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Turning best practice into policy: public procurement reform agenda

European Bank
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Following major developments in procurement best practice key international standard setting instruments for public procurement were recently revised: the 2011 UNCITRAL Model Law on Public Procurement replaced the 1994 standards, in March 2012 the World Trade Organisation adopted a revision of the Agreement on Government Procurement and an update to the European Union directives on public procurement is due in December 2013. New reform concepts are tested by governments to better balance transparency and efficiency of procurement and make procurement a tool for economic development. New policy standards advocate reforming public procurement policies to be more open and accessible to international trade through more extensive application of the information and communication technology (electronic procurement) which can benefit all stakeholders. The journal aims to explore current reform agenda in the EBRD region, where reform objectives and strategies are driven by different political objectives.

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Foreword

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Public procurement policy today is on top of the reform agendas of an increasing number of countries at diverse stages of economic development. This growing interest in "getting procurement policy right" reflects a number of interrelated factors. One is the huge and escalating infrastructure investment needs of major emerging and transition economies in the current era. Another is the importance of avoiding dissipation of scarce government resources through flawed procurement processes, corruption or collusive tendering by suppliers. While yet another is the importance of public procurement as a dimension of the stimulus measures implemented by many governments in response to the economic crisis and its aftermath.

In this context, countries that aim to achieve the best value for money in public procurement activities are faced with the challenge and opportunity of implementing best practices that have been identified internationally in national procurement policies. In an encouraging development, there has been an increasing convergence of views on best practices in government procurement in recent years, and key international instruments in the field have been modernised. These instruments are now available for countries seeking guidance in reforming their procurement systems.

Among the relevant instruments is the World Trade Organisation (WTO) Agreement on Government Procurement (GPA), which aims to open up public procurement markets internationally, based on principles of non-discrimination, transparency and procedural fairness. Like the UNCITRAL Model Law on Public Procurement – another important instrument with which the GPA is extensively harmonised – the GPA has recently been re-negotiated and is consequently among the most up-to-date policy instruments available.

The renegotiation of the GPA achieved three main benefits. First, it significantly expanded the parties' market access commitments. Second, it modernised and improved the text. And lastly, it established a set of future work programmes, relating to the administration and possible further evolution of the agreement, which is to be conducted by the WTO Committee on Government Procurement after the revised agreement comes into effect.

The conclusion of the GPA re-negotiation is important for a number of reasons. It has added an estimated US$ 80-100 billion annually to the value of the market access commitments by the parties under the agreement. This brings the total coverage of the agreement to an estimated US$ 1.7 trillion in procurements by the parties annually.

In addition, the textual revision has modernised the agreement. For example, it reflects the now widespread use of electronic procurement tools, which were not yet developed in 1994 – when the previous version of the agreement was adopted – and were accordingly not well reflected in the earlier agreement. The revised text also embodies a new approach to transitional measures for developing countries joining the agreement, as well as additional flexibility for all participating WTO members.

A further important element of the revised GPA text is a specific new requirement for participating governments and their relevant procuring entities to conduct their procurements in ways that avoid conflicts of interest and prevent corrupt practices. This provision is unique in the context of WTO treaty obligations. The preamble to the agreement recognises the GPA's significance for good governance and the fight against corruption, emphasising the importance of this new substantive provision. Together, these elements signal a belief by the parties that the GPA, while primarily an international trade agreement, is directly relevant to the global struggle for good governance.

These developments are expected to encourage accession to the agreement by emerging and developing economