any notable differences in perceptions.

Despite the fact that stakeholders from all sectors were given the opportunity to contribute to the survey, the sector coverage of responses is variable: in the suppliers survey, four sectors alone accounted for the majority of all respondents (professional support services, wholesale and retail trade, construction and information and communication), with the rest of the sectors representing less than 5% of all responses. On the other hand, the general public services, as well as health and education, are among the highest represented sectors for CAEs (Table 4.5).

Table 4.5 Distribution of responses by sector

Suppliers		CAEs	
Administrative support services	25	Economic and financial affairs	41
Capital and consumer goods	19	Education	93
Construction	88	Environment	60
Financial and related services	11	General public services	357
Information and communication	84	Health	106
Other	125	Housing and community amenities	65
Professional support services	305	Other	181
Transportation and storage	28	Public order and safety	43
Water, sewerage, waste	18	Recreation, culture and religion	35
Wholesale and retail trade	132	Social Protection	35

Source: Surveys of suppliers and CAEs.

Note: the distribution shown is based on multiple choices question in which respondents can select more than one sector that represents them. The total number of choices selected for suppliers and CAEs is 835 and 1,016, respectively. However, these figures do not represent the total number of individual respondents since one respondent can select more than one choice of sector.

Interestingly, the majority of the suppliers that responded to our survey are SMEs with less than 250 employees (464 or 75%) and annual turnover of €5 million or less (311 or 50%, Table 4.6).[46] We believe that the responses would therefore capture well the perceptions of SMEs and they would be particularly relevant in identifying any market problems that hamper the development of SMEs in the procurement market. On the other hand, the size dispersion of the CAEs is more uniform, both in terms of employees and annual procurement value.

Table 4.6 Distribution of responses by different economic characteristics

Number of employees			Size*		
	Supplier	CAEs		Supplier	CAEs
Less than 10	165	33	Less than €500,000	107	72
11 – 50	168	75	€500,000 - €1m	66	91
51 – 250	131	209	€1m - €5m	138	160
251 – 500	48	116	€5m - €10m	64	122
501 – 1000	33	98	More than €10m	232	334
More than 1000	69	300	Do not know	9	53
Do not know	2	1			

Note: * refers to annual revenues (suppliers) and annual procurement value (CAEs).

Source: Surveys of suppliers and CAEs.

The survey responses reflect the opinions of market participants in most of the EU 28 countries, although some countries received very few number of responses. They also

[46] As defined by the European Commission, an SME is a company with less than 250 employees and with either total turnover of less than or equal to €50 million or total balance sheet of no more than €43 million.

reflect the views from a broad range of sectors, where both large and small SMEs and large CAEs are represented.

We note, however, that the size of the sample is relatively small, representing around 1% of the target population for both CAEs and suppliers. The difficulty in the collection of information has been driven by a combination of factors, including: 1) the lack of a centralised database of the organisations that have been involved in a review process;[47] and 2) a reluctance on the part of organisations to invest time in survey activity.[48]

In designing the surveys we considered the possibility of potential self-selection biases which may affect the results obtained from the surveys, although we cannot be sure of the relative strength of any bias. It is possible that the suppliers and CAEs most likely to respond to the questionnaire are those with problems or issues with the Directive, to whom the questionnaire presented the opportunity to influence policy-making. Therefore our results may experience some negative selection bias and may not be representative of the views of all suppliers and CAEs involved in public procurement. We have addressed this unavoidable potential bias by including in our overall evaluation the analysis of data collected from unbiased sources (e.g. data on procurement outcomes).

We also considered a potential positive bias arising from the sampling approach described in section 4.4.1 above. Given that the greater volume of email addresses are obtained from the TED database, it is possible that the responses are skewed towards those suppliers which are recorded as winners in TED. This in turn may give rise to a 'positive' bias in the results in relation to perceptions of the Directive, as TED records *successfully awarded* contracts and it is possible that the associated suppliers may be more positive overall about procurement procedures, including the Directive, than those not included in TED. However, we believe that suppliers may have also been unsuccessful in occasions (it is unlikely that suppliers win all their OJEU tenders), and hence we expect the size of this bias small.

Other potential biases are also possible. For example, one might expect CAEs to have a more negative view of the Directive than suppliers if they are often subject to nuisance complaints, of if they have expended significant time and cost in implementing the Directive provisions. Alternatively, suppliers may be more negative about the Directive if they feel that the provisions have not gone far enough in correcting perceived problems in the procurement market. It is likely that different firms and organisations will have different incentives in responding to our questionnaire based on a number of specific factors (such as past success in procurement or experience with the Directive) and it is difficult to identify a clear 'direction' of likely bias for either group of respondents. To mitigate these effects, the questionnaires were designed to reduce as much as possible the opportunities for respondents to 'game' their answers. For example, many questions were not obviously set out to gather opinions on aspects of the Directive, but rather asked a more general question about procurement and included possible options which would allow us to

[47] The target population was based on the addresses of winners of the contracts, which in some cases contained mistakes or referred to addresses which were no longer used.

[48] The lack of response to questions related to the operation of the Remedies Directives was also reported in the 2006 Impact Assessment (SEC(2006)557). Only 44 individual economic operators replied to the questionnaire.

interpret the effects of the Directive without explicitly asking this of respondents. Where possible we also asked the same question in different ways so that we did not have to rely on a single question which respondents might easily game. Our mitigating steps imply that the overall impact of potential bias is likely to be small. [49]

In order to mitigate potential bias in the legal practitioners' responses we used a long-form survey which could be delivered as a structured interview by the legal experts. This enabled the experts to probe interviewees in some detail to understand the underlying reasons for their answers and to detect any notable exaggerations etc. We also included largely factual questions about legal costs and processes which are less easily influenced by opinion (although we did ask some opinion-related questions). Despite this, it is possible that there is some bias in the responses from legal practitioners willing to respond to the survey: as these operate within the current legal system they may have an incentive in maintaining the status quo and therefore may be more positive about the Directive than others. It may be also that the respondents derive a greater share of their business revenue from Remedies-related cases which may introduce an upward bias to the cost estimates (i.e. if their fees are relatively higher). To correct for this we undertook a careful analysis of the answers provided and corrected or excluded observations that were extraneous in relation to other answers provided by the respondents.

Despite these limitations, the evidence base is indicative of the opinions of stakeholders in relation to different evaluation indicators. We have undertaken several measures to correct for response bias and believe this should be small. For consistency, our results have been caveated for potential biases, where relevant.

4.5 Evaluation matrix

Table 4.7 summarises the data sources used for each indicator across the different evaluation dimensions.

[49] We also aimed to minimise the impact of any bias by including cross-checks and comparisons. For example, our analysis of the relevance of the Directive considers both the responses from suppliers and CAEs so that the results would not be dominated by one set of opinions. In cases where results are contradictory this is clearly stated, in cases where there are different perceptions provided the results are shown comparing ranges of values.

Table 4.7: Evaluation matrix – themes, indicators and sources of information

Relevance	R.1	Perception of relevance	QA, QS, QP
	R.2	Main reasons why the Directive is still relevant/ no longer relevant	QA, QS, QP
Take-up	T.1	Scope and availability of review	LR
	T.2	Time limits for review	LR
	T.3	Body in charge of the review	LR
	T.4	Remedies	LR
	T.5	Ineffectiveness	LR
	T.6	Length of review procedure	LR
	T.7	Review application fee	LR
	T.8	VEAT notice	LR
Usage	U.1	Indicators of usage	
		Number of complaints	LCD
		Number of decisions	LCD
		Number of appeals	LCD
		Estimated length of the complaints	CLR, A
	U.2	Remedies being used	CLR, A
	U.3	Perceptions by respondents (different aspects of the Directive)	QA, QS, QP
	U.4	Usage of the VEAT notice	TED
Factors affecting usage	F.1	Indicators on factors affecting usage	MD, A
	F.2	Indicators on factors affecting probability of usage	MD, EM
Transparency, Openness Effectiveness. and VfM	T.1	Perceptions of transparency/fairness/openness/effectiveness	QA, QS, QP
	V.1	Value for money	MD, EM
Non-compliant behaviour	D.1	Difference in savings as a result of past complaints	MD, EM
	D.2	Difference in probability of receiving a complaint	MD, EM
Additional costs	C.1	Net costs incurred to the complainant	QA, QS, QP
	C.2	Net costs incurred to the authorities	QA, QS, QP
	C.3	Net Costs incurred to a company as a result of third party challenge	QA, QS, QP
Efficiency	E.1	Cost-benefit analysis	MD, EM
	E.2	Costly impediments	QA, QS, QP, LCD, CLR, A
	E.3	Unused provisions	QA, QS
Impact on stakeholders		Differential impact on stakeholders (analysis)	QA, QS, LR
Overall benefits		Overall benefits (analysis)	A

Note: QA – Questionnaire to CAEs, QS – Questionnaire to suppliers, QP – Questionnaire to Law Practitioners, LR – Legal review, LCD – Legal Cases Databases, CLR – Case law review, TED – Tenders Electronic Daily database, MD – Merged Dataset (Case law extraction + TED), A –Analysis, EM – Econometric modelling.

4.6 Summary of the data gathering: findings and problems encountered

The research has yielded some interesting findings and indicated some potential problems, which we summarise below.

The review of remedies systems across Member States has run smoothly thanks to the network of experts assembled for this study. As this was a research task, not relying on stakeholder opinion or the use of samples, there are unlikely to be notable biases affecting these results.

The analysis of the availability of cases presented difficulties both in terms of the number of available cases and the way the information is presented. Given the difficulties of the exercise, we decided that a careful reading of the text was required to complete the information on the legal cases, which necessitated the use of a sampling approach. This approach may have introduced an upward bias into our results for the length of review case, as a large proportion of the cases were complex and went beyond the first instance. Another source of bias may be due to errors in the sample: to control for these, the results are provided using robust statistics (mean-corrected and median), however, dispersion statistics are likely to be inefficient and should be interpreted with caution.

A dataset of analysis was constructed to be able to link cases with complaints with details of the contracts as provided in the OJEU notices. Given the differences in the presentation of the information, we have extracted the relevant data for four Member States: Czech Republic, Denmark, Slovenia, and Slovakia.

The responses to the surveys of suppliers and CAEs have been fewer than desired, but are of sufficient number to enable us to draw conclusions. There are a number of potential sampling and self-selection biases which might have influenced the responses to all surveys (including the legal practitioners). Our questionnaire design attempted to mitigate these where possible, but our results may still be affected by some biases (although we believe these are small). We discuss these where relevant in the analysis section and caveat the results when required.

5. Review and remedies procedures

This chapter describes the review and remedies systems and procedures as set out in the national laws of the different Member States, transposing the Remedies Directives as amended by the Directive. It provides an overview of the functioning of justice systems in all jurisdictions in respect of public procurement cases, taking into account the different national legal provisions. The objective of the chapter is to provide reliable and comparable data which help understanding the differences in the provisions in the Member States.

The approach in this chapter uses a "Remedies Scoreboard" which provides comparable data on the key components envisaged in the Directive. The results are illustrated with graphs and tables, and follow the list of indicators envisaged for Q2 (transposition).[50] The information summarises the data collected through the research by the network of legal experts.

5.1 Indicators of the Remedies Scoreboard

The Remedies Directives set out the different systems and procedures for decisions taken by the CAEs to be reviewed effectively and, in particular, as rapidly as possible. In a number of instances, the Remedies Directives also set out optional provisions which a Member State may or may not have made use of. Certain aspects of the obligatory provisions of the Remedies Directives may also be less prescriptive in some instances, leaving room for interpretation which may potentially lead to national differences in implementation in the different Member States. Differences in implementation across Member States may therefore stem from the application of national rules of procedural law. For example, in some Member States the length of review procedures may be very long. However, the Remedies Directives provide that decisions taken by the CAEs may be reviewed "as rapidly as possible". Where the national system has a very lengthy review procedure therefore this is as a result of the national conditions/procedures rather than the requirements of the Remedies Directives.

It is also important to be aware of gold-plating[51] by Member States, where national provisions have gone beyond the requirements of the Directive in setting up a review and remedies system and procedure. One example is where a Member State automatically suspends the contract award procedure. The amendments introduced by the Directive do not oblige review bodies to suspend the procedure automatically but instead allow review bodies to weigh up the consequences of their decision and deliver it accordingly. Careful consideration therefore needs to be given to those elements that are directly associated with the Directive and those which stem from the practicalities involved in implementing the Remedies Directives or specific national approaches which go above and beyond the requirements of the Directive.

In the following paragraphs we present the remedies scoreboard separately under the following headings:

[50] Our proposed scoreboard follows the guidelines provided in the invitation to tender of the study and is based on the EU Justice Scoreboard, a tool for assisting the EU and the Member States to achieve more effective justice by providing objective, reliable and comparable data on the functioning of the justice systems of all Member States (http://ec.europa.eu/justice/effective-justice/scoreboard/index_en.htm).

[51] See footnote 40.

- Scope and availability of the review.
- Time limits for review.
- Body in charge of the review.
- Interim measures/suspension.
- Remedies.
- Length of the review procedure.
- Cost of the review procedure.

Each item is described in comparison with the provisions envisaged in the Remedies Directives, as amended, which are also described in the analysis.

5.2 Scope and availability of the review

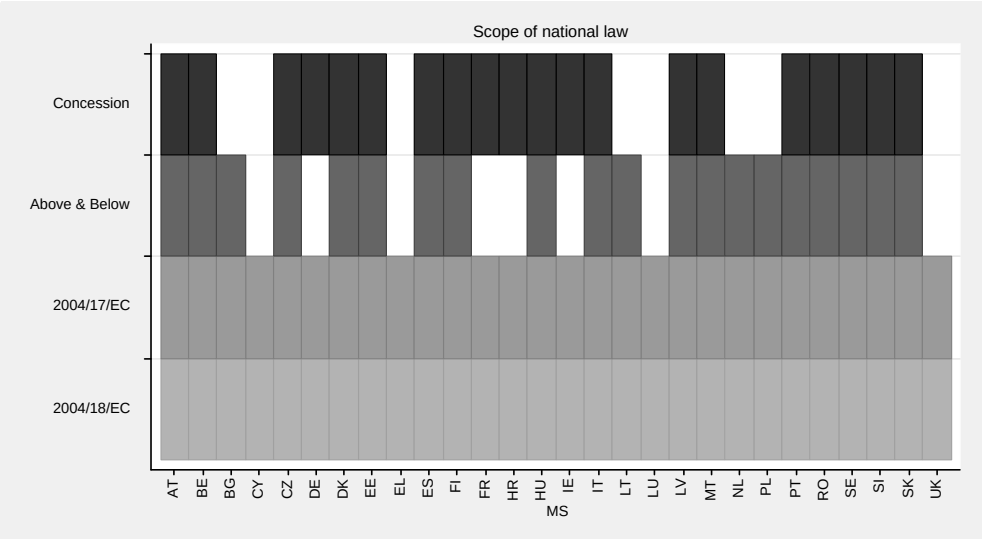
As the Directive amends both the Remedies Directives, the scope of the review procedures is to apply to contracts referred to in both Public Procurement Directives (for the public sector and the utilities sector). While a number of Member States have introduced separate legislation transposing the Public Procurement Directives, the review procedures established cover both types of contracts.

As the review procedures apply to contracts referred to in the Public Procurement Directives, they only apply to the award of contracts whose value equals or exceeds specific thresholds set out in those directives. However, in certain countries, the national provisions also apply to below threshold contracts, thus extending the scope of the Directive provisions: in eight Member States (CY, DE, EL, FR, HR, IE, LU and UK) the review procedures only apply to above-threshold contracts, while the remaining Member States apply these procedures to both above and below-threshold contracts. See Figure 5.1.

Finally, in the majority of Member States, the national law transposing the Directive also applies to concession contracts. Concessions are a form of Public Private Partnerships (PPP) as are partnerships between the public sector and private companies who agree to carry out the development of large public works or provide services of general economic interest, the remuneration for which consists either solely in the right to exploit the works/services that are the subject of the contract or in that right together with payment. It should be noted that concession contracts did not previously fall within the full remit of public procurement legislation as were only partially covered by Directive 2004/18/EC. However, following the introduction of Directive 2014/23/EU on the award of concession contracts[52] in 2014, the Remedies Directives will now also apply to concession contracts.

[52] Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, OJ L 94/1, 28.03.2014.

Figure 5.1: Scope of national law transposing the Directive

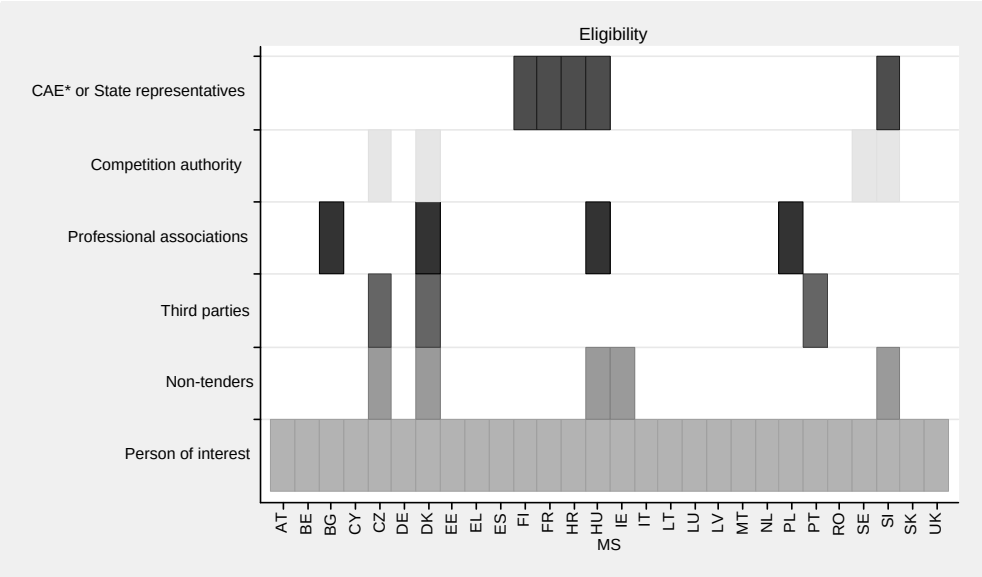


Source: research by network of legal experts, responses to the question "What is the scope of the national law transposing Directive 2007/66/EC?:Contracts referred to in Directive 2004/18/EC; Contracts referred to in Directive 2004/17/EC; Contracts above threshold; Contracts above and below threshold; Concession contracts"

The Remedies Directives require the review procedures to be available "at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement"[53]. All Member States require the review procedure to be available to persons having or having had an interest, and some specifically provide that this includes operators not tendering (in CZ, DK, HU, IE and SI). However, in addition, a number of Member States also provide that other undertakings are eligible to start a review procedure, which includes third parties (CZ, DK and PT). In other jurisdictions this may also include professional associations (BG, DK, HU and PL), the Competition Authority (CZ, DK, SE and SI) or the CAE or other representatives of the State (FR, FI, HR, HU and SI). See Figure 5.2.

[53] Article 1(3) of Directives 89/665/EEC and 92/13/EEC.

Figure 5.2: Eligibility to start a review procedure



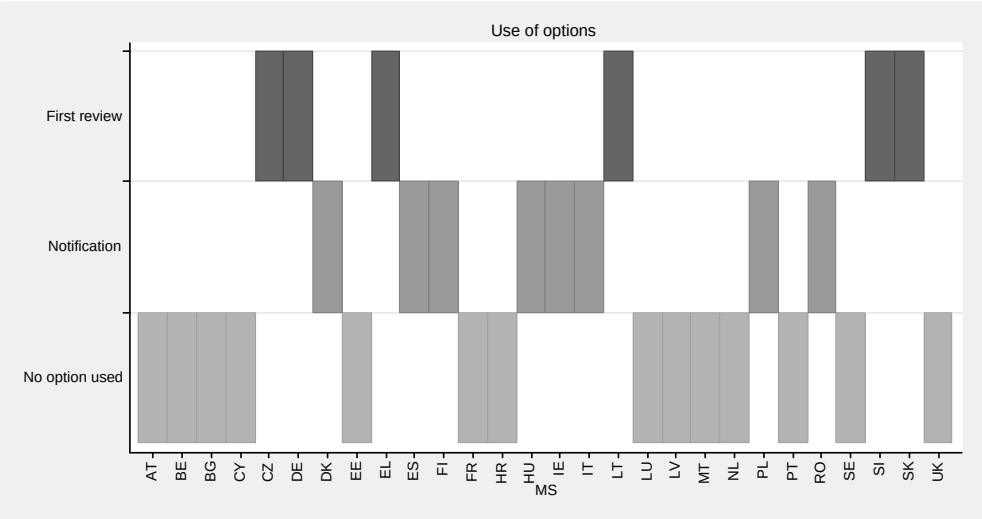
Note: CAE* stands for contracting authority or entity.

Source: research by network of legal experts, responses to the question: "Who is eligible to start a review procedure?: Any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement; Operators not tendering; Third parties; Other". "Other" answers which included open responses of: "CA or State Representatives", "Competition Authority", and "Professional associations".

As noted above, the Remedies Directives set out a number of optional provisions which a Member State may or may not have made use of, two of which concern the availability of the review procedure. Under the Remedies Directives, Member States have the option to require the person wishing to use a review procedure to notify the CAE of the alleged infringement and of their intention to seek review, and/or to first seek review with the CAE[54]. It should be noted that half of the Member States have not made use of either option in the Remedies Directives. Of the remaining Member States, eight countries (DK, ES, FI, HU, IE, IT, PL and RO) have imposed a notification requirement, while six countries (CZ, DE, EL, LT, SK and SI) require that the person concerned first seek review with the CAE. See Figure 5.3.

[54] Articles 1(4) and (5) of Directives 89/665/EEC and 92/13/EEC.

Figure 5.3: Use of notification requirement and first review option



Source: research by network of legal experts, responses to the questions: "Has your country made use of the option set out in the Directive to require the person wishing to use a review procedure to notify the CAE of the alleged infringement and of his intention to seek review?" and "Has your country made use of the option set out in the Directive to require that the person concerned first seek review with the CAE?".

5.3 Time limits for review

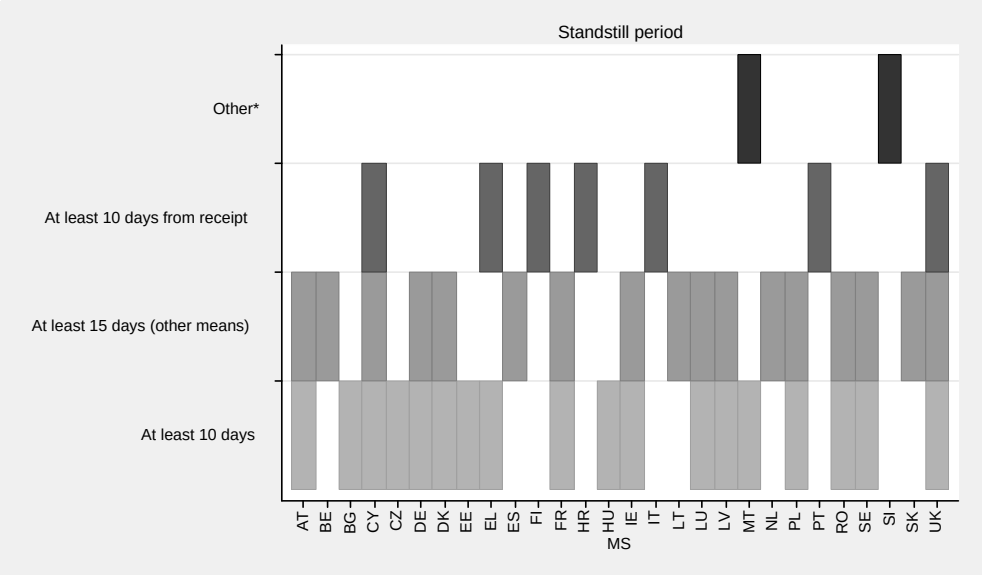
In order to provide sufficient time for effective review of the contract award decisions taken by CAEs, the Remedies Directives make provision for a standstill period. In accordance with Article 2a of the Remedies Directives, a contract may not be concluded following the decision to award a contract before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contract decision is sent to the tenderers and candidates concerned if fax or electronic means are used or 15 calendar days if other means or communication are used, or at least 10 calendar days from the day following the date of the receipt of the contract award decision. Suppliers' and CAEs' perceived relevance of the standstill period is discussed in our analysis chapter in section 6.1.

Almost all Member States apply either one or other of the standstill periods. It should be noted however that in some Member States (AT, CZ, LV), the standstill period starts to run on the date when the contract award decision is sent rather than the day following the date on which the contract award decision is sent, which effectively reduces the standstill period by a day.

In the case of Cyprus and the UK, all three timescales are specified in the legislation according to the different means of communication used. In a number of cases a longer standstill period has been specified. However, the Remedies Directives provide for a minimum standstill period, and given that in most cases the additional period does not appear to be excessive, this is not considered to constitute gold-plating. For example, in Bulgaria and Estonia the standstill period is 14 calendar days from notification of the candidates/participants in the public procurement procedure, while in Ireland it is a minimum of 14 calendar days if sent by fax or electronic means and 16 days if sent by other means. In Finland the standstill period is 10 days from the receipt of the decision only if a dynamic purchasing system is used, with the longer period of 21 days from the receipt of the decision applying in all other cases. The longest standstill period applies in Italy, where a period of 35 days applies from the date of the last communication of the contract award decision.

However, the minimum standstill period set out in the Remedies Directives is not applied in two Member States, which apply shorter timescales. In Malta, the standstill period is 10 calendar days regardless of the means by which the decision was sent. This means that in cases of the use of 'other means' a period of 10 days is provided rather than the Directive minimum of 15 calendar days. In Slovenia, the standstill period is 8 days from receipt of the contract award decision which does not meet either the 10 or 15 day standstill period. See Figure 5.4.

Figure 5.4: Duration of standstill period

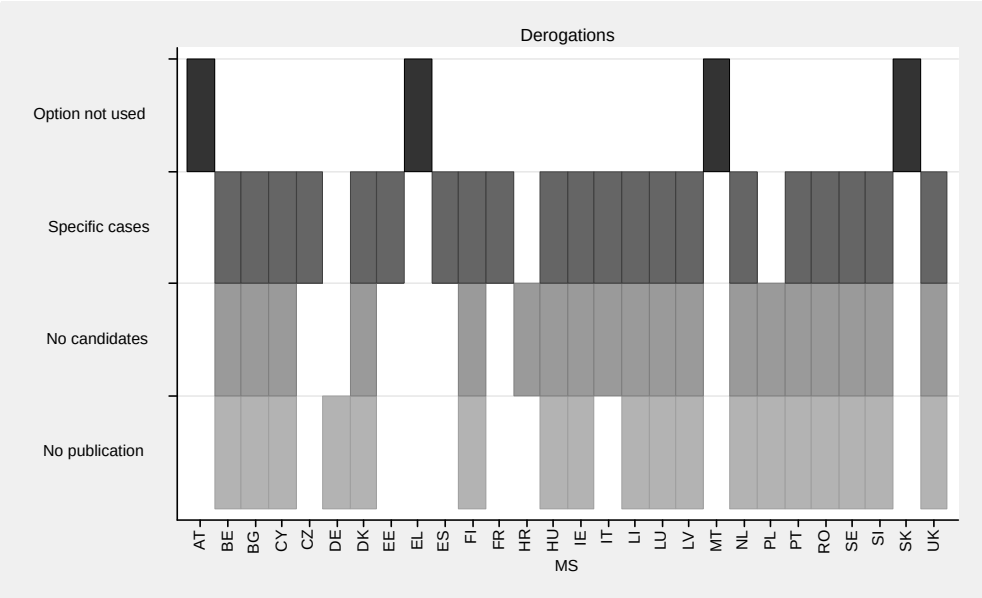


Note: Other* includes those Member States that do not meet the Directive minimum standstill period.
Source: research by network of legal experts, responses to the question: A contract may not be concluded following the decision to award a contract before the expiry of at least the following periods, with effect from the day following the date on which the contract award decision is issued. Please indicate which of the following periods apply in your country: 10 calendar days (if fax or email used); 15 calendar days (if other means used); 10 calendar days from receipt of contract award decision/reply; Other."

The standstill periods referred to above do not apply where a Member State has made use of the derogations provided in Article 2b of the Remedies Directives. Member States may provide that the standstill periods do not apply in cases where no publication is required, there are no concerned candidates, or in specific cases concerning framework contracts or specific contracts set out in Articles 32 and 33 of Directives 2004/18/EC and 2004/17/EC, respectively.

Over half of the Member States (16) have made use of the option to derogate and have applied the derogation in all three cases specified in the Remedies Directives. In a further eight Member States, the derogation has been used in one or two of the cases specified in the Remedies Directives. Only four Member States (AT, EL, MT and SK) have opted not to make use of the derogation, and therefore apply the standstill period set in their country in all cases. See Figure 5.5.

Figure 5.5: Option to derogate from the standstill period



Source: research by network of legal experts, responses to the question: Has your country made use of the option to derogate from the standstill period in the following cases: No publication required; No concerned candidates; In specific cases concerning framework contracts or specific contracts set out in Articles 32 & 33 of Directives 2004/18/EC and 2004/17/EC, respectively; Option to derogate not used."

In accordance with Article 2c of the Remedies Directives, any application for review of the decision of a CAE must be made before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contract decision is sent to the tenderers and candidates concerned if fax or electronic means are used or 15 calendar days if other means or communication are used, or at least 10 calendar days from the day following the date of the receipt of the contract award decision. This minimum period therefore reflects the standstill period set out in Article 2a of the Remedies Directives.

In the majority of countries (20 MS), the time limit does reflect the minimum standstill period. In some cases, such as the UK, a longer period of within 30 days is set. However, it is stated that this must be at least 10 or 15 days, i.e., the standstill period. In one Member State (DK) different time limits are set out in the law. In a further three Member States (BE, FR and IE) the time limit for applying for review depends on the remedy sought but the minimum period reflects the standstill period. For example in BE, the minimum period in cases of suspension is 10 or 15 days, which reflects the standstill period. In the case of declaration of absence of effects, a time limit of 30 days from publication in the OJEU or communication of the outcome of the procurement procedures is set, 60 days in cases of annulment, 6 months in claims for alternative sanctions, while the longest time limit is 5 years in a claim for damages. In Portugal, a longer time limit overall of one month from when the applicant for review was notified of the decision being challenged. The Netherlands does not set a specific time limit while in Luxembourg, an application for review of a utility contract must be made within a "reasonable period".

It is only in two Member States (FI and SK) that the time limit for apply for review is shorter than the standstill period in that country. In Finland, an application for review must be submitted within 14 days from the receipt of the decision while the standstill period is 21 days. In Slovakia, an application for review must be made within 10 days,

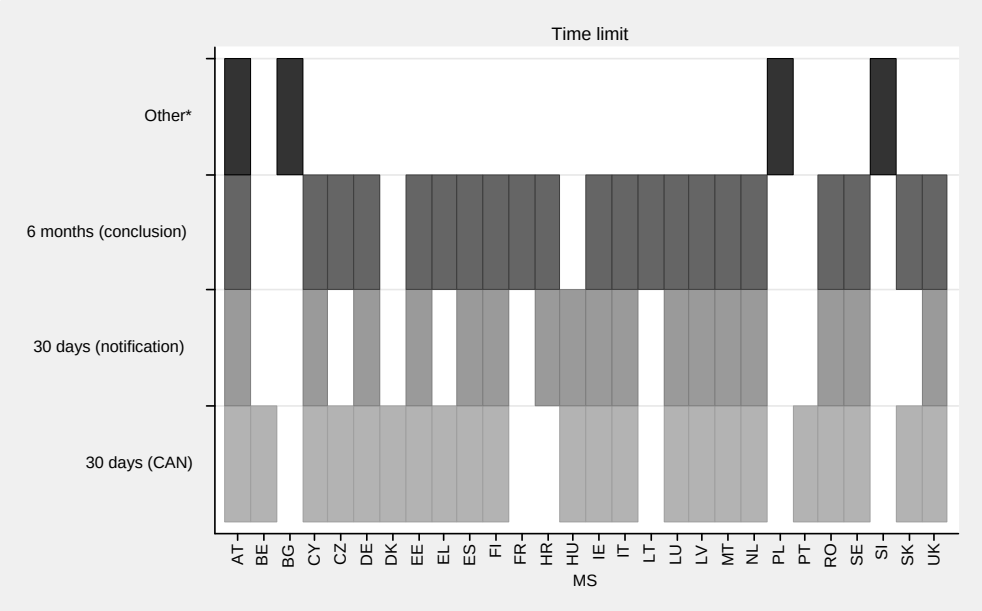
while the standstill period is at least 15 days. However, in each case these time limits still reflect the minimum standstill periods set out in the Remedies Directives.

In cases of ineffectiveness (Article 2d), Member States may provide a longer period within which an application for review must be made (Article 2f). In such cases, an application for review based on ineffectiveness must be made before the expiry of at least 30 calendar days with effect from the day following the date on which the CAE published a contract award notice or informed the tenderers and candidates concerned of the conclusion of the contract, and in any case before the expiry of a period of at least six months with effect from the day following the date of the conclusion of the contract.

Over half of Member States (15) apply all three time limits. In addition, in Austria a further time limit of six weeks from the date on which the applicant was made aware of the award of the contract or the withdrawal from the tender process. However, in such cases the overall period of six months from the conclusion of the contract also applies.

Of the remaining 13 Member States, three Member States (BE, DK and PT) only apply the first time limit of at least 30 calendar days from the publication of the contract award notice. Another four Member States (CZ, EL, HU and SK) apply this time limit in addition to either the period of 30 days from notifying tenderers or candidates or the period of six months from conclusion of the contract. One Member State (HR) applies the minimum time limits of 30 days from notifying tenderers or candidates and six months from conclusion of the contract. Two Member States (FR and LT) only apply the time limit of at least six months from the conclusion of the contract. Finally, three Member States (BG, PL and SI) do not adhere to the specified time limits. In PL the time limit is shorter than that specified in the Directive, as a time limit of 5/10 days is applied. In BG the time limit is longer as a time limit of 2 months from the publication of information about the contract is applied, and not later from 1 year from the day on which the contract entered into force. In SI, there is no time limit set within which an application for ineffectiveness must be made. See Figure 5.6.

Figure 5.6: Time limit for review (ineffectiveness)



Note: Other* includes those Member States that do not meet the Directive minimum time limits.
Source: research by network of legal experts, responses to the question: "An application for review in cases of ineffectiveness must be made before the expiry of the following periods. Please indicate which of the following periods apply in your country?: At least 30 calendar days from publication of an award notice (CAN); At least 30 calendar days from notifying tenderers and candidates; At least 6 months from the conclusion of the contract; Other".

5.4 Body in charge of the review

Under the Remedies Directives Member States are to take the necessary measures to ensure that decisions taken by CAEs may be reviewed effectively, and in particular as rapidly as possible[55]. To this end, a review body has been established in each Member State. In some cases a specialised public procurement review body has been established, while in others, an existing judicial or administrative review body is responsible for the review of decisions taken by the CAEs.

In half of the Member States (14) the review body is a judicial body, where applications for review at first instances are made to the ordinary civil or administrative courts in each country. In the remaining Member States there is an administrative review body at first instance: for example, the Commission on Protection of Competition in BG, the Office for the Protection of Competition in CZ, the Complaints Review Commission of the Procurement Monitoring Bureau in LV and the National Council for Solving Complaints in RO. In the case of Belgium and France, depending on the nature of the claim and the remedy sought, an application for review can be made either to the administrative or judicial body at first instance. In Belgium, claims for annulment or suspension are brought before the Council of State (Administrative Branch) when the CAE is an administrative body, and before the ordinary courts otherwise, while for claims for damages, declaration of absence of effects and alternative sanctions, the ordinary courts (*Ordre judiciaire*) are competent. In France, the review body depends on whether the contract was awarded by a public entity or by a private body. The decisions of CAEs and publicly owned utilities can be

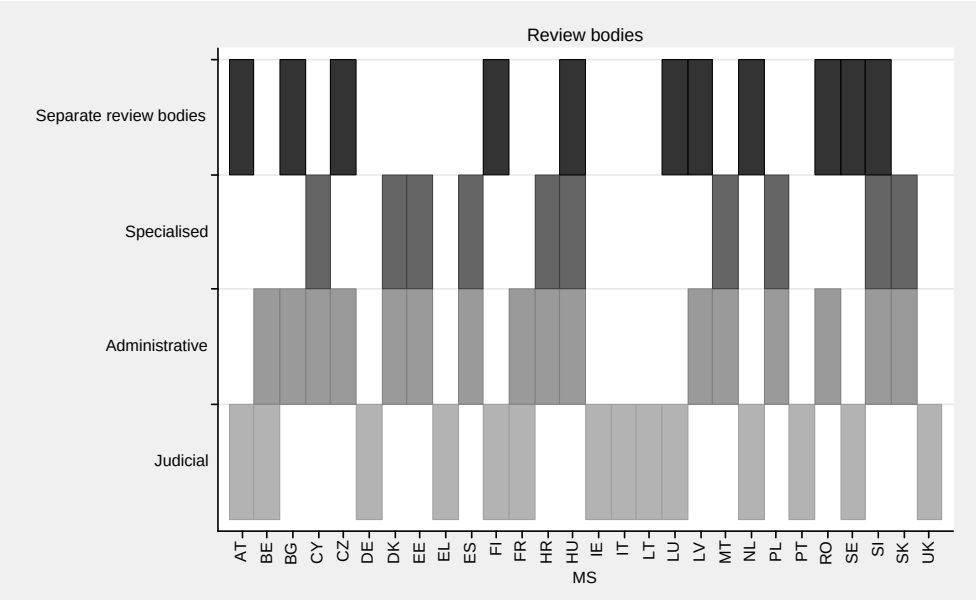
[55] Article 1(1) of Directives 89/665/EEC and 92/13/EEC.

reviewed in the administrative courts, while the decisions of privately owned utilities are reviewed in the ordinary or civil courts. While a number of other countries have judicial bodies in place in addition either to the administrative or specialised public procurement review body, these deal with matters on appeal following the first instance review.

10 Member States (CY, DK, EE, ES, HR, HU, MT, PL, SK and SI) have established specialised public procurement review bodies. Whilst these are administrative review bodies, these review bodies have been established solely to deal with cases relating to public procurement. These include the Tenders Review Authority in Cyprus, the State Commission for Supervision of Public Procurement Procedures (SCSPPP) in Croatia, the Public Procurement Arbitration Board (PPAB) in Hungary, the Public Contracts Review Board in Malta, and the Office of Public Procurement (PPO) in Slovakia.

Finally, in 11 Member States (AT, BG, CZ, FI, HU, LU, LV, NL, RO, SE and SI), separate review bodies are responsible for different aspects of the review procedure. In nine of these Member States, the review body, whether this is a specialised public procurement review body or administrative or judicial review body, is responsible for interim measures and the set aside of a decision or removal or discriminatory specifications, while the relevant administrative or civil courts have separate responsibility for the award of damages. In one Member State (LU) different review bodies deal with different types of contract rather than the different aspects of the review procedure. In the remaining Member State (NL) separate proceedings are required for interim measures. See Figure 5.7.

Figure 5.7: Types of review bodies



Source: research by network of legal experts, responses to the questions: "What type of review body has been established in your country?: Judicial; Administrative; Specialised public procurement review body; Other" and "Are separate review bodies responsible for different aspects of the review procedure?".

5.5 Remedies

Article 2(1) of the Remedies Directives requires that the review procedures include provision for powers to (a) take interim measures, (b) set aside the decision, including the removal of discriminatory specifications, (c) award damages to persons harmed by

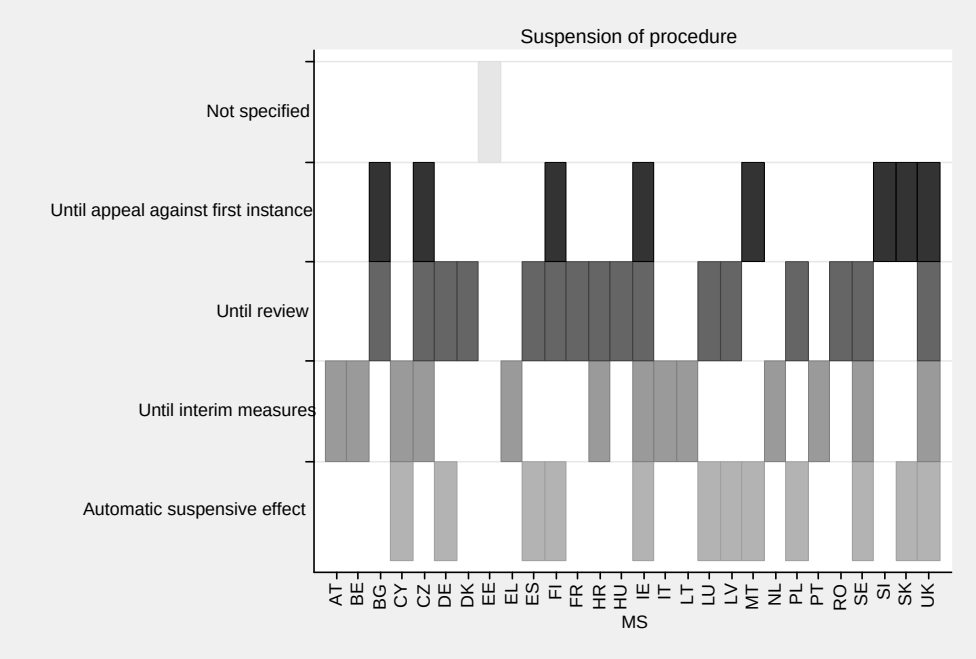
an infringement. In all Member States, provision is made for all three types of remedies. Prior to this, the contract award procedure may or may not have already been suspended following application by the claimant for review. Stakeholders' perceptions of the relevance of these remedies is discussed in our analysis chapter in section 6.1, and evidence on the usage of the Directive is presented in section 6.2 under the indicator "U2: Type of Remedies".

Under Article 2(3) of the Remedies Directives, where a review body reviews a contract award decision, the CAE cannot conclude the contract before the review body has made a decision on the application either for interim measures or for review. In some cases the period of suspension is applied until there is a final decision on appeal against the first instance decision or longer. This therefore is an example of where a number of Member States have gone beyond the requirements of the Directive, which provides that the contract suspension may end following a decision on application for interim measures.

It should be noted that in accordance with Article 2(4) of the Remedies Directives, the review procedures need not necessarily have an automatic suspensive effect on the contract award procedures to which they relate. In over half of the Member States (16) the review procedure does not have automatic suspensive effect. In these countries therefore, suspension of the contract award procedures will have to be sought by way of separate procedure usually by way of an application for interim measures which will include an application for suspension.

With regards to the period of suspension of the contract award procedure, in almost half of the Member States (13), the period of suspension applies until a decision is taken on application for interim measures. In 16 Member States, the period of suspension applies until a decision is taken on the application for review, although in five of these countries (CZ, HR, IE, SE and UK) the suspension can be brought to an end at the earlier stage of the decision on application for interim measures. For example in the UK, the Court may make an interim order bringing to an end the suspension of the contract award procedure. In such cases the Court must consider whether without the suspension, it would be appropriate to make an interim order requiring the CAE to refrain from entering into the contract, and only where it would not be appropriate, can it lift the suspension. In making this decision it therefore has to consider whether the Claimant's claim raises a serious question to be tried, i.e. whether there is a prima facie case, whether damages would be an equitable remedy, and where the 'balance of convenience' lies. In eight Member States (BG, CZ, FI, IE, MT, SI, SK and UK), the period of suspension can apply until a decision on appeal against the first instance decision or longer. However, again a number of these Member States (BG, CZ, FI, IE and UK) have indicated that the suspension can be brought to an end at either the review stage or a decision on interim measures, which shows that following either of these stages, it is at the discretion of the review body as to how long the suspension shall apply for. Finally, only one Member State (EE) does not specify how long the period of suspension shall apply. See Figure 5.8.

Figure 5.8: Period of suspension of the award procedure

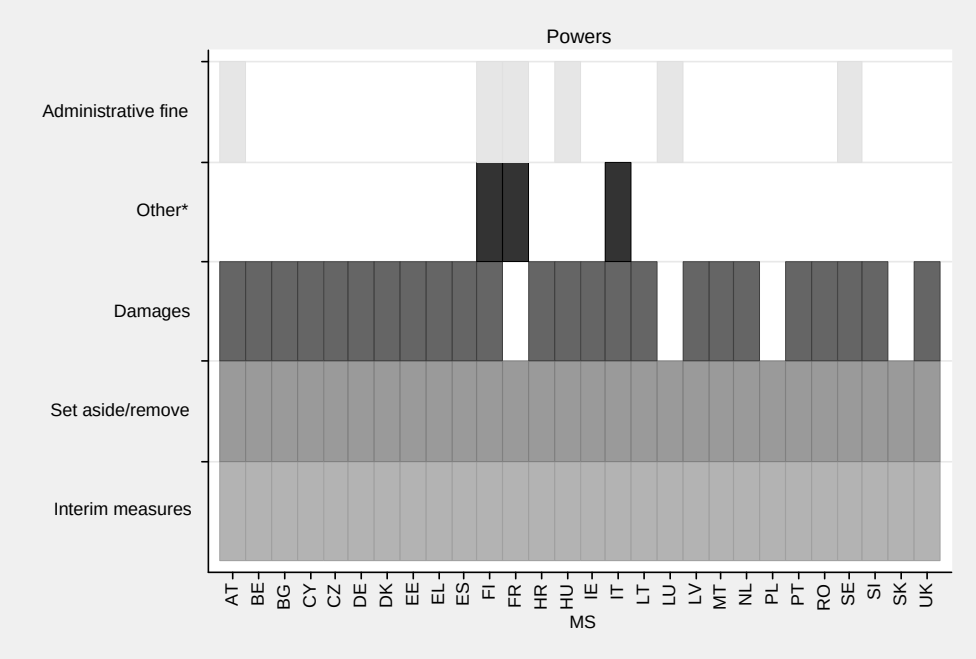


Source: research by network of legal experts, responses to the questions: "Does the review procedure have immediate automatic suspensive effect in all cases in your country?" and "What is the period of suspension of the award procedure in your country?: Until decision on application for interim measures; Until decision on application for review; Until decision on appeal against first instance decision or longer; Not specified; Other".

The review procedure in all Member States includes provision for powers to take interim measures, set aside the decision or remove discriminatory specifications. Finally, damages are also available in national review procedures in all Member States. Whilst specific reference is not made to damages within the transposing legislation in FR, LU, PL and SK, damages can be claimed under the provisions of general civil law in these countries.

A number of Member States also referred to powers to take other measures. In six Member States (AT, FI, FR, HU, LU and SE) powers were available to impose administrative fines. In terms of other measures available: there is also the power to impose financial penalties in France; in Finland the review body can order the CAE to pay a compensatory payment to the supplier; and in Italy, the review body has the power to award the contract to the claimant. See Figure 5.9.

Figure 5.9: Powers of review body



Note: Other* includes the imposition of financial penalties (FR), compensatory payments (FI) or award of the contract to the claimant (IT).
Whilst specific reference is not made to damages within the transposing legislation in FR, LU, PL and SK, damages can be claimed under the provisions of general civil law in these countries.
Source: research by network of legal experts, responses to the question: "Does the national law include provision for the powers to: Take interim measures, Set aside the decision/removal of discriminatory specification, Award damages, Other".

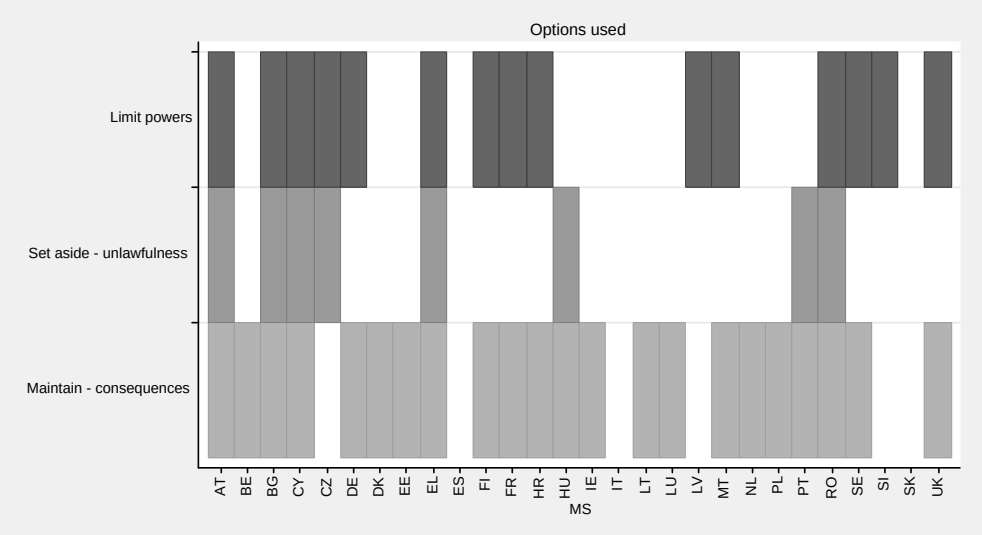
Finally, with regard to the remedies available, it should be noted that the Remedies Directives provide three optional provisions in relation to interim measures and the award of damages which impacts the availability of the full suite of remedies.

Article 2(5) of the Remedies Directives provides that the review body may take into account the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures when their negative consequences could exceed their benefits. With the exception of six Member States (CZ, ES, IT, LV, SK and SI) each Member State has made use of this option under the Remedies Directive, in some cases through the general rules that apply to the grant of interim measures. Indeed, this provision can be used by the defendant to bring to an end the suspension of the award of a contract.

Under Article 2(6) of the Remedies Directives, Member States may provide that where damages are claimed on the grounds that a decision was taken unlawfully, the contested decision must first be set aside by a body having the necessary powers. In this case, only eight Member States (AT, BG, CY, CZ, EL, HU, PT and RO) have made use of this optional provision and require the decision to be set aside as a pre-requisite to claiming damages.

Article 2(7) of the Remedies Directives also provide the option, after the conclusion of a contract, to limit the powers of the review body to awarding damages to any person harmed by an infringement. Over half of Member States (15) have made use of this option, requiring that the powers of the body responsible for review procedures are limited to awarding damages after the conclusion of a contract. See Figure 5.10.

Figure 5.10: Remedies-optional provisions



Source: research by network of legal experts, responses to the questions: "Has your country made use of the option to limit the powers of the review body to award damages to any person harmed by the infringement after the conclusion of a contract?" and "Has your country made use of the option to require the contested decision first to be set aside where damages are claimed on the grounds that a decision was taken unlawfully" and "Has your country made use of the option to allow a decision to be taken not to grant interim measures when their negative consequences could exceed their benefits?".

5.6 Ineffectiveness

Under Article 2d of the Remedies Directives, a contract can be considered ineffective in the following circumstances:

- Where there is no prior publication of a contract notice without this being permissible under the Public Procurement Directives.
- Where certain infringements have deprived the tenderer applying for review.
- Where the Member State has invoked the derogation of the standstill period for contracts based on a framework agreement or dynamic purchasing system.

All Member States provide for ineffectiveness where a CAE has awarded a contract without prior publication of a contract notice in the Official Journal of the European Union without this being permissible in accordance with the Public Procurement Directives.

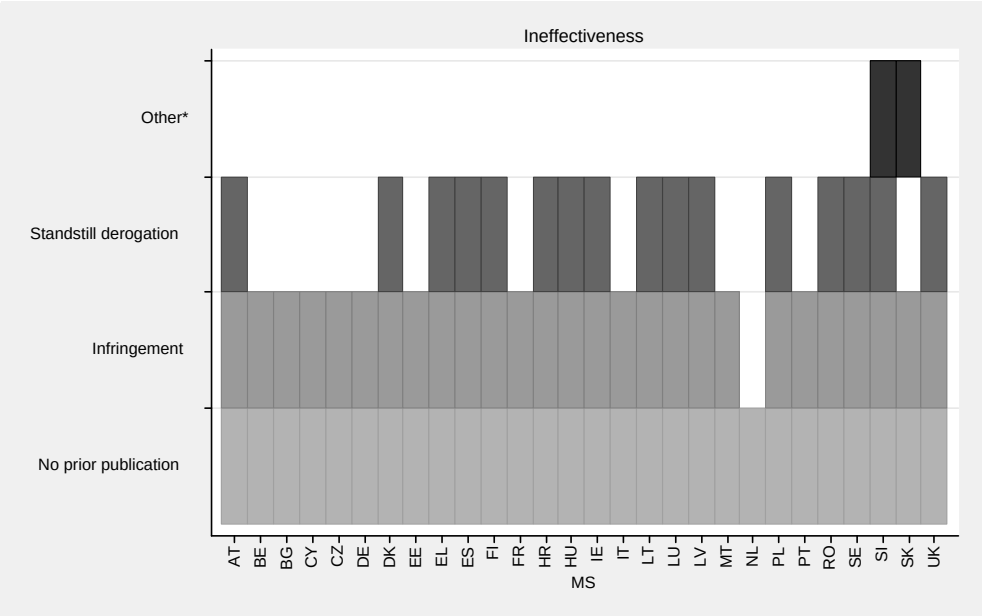
With regard to the second ground for ineffectiveness, with the exception of the Netherlands, all Member States provide for ineffectiveness where certain infringements have deprived the tenderer applying for review. Examples of infringements which can lead to a declaration of ineffectiveness in this case, include where the award of the contract was not in compliance with the information contained in the contract notice, where the procurement procedure was withdrawn unlawfully, or where there is a breach of the standstill provisions.

Over half of the Member States (16) also consider a contract ineffective if the Member State has invoked the derogation of the standstill period for contracts based on a framework agreement or dynamic purchasing system and an infringement occurs.

Two Member States (SI and SK) also refer to 'other' specific grounds for ineffectiveness, which include failure by the CAE to provide the court with the complete documentation of the tender (SK), and where the contract was concluded as

a consequence of a criminal offence committed by the CAE or by the successful tenderer (SI). See Figure 5.11.

Figure 5.11: Grounds for ineffectiveness



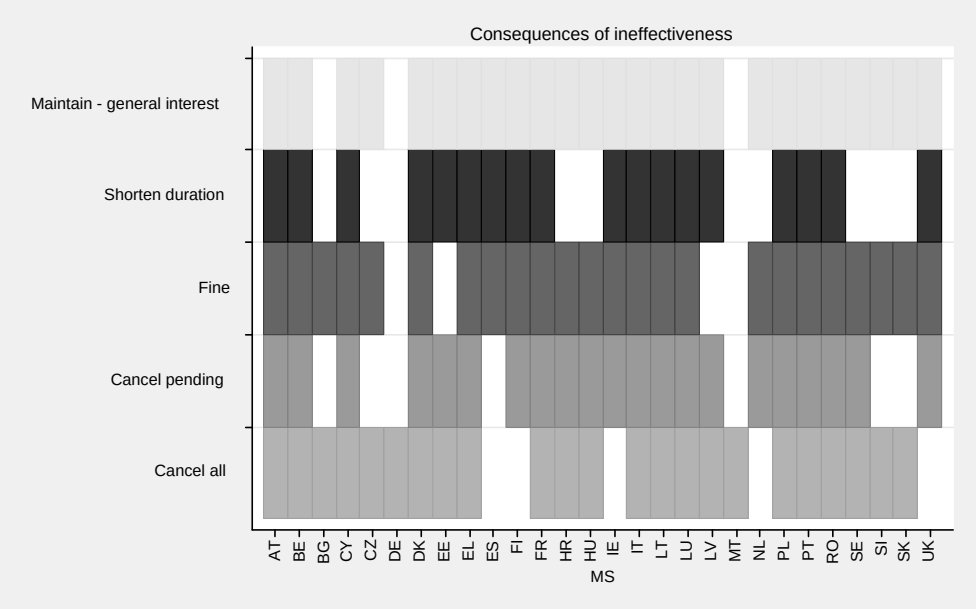
Note: Other* includes failure to provide documentation and commission of a criminal offence.
Source: research by network of legal experts, responses to the question: "In which of the following cases can a contract be considered ineffective in your country?: Where there is no prior publication of a contract notice without this being permissible under the Directive; Where certain infringements have deprived the tenderer applying for review; Where the MS has invoked the derogation of the standstill period for contracts based on a framework agreement or dynamic purchasing system; Other".

Even where a contract is found to have been awarded illegally on one of the grounds set out above, Article 2d(3) of the Remedies Directives provides that the review body has the option not to consider a contract ineffective, if overriding reasons relating to a general interest require that the effects of the contract should be maintained. With the exception of three (BG, DE and MT), all Member States have made use of this optional provision, providing that the contract should be maintained where there are overriding reasons relating to a general interest.

Article 2d(2) of the Remedies Directives states that the consequences of a contract being considered ineffective shall be provided for by national law. However, national law may provide for the retroactive cancellation of all contractual obligations or limit the scope of the cancellation to those obligations which still have to be performed, in which case other penalties, such as the imposition of fines on the CAE or the shortening of the duration of the contract, shall be imposed.

With the exception of one (ES), all Member States provide for either cancellation of all contract obligations or cancellation of those contract obligations which are still to be performed. 17 Member States apply both options. In accordance with Article 2d(2) of the Remedies Directives, each of those countries that provide for cancellation of contract obligations still to be performed, provide for the application of one or other of the alternative penalties set out in Article 2e(2) of the Remedies Directives. In addition, a number of other Member States (BG, CZ, SI and SK) provide for the imposition of fines, while one Member State (ES) provides for both fines and shortening of the contract. See Figure 5.12.

Figure 5.12: Consequences of ineffectiveness



Source: research by network of legal experts, responses to the questions: "What are the consequences of a contract being considered ineffective? Cancellation of all contract obligations; Cancellation of contract obligations still to be performed; Application of alternative remedies; Other"; "Please indicate what alternative penalties are applied in your country: Imposition of fines; Shortening of duration of the contract; Other" and "Has your country made use of the option to not consider a contract ineffective where there are overriding reasons relating to a general interest which require that the effects of the contract should be maintained, and to apply alternative penalties instead?".
Other (for CZ this includes a ban on suppliers to perform any public contracts for a period up to 3 years)" "Has your country made use of the option to not consider a contract ineffective where there are overriding reasons relating to a general interest which require that the effects of the contract should be maintained, and to apply alternative penalties instead?".

Evidence on the frequency of usage of the ineffectiveness remedy is presented in section 6.2 under the indicator "U2: Type of Remedies". Section 6.1 discusses the relevance of this remedy as perceived by stakeholders under the indicator "R2: Reasons why Remedies are still relevant".

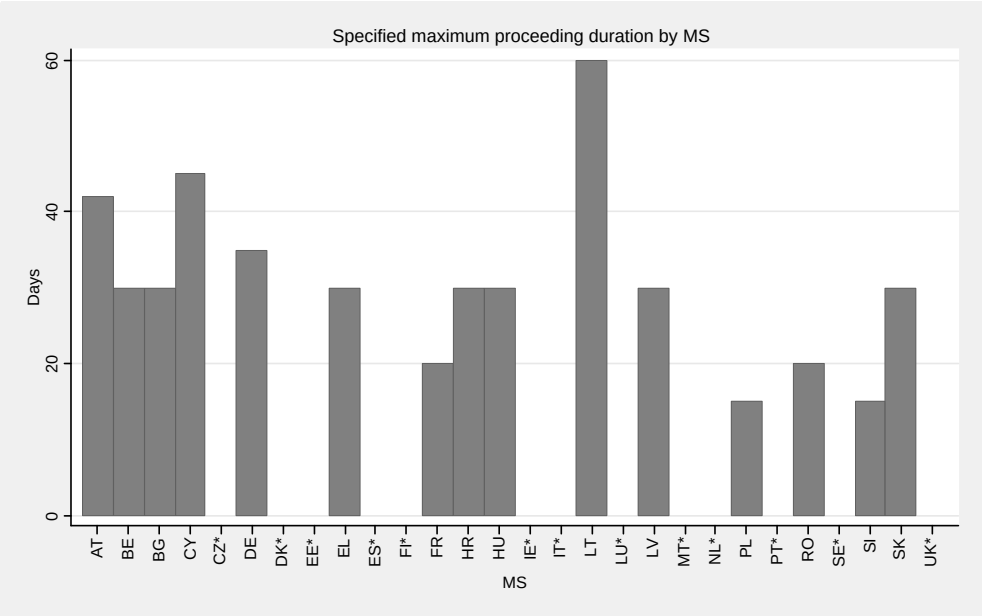
5.7 Length of the review procedure

Under the Remedies Directives Member States are to take the necessary measures to ensure that decisions taken by CAEs may be reviewed effectively, and in particular as rapidly as possible.[56] There are no legislative provisions on the duration of the review procedures in 12 Member States. One Member State (PT) indicated that although there is no maximum duration specified in the legislation, certain stages of the procedure, for example the review of pre-contractual issues, have to be decided as a matter of urgency and the deadlines for certain procedural stages are shortened. Over half of Member States (16) however, do specify a maximum duration for review proceedings. Four Member States set a maximum duration of over 30 days (35, 42, 45 and 60 days in DE, AT, CY and LT, respectively), the maximum period being 60 days/two months in Lithuania, as well as in certain Lander in Austria. Eight Member States (BE, BG, CZ, EL, HR, HU, LV and SK) set a maximum duration for the review procedure of 30 days. In the remaining four Member States, two Member States (FR

[56] Article 1(1) of Directives 89/665/EEC and 92/13/EEC.

and RO) specify 20 days, while the shortest period for review is found in Poland and Slovenia, where the review body is required to take a decision within 15 days from the submission of the application for review. See Figure 5.13.

Figure 5.13: Length of review procedure



Note: CZ, DK*, EE*, ES*, FI*, IE*, IT*, LU*, MT*, NL*, PT*, SE* and UK* do not set a maximum duration.
Source: research by network of legal experts, responses to the question: "The Directive requires that decisions taken by the CAE are to be reviewed "as rapidly as possible". Please indicate which of the following applies in your country: Maximum duration specified in legislation; No legislative provision made on duration of review procedures; Other" e.g. national guidance.

The estimation of the length of reviews across Member States forms a key part of our empirical analysis. The results are presented in section 6.2 under the indicator "U1: Indicators of Usage."

5.8 Review application fee

In order to obtain information on the costs of review procedures, legal experts were asked whether their national law makes provision for the costs of the review procedure. The information obtained covers the requirement to pay a fee on application for review. Information on other costs that will arise during the review procedure, primarily those of the costs of legal advice and representation, has been gathered through interviews with legal practitioners.

The fee for applying for review differs across Member States: in some countries the application fee for a review procedure is a fixed flat rate, irrespective of the characteristics of the contract; in others the costs are determined by a scale criteria or by a value-range that depends on the size or the type of contract (for works, supply or services). Some have a percentage-based fee which is capped at a maximum value. The differences in fee levels and structures will be driven by a range of factors, such as national procedural autonomy, different systems and procedures, the existence of review bodies etc. A summary of the costs in the different Member States is shown in Table 5.1.

Table 5.1: Provision for the costs of the review procedure

MS	Litigation Costs	MS	Litigation Costs
AT	Fee: Scaled based criteria (depending on object, nature of the procedure, procedure relates to above or below threshold contract).	**IE**	Fee €210 Originating notice €190, affidavit €20
BE	Procedural fees: €200 Ordinary courts: €400 Inscription on the roll: €100 Summon [€140; €500]	**IT**	Contract value < 200,000€: €2,000 Contract value [€200,000; 1m]: €4,000 Contract value>€1,000,000: €6,000 For appeals, fees are increased by 50%
BG	Below threshold: €435 (Stamp duty) Above threshold: €869 (Stamp duty)	**LT**	Stamp fee: €290
CY	Fees [€4,000; €20,000] (depending on the value of the contract)	**LU**	Fee: €0 Excluding lawyers and bailiffs fee
CZ	Deposit 1 % of contract [CZK 50k; 2,000k] Unknown contract value: CZK 100,000 Cancelled award: CZK 30,000 Law suit against decision: CZK3,000 Appeal First instance: CZK 5,000	**LV**	Fee: €0 Appeal to decision: €30 Excluding lawyers and bailiffs fee
DE	Fee: [€2,500; €50,000] Fee in exceptional case: [€250;€100,000]	**MT**	Deposit 0.75 % of contract value [€1,200; €58,000]
DK	Fee: 20,000 DKK (Public Sector) Fee:10,000 DKK (Other)	**NL**	Fee: €3829 (legal persons) Contract value >€100,000: €1519 (natural persons)
EL	Fee 1% of contract (max €50,000) Supreme court: €2466 Courts of Appeals: €1020	**PL**	For supplies and services: - Public authority below €134.000: €1.800; above €134.000: €3.600 - Other authority below €207.000: €1.800; above €207.000: €3.600 For works: - Public authority below €5.186.000: €2.500; above €5.186.000: €5.000 - Other authority below €5.186.000: €2.500; above €5.186.000: €5.000
EE	Fee below threshold: €639.11 Fee above threshold: €1278.23	**PT**	The justice tax: €102 Pre-contractual justice tax: €204
ES	Fee: €0	**RO**	€13,860-€92,400: 1% of this value; €92,401-€924k: €924+0.1% excess of 92,401; €924k-€9,240k: €1756+0.01% excess of 9,240k €9,240k-€92,400k: €2587+0.001% excess of 9,240k €92,400k-€924,000k: €3418+0.0001% excess of 92,400k €924,000k or more: €4,250+0.00001% excess of 924,000k Note: these are not costs paid to the review body, but amount withheld from participation guarantee In addition a deposit is required of 1% of contract value (to a maximum of €100,000), retained if complainant's case unsuccessful.
FI	Fee general court: €244	**SE**	Fee: €0
FR	Administrative tribunal: €0 High Courts: ~ €100 - including summons ~[€40; €100]	**SI**	2% of best bid price [€500; €25,000] Goods or services: Low value: €1,500; Open procedure: €3,500 Works: Low value: €2,500; Open: €7,000 Other €1,000 (defence and security B service; framework agreement; dynamic purchasing system or design contests).
HR	0-€197,202.69: €1,314.89 €197,202.69-€986,180.64: €3,287.27 €986,180.64-€3,287,218.27: €5,917.08 €3,287,218.27-€7,889,338.44: €9,204.23 above €7,889,338.44: €13,148.90	**SK**	Before opening of tender: Goods and services: -Above:1% max €4000, -Below:3% max €2000 Works: -Above: 0.1 % max €10,000, -Below:5 % max €5 000 After opening of tender: 1% value (max €300,000) Unknown contract value: €3,000 1% contract value [€600; €30,000] low price exclusion
HU	Fee: 1 % of contract value/lot Revision of decision: HUF 30,000 Court proceedings: 6% of contract value [HUF15.000; HUF1.5 m] Above threshold: (max: HUF 25,000,000) Below threshold: [HUF200,000;HUF6,000,000] In cases pursuant to paragraph 1, fee: a) 1-3 elements fee is amount in paragraph 1 b) 4-6 elements: fee is 125 % of (a) c) 7-10 elements: fee is 150 % of (a) d) 11-15 elements: fee is 175 % of (a) e) 16 or more elements: twice the of (a)	**UK**	Fees: [€44; €2423] (based on contract value) Contract value £200,001- £250,000: €1912 Contract value >£300,000: €2423

Note: 'k' denotes thousands (000).
Source: research by network of legal experts.

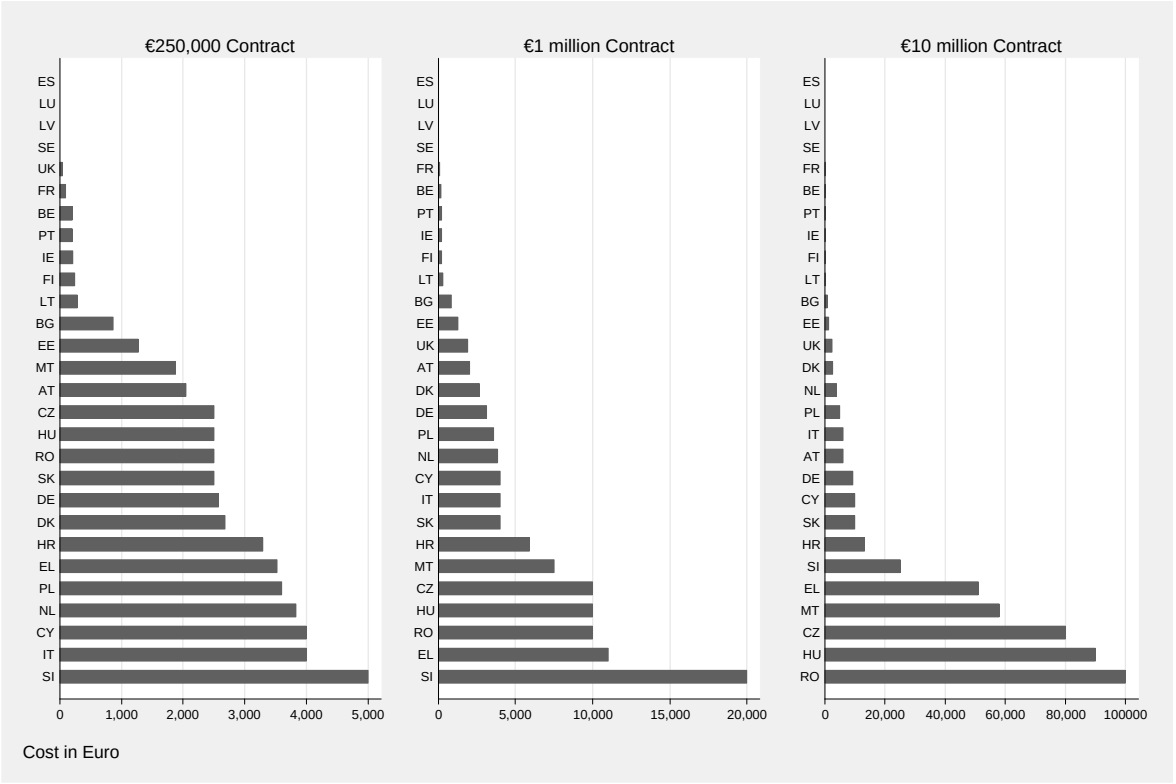
In order to allow a comparison across the Member States, we have calculated the application fee for three representative cases: a supply or service contract of €250,000; a supply or service contract of €1 million; and a works contract of €10 million. The application fees in each of these cases are shown in Figure 5.14.

The application fees for contracts of 250k is low in about a third of the Member States: ranging from zero (ES, LU, LV, and SE) to €500 (UK, FR, BE, PT, IE, FI and LT); ten of the other Member States have costs between €869 and €2,685 with half of them around the upper limit (CZ, HU, SK, DE, RO, and DK). The remaining seven have the highest costs ranging between €3,287 and €5,000 (HR, EL, PL, NL, CY, IT, with SI at the top end with costs of €5,000). See left graph in Figure 5.14.

The application fees for contracts of €1 million are low in 11 Member States: ranging from zero (ES, LU, LV, and SE) to €869. Four countries (EE, UK, AT and DK) have costs between €1,278 and €2,685 and another seven (DE, PL, NL, CY, IT, SK and HR) between €3,152 and €5,917. For the remaining countries the costs are around €10,000 (MT, RO, CZ, HU and EL), except for SI that have the highest costs at €20,000. See middle graph in Figure 5.14.

The application fees for contracts of €10 million are low in 11 Member States: from zero to €869; in other eight Member States the costs range from €1,278 (EE) to €9,250 (DE), with half of them with costs below €5,000 (EE, UK, NL and DK). There is great dispersion of application fees between the Member States with the highest costs ranging from €10,000 (CY) up to €100,000 (RO): in four countries the costs are below €30,000 (CY, SK, HR and SI) and in five above €50,000 (EL, MT, CZ, HU and RO). It should be noted that for the countries in the last group, the application fees are calculated based on a percentage of the value of the contract. See Figure 5.14, right.

Figure 5.14: Review application fees



Source: research by network of legal experts.

The differences in costs between Member States appears to be driven in part by the structure of the fees. Those Member States with fees as a percentage of the contract value are at the lower end of the fee spectrum for the small contracts, but move up in relative cost for the larger contracts. This can be seen in the above figure: CZ, MT, RO and HU all have relatively low costs for the €250,000 contract, but these all move up in position until they are those with the highest costs for the €10 million contracts.

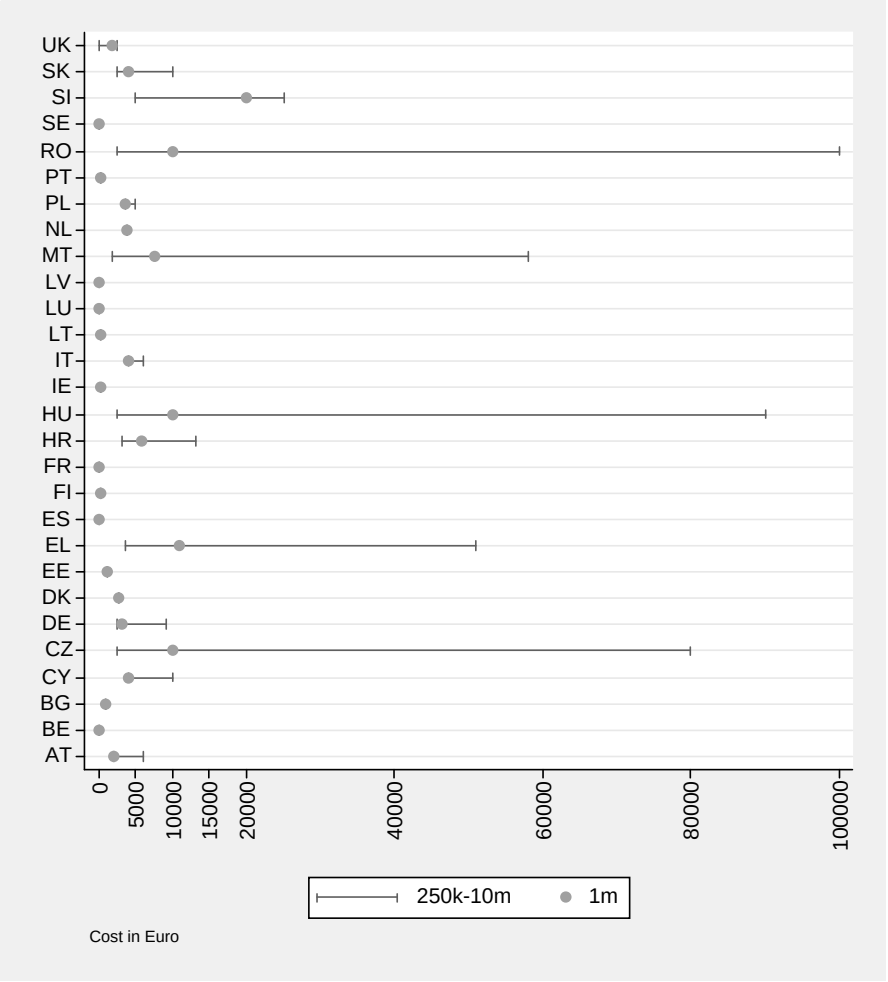
The rationale behind Member States' fee structures is not always apparent from the information available and, as discussed above, will be driven by a range of factors. In some Member States, high fees are in part driven by 'deposits' which complainants must pay and which are refunded only if the complaint is upheld. For example, Romania applies a 'guarantee of good conduct' fee of 1% of the contract value, which explains the very high costs for large contracts.[57] This fee was introduced in 2014, most likely in response to the very large number of complaints submitted in Romania in previous years.[58] Czech Republic and Malta also require deposits as a percentage of the contract value.

The great dispersion of review fees is also apparent within country for different contract types: in 14 countries the costs are flat; in some other six Member States (SI, HR, CY, SK, DE and AT) they are very similar for the three type of contracts; but in five Member States (RO, HU, CZ, MT and EL) the dispersion between the three typology contracts is very large. See Figure 5.15.

[57] It should be noted that the 'guarantee of good conduct' was subject to constitutional review in Romania and is now subject to review before the EU Court of Justice (pending cases C-439/14 and C-488/14).

[58] See Table 6.1 for the number of complaints submitted each year.

Figure 5.15: Dispersion of application fees within Member States



Source: research by network of legal experts.

In section 6.6 we present the results of our empirical estimation of the costs of review procedures, which include all costs incurred in bringing forward a case in addition to application fees (such as legal fees, court fees, costs of expert witnesses etc).

5.9 VEAT notice

Article 2d(4) of the Remedies Directives provides for the publication of a VEAT notice where a CAE deems that a contract does not require prior publication of a contract notice in the OJEU and therefore intends to conclude a contract without publication. This may apply, for example, if the contract meets the exceptional conditions justifying direct award of contracts set out in Article 31 of Directive 2004/18/EC or Article 40(3) of Directive 2004/17/EC.

Under Article 3a of the Remedies Directive, the VEAT notice must contain the following information[59]:

(a) the name and contact details of the CAE;

[59] 'Standard form 15 – Voluntary ex ante transparency notice' is available at: http://simap.europa.eu/docs/simap/pdf_jol/en/sf_015_en.pdf.

(b) a description of the object of the contract;

(c) a justification of the decision of the CAE to award the contract without prior publication of a contract notice in the Official Journal of the European Union;

(d) the name and contact details of the economic operator in favour of whom a contract award decision has been taken; and

(e) where appropriate, any other information deemed useful by the CAE.

Following publication of a VEAT notice, the CAE must observe the minimum standstill period before the contract is awarded. Economic operators may challenge the decision of the CAE during this period and seek pre-contractual remedies. However, should they challenge the decision of the CAE after the expiry of the standstill period, a contract cannot be considered ineffective under Article 2d of the Remedies Directives. Evidence of the usage of the VEAT notice is presented in section 6.2 under the indicator "U4: Usage of the VEAT notice".

6. Analysis

This chapter presents the results of our analysis of the different evaluation indicators, which are set out in Chapter 3. The analysis covers:

- The results from the surveys to suppliers, CAEs and legal practitioners.
- Analysis of the review of the sample of cases in each Member State, provided by the network of national experts.
- Results from the analysis of the characteristics of the contracts under the review, as published in the OJEU (for those cases where the OJEU notice has been found).
- Estimates on the costs of the review procedure.

The analysis is illustrated with graphs and tables, and is presented under the following headings for each of the evaluation indicators (the analysis of transposition, Q2, has already been covered in the previous chapter):

- Relevance (Q1);
- Usage (Q3);
- Factors affecting usage (Q3);
- Transparency and openness (Q4), effectiveness and value-for-money (Q6);
- Non-compliant behaviour (Q5);
- Additional costs (Q7);
- Cost-effectiveness and efficiency (Q8);
- Impact on stakeholders (Q9);
- The overall benefits (Q10).

6.1 Relevance (Q1)

As set out in Chapter 3, the Relevance indicator is designed to answer the questions of how the original need for the intervention has evolved in recent years, and whether there is any reason to believe that the initiative is no longer justified. Relevance is analysed using two indicators related to the perception of relevance (R1) and the reasons that may explain such perceptions (R2). This indicator is assessed through the opinions of the main players in procurement: the CAEs tendering for goods and services, and suppliers bidding for such contracts. The views of legal practitioners also inform the assessment.[60] In addition, the usage indicator (U1, further below) will also be used to inform our assessment of the relevance of the Directive.

R1: Perception of relevance

The perception of relevance has been analysed using two indicators, both from the survey of suppliers.

Indicators of perceptions of relevance:

1) Typical reasons for companies NOT participating in public tenders. (survey suppliers)
2) The reasons for being unsatisfied, or only partially satisfied, with the outcome of a tender. (survey suppliers)

[60] The survey of legal practitioners was designed to complement the surveys of suppliers and CAEs. It gives qualitative explanations and is based on a small sample.

Although these indicators do not directly reflect stakeholders' views of the relevance of the Directive, they are nevertheless important as they indicate whether there are still perceived problems in public procurement, which the Directive was designed to address. Such perceptions indicate that continued efforts to achieve the benefits envisioned by the Public Procurement Directives may still be needed, and thus that the Directive is still relevant. As these indicators only indirectly consider the relevance of the Directive, we also consider more direct indicators under R2.

Suppliers were asked to state the different reasons why they thought companies do not participate in public tenders. To assess the relevance of the Directive, one of the options given in the survey included the possibility of a lack of trust in the procurement process ("I do not really believe that public contracts are awarded on a purely competitive basis").[61] This option was presented among others to enable us to assess the importance of this reason relative to others (which included the "unsuitability of products or services to be supplied", "lack of resources", "difficulties in the procurement rules", "insufficient advertising" or "low chances of success due to the very high competitive environment").[62]

Because the question heading was posed in relation to other suppliers ("Reasons for companies [in general] not participating in public tenders") the problem of response bias is also minimised: respondents are answering not in relation to their own interest, but in relation to a subject that is presented exogenous to them (companies in general). This avoids the bias which may arise from strategic thinking whereby suppliers attempt to influence the results of the analysis to be inferred by their own response. Placing the options related to relevance among other options further mitigates the risk of bias as respondents are less able to 'game' their replies than if they were asked directly about the relevance of the Directive.[63]

Overall, the results of the survey show that suppliers do perceive "lack of trust" as one of the main barriers to participating in public procurement, being the third most mentioned problem with 43% of the responses (Figure 6.1, top). The high-range position of the "lack of trust" response suggests that there are still perceptions of problems with public procurement, and thus is an indication that the Directive continues to be relevant in enhancing the impacts of the Public Procurement Directives.[64] The responses could also be understood as a way of suppliers signalling distrust in the way procurement is being implemented by CAEs (and not necessarily

[61] This option reflects the possibility that the benefits of the Public Procurement Directives are not yet fully realised, and thus that the Directive may still be relevant. Using an indirect question to assess the relevance of the Directive also overcomes the possibility that some respondents may not be familiar with the details or terminology of the Directive, but nevertheless experience its effects – in this case asking directly about the relevance of "the Directive" may confuse respondents and undermine the responses given.

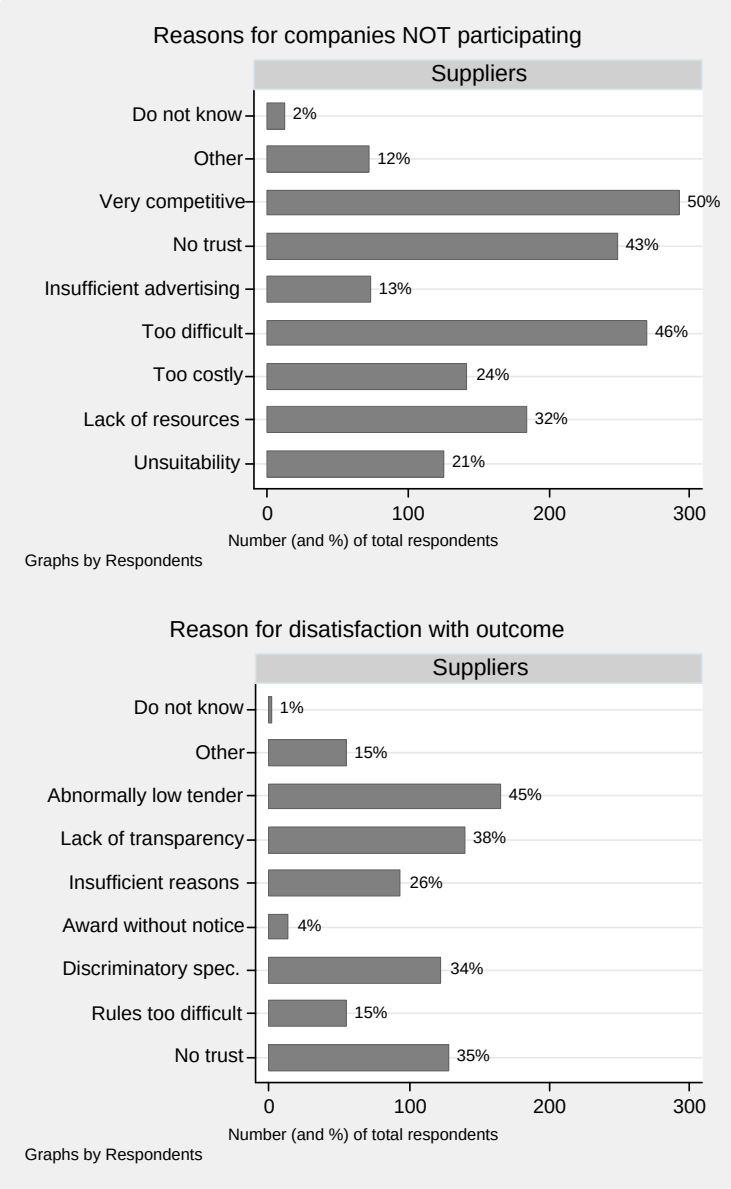
[62] Answers simplified for illustrative purposes. The exact and complete set of multiple choice answers were: "Companies may not have products or services usually sought by public authorities"; "Companies do not have the resources to invest in submitting tenders"; "Monitoring calls for tender could be too time-consuming or costly"; "Public procurement rules and procedures are too difficult to work with"; "Insufficient advertising: Insufficient advertising of calls for tender"; "There is a widespread belief that public contracts are not awarded on a purely competitive basis"; "Very high competitive environment and low chances of success"; "Other"; "Do not know".

[63] See section 4.4.3 for further discussion about mitigating response bias.

[64] This establishes part of the rationale for public intervention. The extent to which the Directive has been functional in this instance is part of the evaluation process.

related to the public procurement provisions). This further highlights the relevance of the Directive in enabling suppliers to challenge inappropriate procurement processes undertaken by CAEs. That said, suppliers also perceive there to be other barriers to participating in public procurement which are unlikely to be addressed by the Directive (such as "very competitive" environments and procurement rules and procedures being "too difficult" to work with).

Figure 6.1: Participation and satisfaction (suppliers only)



Source: Survey of suppliers. Responses to the questions "What do you think are the typical reasons for companies NOT participating in public tenders?" and "What were the reasons for you being unsatisfied, or only partially satisfied with the outcome?".

There is some methodological uncertainty in interpreting the results of this question as an indicator of the relevance of the Directive: as a 'perception' variable it may be transmitting other more general perceptions of suppliers, such as a general low trust in government or an inherent complaining attitude when it comes to such matters. We have tested for this in a number of ways:

- We examined indicators of trust in government[65] and perceived corruption[66] to see if low levels of general trust or high levels of perceived corruption in Member States correspond to low levels of trust in the competitiveness of the procurement process. Whilst there is some correlation this is by no means consistent. For example, Greece and Hungary are ranked first and fourth in terms of a lack of general trust in government by the OECD, and ranked seventh and second in terms of "lack of trust" by our survey. This shows a correlation which may suggest that the general lack of trust in government is driving perceptions of a lack of competitiveness in public procurement, rather than a fundamental problem with procurement. However, some Member States which show a high lack of trust in public procurement in our survey are ranked relatively low in terms of a lack of general trust by the OECD, such as Slovakia, Spain and the United Kingdom. (Similar inconsistent correlations were found with the OECD corruption index.) Further, even where there is a positive correlation the causation of this is unclear – it could well be that public procurement awards in for example Hungary and Greece are not competitive (and hence the Directive is very relevant) and that *this* is in part driving general perceptions of a lack of trust in the government as identified by the OECD indicator.[67]
- To test for a general complaining attitude we compared the results of the option "lack of trust in the competitive procurement process" to the other option which could also be related to public authorities' behaviour, such as "insufficient advertising of calls for tender". However, the latter option was far less frequently cited (13% of respondents) which suggests that respondents are not universally critical of public bodies and are in fact specifically concerned about the level of competitiveness in the award process.

Given these uncertainties, the interpretation of the responses in terms of the relevance of the Directive should be made with some caution. That said, a perception of a lack of competitiveness in public procurement awards is still a valuable indication that the Directive continues to be relevant in allowing suppliers to challenge awards which are perceived to be non-competitive; even if this perception is driven by a more general lack of trust in public institutions (and this is by no means clear from the evidence) it is still possible that this general perception itself stems from actual problems, some of which the Directive could address.

Similar questions were posed to suppliers who have participated in public procurement but have not been satisfied with the outcome (Figure 6.1, bottom).[68] These questions

[65] OECD Confidence in National Government (2012) - Society at a Glance 2014: OECD Social Indicators http://www.oecd-ilibrary.org/social-issues-migration-health/society-at-a-glance_19991290

[66] OECD Corruption Perception Index (2010) - OECD Gallup World Poll, Growing Unequal? Income Distribution and Poverty in OECD Countries. 2011

[67] The results of perceptions of relevance broken down by Member State can be found in the appendix. Given the small sample sizes in some Member States, as shown in Table 4.4, the results by Member State must be viewed with caution. This also limits the weight we can place on the comparisons of Member State results with the corruption and trust indicators.

[68] Multiple choice answers included: "I do not believe public contracts are awarded on a competitive basis"; "The rules are too difficult to understand or to comply with"; "There were discriminatory specifications in the tender documents"; "Tender was awarded without a contract notice"; "Insufficient reasons for the

more directly address the relevance of the Directive as many of the options relate to areas that the Directive addresses. Therefore on the one hand they are more useful to our assessment, but on the other hand may be more open to response bias. The two most commonly reported concerns about the procurement outcome are "abnormally low (cheap) tender" (45%) and "lack of transparency" in the process (38%). Lack of trust in the competitiveness of the award procedure (or "no trust") is again the third most frequently mentioned reason for dissatisfaction with the procurement outcome, followed by the presence of discriminatory specifications and insufficient reasons for awarding). The main reasons for dissatisfaction reflect perceptions of areas not addressed (or not sufficiently addressed) by the Public Procurement Directives (i.e. transparency in the procurement process, discriminatory specifications, etc.). This again suggests that there is potential scope for improving the functioning of the procurement market and that the Directive is relevant to improve procurement outcomes.

R2: Main reasons why the Directive is still relevant/ no longer relevant

Unlike the first indicator which measures the relevance of the Directive indirectly, the second indicator directly asked for respondents' perceptions of the relevance of the Directive. The following indicators were considered:

Indicators on relevance of provisions:

1) Most relevant provisions (survey suppliers, authorities/entities and legal practitioners)
2) Reasons that make the "Remedies" less relevant (survey suppliers and authorities/entities)
3) Persistence in problems in addressing breaches in procurement law (survey suppliers and authorities/entities)

The results of the survey indicate that "automatic debrief" is considered as a relevant provision by most CAEs and suppliers. Other provisions, including "render awards ineffective", "suspension of procedure", "review time limits" and "standstill period", are also felt to be relevant by at least 29 percent of respondents in both surveys. In contrast, "transparency notice" and "penalties and shortening remedies" are considered relevant by fewer respondents.[69] Despite observing a disparity in opinions between the two groups there is some degree of consistency in their responses with regards to the most relevant provisions (Figure 6.2, top). Specifically, the findings show that "automatic debrief", "render awards ineffective", "suspension of procedure", "review time limits" and "standstill period", are considered relevant by about 30% or more of respondents for both suppliers and CAEs.

The results compare well with the responses obtained from the several legal practitioners: "suspension of the contract award procedure" and "standstill period" are considered relevant by the greatest number of legal practitioners, having been chosen by around 80% and 76% of respondents, respectively. These provisions are followed

authority's decision given in the award notice"; "Lack of transparency in the process"; "Contract was awarded to an abnormally cheap tender"; "Other"; and "Do not know".

[69] Multiple choice answers included: "Automatic debrief to bidders at the time of the contract award decision notice"; "'Standstill period' to be at least 10 days"; "Time limits for applying for a review to be at least 10 days"; "Suspension of the contract award procedure where review proceedings are raised"; "The ability of an independent review body to render a contract award ineffective"; "Civil financial penalties and contract shortening remedies"; "Voluntary ex ante transparency notice"; "None of these provisions are relevant in practice"; and "Do not know".

by "automatic debrief" and "render awards ineffective" and "time limits," each being declared effective by about 55-57% of respondents.[70]

We cross-checked the perceptions of relevant provisions by Member State with our analysis of the review and remedies procedures from Chapter 5 to identify potential driving factors. Whilst it is not possible to establish *causation* between Member States' provisions and the perceptions of respondents, knowledge of the implementation of the Directive can nevertheless assist in understanding respondents' perceptions. For example, standstill periods vary across Member States and this may affect perceptions of the relevance of this provision. Slovenia has the lowest perception of relevance of the standstill provision among CAEs, which could be driven by the fact that it is one of two Member States with a standstill period below the minimum set out in the Directive.[71] Of those Member States with a relatively high perception of the relevance of the "Suspension of the contract award procedure", the majority have provision for the suspension of the contract until a decision on appeal against the first instance decision or longer (i.e. a relatively long period compared to other Member States, which may increase the impact of the suspension of award and thus raise its perceived relevance).[72]

To assess respondents' perceptions of a lack of relevance of the Directive, different response options were provided.[73] Similar to the previous question, a variety of views is reflected in the answers. The most commonly cited reason for the Directive being less relevant is the "inappropriate use" of the Directive (reflecting perceived unnecessary actions being brought forward or nuisance complaints): this is supported by 34% of CAEs but only by 20% of suppliers. On the other hand, around 26% of suppliers indicated that "lack of attention" by the CAEs can make the Directive less relevant, something that is shared by the opinions of CAEs (Figure 6.2, bottom). Some of the differences in the perception of relevance can be attributed to the difference in the position and economic interests of the respondents (i.e. public bodies who are the subject of the review versus review applicants). For example, it is to be expected that CAEs perceive a greater inappropriate use of the Directive than suppliers, as the former would be most affected by nuisance complaints (if these indeed are being used by suppliers).

The improvement made in procurement law is mentioned by 27% and 13% of CAEs and suppliers, respectively. Interestingly, a similar proportion of respondents in both surveys (around 30%) believed that there is "nothing" that makes the Directive less relevant.

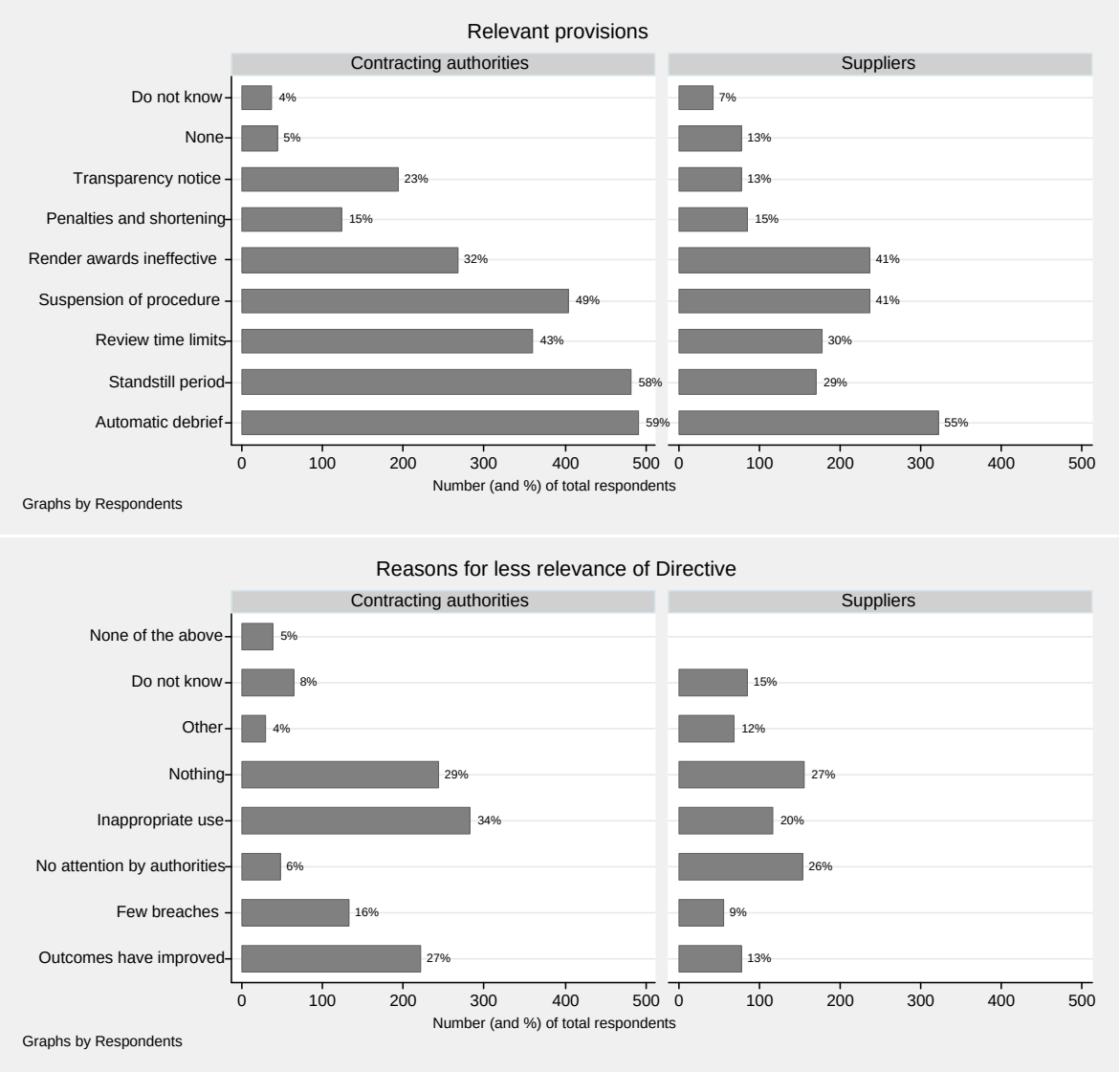
[70] The survey of legal practitioners was conducted on a small sample and represents a cross check validation of the main surveys.

[71] See Figure 5.4. CAEs in the other Member State (Malta) however have a relatively high perception of relevance of this provision.

[72] See Figure 5.8.

[73] Multiple choice answers included: "Public procurement outcomes have already improved considerably over the past few years"; "There are very few instances of breaches in procurement law"; "CAEs do not pay attention to public procurement rules and therefore the "Remedies" are ineffective"; "People make inappropriate use of the reviews just to increase the burden for CAEs and successful firms"; "I do not think anything makes the "Remedies" less relevant"; "Other"; and "Do not know".

Figure 6.2: Relevant provisions/reasons for less relevance

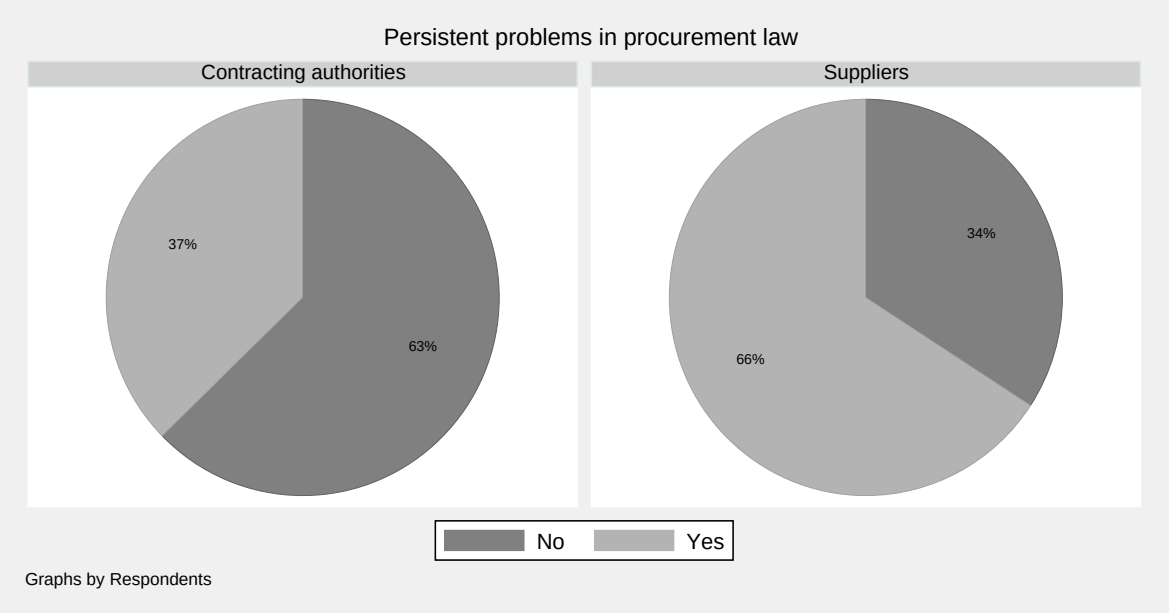


Source: Survey of suppliers and CAEs. Answers to the questions: "Please tick the provisions you consider most relevant". "What are the reasons that make the "Remedies" less relevant?".

We have seen some differences in the responses from suppliers and authorities: CAEs who responded to the survey generally have a higher perception of the relevance of most provisions than suppliers. On the one hand, this is surprising as one would expect suppliers to benefit more from the Directive than CAEs, who may view them as a nuisance. However, a perception of 'relevance' does not necessarily imply a 'positive' perception. A greater perception of relevance may reflect that CAEs are more familiar with, and affected by, the Directive, having had to adapt their behaviour in light of the provisions to a greater extent than suppliers. This could be due to the fact that some provisions require explicit action on the part of the CAEs (e.g. implementing the standstill period and issuing transparency notices); and could also be the result of CAEs feeling the potential 'threat' of the Directive provisions, even if suppliers do not often make use of these. The lower perception of relevance among suppliers may also reflect continuing dissatisfaction with public procurement in general (i.e. they may feel the Directive has not gone far enough) – this is apparent when looking at the final indicator below.

The next indicator on the relevance of the Directive reflects an essential feature of the public procurement market: the existence or not of persistent problems in addressing breaches in procurement law. Unsurprisingly, the results from both parties are mixed: around 63% of the CAEs reported that there are no persistent problems, but only 34% of suppliers stated that as being the case (Figure 6.3). This could reflect underlying response bias, whereby CAEs who are responsible for public procurement have an incentive to portray the process in a more positive light.

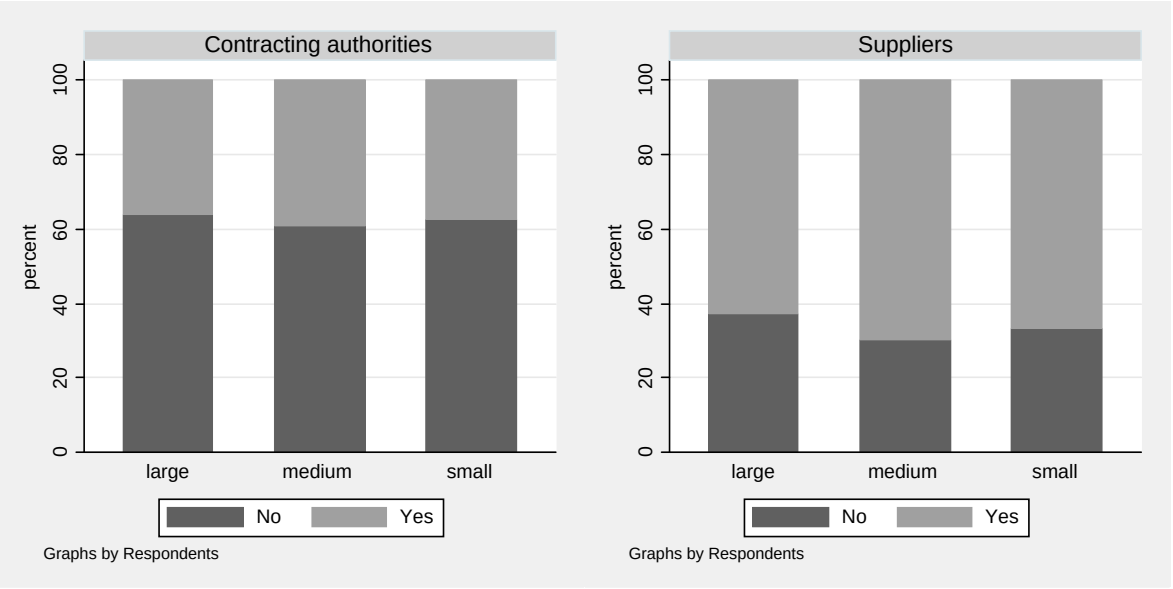
Figure 6.3: Persistent problems in procurement law



Number of respondents to question: CAEs – 832; suppliers – 582.
Source: Survey of suppliers and CAEs. Answers to the questions: "Do you think there are still problems in addressing breaches in procurement law?".

We also analysed the existence of persistent problems by different sizes of organisations (defined by value of annual turnover for suppliers and by value of annual procurement contract for CAEs). It is evident that the experience of problems does not vary by the organisation size (Figure 6.4).

Figure 6.4: Persistent problems in procurement law by size of organisation



Number of respondents to question: CAEs – 832; suppliers – 582.
Source: Survey of suppliers and CAEs. Answers to the questions: "Do you think there are still problems in addressing breaches in procurement law?".

As for legal practitioners, about 26% believe that there are persistent problems in addressing breaches in procurement law. This figure is in line with that reported by the CAEs.

The usage of the Directive, assessed in detail in the following section, is also an indication of the continued relevance of the Directive. Many of the provisions of the Directive have been used widely by suppliers across the EU, as seen in the number of complaints and decisions in indicator U1 (indicators of usage).

6.2 Usage (Q3)

To assess the extent to which the provisions envisaged in the Directive are being used, we analyse a number of indicators related to the number of complaints or challenges[74], suspensions and appeals[75], and the length of the complaints as part of indicator U1. The characteristics of the complaints and decisions (e.g. the remedy being sought) are investigated as part of indicator U2, using the review of case law. We also look at the reasons stated for a review, the outcomes, the degree of satisfaction with the review using the perceptions from respondents of the survey to CAEs and suppliers (indicator U3). The sub-section finishes with an analysis of the use of the VEAT notice (U4).

U1: Indicators of usage

Indicators of usage include data on the number of complaints, decisions and appeals, by Member State.

[74] For consistency, we use the term "complaint" or "challenge" to refer to the initial application for review.

[75] We use the term "appeal" to refer to an appeal made against the decision of the review body at first instance.

Indicators of usage:

1) Number of complaints (legal cases databases)
2) Number of decisions (legal cases databases)
3) Number of appeals (legal cases databases)
4) Estimated length of the complaints (case law review)

The network of experts researched the different databases and statistical reports of procurement review bodies and judicial authorities across Member States in order to provide estimates of case availability in the EU. By examining the available information we determined the number of requests initiated and the number of decisions regarding these requests by Member State for 2009-2012.

Information on the date of application of the complaints is not always available in the different Member States. In the 10 Member States where data is available, we observe more than ten thousand annual complaints initiated in the 2009-2012 period. The four-year total was slightly over 52,000 (yearly breakdown not available for all Member States). This information is presented in Table 6.1 for Member States which had available information during 2009-2012. The total number of complaints is driven by a few countries with a particularly high number of requests such as BG (4,244), SE (11,674) and most notably RO (26,369). These figures are likely to be linked to the fees associated with filing complaints, as shown in Figure 5.14. Sweden has no formal application fee, which implies a low barrier to filing complaints; similarly Bulgaria has a relatively low, fixed fee. On the other hand, the high number of complaints in Romania may well have driven the 'guarantee of good conduct' fee recently introduced in 2014 (which makes Romanian fees the highest across Member States for large contracts), to be paid by the complainant and retained by the CAE if the complaint is dismissed or withdrawn.[76] This is presumably to reduce the number of complaints filed, and it would be expected that over time the number of complaints in Romania will fall as a result of this, particularly for large contract values.

[76] Introduced in the Emergency Government Ordinance 51/2014, and equivalent to 1% of the estimate value of the contract, with a limit of €100,000. However, this EGO is being investigated under EU Pilot 7189/14/MARK, in response to complaints filed to DG MARKT regarding the excessive guarantee of good conduct fee. On 15 January 2015, the Constitutional Court in Romania declared that the provisions of the EGO which allow the 'guarantee of good faith' to be withheld following rejection of a complaint are unconstitutional. The 'guarantee of good faith' is also subject to review before the EU Court of Justice (pending cases C-439/14 and C-488/14) following requests from the national courts for a preliminary ruling.

Table 6.1: Number of complaints initiated/lodged: by MS and year

MS	2009	2010	2011	2012	Total
BG	902	937	1,250	1,155	**4,244**
CZ	309	425	530	650	**1,914**
ES					**1,383**
FI	578	612	399	449	**2,038**
HU	669	695	810	516	**2,690**
MT		16	114	143	**273**
RO	6,212	7,867	6,293	5,997	**26,369**
SE	2,083	3,572	2,754	3,265	**11,674**
SI	392	419	537	516	**1,864**
UK	5	14	4	6	**29**
Total	**11,150**	**14,557**	**12,691**	**12,697**	**52,478**

Note: Number of requests initiated/lodged only for MS where information was available.
Source: Review of case law.

Information on first instance decisions is more widely available. There were around 50,000 first instance decisions across Member States during 2009-2012, with more than 20,000 sourcing from SE (11,144) and PL (10,570). While no other Member States approach the numbers of these two countries, HR (6,939), BG (4,411) and DE (4,222) also have a considerable number of decisions. There were more than 10,000 decisions made in every year of our sample, with the maximum being reached in 2011 (14,328). This information is presented in Table 6.2 for all Member States with available information during 2009-2012.

Table 6.2: Number of decisions: by MS and year

MS	2009	2010	2011	2012	Total
AT	253	204	241	234	**932**
BE	138	160	192	221	**711**
BG	1,224	1,072	1,146	969	**4,411**
CY	111	130	73	66	**380**
CZ	508	511	710	1,049	**2,778**
DE	1,275	1,065	989	893	**4,222**
DK	75	99	201	205	**580**
EE	193	208	224	254	**879**
EL	-	~207	~207	~207	**620**
ES	-	~441	~441	~441	**1,323**
FI	610	587	569	425	**2,191**
FR		6	16	18	**40**
HR	1,374	1,810	1,888	1,867	**6,939**
HU	598	673	688	460	**2,419**
IE	1	1	11	8	**21**
IT	69	91	180	0	**340**
LT	235	413	409	353	**1,410**
LU	18	8	10	3	**39**
LV	901	835	1,019	1,020	**3,775**
MT		5	83	152	**240**
NL	254	279	271	307	**1,111**
PL	1,985	2,823	2,820	2,942	**10,570**
PT	16	18	30	22	**86**
RO	225	401	619	427	**1,672**
SE	1,990	3,156	2,960	3,038	**11,144**
SI	392	419	537	516	**1,864**
SK	189	284	314	472	**1,259**
UK	5	13	16	13	**47**
Total	**11,265**	**13,461**	**14,328**	**14,067**	**55,064**

Note: Number of decisions only for MS where information was available. ~ indicates approximate figure.
Source: Review of case law.

During the same period, there were also 10,103 second instance decisions made (for Member States where information was available). There were more than 2,200 decisions per year, with 2,895 taking place in 2011. Out of the Member States with available information, RO and SE had the highest numbers (2,231 and 2,386, respectively). See Table 6.3.

Table 6.3: Number of second instance decisions: by MS and year

MS	2009	2010	2011	2012	Total
CZ	100	167	155	229	**651**
CY	14	11	13	10	**48**
DE	199	226	241	184	**850**
DK	10	3	4	5	**22**
EE	48	37	57	55	**197**
HU	193	196	164	130	**683**
IE	111	17	79	0	**207**
LT	137	284	305	280	**1,006**
LU	4	4	4	2	**14**
RO	784	401	619	427	**2,231**
SE	409	544	717	716	**2,386**
SI	365	401	537	505	**1,808**
Total	**2,374**	**2,291**	**2,895**	**2,543**	**10,103**

Note: Number of second instance decisions only for MS where information was available. ~ indicates approximate figure.
Source: Review of case law.

Information on the number of third instance decisions was available for only three Member States (EE, LT and SE). Out of the total 800 decisions, 686 sourced from SE with EE and LT having significantly fewer cases. There are more than 100 cases per year where the maximum number of third instance decisions is observed in 2011 (269). See Table 6.4.

Table 6.4: Number of third instance decisions: by MS and year

MS	2009	2010	2011	2012	Total
EE	12	13	12	16	**53**
LT	8	10	23	20	**61**
SE	129	108	234	216	**686**
Total	**149**	**131**	**269**	**252**	**800**

Note: Number of third instance decisions only for MS where information was available.
Source: Review of case law.

The information presented above shows that from 2009 to 2012 there have been a large number of requests initiated and decisions made on these requests across Member States. As expected, the number of decisions declines from first to second to third instance. There is no notable evolution in the number of requests and decisions from year to year, with the exception of 2010 where the number of requests was higher than in 2009 in all Member States for which information was available.

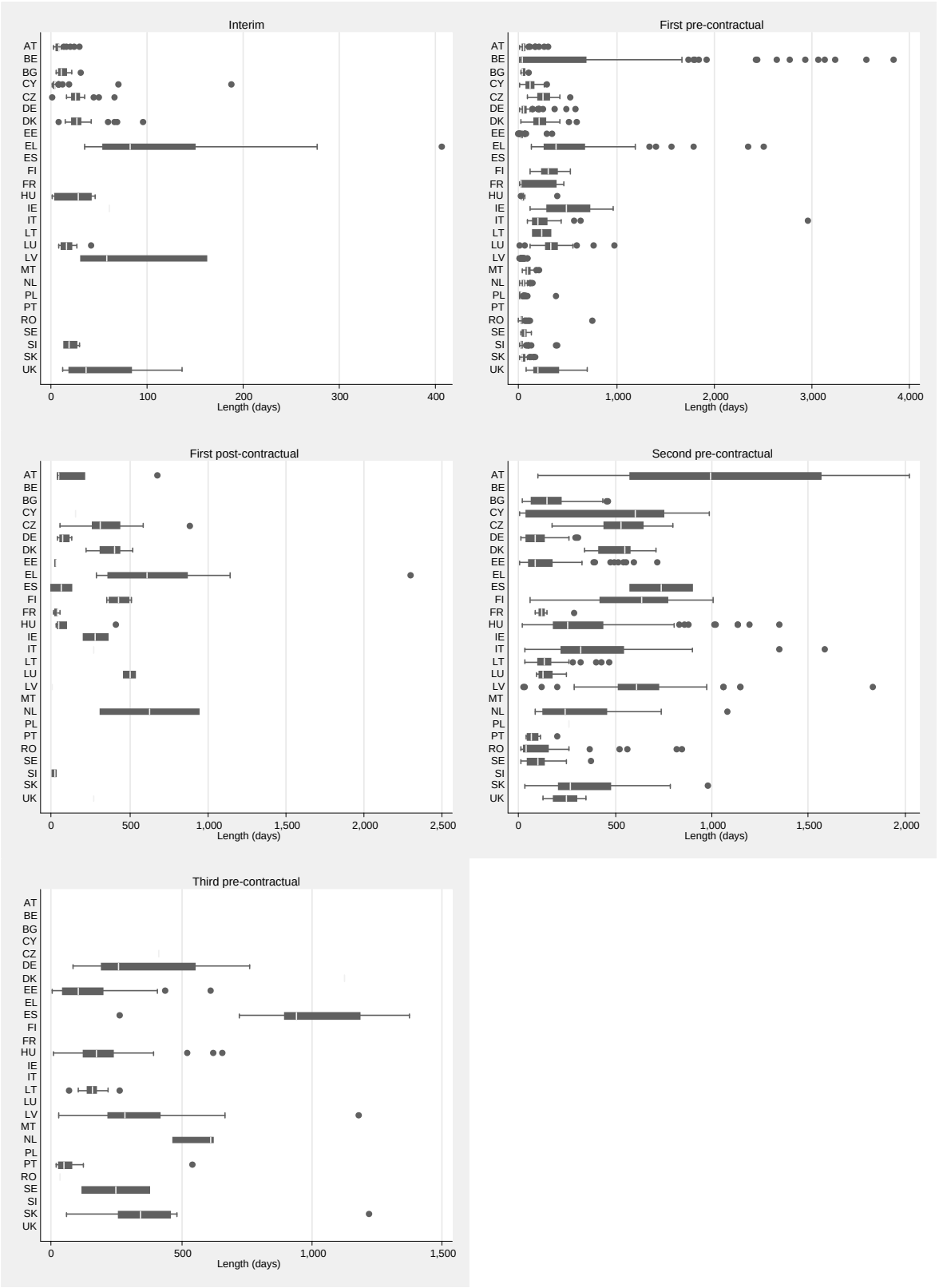
We use the review of case law to analyse the length of the review procedures. This has been calculated, for each decision, as the difference (in days) between the date of decision and date of application. In cases where the date of application was missing, these were estimated by adding the statutory deadline for appeal to the date of decision of the previous instance decision.[77]

[77] Hence, the date of application in third instance was estimated using the date of decision of the second instance and the statutory deadline for appeal (as reported by the network of experts). The following deadlines (days) were used: HU - 16; SK - 16; SE - 21; DK - 29; EE - 30; LT - 30; DE - 31; NL - 90; and CZ - 61. The date of application in second instance was estimated using the date of decision of the

The calculated length of review procedures across Member States is particularly dispersed and has some extreme observations. This is illustrated in several box plots in Figure 6.5 showing the distribution of length (boxes represent the distribution range containing 50% of the estimated lengths between the 25th and 75th percentiles; the white gap dissecting the boxes represent the median value, any outliers in the responses are presented as dots, the line represents the minimal and maximal non-outlier values).

first instance and the statutory deadline for appeal. The following deadlines were used: DK - 57; NL - 28; EE - 10; HU - 16; FI - 30; SK - 61; IT - 31; AT - 43; DE - 14; LT - 14; SE - 21; and BE – 14.

Figure 6.5: Dispersion of length of the review

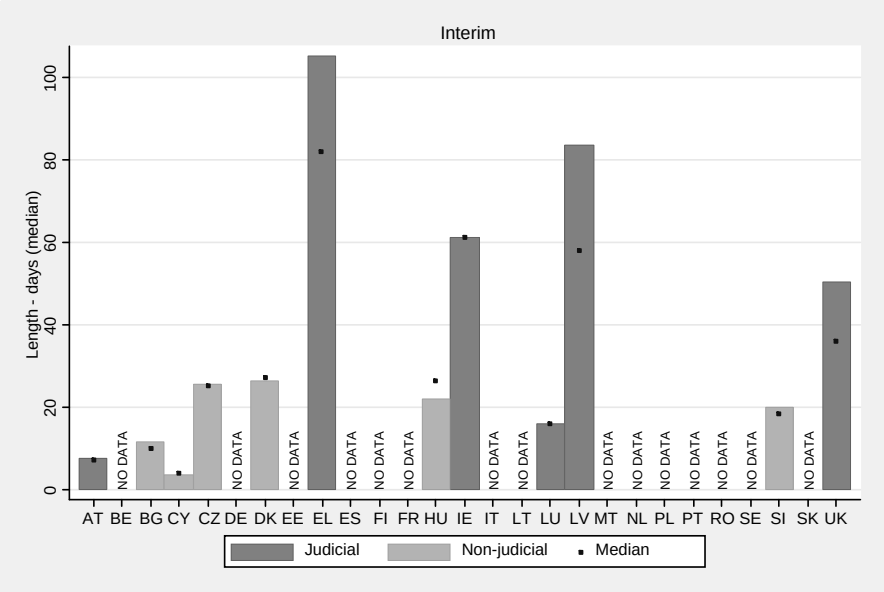


Source: Review of case law. Countries with only one observation are not shown.

Given the high dispersion in the length values, we calculated a corrected mean-length (after removing outlying observations[78]) and the median-length value[79], for each of the instances (interim, first pre-contractual, first post-contractual, second or third). A mean significantly different than its median indicates that the underlying distribution is skewed and probably more affected by the presence of extreme observations. Figure 6.6-Figure 6.9 show the length of the different reviews for years 2009-2012.

The length of interim measures was estimated for 12 Member States. By some margin, EL shows the greatest length both in terms of the mean and median value. IE and LV are also considerably higher in terms of median estimated length compared to the rest of the sample (LV having a significantly higher mean). It is also important to note the short estimated length that is observed for AT and CY (see Figure 6.6).

Figure 6.6: Estimated length of the review (interim measures 2009-2012)



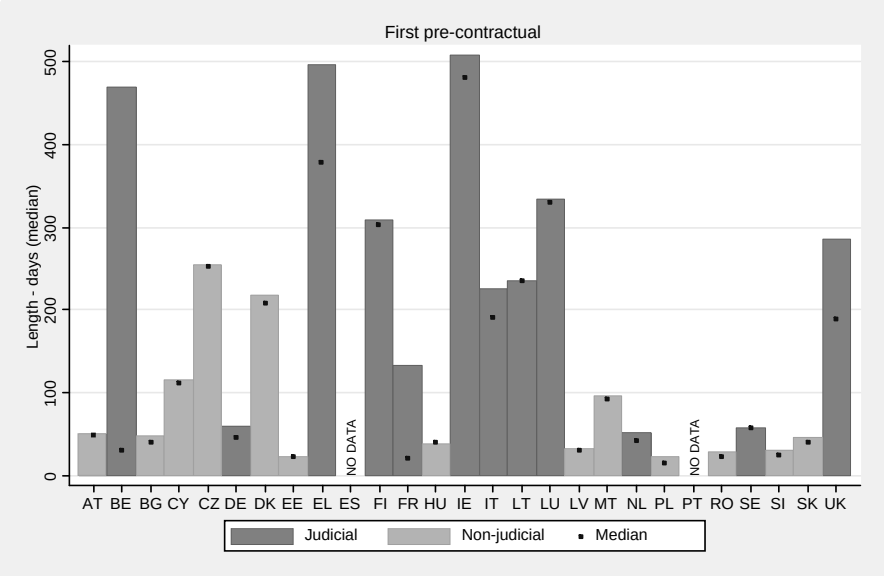
Note: statistics based on the following number of observations: AT: 88; BG: 31; CY: 111; CZ: 42; DK: 90; EL: 104; HU: 39; IE: 1; LU: 24; LV: 3; SI: 4; UK: 11.
Source: Review of case law.

[78] These are defined as length values greater than three times the standard deviation of the lengths in each Member State and instance (interim, first pre-contractual, first post-contractual, second or third).

[79] Medians calculated on the entire sample.

In examining the length of review associated with pre-contractual remedies, data are available for 25 Member States. The five greatest duration median values are observed in Member States with judicial review bodies[80] (IE, EL, BE, LU, and FI). Out of the Member States with non-judicial review bodies, CZ has the highest median length estimate followed by DK and CY. For all other non-judicial Member States, the median estimated review length is below 100 days.

Figure 6.7: Estimated length of the review (pre-contractual remedies 2009-2012)

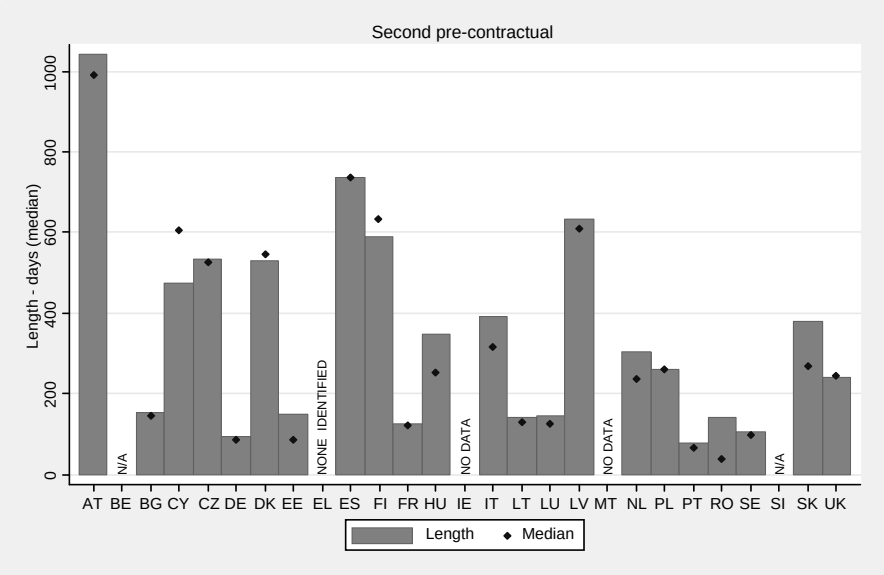


Note: AT system is entirely judicial as of 2014, but was non-judicial for the period of analysis 2009-2012. Statistics based on the following number of observations: AT: 62; BE: 118; BG: 118; CY: 119; CZ: 60; DE: 92; DK: 103; EE: 44; EL: 100; FI: 26; FR: 17; HU: 116; IE: 4; IT: 24; LT: 2; LU: 31; LV: 134; MT: 60; NL: 37; PL: 164; RO: 116; SE: 18; SI: 114; SK: 109; UK: 7. CZ – The total length is calculated by adding the duration of the initial application for review before the Office for the Protection of Competition plus the duration of appeal to the Head of the Office; ES – No data; PT – No data.
Source: Review of case law.

The Member States with the highest median estimated length of review for second pre-contractual instance cases are AT and ES, which are both in the 700-1,000 days range. Five Member States are close to a 600 day estimated length, CY, CZ, DK, FI and LV, while most Member States are clustered in the 0-200 days range (BG, DE, EE, FR, LT, LU, PT, RO and SE).

[80] Based on the analysis in Chapter 5 (Figure 5.7), Member States with a judicial review body were classified as "judicial" while Member States other types of review bodies were classified as "non-judicial".

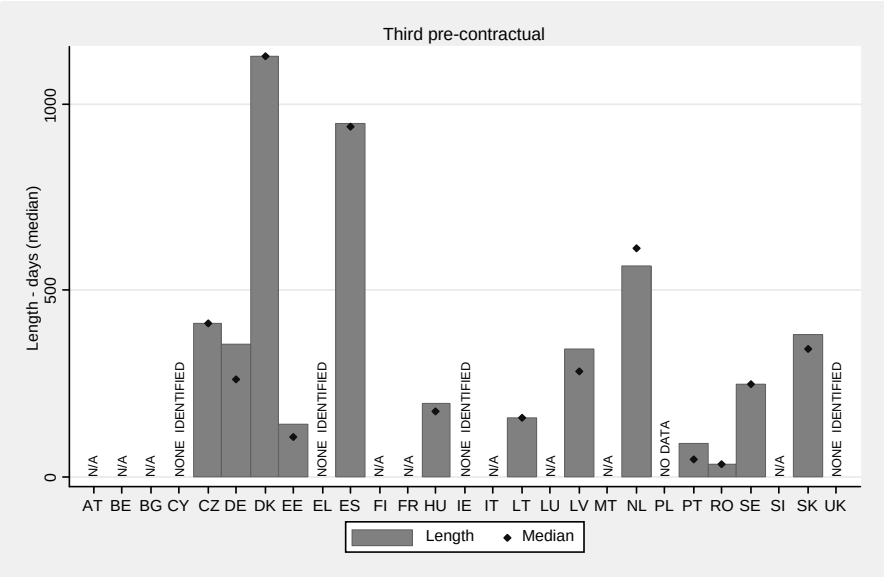
Figure 6.8: Estimated length of the review (second instance 2009-2012)



Note: statistics based on the following number of observations: AT: 44; BG: 124; CY: 5; CZ: 27; DE: 139; DK: 10; EE: 73; ES: 2; FI: 49; FR: 21; HU: 113; IT: 93; LT: 105; LU: 14; LV: 58; NL: 24; PL: 1; PT: 14; RO: 34; SE: 32; SK: 17; UK: 4. BE – N/A (no appeal from Council of State); EL – None identified from sample reviewed; IE – No data (there is 1 case in 2011 and 1 in 2012 but dates of decision are missing); MT – No data; SI – N/A (no appeal from National Review Commission).
Source: Review of case law.

Data availability for the length of third pre-contractual instance cases is more limited and includes only 13 Member States. DK has an estimated median value of around 1,100 days, ES around 900, NL around 600, and CZ around 400. Of the rest Member States, four are in the 200-400 days range (DE, LV, SE and SK) and five are in the 0-200 days range (EE, HU, LT, PT and RO, see Figure 6.9).

Figure 6.9: Estimated length of the review (third instance 2009-2012)



Note: statistics based on the following number of observations: CZ: 1; DE: 7; DK: 1; EE: 30; ES: 10; HU: 69; LT: 47; LV: 17; NL: 3; PT: 14; RO: 1; SE: 2; SK: 14. AT – N/A (second is final instance); BE – N/A; BG – N/A; CY – None identified from sample reviewed; EL – None identified from sample reviewed; FI – N/A; FR – N/A; IE – None identified from sample reviewed; IT – N/A; LU – N/A; MT – N/A; PL – No data; SI – N/A; UK – None identified from sample reviewed.
Source: Review of case law.

In summary, the length of interim measures and reviews varies significantly across Member States and by type of review, with interim measures being the shortest on average and second and third instance reviews being the longest. Length of pre-contractual remedies appears to be influenced by whether the Member State has a non-judicial Review Body – the figures show that Member States with a specialist non-judicial Review Body generally have the shorter review lengths for interim reviews and pre-contractual remedies; similarly those Member States with the longest lengths have a judicial process (IE, EL, BE, LU, and FI).

There is no clear link between the lengths of different types of review within Member States, although some Member States do show consistently long review lengths. For example, second instance reviews are particularly long in AT, ES and LV, but for third instance reviews the greatest lengths are in DK, ES and NL. ES is the one Member State here with relatively long review lengths for both. EL and IE have relatively long review lengths for both pre-contractual and interim measures reviews, as does the UK. Mapping these results to the provisions for length of review discussed in section 5.7 indicates some correlation – there is no maximum review length specified in ES, IE or the UK which may explain the relatively long lengths. However, the available evidence does not enable us to conclude that review lengths are driven by the Directive provisions in Member States – length of review could be influenced by manifold country-specific factors, and establishing causation is challenging. For example, the single Market public procurement scoreboard shows that ES, EL and IE are all rated as having low procedural efficiency in relation to procurement.[81] One the one hand,

[81] Single Market Scoreboard: Performance per policy area - Public procurement, Reporting period: 01/2013 - 12/2013, http://ec.europa.eu/internal_market/scoreboard/_docs/2014/07/public-procurement/2014-07-scoreboard-public-procurement_en.pdf

general procedural slowness could explain the long review lengths; but on the other hand (and more likely), long review lengths could be driving the overall procedural slowness picked up the by Scoreboard indicator.[82]

U2: Type of remedies

The remedies used were identified from the review of cases to analyse the following indicators.

Indicators on remedies being used:

1) Type of remedies used (in first, second and third instance) (case law review)
2) Decisions by type of complaint (case law review)

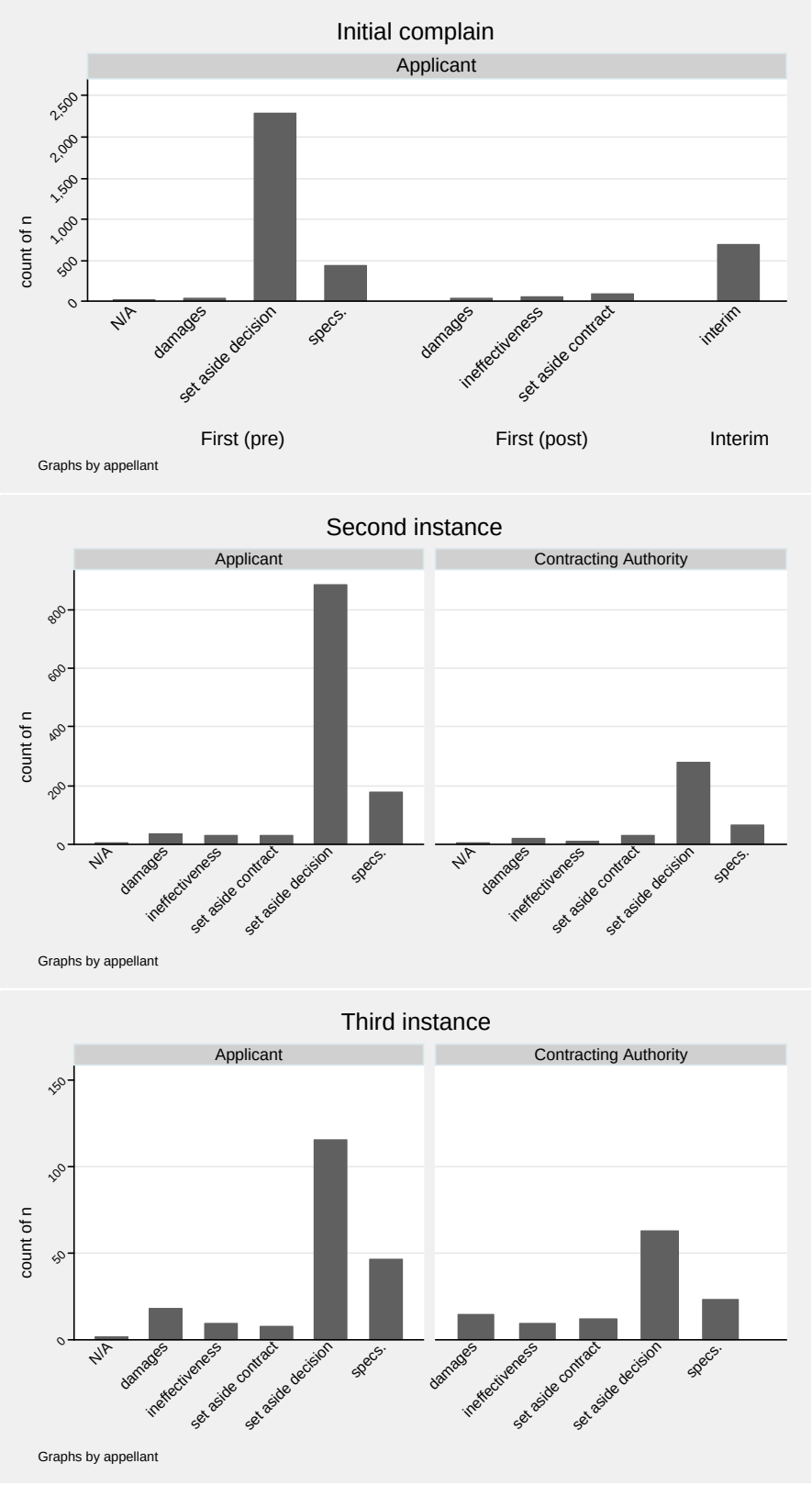
The typology of complaints was based on the analysis of legal cases. The main types of complaints relate to the remedy that is being sought by the complainant such as damages, ineffectiveness, interim injunction and setting aside the decision. These are the main types recorded (in many cases they were accompanied by secondary claims, which are not considered in the analysis). In response to the decision in first instance, appeals can be made (in second or third instance) by both the initial applicant and the CAE.

Across the EU, the most frequently sought type of initial remedy is set aside decision, followed at distance by interim measures and the removal of discriminatory specifications. In our sample, there were 2,300 pre-contract set aside decision initial complaints and just under 500 complaints on discriminatory specifications (about 82% and 16%, respectively of total pre-contract complaints). There were much less post-contract complaints, all under 100 complaints (damages, ineffectiveness, and set aside contract amounted to about 21%, 29% and 50% of all post-contract complaints, respectively, Figure 6.10, top).

In the second instances of our sample, set aside of decision is the most used appeal by both applicants and CAEs (883 and 282 cases, which amount to about 76% and 67%, respectively) followed by discriminatory specifications (178 and 69, or about 15% and 17%, respectively). A similar pattern is observed for third instance decisions in the sample: there are 116 and 63 set aside cases (about 58% for applicants and 51% for authorities, respectively) and 47 and 23 for discriminatory specifications (23% and 19%, respectively, Figure 6.10, bottom graphs).

[82] Caution must also be exercised in attempting to establish explanatory factors for the findings of our empirical work, as external data may not be capturing the same elements as our research. For example, the Scoreboard's procurement efficiency indicator measures the average decision period, i.e. the time between the deadline for receipt of offers and the awarding of the contract. Whilst this may be affected by the review length, it is more likely to reflect the CAEs' actual decision-making processes rather than the efficiency of the courts and non-judicial bodies in processing reviews.

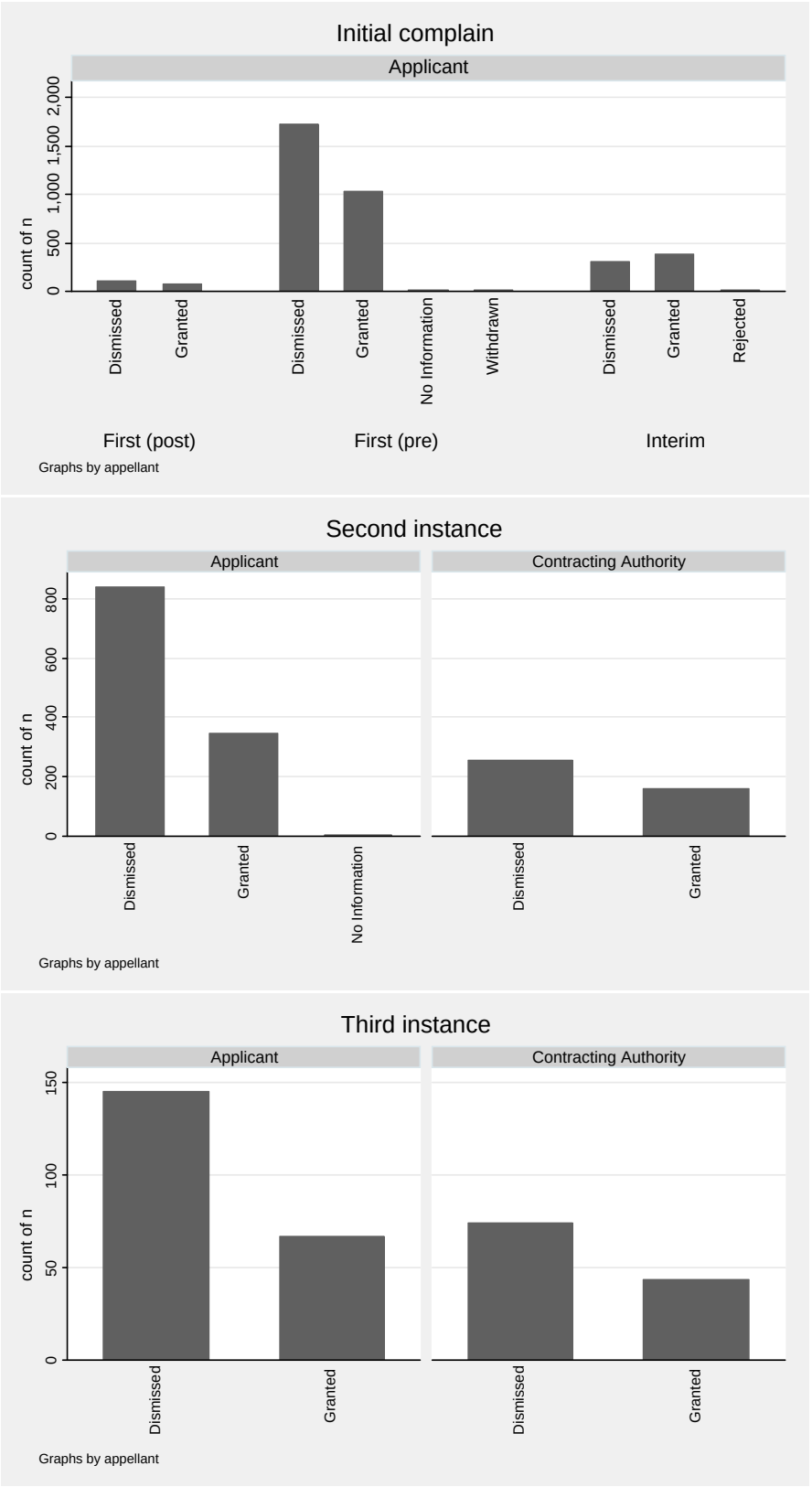
Figure 6.10: Frequency of remedies sought in complaint (2009-2012)



Source: Review of case law (sample).

The data on decisions (shown in Figure 6.11) indicates that in the EU complaints are more commonly dismissed than granted. This holds for both applicants and CAEs. More than 1,600 initial pre-contract complaints are dismissed with just over 1,000 granted (62% and 37%, respectively). The exception to this is interim measures with 393 granted and 306 dismissed (about 56% and 44%, respectively). The gap between dismissed and granted applications is larger for applicants than CAEs. Applicants have around twice the number of appeals dismissed than granted in the second (843 to 346, or 71% compared to 29%, respectively) and third instances (155 to 69, or 69% compared to 31%, respectively). CAEs on the other hand have 267 challenges dismissed and 163 granted in the second instance (about 62% and 38%, respectively) as well as 84 dismissed and 49 granted in the third (about 63% and 37%, respectively).

Figure 6.11: Frequency of decisions (2009-2012)



Source: Review of case law (sample).

U3: Perceptions by respondents (different aspects of the Directive)

To understand the perceptions of the suppliers and CAEs on the usage of the Directive, we have used a number of indicators, as shown in the box below.

Indicators on perception of usage:

1) The reasons for making an application for review. (survey of suppliers and authorities)
2) The outcome of the review. (survey of suppliers and authorities)
3) The reasons for being unsatisfied, or partially satisfied, with the outcomes of the review. (survey of suppliers)
4) The reasons for not asking for a review. (survey of suppliers)

We asked respondents to provide their reasons for the recent usage of a review of a public procurement process.[83] The question is designed to explore the problems in the public tender process that drive the suppliers' decision for review. It covers all stages of the procurement process, from tender specification to the award of contract.

Around a third of suppliers reported that "discriminatory specification", "illegal qualification", "insufficient reasoning" and "lack of transparency in the tender process" are the driving reasons for review. Other reasons suggested by around 20% of respondents are "contracts being awarded to an abnormally low tender" and reasons other than those listed in the survey. "Absence of contract notice" and "illegal composition" are not usually considered as the reasons for review by most suppliers.

In comparison, the perception of CAEs on the reasons for review is more widespread with the majority of respondents (43%) selecting "others". The next highest reasons for a review are considered to be "illegal qualification" (20%), "discriminatory specification" (18%) and "insufficient reasoning" (16%). This is in line with the perception of the majority of suppliers. The rest of the reasons are considered to be less likely to cause a review, with each of them accounting for no more than 10% of the CAEs. In particular, neither CAEs nor suppliers who had past review experience felt that an "illegal composition of evaluation committees" can lead a review of a procurement outcome (Figure 6.12, top).

Regarding outcome of the recent review[84], a majority of suppliers (58%) were not successful. Similarly, around 67% of CAEs also noted a "not successful" outcome. On one hand, this may suggest that there is an evidence of inappropriate use of the Directive by requesting invalid reviews of the procurement outcome: in particular, the majority of the CAEs felt that inappropriate use could undermine the relevance of the Directive. On the other hand, this could indicate the Directive has been effective in encouraging suppliers who are unhappy with the procurement outcome to file a review but individuals are still in the learning process to evaluate whether the reasons for review would be valid or not. This could result in reviews being submitted on insufficient grounds, leading to high rate of unsuccessful outcomes.

[83] Multiple choice answers included: "Discriminatory specifications in tender documents", "Illegal qualification/shortlisting decision", "Tender was awarded without a contract notice", "Lack of transparency in the process", "Insufficient reasoning in award notice", "Illegal composition of evaluation committees", "Contract awarded to an abnormally low tender", "Other", and "Do not know".

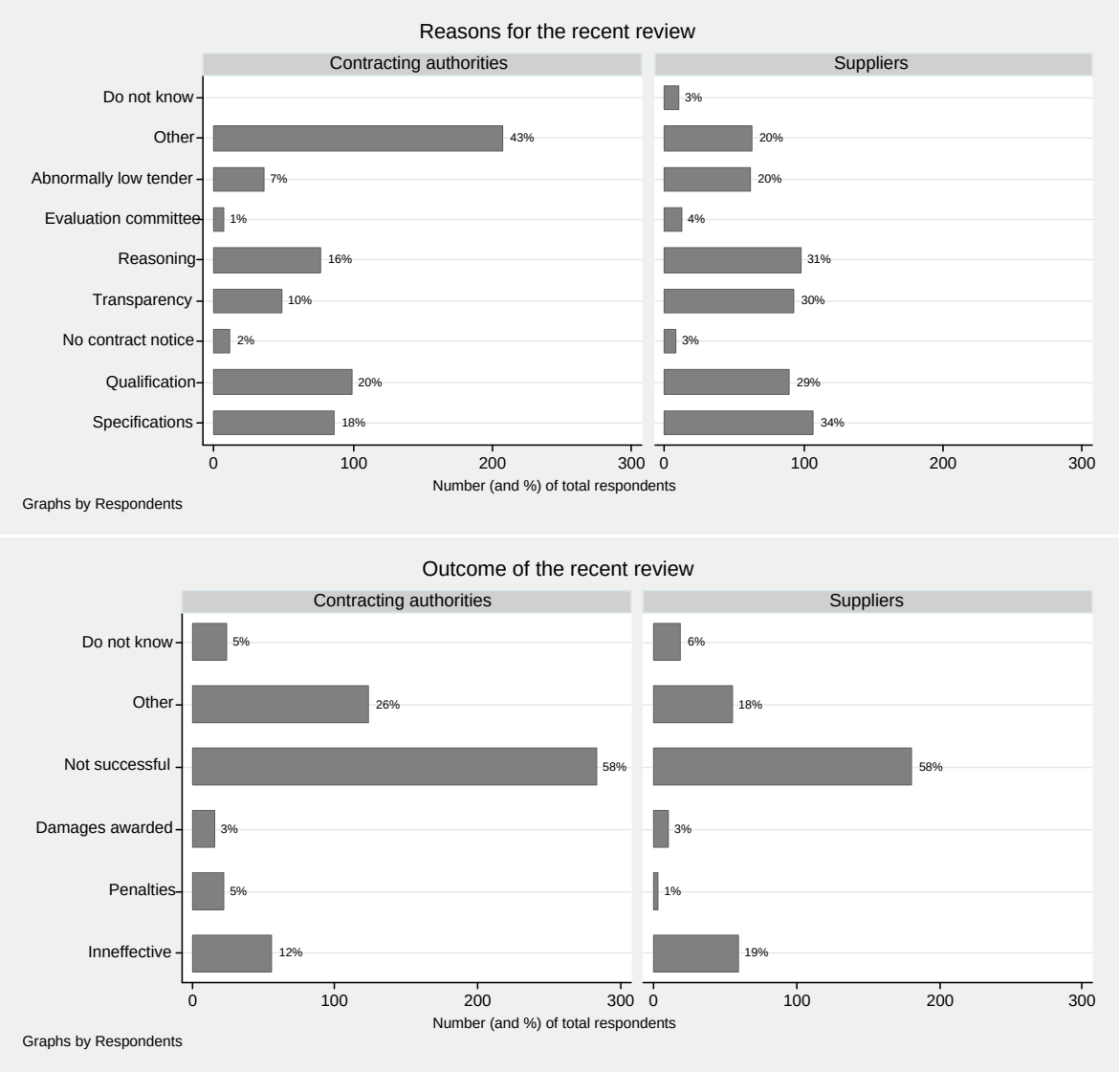
[84] Multiple choice answers included: "The contract was declared ineffective by the Review body", "Alternative penalties were applied (e.g. financial penalties or shortening of the contract)", "Damages were awarded to my company", "The review was not successful for us", "Other", and "Do not know".

The second most common outcome that has been received by the respondents is the "ineffectiveness of the contract" as declared by the review body. Around 19% of the suppliers and 12% of CAEs had terminated the awarded contracts as a result of a recent review. Very few suppliers and CAEs had received/issued "damages or penalties" as the compensation for the unsatisfactory procurement outcome. A further 18% of suppliers and 26% of CAEs reported "other" outcomes of their recent review (Figure 6.12, bottom).

This is supported by the results of the legal practitioners' survey: the majority of respondents stated that damages were seldom awarded and that the benefits of seeking damages seldom justified the costs. Of all respondents, only 14 (across 10 Member States) were able to provide information about damages awarded, and in many cases had not themselves observed damages being awarded but rather provided generic information.[85]

[85] Damages observed are generally reported as a percentage of the value of the contract. These percentages, where given, varied significantly across respondents.

Figure 6.12: Reasons for and outcomes of the review

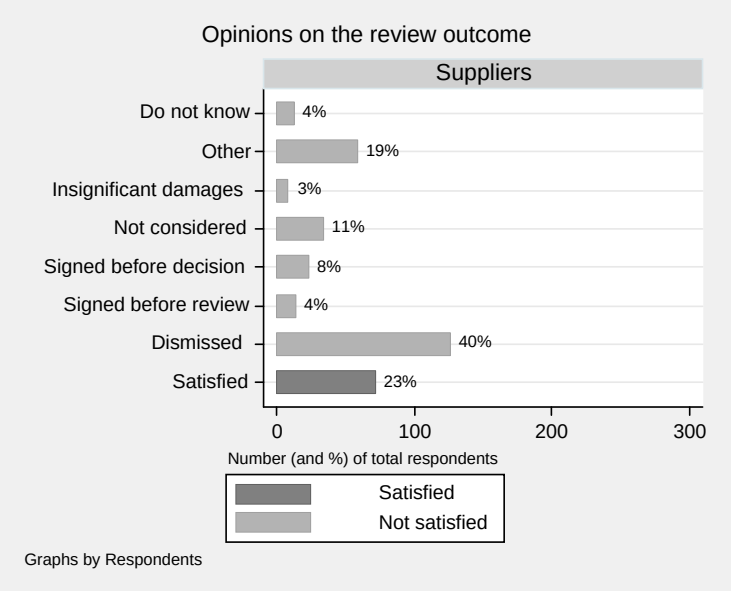


Source: Survey of suppliers and CAEs. Answers to the questions: "What were the reasons for making an application for review on that occasion?" and "What was the outcome of the review on that occasion?".

Suppliers were asked if they were satisfied with the outcomes of their review.[86] As many as 72 of respondents (23%) were satisfied with the outcome of their review (Figure 6.13), which we consider as a reasonable degree of satisfaction. Among the unsatisfied respondents (242 in total), the most common reason of dissatisfaction was "dismissal of the review" (40%). A minority of individuals were unsatisfied because of other reasons, including: cases where the organisations were "not considered to have sufficient interest in acting" (11%); because the contract was "signed before a review" could be sought (4%) or the contract was "signed before resolution or judgement" (8%).

[86] Multiple choice answers included: "Satisfied with the outcome"; "The review was dismissed by the review body"; "The contract was signed before a review could be sought"; "The contract was signed before resolution or judgment"; "Our company was not considered to have sufficient interest in acting"; "Damages awarded were insignificant"; "Other"; and "Do not know".

Figure 6.13: Satisfaction with review outcome and reasons for dissatisfaction



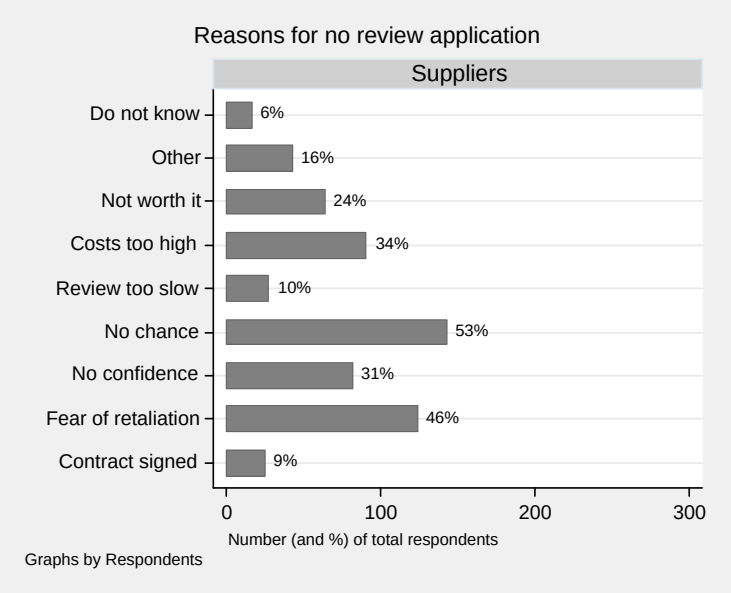
Source: Survey of suppliers. For the "Not satisfied" category, answers to the question: "What were the reasons for you being unsatisfied, or only partially satisfied with the outcomes of the review?" where multiple options could be selected. For the "Satisfied" category all the "Yes" answers to: "Thinking about the last time you bid for a public sector contract, were you satisfied with the outcome?".

The questionnaire also explored the underlying factors that can undermine the usage of the Directive, such as fears of retaliation and cost of review etc.[87] Of those suppliers who had not used the Directive before, the majority refused to act because they felt they had too low or "no chance" of success (53%). Also, a large proportion of suppliers (46%) had "fears of retaliation" (they believed that a review could affect their chances of winning future contracts). "Lack of confidence" in the review process and "high costs" are also considered to be a reason for no review for around a third of respondents. Other reasons, such as "contract already signed", "slow review process" and "net loss of the reviews" are also considered to be the underlying factors to some respondents (Figure 6.14). Such findings suggest that the benefits of the Directive are not being fully realised by some suppliers.

From the survey results, it is clear that the perception of failure and the fear of retaliation have hampered the usage of the Directive. Also, the legal costs, lack of confidence and the expected benefits of the reviews are mentioned by 34%, 31% and 24% of respondents, respectively. This implies that cost can act as a major concern when seeking for a review, particularly for SMEs. The results suggest that there is scope of potential improvement in the review system to improve the confidence of the suppliers and simply the process to make it more affordable to SMEs.

[87] Multiple choice answers included: "No opportunity to do so (contract already signed)", "Fears of retaliation (less chance of winning future contracts)", "No confidence in the system for reviewing decisions", "Small chances of success", "The review system is too slow", "Legal costs too high", "Potential rewards do not cover losses", "Other" and "Do not know".

Figure 6.14: Reasons for no usage



Source: Survey of suppliers. Answers to question: "For what reasons did your company NOT ask for a review?"

U4: Usage of the VEAT notice

CAE may award a contract without prior publication of a contract notice if this is properly justified and published in a notice for voluntary ex ante transparency, as defined in Article 2d(4) of the Remedies Directives. This is described in more detail in section 5.9.

Transparency notices need to be published in TED using Standard Form 15, for public procurement.[88] For the purposes of the analysis of this indicator, the notices have been identified in TED using the field relating to type of document "V - Voluntary ex ante transparency notice".[89] Data on VEAT notice usage was obtained through searches in the TED archive for the number of published tenders by year, Member State, and sector. Frequency statistics were estimated at different levels of aggregation of such data to construct different indicators.

Indicators on the usage of VEAT notice:

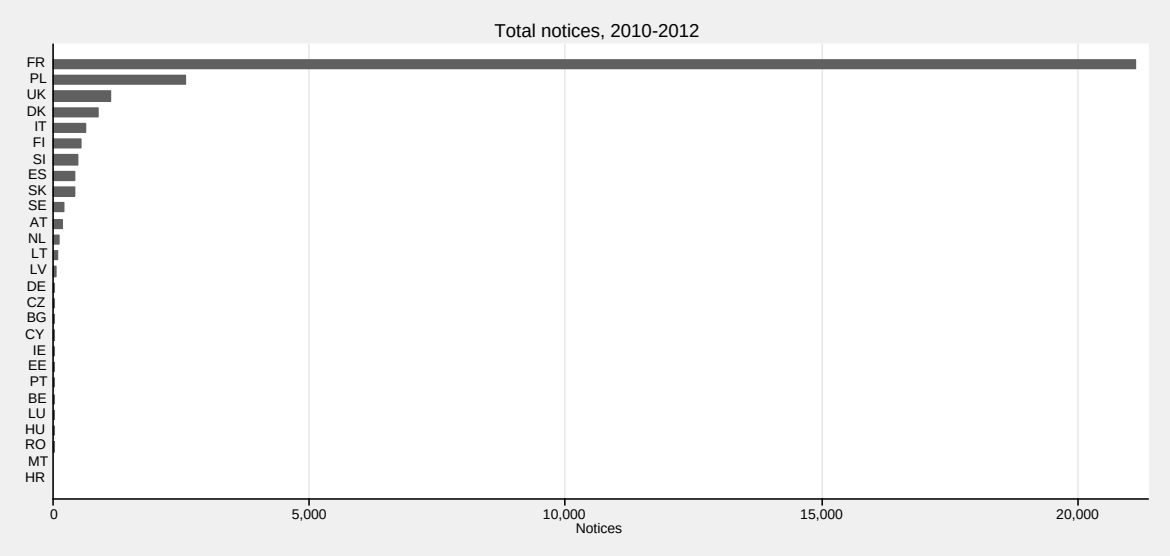
1) Total notices by Member State (TED)
2) Total notices by year (TED)
3) Total notices by sector and year (TED)
4) Evolution of use of notices across time by Member State (TED)

[88] http://simap.europa.eu/buyer/forms-standard/index_en.htm.

[89] The format is slightly different in TED, and in fact we have seen that there are some duplicated records for the same transparency notice. This is because some transparency notices have been recorded using data from Standard Forms 15, but some other notices appear as part of the complementary information attached to different contract's file (in particular, under the "id_previous" variable).

There were more than twenty-five thousand published notices across 27 Member States from 2010 to 2012[90]. The majority of VEAT notice usage was by France (21,102 contracts), with Poland (2,608), the United Kingdom (1,136), and Denmark (895) following at a distance. The other 23 Member States combined were responsible for just over 10% of the total notices. This information is presented in Figure 6.15.

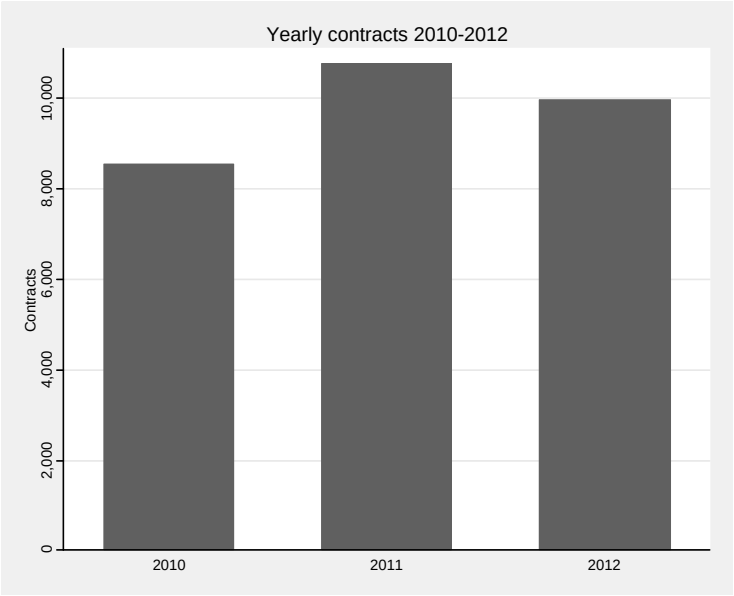
Figure 6.15: Usage of VEAT notice, Member State



Source: TED.

For the EU as a whole, data shows an increase in the number of notices from 2010 to 2011 (10,784) followed by a small drop in 2012. This is shown in Figure 6.16.

Figure 6.16: Usage of VEAT notice, EU total



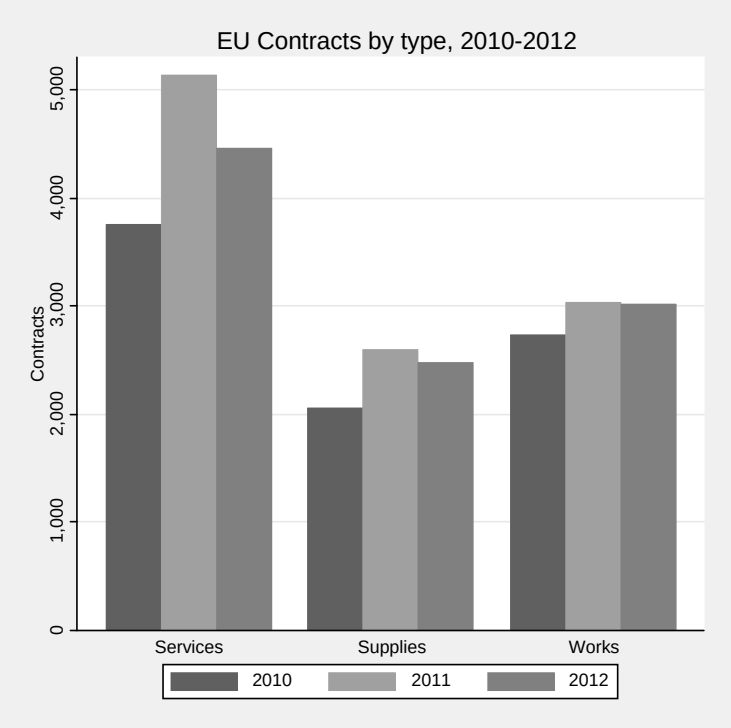
Source: TED

Note: voluntary transparency notices not available in TED for 2009.

[90] Voluntary transparency notices are not available in TED for 2009.

The most tenders were for services contracts (13,387, 46%), followed by works (8,795, 30%) and supplies (7,156, 24%). When comparing this data, to the breakdown of contract types for the complete TED database (services 46%, supplies 36% and works 18%), we observe an over-representation of the "works" contract type in the VEAT sub-sample and an under-representation of the "supplies" contract type. The overall trend with 2011 being the peak year was consistent across all three sectors although works saw a smaller decrease from 2011 to 2012 (Figure 6.17).

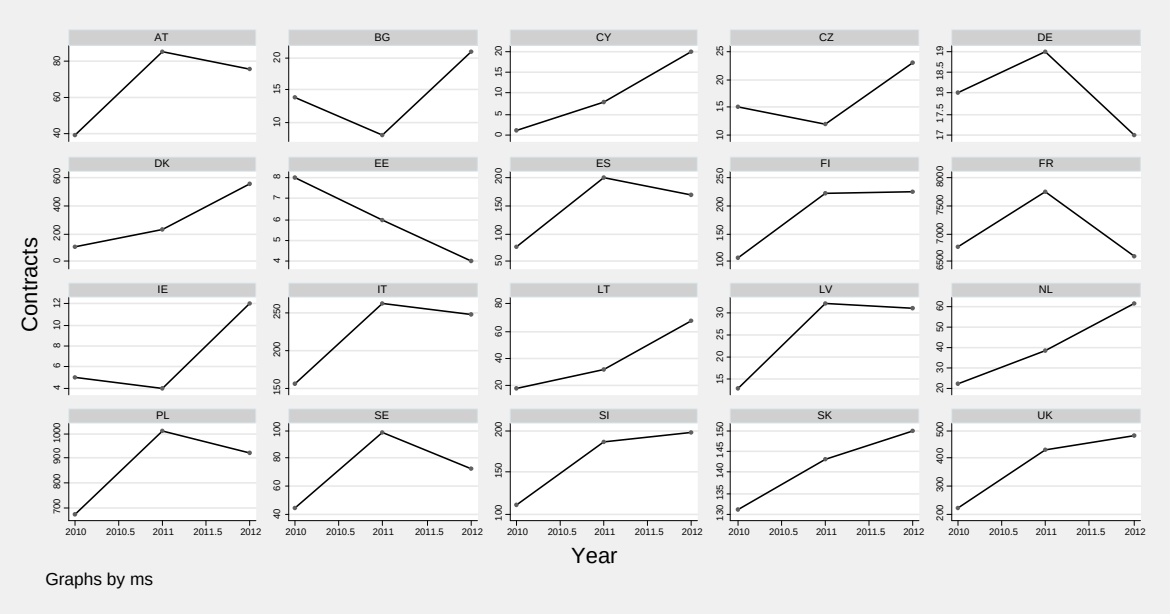
Figure 6.17: Usage of VEAT notice, by contract type



Note: voluntary transparency notices not available in TED for 2009.
Source: TED

Data for individual Member States shows that the trend was very different across Member States, a few of them (AT, DE, EE, ES, FR, IT, PL, and SE) show decline in the use of VEAT notices for the three years of data (Figure 6.18, excludes Member States publishing less than 10 notices annually).

Figure 6.18: Usage of VEAT notice, by MS



Note: voluntary transparency notices not available in TED for 2009. Excludes Member States publishing less than 10 notices annually.
Source: TED.

6.3 Factors affecting usage (Q3)

The factors affecting usage are investigated by analysing the characteristics of the contracts under complaint. We started by looking at the different contract characteristics for the extracted cases (from CZ, DK, SI and SK) that we were able to match with contracts from TED, which are reflected in indicator F1. This analysis is complemented by econometric models that attempt to explain variations in the probability of a complaint being lodged (indicator F2). Due to issues with data availability, our analysis is only based on a small sample of Member States. More comprehensive conclusions on the factors affecting usage could be drawn if information were available to create a larger sample of matched cases, across more Member States.

F1: Indicators on factors affecting usage

We first look at the characteristics of the tender to evaluate the implications of the following factors on usage: type of CAE, type of contract, type of procedure, award criteria, and size of contracts.[91] The analysis is undertaken for the matched sample of complaints and TED notices in CZ, DK, SI and SK.

[91] Because our analysis uses information from the contract notices this means that only variables available for the notices are used in the analysis. Variables related to the number of bidders or the final value of the awarded contract cannot be used as part of this analysis.

Indicators on factors affecting usage:

1) Number and sample share of contracts challenged by type of CAE (constructed dataset)
2) Number and sample share of contracts challenged by type of contract (work, services and supplies) (constructed dataset)
3) Number and sample share of contracts challenged by type of procedure (constructed dataset)
4) Number and sample share of contracts challenged by award criteria (lowest price or MEAT) (constructed dataset)
5) Aggregate size of challenged contracts (constructed dataset)

In Table 6.5 we present the breakdown of contracts by Member States, distinguishing between contracts that have received a challenge and those that have not. The highest percentage of challenged contracts is observed in SK (6.5%) while CZ and SI are in the range of 4-6%. DK has a significantly lower percentage at 1.5%.

Table 6.5: Breakdown of contracts: number and share (%) of complaints per Member State

Status	CZ	DK	SI	SK
Challenged	640 (4.27)	138 (1.49)	302 (5.56)	250 (6.49)
Not challenged	14,343 (95.73)	9,147 (98.51)	5,127 (94.44)	3,601 (93.51)
Total	**14,983 (100)**	**9,285 (100)**	**5,429 (100)**	**3,851 (100)**

Note: Figures in parentheses are percentages with respect to all contracts in TED.
Source: TED and case law extraction (matched sample).

In Table 6.6 we present the breakdown of challenged contracts in each category of CAE. For each category ("Central government", "Local authority" …) we present the number of challenges and the share of contracts challenged as a proportion of total contracts in that category (in parenthesis). The categories receiving the highest percentage of challenges are "Central government" and "Water, energy, telecoms and transports" in CZ, SI, and SK: the challenges range between 6% and 10% of total tenders in each of those categories. The highest number of challenges is observed in "Central Government" in CZ (156), but this represents only a 6% of total contracts tendered by such authorities. Low percentages are observed for "Other" authorities (no challenges in SI and SK) and for "Body governed by public law" where, despite the high numbers, challenged contracts represent less than 5% for all countries. In DK all types of CAEs have had less than 3% of complaints, with "national or federal agency/office" having no complaints and "regional or local agency/office" having the highest percentage.

Table 6.6: Breakdown of challenged contracts by type of CAE: number and share (%) of complaints per category

Type of CAE	CZ	DK	SI	SK
Body governed by public law	90 (3.27)	19 (1.08)	108 (4.65)	75 (4.68)
Central government	156 (6.02)	27 (2.02)	84 (8.16)	64 (10.36)
Local authorities	181 (5.28)	63 (1.53)	33 (4.78)	42 (8.32)
National or federal agency / office	53 (2.93)	0 (0)	1 (7.14)	1 (1.49)
Other	2 (4.08)	16 (2.22)	0 (0)	0 (0)
Regional or local agency / office	69 (3.18)	5 (2.56)	40 (5.93)	38 (5.41)
Water, energy, telecoms and transports	39 (5.64)	8 (0.71)	3 (10.34)	30 (9.17)
Total	**640 (4.27)**	**138 (1.49)**	**302 (5.56)**	**250 (6.49)**

Note: Figures in parentheses are percentages with respect to all contracts in TED.
Source: TED and case law extraction (matched sample).

Looking at the complaints by sector (Services, Suppliers and Works) we observe that works contracts receive a higher percentage of complaints in SI and SK (15% and 21%, respectively) and to a less extent in CZ (7%), compared to other types of contracts (see Table 6.7). Supplies contracts receive generally fewer complaints: 4% or less of all supply contracts receive a complaint; whereas between 5% and 9% of service contracts receive a complaint in CZ, SI and SK (in DK the share is much less at 1.5%). There are no significant differences in the percentage of complaints per sector in DK.

Table 6.7: Breakdown of challenged contracts by type of contract: number and share (%) of complaints per category

Type of CAE	CZ	DK	SI	SK
Services	324 (5.42)	70 (1.56)	115 (6.03)	128 (8.99)
Supplies	192 (2.66)	54 (1.6)	134 (4.24)	59 (2.78)
Works	124 (6.93)	14 (0.97)	53 (14.6)	63 (20.93)
Total	**640 (4.27)**	**138 (1.49)**	**302 (5.56)**	**250 (6.49)**

Note: Figures in parentheses are percentages with respect to all contracts in TED.
Source: TED and case law extraction (matched sample).

When considering the type of procedure (Open, Restricted, Competitive dialogue, or Negotiated) we observe that most total challenges are in "Open" (540 in CZ, 79 in DK, 280 in SI and 173 in SK) although this represents around 4-6% of all "Open" contracts being challenged (except for DK where 1.6% of contracts were challenged, Table 6.8). Additionally, "Restricted" contracts receive a relatively high percentage of challenges (above 6% for CZ, SI and SK). There are very few complaints in "Competitive

dialogue" contracts, but in SK these represent a high share of all such contracts (14%).

Table 6.8: Breakdown of challenged contracts by type of procedure: number and share (%) of complaints per category

Type of CAE	CZ	DK	SI	SK
Competitive dialogue	0 (0)	1 (3.13)	3 (6.38)	4 (13.79)
Negotiated	25 (3.31)	6 (0.69)	12 (3.27)	2 (3.17)
Open	540 (4.05)	79 (1.63)	280 (5.72)	173 (5.37)
Restricted	75 (8.59)	52 (1.46)	7 (5.93)	71 (13.15)
Total	**640 (4.27)**	**138 (1.49)**	**302 (5.56)**	**250 (6.49)**

Note: Figures in parentheses are percentages with respect to all contracts in TED.
Source: TED and case law extraction (matched sample).

Looking at the award criteria specified in contract ("most economically advantageous tender" - MEAT or lowest price), the percentage of contracts awarded according to the MEAT criterion receiving a complaint is higher than the corresponding percentage of contracts awarded according to the "lowest price" criterion for CZ, DK and SK. The exception is SI with contracts that specify a "lowest price" criterion receiving relatively more complaints (see Table 6.9).

Table 6.9: Breakdown of challenged contracts by award criteria: number and share (%) of complaints per category

Type of CAE	CZ	DK	SI	SK
Unspecified	10 (11.76)	0 (0)	3 (1.52)	1 (11.11)
Lowest price	216 (2.94)	17 (0.72)	213 (5.97)	201 (6.13)
MEAT	414 (5.47)	121 (1.76)	86 (5.17)	48 (8.53)
Total	**640 (4.27)**	**138 (1.49)**	**302 (5.56)**	**250 (6.49)**

Note: Figures in parentheses are percentages with respect to all contracts in TED.
Source: TED and case law extraction (matched sample).

The mean and median estimated contract value for contracts that have received at least one complaint is significantly higher compared to contracts that have not received any complaints. This relationship is observed in all four countries as illustrated in Table 6.10.

Table 6.10: Mean (and median) for estimated contract value (€)

Total contract final value	CZ	DK	SI	SK
No complaint	2,514,502 (596,176)	5,661,084 (1,476,391)	1,109,932 (386,000)	2,623,797 (673,000)
Complained contracts	5,084,085 (1,590,521)	13,900,000* (5,705,428)	3,305,051 (720,974)	6,382,991 (3,017,778)

Note*: The mean size for Denmark is only accurate to the hundredth thousand. Source: TED and review of case law (matched sample).

F2: Indicators on factors affecting probability of usage

This set of indicators looks at characteristics of reviewed contracts that can have a significant impact in the probability of receiving a complaint. More specifically, for each of the four Member States in our sample, we evaluate the implication on the probability of usage, of the following contract characteristics: estimated value, type (services, supplies or works), type of competition, type of awarding authority, award criteria and type of services (CPV code). Six different indicators are analysed, separately and jointly, as part of a probabilistic model.

Indicators on factors affecting probability of usage:

1) Probability of receiving a complaint by estimated contract value (constructed dataset)
2) Probability of receiving a complaint by contract type (constructed dataset)
3) Probability of receiving a complaint by type of competition (constructed dataset)
4) Probability of receiving a complaint by award criterion (constructed dataset)
5) Probability of receiving a complaint by type of awarding authority (constructed dataset)
6) Probability of receiving a complaint by 2-digit CPV code (constructed dataset)

We have estimated a number of probit models for each of the four countries in our sample (CZ, DK, SI and SK), testing a variety of different specifications. Our examination of the models started from simple bivariate relationships, to which explanatory variables were gradually added in order to explore different interactions. Below, we present a step-by-step narrative of these results, leading to the final, preferred model. For presentational purposes, the estimated coefficients of all preliminary models are included in the appendices.

In the first model MP1 (in the appendices) we estimate the probability of complaint based only on the logarithm of the estimated contract value[92]. The sample used for this regression is limited to CNs as this is the type of notice typically referred to in the complaints.[93] Our complaint variable takes value of "1" when a contract in TED has been successfully matched with one of the OJEU numbers mentioned in the legal cases that we extracted. The resulting probit coefficients for MP1 are positive and significant for all four countries, indicating that a percentage increase in the estimated value of a contract is associated with a higher probability of receiving a complaint.

[92] The estimated contract value made use of the "notice_value_computed" variable included in the TED database. In terms of CNs, this variable captures the best estimate of value at the "id_notice" level. Due to the variability in this variables (and known errors in the data) this variable was adjusted to only account for values between 100,000 and 1,000,000,000; values greater than three standard deviations from the mean value were also excluded.

[93] In practice this means that features from the award of the contracts (such as number of bidders) could not have been included in this part of the analysis.

MP2 also includes dummy variables representing the type of contract (supply, services or works). For all countries, the positive coefficients for the estimated value variable are maintained while the coefficients on the additional dummy variables produce mixed results: only significant results appeared in CZ (service contracts more likely to receive complaints than works contracts) and SK (supply contracts less likely to receive complaints than works contracts).

MP3 also includes variables on type of competition in the tender: a dummy variable is included for "open" tenders and "restricted contracts" (these are evaluated in relation to the remaining types: "competitive dialogue", "negotiated" or "no publication"). The added variables are significant only for CZ, showing that "open" and "restricted" contracts are associated with a higher probability of receiving a complaint, compared to other types of tenders. For the remaining countries, the additional variables do not have a statistically significant influence on the probability of receiving a complaint and they do not affect the significance of the remaining variables.

MP4 replaces the type of competition with dummy variables related to the type of awarding authority: "central government", "local authorities" and "bodies governed by public law". As with previous iterations, logged estimates of value remain significant in all countries, and there are mixed results for the added variables. In particular, "central government bodies" and "local authorities" are associated with higher probabilities of a complaint being lodged in CZ, but only "central government bodies" increase the probability in SK.

In MP5 we examine the criteria for awarding the contract and include a dummy variable for tenders where "most economically advantageous tender" (MEAT) criteria is used. We observed that MEAT is associated with a higher probability of a complaint being lodged in CZ and DK compared to cases where "lowest price" criteria is used.

MP6 uses all of the above variables and found no changes to the previous outcomes, which reflects the lack of correlation between the variables included.

As a final step taken, MP7 adds dummy variables for a selected list of 2-digit CPV codes (in replacement of the type of contract variables that distinguished between supplies, services and works contracts). This list was populated with 6 CPV codes that are represented by a minimum of 5 complaints in each country.[94] The addition of the CPV dummies: are significant in SI (contracts related to CPV "71 - Architectural, construction, engineering and inspection services" are associated with a higher probability of a complaint being lodged); in CZ ("90 Sewage, refuse, cleaning, and environmental services" is associated with a higher probability of a complaint being lodged); in SK there is a positive and significant coefficient for "45 Construction work", "60 Transport services excl. Waste transport", "71 Architectural, construction, engineering and inspection services", "72 IT services: consulting, software development, Internet and support" and "90 Sewage, refuse, cleaning, and environmental services". No effects are found in DK.

Finally, MP8 uses a "stepwise" approach where at each step, the variables that have a p-value of more than 0.20 are dropped and estimation is carried on for the rest of the variables resulting in a final set of included variables that has a p-value of less than

[94] These include: "33 Medical equipments, pharmaceuticals and personal care products, "45 Construction work, "60 Transport services excl. Waste transport, "71 Architectural, construction, engineering and inspection services, "72 IT services: consulting, software development, Internet and support and "90 Sewage, refuse, cleaning, and environmental services".

0.20. The results of estimating that model for the countries in our sample are presented in the table below (Table 6.1). The table presents the marginal effects on the probability associated with each explanatory variable.[95]

In summary we have found that:

- In all countries, a percentage increase in estimated contract value is associated with a higher probability of a complaint being lodged, in the range of around 2% (with the exception of DK which is around 0.7%).
- In terms of CPV codes, "71 Architectural, construction, engineering and inspection services" in SK, is associated with a 10% higher probability of a complaint being lodged compared to the base CPV categories. In CZ, contracts in "90 Sewage, refuse, cleaning, and environmental services" have a 4.3% higher probability of a complaint being lodged. CPV categories in DK and SI as well as the rest of the categories in CZ and SK do not produce any statistically significant coefficients (p-value<0.001).
- Contracts that are classified as being openly competitive are associated with a higher probability of a complaint being lodged in CZ (2.3% higher compared to other type of contracts). There are no statistically significant results in DK, SI and SK.
- In CZ, contracts published by "central government" and "local authorities" have a higher probability of a complaint being lodged (3.5% and 2.4%, respectively, compared to the other type of authorities). Contracts published by "central government" awarding authorities were also linked with a 4.9% increase in the probability of a complaint being lodged in SK (compared to the types of awarding authorities not included in the model). No significant results were found in DK and SI.
- Lastly, contracts that specified the "MEAT" criterion, as opposed to a "lowest price" criterion, were associated with a higher probability of a complaint being lodged in CZ and DK (2% and 0.7%, respectively).

In general the results are very dispersed and do not reveal a systematic pattern or characteristics of the contracts with complaints across the four Member States analysed.

[95] Marginal effects capture the change in the predicted probability of a complaint being lodged for a given change in the explanatory variable. In cases where the explanatory variable is a binary variable, marginal effects capture the discrete change of the variable from 0 to 1. In the case of the log of estimated value, the marginal effect captures the effect of a 1% change in estimated value on the probability of a complaint being lodged.

Table 6.11: Marginal effects for stepwise probit model (MP8)

Variables	CZ	DK	SI	SK
Log of estimated value	0.018***	0.007***	0.020***	0.023***
Medical equipment, etc.	-	-	0.033*	-0.019*
Construction works	-0.011*	-0.012**	-	0.051**
Transport services	0.065	-	-0.030*	0.205**
Architectural and other services	-	-	0.090*	0.103***
IT services	-	-		0.090**
Sewage and other services	0.043***	0.017	0.069	0.097**
Open competition	0.023***	0.006	-	0.024
Restricted competition	0.050*	-0.007	-	0.048
Central government	0.035***	-	0.051*	0.049***
Local authorities	0.024***	-0.010	0.043	-
Bodies governed by public law	0.008	0.016**	-	-
MEAT criterion	0.020***	0.007***	-	-
Number of observations	12,337	2,872	1,313	3,636
Pseudo-R^2	0.07	0.10	0.12	0.16

Note: * p<0.05; ** p<0.01; and ***p<0.001.
Source: Europe Economics' analysis.

6.4 Transparency and openness (Q4), effectiveness and value-for-money (Q6)

The Directive aims at promoting transparency and openness of the market, as well as the effectiveness and fairness of the tendering process. We base our analysis of the stakeholders' opinion on the perception of the impact of different provisions on outcome procurement variables, as part of the indicators T1. The indicators obtained in this section aim at answering the questions related to transparency (Q6) and benefits and effectiveness and fairness of the Directive (Q4). Value for money is considered under V1, where we estimate the savings in procurement outcomes arising from the Directive.

T1: Perceptions of transparency/fairness/openness/effectiveness due to provisions

Indicators on transparency, fairness and openness due to the provisions:

1) Effectiveness of the "Remedies" (survey of suppliers, CAEs and legal practitioners)
2) Fairness of the public procurement (survey of suppliers, CAEs and legal practitioners)
3) Openness of the public procurement (survey of suppliers, CAEs and legal practitioners)
4) Transparency of the public procurement (survey of suppliers, CAEs and legal practitioners)

These questions assess the direct benefits of the Directive in terms of increased transparency and openness, and effectiveness and fairness of public procurement, and provide evidence on the intermediate impacts within the intervention logic model. Survey respondents were asked to express their opinions on four aspects of the Directive[96]:

[96] Individuals are invited to express their views on the statements and are given the options of "strongly agree", "agree", "indifferent", "disagree", "strongly disagree" and "I do not know".

- Effectiveness: the Directive aims to enhance the functioning of the procurement market through various provisions in an effective manner.
- Fairness: One of the major objectives of the Directive is to improve the fairness of the procurement market to ensure a level playing field for all suppliers.
- Openness: the Directive is designed to reduce any anti-competitive barriers in the market and to promote healthy competition.
- Transparency: the Directive aims to tackle the lack of transparency in the procurement market and help to ensure relevant information is easily accessible and available for all companies.

Of those CAEs that answered these questions, over 60% of them "agreed" or "strongly agreed" that the Directive have helped to improve the fairness and transparency of the procurement market. About 70% of the respondents also felt that the Directive is effective in achieving its objectives. In contrast, less than half of the respondents opined that the market openness has improved through different provisions of the Directive. On the other hand, there is a smaller proportion of suppliers that "agreed" or "strongly agreed" on the effectiveness of the Directive and the improvement made on different aspects of the market. Just over half of the respondents felt that the provisions of the Directive are effective for reviewing and challenging procurement decisions. A similar level of views is held on the improvement on the transparency of the market. In terms of the fairness and openness of the market, around 30% of suppliers "disagreed" or "strongly disagreed" that the Directive has helped to improve these aspects of the market (Figure 6.19).

For all four dimensions of the "Remedies", it is interesting to find that the levels of perception differ by size organisation for suppliers but stay fairly constant for CAEs, regardless of the size of annual procurement value. Smaller suppliers tend to have less favourable opinions on the four aspects of the "Remedies", with a larger proportion of them responding in disagreement with the statement and smaller proportion of them agreeing. For more details, the charts on the perceptions by size of organisation are presented in the appendix.

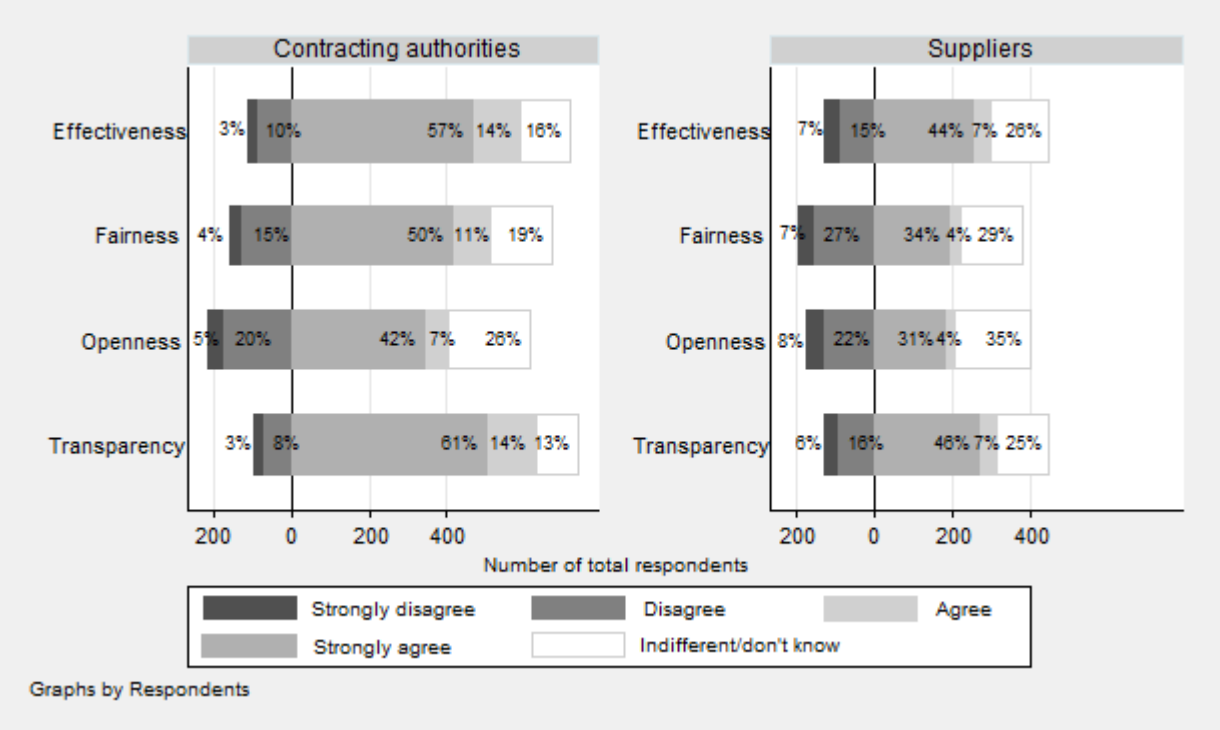
In slight contrast to the suppliers' and CAEs' results, the views from legal practitioners were positive with respect to the success of the Directive in all areas. In particular, in improving the transparency of public procurement and in providing an effective way for the review and challenge of decisions (just over 83% of respondents agreed or strongly agreed with these statements). More than 61% also agreed or strongly agreed that the Directive has helped the public procurement process become fairer and more open.[97]

The legal practitioners' survey also provides insight into views of the impact of the Directive on suppliers' taking action against CAEs in the event of a suspected breach of procurement law. Two thirds of respondents thought that the Directive provides reassurance to suppliers of a fair and open public procurement process, and 63% thought that the Directive helps to monitor and reduce non-compliant behaviour. Only a small minority of respondents (around 15%) felt the Directive increases the likelihood of nuisance claims being brought by suppliers.

In summary, the results suggest that the Directive has helped improve the effectiveness and transparency of procurement outcomes but have not been as effective in promoting the fairness or openness of the market.

[97] Results included in the appendix.

Figure 6.19: Perceptions of improvement of public procurement aspects



Source: Survey of suppliers and CAEs. Answers to questions: "The "Remedies" are an effective way for reviewing and challenging procurement decisions.", "The "Remedies" have helped the public procurement process to become fairer (all companies have the same opportunities to bid for public procurement contracts).", "The "Remedies" have helped the public procurement process to become more open (there are fewer barriers to companies participating in public procurement contracts, cross-border procurement is easier)." and "The "Remedies" have helped the public procurement process to become more transparent (more information is available to all companies about the details of public contracts, how they have been awarded, and how parties may challenge decisions)."

V1: Value for money

To estimate the value for money of the Directive we investigate the relationship between complaints lodged by economic operators and procurement outcomes, measured as savings in the final value of contracts awarded. Due to issues with data availability, our analysis is only based on a small sample of Member States, and the results for our sample are statistically significant for one Member State only. This must be kept in mind when considering our conclusions.[98]

Indicators of effectiveness and value for money:

1) Effects of the Directive on estimated "savings" (constructed dataset)

The proposition to be tested is whether the number of complaints has an impact on the savings achieved through the procurement process. The underlying hypothesis is that complaints act as a monitoring mechanism, and that CAEs not complying with procurement practices (or not complying fully) would change their procedures to make procurement more open and competitive in response to complaints lodged. If this

[98] More comprehensive conclusions on impact of the Directive on value for money could be drawn if information were available to create a larger sample of matched cases, across more Member States.

hypothesis holds, we would expect procurement outcomes ("savings") to improve after a CAE has had complaints lodged against it.

As the various provisions of the Directive facilitate complaints about non-compliant procurement processes, using the "complaints" as a variable is a good proxy for the overall effect of the Directive. The rationale for using the "savings" variable is to capture the increased efficiency that may result in the final value of awarded contracts as a result of the complaints.

We estimate savings by calculating the difference between the initial budget estimate and the final value of published contracts in TED, in percentage terms.[99] Only records where both estimate and total final values are present have been included in the calculations.[100] Because the variables contain a lot of noise and errors in the data, we excluded notices of less than €100,000 and also excluded savings that were greater than 50% of the contract value (or lower than -50%).[101] We measure complaints by summing the number of contract notices which have received complaints over specified time periods.[102]

To measure the effects of the corrective mechanism, we compare the savings achieved across contracts with the sum of complaints lodged in the past, for each Member State in our sample (CZ, DK, SI, SK).[103] The consideration of all complaints across each Member States implicitly assumes that CAEs are influenced not only by the complaints directed at their organisation but also by complaints lodged more widely against other organisations in their Member State (as this may be showing the contestability of bidders).

As there will be some time lag between the lodge of complaints and the corrective effects on the procurement process (i.e. arising from the time taken for CAEs to change their behaviour in response to complaints), we consider complaints lodged on contracts awarded 7 to 12 months before the savings are identified. The time lag also reflects the time that takes place between a challenged contract notice, and the time it takes to issue a new tender and award a new contract. To test the robustness of our results to this assumption, we also try with other time windows (complaints on notices from the previous 6-11, 8-13, or 9-14 months).

[99] Both variables are taken from "Section V: Award of contract" of contract award notices. Where contract lots are present we sum the value for each lot to arrive at a total value for the contract.

[100] We excluded other variables available in TED which contain the total values (sum of lots) for each contract notice as these do not account for missing values which may be present in the estimate or final value.

[101] It is possible to observe "negative" savings in the database. This refers to situations where the final contract value is greater than the original estimated value, as this is usually used as an indication of the total value of the contract (although in some cases is used as a maximum above which the tenders are not considered).

[102] Details of contracts which received complaints are obtained from matching the TED data to the list of complaints drawn from the different Member States.

[103] We tried to aggregate complaints for each awarding authority/entity but the disparity of formats and description of their names made impossible to identify uniquely each authority/entity. Hence the analysis was done at the Member State level.

Results

The results of our analysis are presented in the following paragraphs. To be able to see how the results are affected by different variables included we have used a specific-to-general approach starting from simple relationships including sequentially additional variables in different models. All our models use regression with robust standard errors.

Our initial specifications are restricted to those sectors where more complaints have been lodged,[104] as we believe that the effect of the monitoring mechanism should be strong in these sectors. This is relaxed in our sensitivity analysis where we also show the results for the overall sample of sectors. In the first set of specifications we use the sum of complaints in each Member State of notices published in the time window of 7 to 12 months previous to an award of contract; other time windows are included in the sensitivity analysis.

Under a monitoring mechanism hypothesis we would expect a positive significant coefficient for the variable representing the number of complaints observed in the previous 7-12 months of each awarded contract with identified savings. This would indicate that the previous complaints are modifying the behaviour of CAEs which translates into more efficient outcomes (i.e. "savings") in the contracts that are awarded between 7 and 12 months later. The next paragraphs present a narrative of the models which lead to the final preferred model. All preliminary models are included in the appendices.

Our first specification (model MV1, in appendix) includes only the estimated savings and the sum of the contract notices that received complaints in the last 7 to 12 months (in addition to country fixed-effects).[105] In this simple model the coefficient of the "complaints" variable is significant and in the order of 0.048 which indicates that each additional complaint is likely to increase savings by approximately 0.05 percentage points of the contract value on average.[106] The "goodness of fit" of this model is low, with an R-squared of less than 3%.[107]

In our second specification –MV2– we include interactions between the complaints variable and the Member States (in practice this is allowing different coefficients on the complaints variable for each Member State). The coefficients for Member States DK, SI and SK are not significant indicating that there are no statistical differences between individual Member States. The coefficient for the complaints variable is still significant and in the order of 0.05.

MV3 includes the contracts' CPV codes, to assess whether savings are influenced by sector.[108] This results in a significant improvement in the goodness of fit (R-squared of

[104] This is contracts which main CPV is one of the following: "33 Medical equipment, pharmaceuticals and personal care products", "45 Construction work", "60 Transport services excl. Waste transport", "71 Architectural, construction, engineering and inspection services", "72 IT services: consulting, software development, Internet and support" and "90 Sewage, refuse, cleaning, and environmental services".

[105] We use the logarithm of savings for statistical purposes.

[106] For the sample-average savings of 6.48% each additional complaint is likely to increase savings to 6.53%.

[107] The "R-squared" is a statistical indicator of how well the model fits the underlying data.

[108] This is done using dummy variables for each CPV code.

6%) and shows that sectors "90 Sewage, refuse, cleaning, and environmental services", "45 Construction work", and "71 Architectural, construction, engineering and inspection services" have, on average, greater savings (between 3 and 8 percentage points).

MV4 also includes dummy variables for "open" tenders and "restricted contracts" (these are evaluated in relation to: "competitive dialogue", "negotiated" or "no publication") and a dummy variable for tenders where "most economically advantageous tender" (MEAT) criteria is used. The results show that "open" tenders have, on average, significantly higher savings and in the order of 10 percentage points, whereas "restricted" have only 1.7 more savings than other tenders (although the coefficient is not significant at a 5% level).[109] The coefficient for complaints remains significant at a 1% confidence level (without significant differences across Member States). These results show that even *after* accounting for the type of tender (which one would expect to explain a lot of the variation in savings), the number of complaints is still a significant influence on procurement outcomes. The goodness of fit of the model has improved and shows an R-squared of 12%.

Finally, MV5 also includes the number of bidders in the tender.[110] When included, the variable has a significant coefficient of 1.60, which shows how much an additional bidder contributes to increase the savings in each contract. Again, it is to be expected that the number of bidders has a strong influence on the savings. The other main variables of interest in the model maintain their statistical significance and are of a very similar magnitude as in the previous model. One main difference is that the dummy variable for "open" contracts is now of a smaller magnitude and this is because some of its effect is being picked up by the number of bidders. The goodness of fit of the model has improved significantly with the new variable and shows an R-squared of 22%, which we consider satisfactory given the huge variation in the data and the differences in the contracts included.[111] This is shown in Table 6.1, below (details of the model are presented in the appendix). A key point to note is that the number of complaints still has a significant explanatory power of savings.

[109] It is to be expected that savings are positively influenced by the type of tender (i.e. open tenders being more competitive than restricted).

[110] The number of bidders is a variable that is recorded for the different awarded lots in each contract award notice. As our analysis is at the level of the contract award notices we summarised the different lot information in a single number, so the average number of bidders has been used.

[111] The goodness of fit indicator shows that all the variables together (number of bidders, type of tender, sector, number of complaints) provide the best explanation for the estimated savings.

Table 6.12: Regression results for MV5

Variables	MV5
Log of estimated value	-0.208
DK	0.369
SI	3.964
SK	4.469*
Past complaints (7-12)	0.050***
Past complaints (7-12) - DK	-0.097
Past complaints (7-12) - SI	-0.080
Past complaints (7-12) - SK	-0.075
Sewage and other services	1.860
Construction works	4.018**
IT services	4.737***
Medical equipment, etc.	1.121
Architectural and other services	6.671***
MEAT criterion	-0.398
Open competition	6.747***
Restricted competition	-0.533
Number of bidders	1.584***
Constant	-4.150
Number of observations	4,149
R^2	0.219

Note: * p<0.05; ** p<0.01; and ***p<0.001

Source: Europe Economics' analysis.

The results of the final model show that there is a statistically significant, positive relationship between the number of complaints lodged and procurement outcomes as measured by savings. This implies that complaints are likely to cause CAEs to change their behaviour and improve the procurement process, such that the final value of contracts is less than the estimated budget. This could be due to a number of features such as increased competitiveness and openness of the procurement process. As the Directive is a key factor facilitating the lodging of complaints, these results show one aspect of the effectiveness of the Directive.

A comparison between the savings related to the Directive and the costs incurred by entities in lodging and defending complaints will provide a clearer view of the value for money of the Directive. We discuss this in section 6.9.

Sensitivity analysis

The results of our analysis show that contracts savings are likely to have been influenced by the number of complaints lodged in the past in the different Member States of the analysis. The regressions have used a time window of 7 to 12 previous months and also have been constrained to a sample of CPV where most of the complaints have been lodged. To assess the extent to which the results depend on these assumptions, in this section we report the sensitivity of the results to small changes in these parameters.

Using the final model specification in MV5, we have tested other time windows of contract notices with complaints, namely 6-11, 8-13, or 9-14 months earlier. The results do not yield significant differences and still show a significant coefficient on the

complaints variable in the order of between 0.03 and 0.05 (models S1-S3, in the appendix). This implies that complaints have a monitoring effect over a wide time period.

One difference that the models reflect is that the country-specific interaction for SK is significant and negative in the models using 8-13 and 9-14 windows and this goes against the expected results (i.e. it implies that an extra complaint *reduces* savings). However, this is likely to arise from the collinearity with some of the included variables and may be also due to the sample used. In further specifications using a broader sample this effect is lost. Nevertheless, it should be born in mind that the estimate is less robust for SK (something that will be apparent later).

We have also tested how much our results change when all contracts across sectors are included (hence including contracts other than the ones with CPV codes "33", "45", "60", "71", "72" and "90"). We have found that the significance of the past complaints variable is maintained (in specifications using 7-12, 8-13, and 9-14) with no statistical differences between Member States (models A1-A3 in the appendix). The coefficient of the complaints variable has nonetheless been reduced and it is around 0.01. This shows that the efficiency effects of the Directive are greater in sectors where complaints are more frequent. This confirms our expectations as sectors where complains are less often encountered may already be showing signs of efficiency, and hence the impact on savings is more limited.

Finally, we have estimated MV5 separately for each Member State and the results show that the complaint variable is significant and of a very similar magnitude in the equation for CZ (models MS1-MS3, in the appendix). However the significance is lost in the other Member States. Hence, it can be said that the results obtained are mainly driven by CZ and are less obvious in the other Member States. One possible explanation may be derived from the lower number of observations in DK, SI and SK, all around 700 or less, compared to almost 2,500 in CZ. On the other hand, some previous specifications that showed no significant differences in the country parameters in the preferred model (pooling the four countries together) are evidence that the effect of complaints cannot be ruled out completely in those other Member States. The current effects of past complaints in these other Member States are nevertheless likely to be much less significant than the effects found for CZ. One possibility explaining this finding may be related to fact that these Member States may have already achieved increased efficiencies in procurement and thus the incremental impact of complaints on savings is not observable.

Summary of results

We used several regression models to explain awarding authorities' "savings" on the final contract value as a result of complaints lodged within the Member State in the past. Because of the difficulties in accessing the data on complaints and matching them with existing contract information available in TED our analysis has been limited to four Member States: CZ, DK, SI and SL.

Our preferred model is capable of explaining 22% of all savings variation in the sample. This is a very high result given the diversity and disparity of contracts in the database. The preferred model includes, for each awarded contract, the number of notices with complaints observed in the previous 7-12 months. If complaints are exercising any type of corrective mechanism on awarding authorities we would expect this variable to have a positive correlation with savings. This is because complaints would lead to improved procurement processes such as greater openness and

competition, which in turn would translate into greater "savings". Our hypothesis has been confirmed; the model shows that the coefficient of "complaints" is significant and in the order of 0.05 which indicates that for an average saving of 6.48% each additional complaint is likely to increase savings to 6.53%.

This result is robust to different samples used and changes in the model specification to allow for inclusion of a number of control variables, in essence, all variables which may also potentially influence the savings, including the size of the contract, CPV codes, type of tenders ("open" and "restricted contracts"), tender selection criteria based on most economically advantageous tender, and number of bidders in the tender. This shows that even after the influence of these variables is taken into account, the number of complaints still has a positive influence on savings.

We have also found that the effects may be different for different Member States. While the effect found is very consistent with estimates for CZ, the results are weaker for the other three Member States. The lack of a significant "complaints" coefficient may be driven by statistical challenges (such as the lower number of observations in DK, SI and SK).

6.5 Non-compliant behaviour (Q5)

The presence of a deterrence effect is examined through two alternative perspectives. First, the results of the "Value for money" analysis are interpreted from a deterrence angle. Second, we employ the probit model specification used in "Factors affecting usage" (F2) and enhance it by adding the "complaint" specification introduced in the "Value for money" section. Our analysis is only based on a small sample of Member States, which must be kept in mind when considering our conclusions.[112]

Indicators of effectiveness and value for money:

1) Difference in savings as a result of past complaints within a Member State (constructed dataset)
2) Difference in probability of having a complaint lodged against (constructed dataset)

D1: Effect on savings

The results from the "Value for money" analysis section support the existence of a deterrence effect of the Directive on procurement law breaches by CAEs. Our model specifications measure the impact of *all* complaints lodged in a Member State on the savings achieved for specific contracts and CAEs.[113] This implies that each contract tendered is influenced not only by the complaints directly received but also by complaints lodged more widely. This is consistent with a deterrent effect, whereby CAEs do not have to have *directly* incurred costs from a complaint in order to change their behaviour, but are also incentivised to do so by observing other complaints received in the past.

[112] Access to a larger sample would allow drawing more comprehensive conclusions.

[113] To recap, the savings measure the difference between the initial budget estimate and the final value of published contracts, and are an indication of a more open and competitive procurement process.

D2: Effect on probability of a complaint being lodged

Section 6.3 introduced MP8 as our preferred specification for modelling the probability of having a complaint lodged against a CAE. This specification is enhanced by the addition of a "complaints" variable as defined in 6.4 (creating MP9).

Past complaints have a significant negative effect (of a small magnitude) in the probability of having a complaint lodged in CZ; this means that a higher number of complaints (over the past 7-12 months) in CZ results in a lower probability of a complaint being lodged. This relationship highlights the possible existence of a deterrent effect captured from the following dynamic: past complaints and their associated costs incentivise CAEs (both the ones that have experienced complaints and the ones observing others having complaints lodged against them) to improve their behaviour in a manner that results in a decreased probability of having a complaint lodged against them.

As with our sensitivity analysis in Section 6.4.2, the "past complaints" variable loses its significance in other countries' regressions, indicating that results are primarily driven by CZ in that respect. The pseudo-R^2 for CZ has improved slightly and all control variables which were statistically significant at the 1% level under MP8 have retained their significance. We can therefore conclude that the inclusion of past complaints has improved our model's fit. Additionally, the significance of the past complaints' deterrent effects is not undermined by the presence of a number of additional control variables which are also explaining variations in the probability of having a complaint lodged against a CAE.

A summary of the marginal effects estimated for the four different countries is presented in Table 6.13. Sensitivity analysis was also conducted as a cross-check for this model, varying the lag of the complaints variable and limiting the sample to observations belonging to CPV categories with a significant number of complaints (above 5 in each country). The sensitivity analysis did not flag any considerable issues and is included in the appendices.

Table 6.13: Marginal effects for stepwise probit model (MP9)

Variables	CZ	DK	SI	SK
Past complaints (7-12)	-0.0003***	-	-	-
Log of estimated value	0.0182***	0.0070***	0.0217***	0.239***
Medical equipment, etc.	-	-	0.515	-0.0189*
Construction works	-0.0115*	-0.0096**	-	0.0594*
Transport services	0.0591	-	-	-
Architectural and other services	-	-	0.2030**	0.1344***
IT services	-	-	-	0.1159**
Sewage and other services	0.0404**	-	-	0.0809**
Open competition	0.0240***	0.0114	-	0.0256*
Restricted competition	0.0609**	0.0141	-	0.0658
Central government	0.0404***	-	-	0.0650**
Local authorities	0.0229***	-	-	0.0225
Bodies governed by public law	0.0106	-0.0084*	-	0.0145
MEAT criterion	0.0143***	0.0147***	-	-
Number of observations	10,006	2,322	913	2,942
Pseudo-R^2	0.08	0.12	0.13	0.19

Note: * p<0.05; ** p<0.01; and ***p<0.001.
Source: Europe Economics' analysis.

6.6 Additional costs (Q7)

We now assess the cost of review and the Directive by considering different elements of activities in relation to the Directive.

For suppliers, these include: internal and external costs related to bringing forward a review, as well as financial penalties incurred by the complainants (indicator C1). Internal costs are measured as the number of days spent by junior and senior staff multiplied by the salary rate while external costs are the sum of legal fees, court fees and other external costs related to a review. Due to the limited responses to this section of the survey, we do not report the results for financial penalties. The analysis of the costs incurred by suppliers is combined with the results of the legal practitioners' survey.

For CAEs, two categories of costs are measured. The first category of costs is made up of internal and external costs incurred in responding to a review of a procurement outcome by complainants (indicator C2). The second is related to the activities required for CAEs to be compliant with the Directive, which would involve both initial set up and on-going costs.

There are also additional costs for companies that are subject to third party challenge of the procurement outcome, and these are measured as part of indicator C3.

Our conclusions are based on the survey of stakeholders. Information on costs was not provided by all respondents, and in general there is great variation in responses. This must be kept in mind then considering our conclusions.[114]

C1 and C2: Net Costs incurred to the complainant and authorities

To assess the additional costs incurred by suppliers in making a review in relation to an unsatisfactory procurement outcome, and the costs to CAEs in dealing with such complaints, we use the following indicators:

Indicators C1 and C2 on additional costs to complainant:

1) Total costs (survey suppliers, CAEs and legal practitioners)
2) Costs by Member State: totals and disparity (survey suppliers, CAEs and legal practitioners)
3) Costs by sector: totals and disparity (survey suppliers and authorities)
4) Total costs breakdown by internal and external costs (survey suppliers and authorities)

In the survey, suppliers are asked to provide an estimate of all elements of costs associated with a review, which included internal and external costs.[115]

We received 136 and 162 responses from suppliers and CAEs respectively that provided estimates for the analysis of costs. The number of responses on cost information is far fewer than the total number of respondents. The low response rate can be attributed to the difficulty of attaining information for the respondent, and/or a reluctance to reveal sensitive cost information. Therefore, the data on the costs of review gathered may not be fully representative in some Member State where the data is only drawn from a few responses (this is indicated in the graphs).

The median total costs for suppliers and CAEs are in the order of €4,000 for both suppliers and CAEs, while the mean is €11,100 for suppliers and €23,800 for CAEs (Table 6.14)

Table 6.14: Cost of review: by mean and median

	Suppliers	CAEs
Mean	€11,100	€23,800
Median	**€4,100**	**€3,900**
Minimum	€0	€0
Maximum	€76,900	€1,718,200

We consider the median to be the best indicator of average costs across respondents.
Source: Suppliers and CAEs surveys.

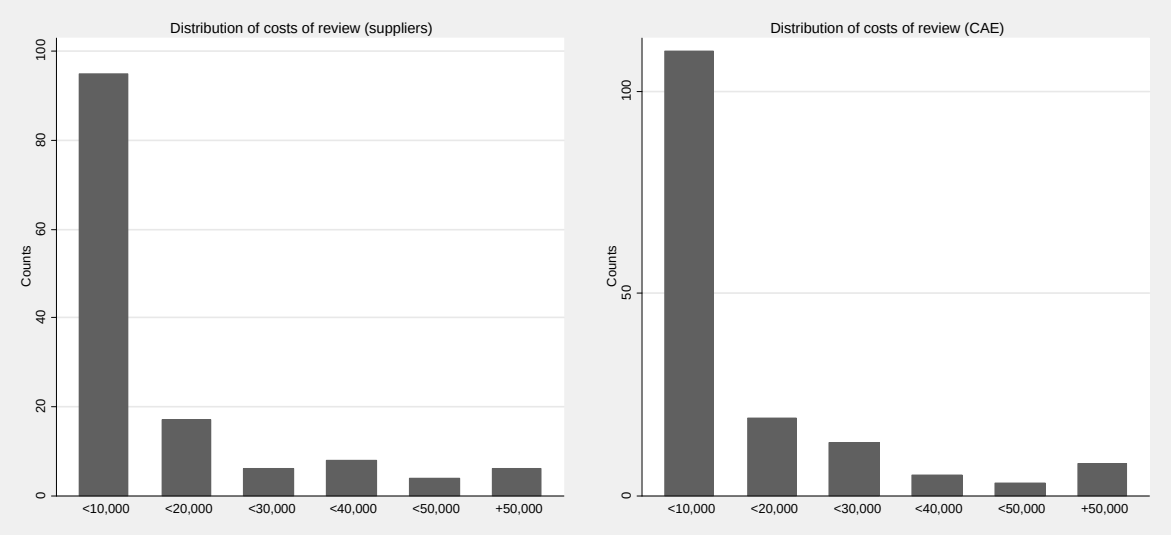
Overall, the cost impact of a review is less than €10,000 for the majority of suppliers and CAEs responding to the survey (Figure 6.20). The distribution of review costs is highly skewed to the right, suggesting that the majority of respondents are clustered

[114] Given the sensitivity of cost information, and the limited ability of respondents to accurately estimate costs, it is likely that similar issues would be encountered even in larger survey exercises. Further and more focused research into this may not produce significantly more accurate results.

[115] Internal costs include the time of internal staff to prepare and administrate a review and were addressed by asking respondents to provide the number of day spent by junior and senior staff in the review process (the numbers were subsequently multiplied by national wage level for junior and senior staff in the private sector). External costs include direct payments for legal advice, court fee and other external costs associated to a review.

around the median level. In the presence of extreme values, we therefore consider the median to be the most robust measure for the average cost of review.

Figure 6.20: Distribution of total Review costs (by responses)



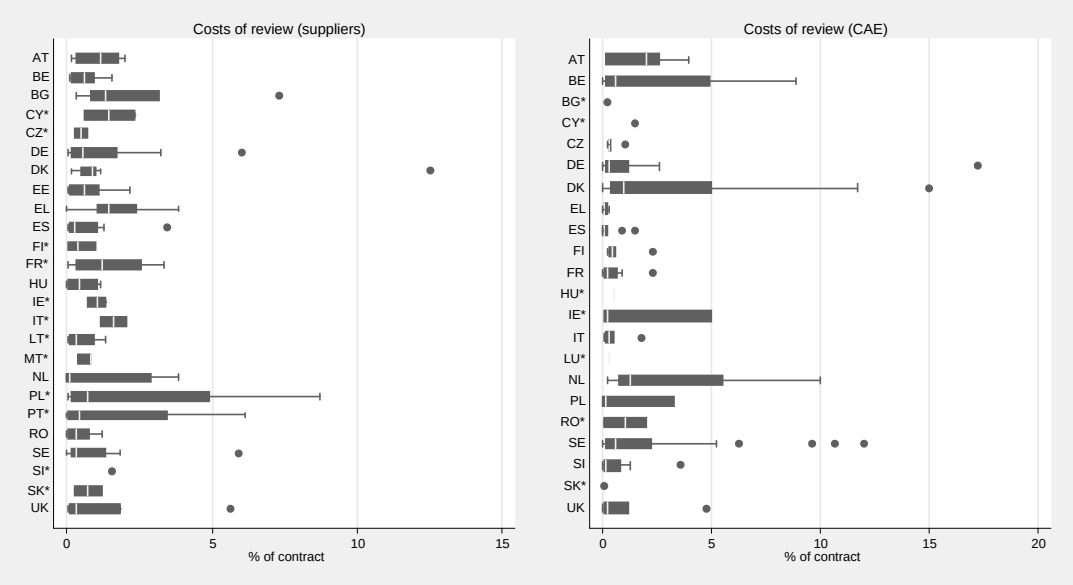
Number of respondents to question: CAEs – 162; suppliers – 136.

Source: Suppliers and CAEs surveys. Answers to questions: "Please estimate: the number of days (full-time equivalent) spent by your junior and senior staff; external legal and court fees; and any other costs."

For both suppliers and CAEs, cost estimates at the Member State level reveal a huge disparity, and this is shown in box plots showing the distribution of costs (in Figure 6.21), where the boxes represent the distribution range (containing 50% of respondents with a maximum estimated cost between the 25th and 75th percentiles), and the white gap dissecting the boxes represent the median value. Any outliers in the responses are presented as dots.[116] Since the cost of reviews may vary significantly depending on the different characteristics of a contract, the costs are expressed as the percentage of the contract size to facilitate comparison.

[116] Outliers are defined here as observations extending beyond the upper and lower adjacent values. The upper and lower adjacent values are calculated by adding 1.5 times the inter-quartile range to the 75th percentile and subtracting 1.5 times the inter-quartile range from the 25th percentile, respectively.

Figure 6.21: Dispersion of Review costs, as a percentage of the size of contract (estimates by MS)



Number of respondents to question: CAEs – 162; suppliers – 136.
Note: * denotes Member States with less than 5 responses.
Source: Suppliers and CAEs surveys.

For suppliers, the lowest cost is estimated at around 0.3% of the contract size. Countries with the lowest review costs include Spain, Lithuania, Romania, Sweden and UK. By this same metric, Italy is the most expensive place to conduct a review and the median cost is estimated to be around 1.6% of the size of contract. It is followed by Cyrus, Greece and Slovenia, with their average cost of review estimated to be around 1.5% of the contract size. The average cost across member states covered is found to be around 0.6% of a contract size. We present the average cost of reviews as a percentage of the contract size and the minimum and maximum costs incurred by suppliers and CAEs in the table below (Table 6.15)

Table 6.15: Cost of review as a percentage of the size of contract

	Suppliers	**CAEs**
Mean	1.2%	1.6%
Median	**0.6%**	**0.4%**
Minimum	0%	0%
Maximum	12.5%	17.2%

We consider the median to be the best indicator of average costs across respondents.
Source: Suppliers and CAEs surveys.

These results must be interpreted with caution. For example, the picture in Romania is very different to that presented in Figure 5.14 of review application fees, which shows Romania to have among the *highest* application fees for larger contracts. In addition, the total cost of reviews obtained from the survey of suppliers is significantly lower than the application fees alone presented in section 5.8 (around 0.3% compared to around 1% of contract size[117]). This is likely to reflect inconsistencies in how suppliers responded to the survey. For example, although asked to include all costs,

[117] Although in many cases, the review application costs which are a percentage of contract value have a maximum cap.

respondents may not have included deposit fees (this in particular is the main driver of review costs in Romania), or may have not have considered all external fees including review application and court fees. The specific details of the review cases that suppliers considered when responding to the survey may also have given rise to very particular and non-representative costs. In addition, cost estimates in this section have been based on a very small sample size (for a number of countries, less than 5 observations). Therefore it must the noted that although the results of the survey provide an interesting picture of the costs of reviews, they cannot be considered to be representative, and serve more to highlight the great variety of costs within and between Member States.

The results of the legal practitioners' survey provide an interesting comparison of the costs incurred in bringing forward a review case. The costs include both the costs of legal services, and other costs. The types of 'other' costs vary across Member States but in general include court fees, administration fees (i.e. in bringing a complaint before a Review Body), stamp fees, external expert and witness costs. In some Member States clients incur a cost if the claim they bring is judged to be invalid – this reflects the deposit fee discussed in section 5.8.

We present the average and median costs across all respondents for three different contract sizes in Table 6.16. Median costs represents the midpoint of the distribution and is more meaningful in this case as data contain a number of extreme observations.

Table 6.16: Total cost of review according to legal practitioners, by different contract sizes

	€ 250,000	€1 million	€10 million	Average of all contracts
Values				
Mean	19,737	27,043	53,015	33,265
Median	9,188	18,488	30,124	19,266
% of contract size				
Mean	7.3%	2.5%	0.5%	3.4%
Median	3.7%	1.8%	0.3%	1.9%

Source: Legal practitioners' survey

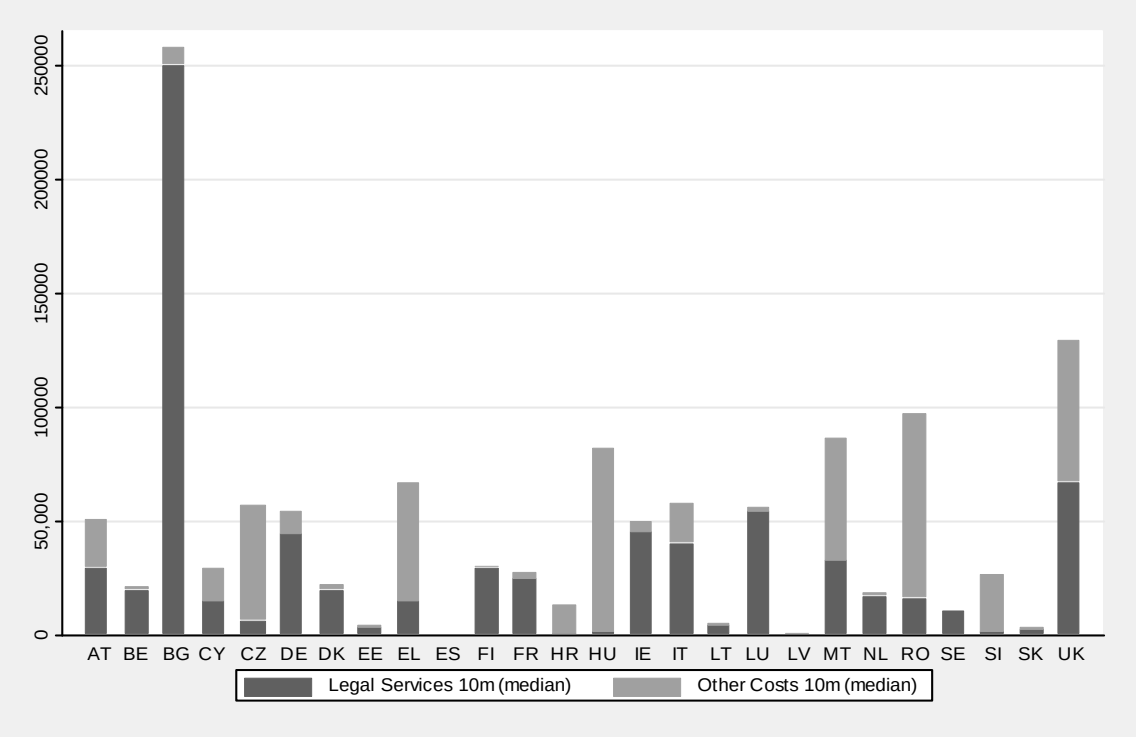
As shown in the figures below, there is a significant disparity in costs across Member States, which is consistent with the findings from the suppliers' survey. Figure 6.22 shows the costs for a typical contract of value €10 million, which includes both the costs of the legal services, and other costs. The majority of respondents emphasised that the legal fees they charged did not vary according to the size of the contract, but rather with the length and complexity of the case, e.g. whether it is appealed or goes to a second or third instance. There are many different types of cases that the different respondents considered when responding to the survey and this accounts for the great variation.

'Other' costs can also vary significantly by the length and complexity of the case, and not always by the size of the contract, although in some Member States court fees do vary by contract size. (Indeed, considering the review application fees presented in section 5.8, a number of Member States stipulate fees as a percentage of the value of the contract.) Further, a number of respondents had no experience with review cases

for contracts of less than €10 million. For these reasons we present the costs for contracts of €10 million only.[118]

We have calculated the median costs across Member States for the figure below, but caution that the great disparity of cost estimates received (as driven by a variety of factors as explained above) means that this may not be representative of the situation in each Member State.

Figure 6.22: Costs incurred by legal practitioners' clients for review, (contract size €10 million)



Source: legal practitioners' survey. We note that 'other' costs are relatively large compared to legal services in a number of Member States, in particular CZ, EL, HU, MT, RO, SI and UK. More detail about the factors affecting costs are included in the appendix. We also note that Bulgaria has particularly high costs. This is due to respondents quoting legal fees as a percentage of the contract value, which were the same across contract sizes.

It is interesting to note the relative share of costs for legal services compared to 'other' costs. In a number of Member States, 'other' costs make up a large proportion of total costs. This is likely to be driven at least in part by the review application fees as discussed in section 5.8. For example, the above figure shows that 'other' costs are relatively high in RO, HU, CZ, EL and MT, and these countries also have the highest review application fees for contracts of this size (Figure 5.14, right).

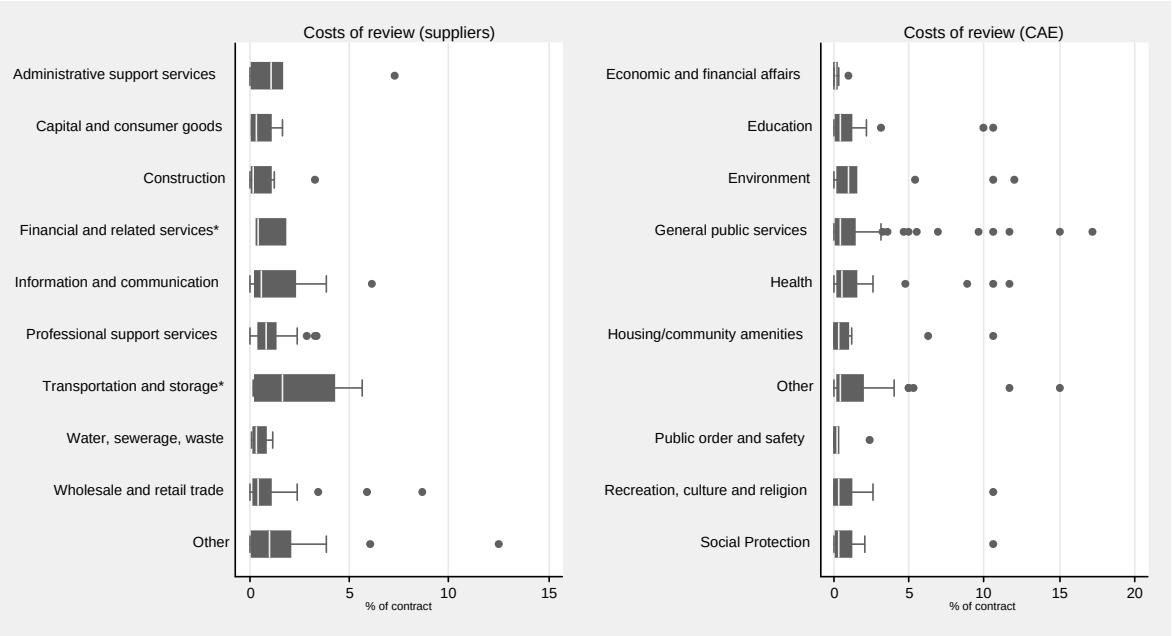
The cost ranges within each Member State were also significant, as estimates provided by the legal practitioners depended on a number of factors as mentioned above, and different respondents gave estimates for different case types. These cost drivers are summarised in the table in the appendix.

From the survey of suppliers and CAEs we estimated costs by sector. By sector, the average cost of review is estimated to be less than 2% of the contract size for all

[118] Costs varied notably across different contract sizes in 10 Member States: AT, BG, CZ, DE, DK, EL, HU, IT, LU, RO. The charts of the costs for other contract sizes are presented in the appendix.

sectors. Administrative support service is by far the most expensive sector to conduct a review on a procurement outcome for suppliers, with the largest median value of 1.1% of contract size. In comparison, Construction and water, sewerage and waste sectors appear to have the two lowest average values of 0.2% and 0.3% respectively. They also have relatively smaller dispersion of costs than majority of other sectors. For CAEs, the majority of sectors have average costs of review less than 0.5% of contract size. Economic and financial affairs sector has the lowest average cost of 0.1% of contract size. On the other hand, environment is the sector with the largest average review costs of 1%. Once again, the results show a large disparity in the costs when measured at the sector level (Figure 6.23), and we note again the caveats around the representativeness of the survey results.

Figure 6.23: Dispersion of Review costs (estimates by sector)

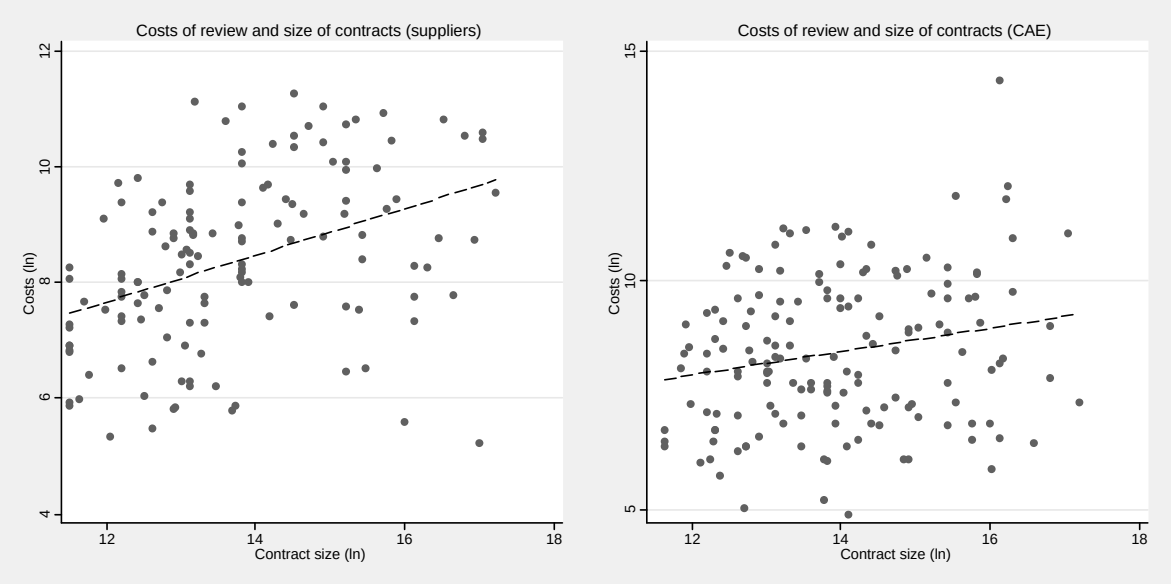


Number of respondents to question: CAEs – 162; suppliers – 136.
Note: * denotes sector with less than 5 responses.
Source: Survey of suppliers and authorities.

We can find a small positive correlation between the size of the contract and the costs of the review from the data from the suppliers' and CAEs' surveys (Figure 6.24). This is corroborated by the results from the legal practitioners' survey; whilst 'other' costs may vary by contract size in some Member States, legal fees are usually not driven by the size of the contract but rather by the nature of the case, and thus total costs will at most be weakly correlated with contract size. The positive relationship is less significant for CAEs, which could be explained by the fact that their fees will most likely be legal and internal fees rather than external court or application fees (the latter being those most likely to be driven by contract size). Also, it is apparent that there is huge disparity in costs, which means that there are a lot of other factors besides the size of the contract that would explain the cost variation encountered in the costs of review for both parties.[119]

[119] As noted above, the majority of legal practitioners noted that costs do not often vary according to the size of the contract, but are rather driven by the length and complexity of the case.

Figure 6.24: Relationship of Review costs and size of contract



Source: Survey of suppliers and authorities.

C2: Compliance Costs for CAEs

With the introduction of the Directive, a CAE would be required to establish an internal framework to comply with the Directive. This could involve initial set-up costs, such as IT system and staff training at the beginning of the compliance process. Several types of one-off costs are explored in our survey to CAEs and these are costs related to training of staff, development of new administrative and IT systems, seeking legal advice and other one-off costs. In addition to the initial set up costs, a CAE would also need to allocate internal resources for the on-going compliance with the Directive. The various types of annual on-going costs covered in our survey are costs related to training of staff, maintenance of the new administrative and IT systems, seeking legal advice, responding to reviews and challenges from suppliers and other on-going costs.

We present the average one-off and annual on-going costs as a percentage of the annual size of the procurement value in each Member States where there are sufficient information with at least 5 survey responses in the table below. (Table 6.17) As we can see from the statistics, a majority of the Member States spend less than 0.3% of annual size of procurement value on the compliance with the Directive and the average one-off and on-going costs in Europe are estimated to be 0.16% and 0.18% respectively. Interestingly, Germany and Sweden are found to have spent the largest proportion costs: around 0.5% or less and around 0.6% for the one-off and ongoing costs of complying with the Directive (country averages of percentages in relation to the annual procurement value).

Table 6.17: One-off and annual on-going compliance cost of the Directive* (% of the annual size of procurement value and number of responses)

MS	One-off costs [number of responses]	Ongoing costs [number of responses]
BE	0.08% [13]	0.31% [13]
CZ	0.22% [5]	0.51% [6]
DE	0.53% [27]	0.63% [24]
DK	0.27% [29]	0.21% [32]
ES	0.00% [12]	0.00% [8]
FI**	Insufficient data	0.16% [7]
FR	0.18% [12]	0.23% [14]
IE**	Insufficient data	0.05% [5]
IT	0.04% [9]	0.02% [9]
NL	0.16% [20]	0.19% [18]
PL	0.02% [9]	0.12% [8]
SE	0.42% [36]	0.64% [40]
SI	0.02% [6]	0.10% [5]
SK**	0.03% [6]	Insufficient data
UK	0.18% [29]	0.11% [28]

Note: * Member States with less than 5 survey response are not reported. The omitted Member states are AT, BG, CY, EE, EL, HR, HU, LT, LU, LV, MT, PT and RO. ** For FI and IE, there are no sufficient information on the one-off costs provided by the survey respondents. For SK, the information on on-going costs provided is too limited to be reported.

Source: Survey of CAEs. Answers to the questions: "Please estimate the one-off costs related to training staff, developing new administrative systems and IT systems, seeking legal advice and other one-off costs" and "Please estimate the annual on-going costs related to staff training, developing new administrative and IT systems, seeking legal advice, responding to reviews and challenges from suppliers and other annual on-going costs.

C3: Net Costs incurred to a company as a result of third party challenge

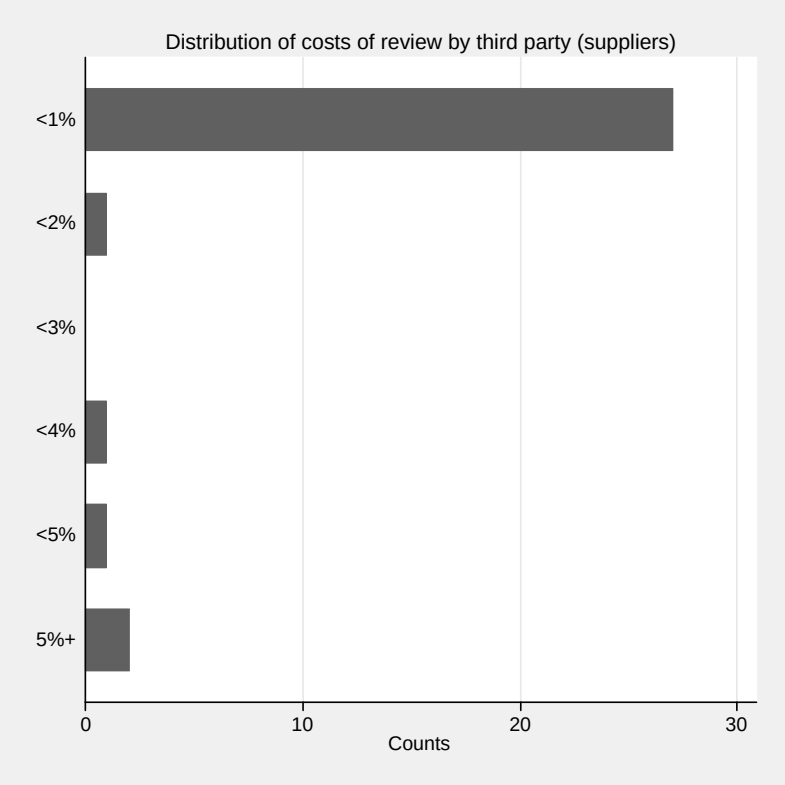
In addition to direct costs incurred from its review, another type of additional costs a company would incur is related to a third party challenge of its procurement outcome. As a result of a third party review, they can be subject to both direct costs, which are similar to the costs associated to a review initiated by its own company on a third party outcome, and indirect costs, namely loss of profit and revenue. The indicator for total cost is used (due to the small responses, indicators broken down by Member State or sector could not be constructed). We received very few survey responses for the potential lost revenues or profits due to the third party review so the indicators for these variables have not been reported.

Indicators on additional costs to third-party challenge on procurement outcome:

1) Total costs (survey suppliers)

The total costs incur to a supplier as a result of a third party challenge is less than 1% of the size of the contract for majority of respondents (Figure 6.25). The range of the total costs is estimated to be between 0.002% and 10.6%, with the median being 0.2%. The average costs to supplier, as expressed in percentage of the size of contract is lower in reacting to a third-party challenge on procurement as compared to the average costs associated to initiate a review.

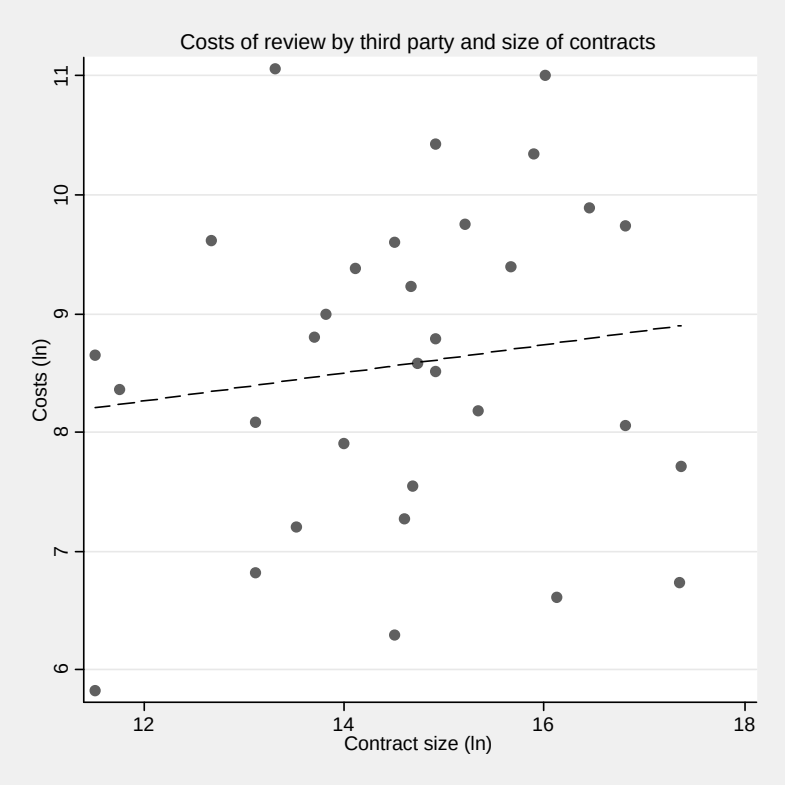
Figure 6.25: Distribution of total Review costs due to third party challenge (by responses)



Source: Survey of suppliers. Answers to questions: "Please estimate: the number of days (full-time equivalent) spent by your junior and senior staff; external legal and court fees;

Using the responses, we found that the review costs as a result of third party challenge is positively correlated to the size of contract but the relationship is very weak (Figure 6.26). Similar to the cost of review, the huge disparity in the chart below suggests that in addition to the size of contract, the review costs by third party challenge are influenced by other factors.

Figure 6.26: Relationship of review costs due to third party challenge and size of contract



Source: Survey of suppliers.

6.7 Cost-effectiveness and efficiency (Q8)

In this section we assess the cost-effectiveness and efficiency of the Directive in achieving its objectives. Our main indicator is derived from the comparison of the benefits and costs of the Directive as measured in the previous sections of this chapter. The results of this analysis are based on the results of the value for money analysis and thus are limited to the sample of four Member States analysed – any generalisations are made with caution. More robust and representative results would be achieved if data were available to construct a larger sample of matched legal cases.

Another measure of efficiency is whether the benefits of the Directive could have been achieved at lower costs. We examine two indicators for this: costly impediments to the efficient operation of the Directive (e.g. inappropriate usage, length of the process and fear of retaliation), and unused provisions of the Directive.

Indicators of efficiency:

1) Cost-benefit analysis (merged dataset, analysis)
2) Costly impediments (survey suppliers, CAEs and legal practitioners, legal databases, case law review)
3) Unused provisions (survey supplies and authorities)

E1: Cost-benefit analysis

Our analysis of the value for money of the Directive has shown that the number of complaints lodged in the past has a positive effect on the savings achieved through the procurement process (measured as the difference between the initial budget

estimate and the final value for published contracts, as a percentage of the initial estimate). For four Member States (CZ, DK, SI and SK) each *additional* complaint lodged in the past increases savings by around 0.05 percentage points on average (this is for the subsample of contracts in the sectors where most complaints have been lodged). This result is robust to different samples used and changes in the model specification to allow for the inclusion of a number of control variables. We have also found that this effect is strong in CZ and may be weaker in the other three Member States.

These results show the impact of a single additional complaint. In order to assess the aggregate benefit of the Directive we therefore estimate the impact of *all* complaints on savings.

Using our preferred model MV5, we estimated the predicted average savings that would accrue if all the complaints that took place were eliminated (i.e. the values for the complaints variable were set to 0). This represents a situation without the Directive. We compared this with the estimated average savings per contract that the model would predict using the actual observed values (representing the current situation with the Directive). The difference for the Member States in our sample is 2.26 percentage points.[120] This means that the average savings resulting from all complaints (in CPV-code sectors where complaints are more common) is 2.26% of the initial estimated contract value – a very significant result. The results for CZ are much greater, showing a 4.45 percentage points gain; this is the benefit compared to a situation where all complaints have been removed. Given the limited data availability and these findings should be seen as indicative of the possible effect complaints can have on contract's savings.

Comparing these benefits with the cost estimates of complaints as received by suppliers, CAEs and legal practitioners enables us to assess the overall efficiency of the Directive.[121] Median cost estimates from suppliers in the four sample Member States (CZ, DK, SI and SK) range from around 0.5% to 1.5% of the contract value, which is significantly lower than the estimated benefits. Even considering the costs estimated by CAEs (ranging between 0.1% and 0.9% of contact value) still results in savings which outweigh costs in the individual Member States.[122] As the survey sample sizes in these Member States are low, we conduct a similar comparison with the EU median costs – estimated at 0.6%, 0.4% and 1.9% of contact value by suppliers, CAEs and legal practitioners respectively – which again is much lower than the estimated average savings.

In comparing the estimated costs and benefits it is important to note that the benefit estimates only include monetary savings from improved procurement processes, and do not account for additional benefits stemming from increased quality of tenders which may result from greater competition.

[120] The average fitted saving of the model is 9.93%, compared to 7.67% when all the complaints have been removed.

[121] We note that this comparison considers the benefits related to contracts from a selection of CPV codes. However, as these CPV codes represent sectors with the most complaints, it is likely that the majority of costs will also relate to these sectors.

[122] As cost estimates from suppliers and CAEs were obtained from different surveys we do not add these together formally. However, indicative total costs across suppliers and CAEs range from 0.7% to 1.6% of contract values.

Given that the results relate to only a small sample of Member States, it is difficult to generalise to the rest of the EU. However, they are an indication of the *potential* benefits achievable through the Directive. It may be that some Member States may already be achieving the higher levels of efficiency in procurement as a result of the Directive (and thus the incremental impact of complaints on savings would be hard to observe). Removing the possibility of complaints may reduce the efficiency of procurement practices and deteriorate the contracts savings, in the opposite way of the results found for CZ.

E2: Costly impediments

We asses this indicator by considering a number of features which may potentially increase the costs of the Directive whilst impeding its benefits. These include nuisance complaints, the length of the reviews, and non-monetary costs.

We first consider whether the use of the Directive has led to nuisance complaints. Nuisance complaints reflect the inappropriate use of the Directive by economic operators to, for example, disrupt and paralyse CAEs as punishment for not awarding them the contract, strategically influence CAEs' award processes by the threat of future complaints, or to inflict costs on competitors by delaying income streams from disrupted contract awards. These behaviours would increase the costs associated with the Directive whilst not contributing to the benefits.[123]

There is some evidence of a perception of the inappropriate use of complaints from our surveys: 34% of CAEs and 20% of suppliers mentioned the "inappropriate use" as a factor making the Directive less relevant (see indicator R2 above). This suggests that the efficiency of the Directive may be compromised. However, assessing the extent to which this may be the case in reality is not possible given the available evidence. For example, CAEs may have an incentive to overstate the inappropriate use of the Directive. On the other hand, very few legal practitioners considered the Directive to increase the risk of nuisance complaints; whilst these may have a more impartial view than CAEs, their responses may still be influenced by some bias as their business relies on economic operators bringing forward complaints.

The use of 'deposit' review application fees in some Member States may address the issue of nuisance complaints. For example, our data up to 2012 shows that Romania has had the highest number of complaints, which may explain the recent introduction of the significant 'guarantee of good conduct' application fee (1% of the contract value). However, there is no convincing evidence that a deposit fee influences inappropriate use. Although this hypothesis holds in Romania (the perception of inappropriate use of the Directive among CAEs is very low), it does not hold in other Member States which have a deposit fee (e.g. CZ and MT), where CAE's perception of inappropriate use is still high. This suggests that either (a) the deterrent effect of a penalty is not effective in these Member States or (b) economic operators *are*

[123] Assessing the existence of nuisance complaints is methodologically challenging. Without examining each complaint and resulting decision it is not possible to determine whether a large number of complaints is indicative of suppliers using complaints inappropriately, or evidence of continuing problems in public procurement which suppliers are legitimately challenging. Even observed changes in complaint behaviour following initiatives to address possible inappropriate use (such as penalty fees for suppliers whose complaints are not granted) is not evidence that there was inappropriate use in the first place – these initiatives may deter suppliers from making even appropriate complaints if the risk of having to pay a fee is too great. A good approximation of the extent of this problem is through the perceptions by stakeholders in our survey.

influenced by the penalty fee to only lodge genuine complaints but that the perceptions of CAEs overstate the inappropriate use of the Directive.

Our conclusion is that while there is certainly some perception of the inappropriate use of the Directive through nuisance complaints, there is not sufficient evidence to robustly conclude whether this is indeed the case, or what the scale of such use might be. It is also not possible to conclude that measures such as penalty fees are effective in reducing inappropriate use, although this hypothesis does appear to hold in some Member States.

We also consider the length of the review procedures. As shown in the U1 indicator, the length of the review procedures varies greatly across Member States. Whilst variations in observed length reflect national procedural autonomy relating to Member States' judicial and administrative processes, the cross-country discrepancies are not conducive towards the functioning of the Internal Market for example as different lengths between Member States may restrict the provision of cross-border services. Therefore the observed discrepancy of review length across Member States could be viewed as an impediment towards the efficiency and cost-effectiveness of the Directive.

A final potential impediment to the cost-effectiveness of the Directive is the non-monetary costs which may arise, in particular the fear of retaliation. Economic operators may avoid lodging a complaint due to the credible threat that CAEs may retaliate against them by acting in an unfavourable manner in future procurement opportunities. Almost (46%) of the surveyed suppliers stated "fear of retaliation" as the reason why their company did not ask for a review. This may impede the cost-effectiveness of the Directive.

In summary, there do appear to be factors which may reduce the cost-effectiveness of the Directive, without which the benefits of the Directive could be achieved at a lower cost. Estimating the scale of these impediments is not possible given the available evidence. However, even in the presence of these impediments the overall benefits of the Directive are likely to outweigh the costs as shown in our cost-benefit analysis (further below).

E3: Unused features

The final indicator of cost-effectiveness is whether there are any provisions in the Directive which are unnecessary to achieve the benefits and yet give rise to costs. Responses to our surveys indicate that the "VEAT notice" and "penalties and shortening" are two provisions that are stated as relevant by only a minority of CAEs (only 23% and 15%, respectively) and by even fewer suppliers (13% and 15%, respectively). The low perception of relevance of VEAT is to be expected as this is only applicable in certain circumstances and is unlikely to concern the majority of respondents.

Although these provisions are seen as relevant by fewer respondents compared to other provisions, they are nevertheless considered relevant by some respondents, and therefore we cannot conclude that these are irrelevant. Our conclusion is that there is no convincing evidence of unused or irrelevant provisions in the Directive which would reduce the cost-effectiveness.

6.8 Impact on stakeholders (Q9)

Q9 explores whether the Directive has had different impacts on different stakeholders. More specifically, we look at notable differences between suppliers and CAEs, and between stakeholders of different sizes, drawing from our analysis in the sections above. Results are presented in the appendix.

The impact of the Directive on improving various aspects of the public procurement process (in terms of effectiveness, fairness, openness and transparency) is also viewed differently by respondents of different types (suppliers versus CAEs) and different size:

- The proportion of suppliers that "agreed" or "strongly agreed" with the effectiveness of the Directive and the improvements made on different aspects of the market is smaller than the corresponding proportion of CAEs. This may reflect different experiences and perceptions.
- The proportion of small suppliers who either "disagree" or "strongly disagree" on the effectiveness of the Directive is higher compared to medium and large companies, concerning all four aspects.[124] With the exception of openness, large suppliers have the highest portion of "agreed" or "strongly agreed" responses compared to medium and small companies. Small suppliers may be less able to make use of the Directive provisions for cost reasons and thus may have a lower opinion of the effectiveness of the Directive. Small suppliers may also be more generally disadvantaged in procurement (e.g. due to administrative burdens etc.) and this may translate to an overall more negative view of procurement, even if not directly driven by the Directive.
- Large CAEs have the highest shares of "disagree" or "strongly disagree", with the exception of the aspect of transparency, where medium CAEs have the highest share. The percentage of CAE respondents who disagreed with perceived improvement in any of the aspects is, however, not that high.

The cost impact of the Directive is largely similar across CAEs and suppliers – there were no significant differences observed in the median cost of review faced by these groups of suppliers. While there was a significant difference in the mean value observed, this can be attributed to the considerably larger size of some of the CAEs that were included in our sample.

As seen in our judicial review, a number of Member States allowed stakeholders beyond those with an immediate interest in the contract to launch a review process, implying a different impact of the Directive. These stakeholders can include operators not tendering (in CZ, DK, HU, IE and SI) and even third parties (CZ, DK and PT). This shows that, in some Member States, the Directive is relevant to a wider range of stakeholders.

6.9 Overall benefits (Q10)

The evaluation of the Directive has simultaneously considered two different aspects: the *direct* effect of its implementation and usage, and the *indirect* effect of the prevention of (or deterrence of) illegal practices in public procurement.

[124] This is illustrated in the charts in the appendix.

The Directive provides a direct and effective way for rapid action to be taken when there is an alleged breach of the Public Procurement Directives. The quantification of these direct effects has been undertaken with an exhaustive analysis of the transposition and implementation of the Directive and the analysis of how it is being used in the different Member States.

To the extent that CAEs feel there is a credible possibility of being scrutinised, the Directive may also act as a deterrent to breaching procurement laws. The effectiveness of the Directive in this case is indirect: it corrects any illicit practice *before* such a practice can be observed, and it works through the credibility of the system. This makes it very difficult to estimate the effects of the deterrence role of the Directive, as there are likely to be fewer illicit practices observed and hence fewer complaints being made: the absence of complaints in this case is driven by the success of the Directive, but cannot be measured.

Our overarching conclusion from the analysis is that the Directive is providing some overall benefits along the intended impacts, both direct and indirect. The prevalent belief is that the provisions are considered relevant by stakeholders: the most relevant provision across both suppliers and CAEs is "automatic debrief", and a number of other provisions are also considered relevant by at least 40%-50% of respondents. Perceptions of relevance among legal practitioners interviewed are much higher.

We have also found indications of the Directive being beneficial in the sense of being used extensively by suppliers to challenge unsatisfactory outcomes: we have observed large numbers of successful requests, decisions and appeals. The Directive has also helped to improve the perception of transparency and effectiveness of the procurement process, according to the view of stakeholders. This is in terms of improving the functioning of the procurement market and ensuring information is available to all participants.

There is also some evidence of the indirect deterrent effect of the Directive for CZ: past complaints are positively related to savings and negatively related on the probability of having a complaint lodged. The results are weaker for the other three analysed Member States. Given that the results relate to only a small sample of Member States, it is difficult to generalise to the rest of the EU. However, they are an indication of the *potential* benefits achievable through the Directive.

In any case, we find that the costs to CAEs and suppliers of bringing forward or defending a review case vary widely across the EU, but are in general small. Hence, even with the uncertainty surrounding the potential benefits of the Directive, the small costs are unlikely to outweigh the benefits.

There is some likelihood that the cost effectiveness of the Directive is being undermined in some way by features which increase cost without adding to the benefits. For example, there are perceptions of some inappropriate use of the Directive in bringing forward nuisance complaints, and perceptions that some provisions are less relevant (such as the VEAT notice and penalties). Further, the significant variations across Member States in the costs and length of reviews may inhibit the functioning of the Single Market and limit the cross-border provision of services.

The extent to which these factors may be undermining the cost-effectiveness of the Directive is not measurable. We have also mentioned a number of caveats in our analysis about the robustness of the evidence around any impediments to the efficiency of the Directive. However, even in the presence of these potential

impediments the overall benefits of the Directive are likely to outweigh the costs (which have been found to be small). This implies that the overall cost effectiveness of the Directive would still be positive.

In addition, it is possible that some of these 'impediments' are still contributing to the indirect impacts of the Directive. One may ask if the observation of unsuccessful claims is a source of inefficiency of the Directive, or the fact that some provisions are used less often means that such provisions are redundant. In a "direct" sense they may be viewed as inefficient as they would incur unnecessary costs to society (although unsuccessful claims may generate some benefits for claimants as they become accustomed to the system, obtain experience and obtain satisfaction that their complaints are addressed by a responsible authority). But in an "indirect" sense they are reinforcing the public procurement monitoring and deterrence mechanism as they are signalling to the market that any diversion from legitimate practices will be challenged. This is also true for provisions less frequently used: their sole presence may be necessary to signal that they *could* be used if needed and this could be enough to fortify the role of the Directive.

7. Summary and conclusions

We present a concise summary of our findings in relation to the evaluation questions addressed in this report. These questions follow the objectives, inputs, outcomes, intermediate impacts and final impacts of the Directive.

Relevance (Q1)

In Q1 we assess the relevance of the Directive for the purpose of identifying whether the objectives set out are still pertinent and whether there is still a need for intervention. This analysis is based on the survey of stakeholders and on data on the usage of the Directive (also included in question Q3).

We find that many provisions of the Directive are perceived as relevant across suppliers, CAEs, and legal practitioners, with the most relevant provision being the "automatic debrief". Some provisions are perceived as less relevant, such as the VEAT notices and penalties. Figure 6.2 in the main report presents the details of these findings.

There are perceptions of continuing problems in addressing breaches in procurement law among some participants (particularly suppliers). There is also some evidence of a perceived lack of trust in the procurement process and a perceived lack of transparency in public procurement. These perceptions suggest that continuing efforts are required to achieve the envisaged benefits of the Public Procurement Directives. The Directive should thus continue to be relevant in enabling procurement law breaches to be challenged and in promoting a more efficient and transparent procurement market.

Finally, the extensive usage of the provisions of the Directive (as shown in U3: Usage), is further evidence that the Directive is still relevant.

Transposition (Q2)

In Q2 we examine the transposition of the Directive across the EU. The Directive sets out optional provisions which a Member State may or may not have made use of. In addition, certain aspects of the obligatory provisions are less prescriptive in some instances, leaving room for interpretation which may potentially lead to national differences in implementation. Differences in implementation across Member States may therefore stem from the application of national rules of procedural law. Our findings are briefly summarised as follows:

We find that the scope and availability of the review procedure differs on some aspects across Member States. All but two Member States (MT and SI) apply a minimum standstill period in accordance with the Directive; a few apply an additional period but one which is not excessive.

Review bodies of very different natures have been established in each Member State: in some, this is a specialised public procurement review body, while in others, an existing judicial or administrative review body is responsible for the review of procurement and contracting decisions. Figure 5.7 presents this detail.

In all Member States, provision is made for the main types of remedies, i.e. (a) powers to take interim measures, (b) set aside the decision, including the removal of discriminatory specifications, and (c) award damages to persons harmed by an infringement.

The provisions for the suspension of the contact vary across Member States, and some have gone beyond the provision of the Directive with the suspension of a contract until a final decision on appeals is reached, rather than just a decision on interim measures. On the other hand, some Member States (AT, BE, BG, CZ, DK, EE, EL, FR, HR, HU, IT, LT, NL, PT, RO and SI) have not provided for an automatic suspensive effect of the review procedures which makes it more challenging for the claimant to apply for a suspension of the contract.

The Directive provides for contracts to be declared ineffective under three circumstances. Almost all Member States provide for ineffectiveness in the first and second circumstances, but only around half provide for ineffectiveness in the third circumstance.

The length of review proceedings is very dispersed across Member States. There are no legislative provisions on the duration of the review procedures in 12 Member States, but in over half of Member States there are maximum duration periods for review proceedings.

The fee for applying for review varies widely across Member States: in some countries the application fee for a review procedure is a fixed flat rate, irrespective of the characteristics of the contract; in others the costs are determined by a scale criteria or by a value-range that depends on the size or the type of contract (for works, supply or services). The great dispersion of review fees is also apparent within country for different contract types. Figure 5.14 presents this detail.

Usage and factors affecting usage (Q3)

In Q3 we assess the extent to which the provisions envisaged in the Directive are being used across different Member States, CAEs and sectors, and the factors affecting this usage.

The Directive have been used widely by suppliers across the EU to challenge procurement outcomes:

- Large numbers of requests have been initiated and decisions taken on these requests, as shown in Table 6.1 and Table 6.2.
- Decisions have also been appealed, as seen from the numbers of second and third instance cases shown in Table 6.3 and Table 6.4.
- The use of the VEAT notice is less widespread across the EU, being concentrated in France, and to less extent, Poland, the UK and Denmark.

The characteristics of the complaints and decisions are investigated using a review of case law in the different Member States. Given issues with data availability, more comprehensive conclusions on usage could be drawn if a wider review of case law were possible covering more cases in more Member States.

We find that there is great variation in the length of the reviews in practice. The length of pre-contractual remedies cases appears to be (in part) influenced by whether the Member State has a non-judicial Review Body – Member States with a specialist non-judicial Review Body generally have the shorter review lengths for interim reviews and pre-contractual remedies, as shown in Figure 6.6 and Figure 6.7.

Complaints are more likely to be dismissed than upheld. Where complaints are successful, our results show that the most common outcome of decisions is the contract being declared ineffective by the review body. Very few respondents to our

surveys had issued or received damages or penalties, a finding supported by the legal practitioners.

Our survey results also show that there are a number of reasons for suppliers not making use of the Directive to seek reviews, the two most common reasons being lack of confidence in the success of the complaints and a fear of retaliation by the awarding authority.

Transparency and openness (Q4) and Value for money (Q6)

These questions assess the direct benefits of the Directive in terms of increased transparency and openness, and effectiveness and fairness of public procurement, as well as value for money.

Stakeholders' views indicate that the Directive has helped to improve the "effectiveness" and "transparency" of the procurement process, i.e. improving the functioning of the procurement market and ensuring information is available to all participants (70% and 60% of CAEs for each impact respectively, and over 50% of suppliers for both). In contrast, fewer than half of the respondents thought that market "openness" has improved through the Directive, i.e. the ease with which bidders can access the market (49% and 35% of CAEs and suppliers respectively). This suggests that while the Directive has gone some way to improve the procurement process, there is the perception that further improvement is possible, particularly in terms of the openness of the market.

To assess the impact of the Directive on value for money in procurement we used several regression models to explain awarding authorities' "savings" on the final contract value as a result of complaints lodged within the Member State in the past. Because of the difficulties in accessing the data on complaints and matching them with existing contract information available in TED, our analysis has been limited to four Member States: CZ, DK, SI and SK. We have found that the effects may be different across Member States. A consistently positive effect is found for CZ i.e. that additional past complaints are significantly and positively related to savings; results are weaker for the other three Member States. Due to issues with data availability, our analysis is only based on a small sample of Member States, and the results for our sample are statistically significant for one Member State only. More comprehensive conclusions on impact of the Directive on value for money could be drawn if information were available to create a larger sample of matched cases, across more Member States.

Our model does not measure other outcomes of better procurement processes, such as improved quality of bids, and thus is likely to understate the benefits. Although our findings are based on a small sample, they nevertheless are a good indication of the potential benefits of the Directive that can be (or have already been) achieved.

Non-compliant behaviour (Q5)

This question assesses the extent to which the provisions envisaged in the Directive are acting as a deterrent to non-compliant behavior of CAEs. We measure this using the sample of complaints lodged and tender notices in TED for four Member States (CZ, DK, SI, SK). We find that past complaints have a significant negative effect on the probability of having a complaint lodged in CZ; this is evidence of a deterrence effect, although only observed for one Member State in our sample. More comprehensive conclusions could be drawn if information were available to create a larger sample of matched cases, across more Member States.

Additional costs (Q7)

In Q7 we assess the extent to which the Directive causes additional costs. We examine the costs to CAEs of complying with the Directive's provisions and of defending themselves against complaints; to suppliers in bringing forward reviews; and to winning suppliers defending themselves against third-party reviews.

We find that the costs to CAEs and suppliers of bringing forward or defending a review case vary widely across the EU, but are in general small.

The median cost of review for suppliers across all Member States is estimated at around €4,100 per review. In terms of costs as a percentage of contract size, the median value across survey respondents is 0.6%. The median cost estimated for CAEs is just under €4,000. In terms of costs as a percentage of contract size, the median value across survey respondents is 0.4%.

Median costs to CAEs as a percentage of contract value in individual Member States range from around 0.1% (in EL, PL, SI and SK) to around 2% (AT). Among suppliers, median costs range from 0.3% (ES, LT, RO, SE and UK) to 1.5% (CY, EL, SI).

Costs to third-party suppliers of defending reviews are relatively low (a median cost of 0.2% of contract size). However, the very small number of survey responses in relation to this estimate means that the results must be viewed with high caution.

Average one-off and ongoing costs to CAEs of complying with the Directive are estimated to be 0.16% and 0.18% of the annual value of procurement respectively, and the majority of the CAEs spend less than 0.3% on compliance.

Our conclusions are based on the survey of stakeholders. Information on costs was not provided by all respondents, and in general there is great variation in responses. This must be kept in mind then considering our conclusions.

Efficiency and cost-effectiveness (Q8)

Q8 investigates the cost effectiveness and efficiency of the Directive. The main questions are whether the benefits of the Directive outweigh the costs, and whether the same benefits could have been achieved at a lower cost.

Using the sample of complaints lodged and tender notices in TED for four Member States (CZ, DK, SI, SK), we estimate the savings attributable to all past complaints. Comparing this to the cost estimates of complaints from our survey of suppliers and CAEs for these Member States shows us that the savings as a percentage of contract value are greater than the median cost estimates for one of the Member States only: CZ. Given that the results relate to only a small sample of Member States, we cannot generalise to the rest of the EU. However, they are an indication of the *potential* benefits achievable through the Directive. It may be that some Member States may already be achieving the higher levels of efficiency in procurement as a result of the Directive (and thus the incremental impact of complaints on savings would be hard to observe). Removing the possibility of complaints may reduce the efficiency of procurement practices and deteriorate the contracts savings, in the opposite way of the results found for CZ. The results of this analysis are based on the results of the value for money analysis and thus are limited to the sample of four Member States analysed – any generalisations are made with caution. More robust and representative results would be achieved with a larger sample of matched cases.

There is some possibility that the cost effectiveness of the Directive is being undermined in some way by features which increase cost without adding to the

benefits, for example through inappropriate use or less relevant provisions. The extent to which these factors may be undermining the cost-effectiveness of the Directive is not measurable, and we have mentioned a number of caveats in our analysis about the robustness of the evidence around any impediments to the efficiency of the Directive (for example, there are methodological challenges in assessing inappropriate use, and the evidence we have is based solely on perceptions). However, even in the presence of these potential 'impediments', the relatively low costs of the Directive and the evidence that we have (from our small sample) of savings implies that the overall cost effectiveness of the Directive is likely to be positive.

Impacts on stakeholders (Q9)

Q9 explores whether the Directive has had a different impact on different stakeholders. More specifically, we look at notable differences between suppliers and CAEs, and between stakeholders of different sizes.

The impact of the Directive on improving various aspects of the public procurement process (in terms of effectiveness, fairness, openness and transparency) is viewed differently by respondents of different types (suppliers versus CAEs) and different size. A greater proportion of CAEs than suppliers perceived the Directive to improve transparency and be effective. Smaller suppliers are in general less likely to perceive a positive impact of the Directive – this may be due to these being less able to make use of the provisions for cost reasons.

The cost impact of the Directive is largely similar across CAEs and suppliers – there were no significant differences observed in the median cost of review faced by these groups.

Conclusions and overall benefits (Q10)

The evaluation of the Directive has simultaneously considered two different aspects: the *direct* effect of the implementation and usage, and the *indirect* effect of the prevention of (or deterrence of) illegal practices in public procurement.

The Directive provides a direct and effective way for rapid action to be taken when there is an alleged breach of the Public Procurement Directives. The quantification of these direct effects has been undertaken with an exhaustive analysis of the transposition and implementation of the Directive and the analysis of how it is being used in the different Member States.

To the extent that CAEs feel there is a credible possibility of being scrutinised, the Directive may also act as a deterrent to breaching procurement laws. The effectiveness of the remedies system in this case is indirect: it corrects any illicit practice *before* such a practice can be observed, and it works through the credibility of the system. This makes it very difficult to estimate the effects of the deterrence role of the Directive, as there are likely to be fewer illicit practices observed and hence fewer complaints being made: the absence of complaints in this case is driven by the success of the Directive, but cannot be measured.

Our overarching conclusion from the analysis is that the Directive is providing some overall benefits along the intended impacts, both direct and indirect. The prevalent belief is that the provisions are considered relevant by stakeholders: the most relevant provision across both suppliers and CAEs is "automatic debrief", and a number of other provisions are also considered relevant by at least 40%-50% of respondents. Perceptions of relevance among legal practitioners interviewed are much higher.

We have also found indications of the Directive being beneficial in the sense of being used extensively by suppliers to challenge unsatisfactory outcomes: we have observed large numbers of successful requests, decisions and appeals. The Directive has also helped to improve the perception of transparency and effectiveness of the procurement process, according to the view of stakeholders. This is in terms of improving the functioning of the procurement market and ensuring information is available to all participants.

There is also some evidence of the indirect deterrent effect of the Directive for CZ: past complaints are positively related to savings and negatively related on the probability of having a complaint lodged. The results are weaker for the other three analysed Member States. Given that the results relate to only a small sample of Member States, it is difficult to generalise to the rest of the EU. However, they are an indication of the *potential* benefits achievable through the Directive.

In any case, we find that the costs to CAEs and suppliers of bringing forward or defending a review case vary widely across the EU, but are in general small. Hence, even with the uncertainty surrounding the potential benefits of the Directive, the costs are unlikely to outweigh the benefits.

There is some likelihood that the cost effectiveness of the Directive is being undermined in some way by features which increase cost without adding to the benefits. For example, there are perceptions of some inappropriate use of the Directive in bringing forward nuisance complaints.[125] There are also perceptions that some provisions are less relevant (such as the VEAT notice and penalties). Further, the significant variations across Member States in the costs and length of reviews may inhibit the functioning of the Single Market and limit the cross-border provision of services.

The extent to which these factors may be undermining the cost-effectiveness of the Directive is not measurable, and we have mentioned a number of caveats in our analysis about the robustness of the evidence around any impediments to the efficiency of the Directive. But even in the presence of these potential impediments the overall benefits of the Directive are likely to outweigh the costs (which have been found to be small). This implies that the overall cost effectiveness of the Directive would still be positive.

In addition, it is possible that some of these 'impediments' are still contributing to the indirect impacts of the Directive. One may ask if the observation of unsuccessful claims is a source of inefficiency of the Directive, or the fact that some provisions are used less often means that such provisions are redundant. In a "direct" sense they may be viewed as inefficient as they would incur unnecessary costs to society (although unsuccessful claims may generate some benefits for claimants as they become accustomed to the system, obtain experience and obtain satisfaction that their complaints are addressed by a responsible authority). But in an "indirect" sense they are reinforcing the public procurement monitoring and deterrence mechanism as they are signalling to the market that any diversion from legitimate practices will be challenged. This is also true for provisions less frequently used: their sole presence

[125] Although as stated under indicator E2 this is a perception only and the methodological difficulties in assessing the existence of nuisance complaints means that we cannot robustly conclude that the Directive is being inappropriately used.

may be necessary to signal that they *could* be used if needed and this could be enough to fortify the role of the Directive.

Challenges in data availability

The lack of availability and comparability of data has been one of the main difficulties of the evaluation of the Directive. The main challenge we faced was in relation to creating a database of procurement contracts containing information of review cases with details of the contact (obtained from TED).

The compilation of review cases was very difficult for a number of reasons:

- Not all Member States publish the details of court decisions concerning public procurement contracts which have been challenged under the Directive.
- Where existing judicial procedures are used to judge procurement review cases, many Member States do not specify the type of case in their records and thus it is not possible to identify the cases relating to public procurement without going into the detail of each case.
- In addition, in Member States without a centralised public procurement review body, public procurement cases can be dealt with in courts all around the country, which further reduces the feasibility of collecting all relevant cases.
- Even when cases are published online, in many cases the databases are not examinable using electronic techniques (search tools) to identify the correct cases and the details thereof (e.g. dates or type of remedy sought). Where there are thousands of cases listed, examining each one to extract these details is not feasible.
- Finally, the case law review shows a huge disparity in the reporting practices across Member States: in some cases there are summary tables but in others the review is only provided in the form of pdf documents.

In addition to issues in gathering cases, we also faced a challenge in getting details of the contracts being challenged. Matching the legal cases to the contract details contained in TED was not always feasible as there are difficulties in the linking process: with very few exceptions (including CZ, SK, SL, DK), Member States do not typically report the OJEU reference number from TED or other details that facilitate the linking.

Based on the experience gained in this evaluation, we recommend improved record keeping of legal cases involving the review of public procurement contracts in order to facilitate more comprehensive research. The European Commission could consider, where appropriate, placing a requirement on Member States to collect data on public procurement review cases. This could be accompanied by a requirement to make the details of cases available on a publically available online site, in a suitable electronic format that facilitates interrogation and collection of relevant data (such as dates, remedy sought, decisions, and OJEU identification number).

We note that these obligations may impose a significant burden on some Member States, in particular those where existing judicial procedures are used rather the specialised review bodies (some do not even use computerised systems, and some do not currently collect or publish information on the type of case). The European Commission should consider further the feasibility and administrative burden imposed by such obligations.

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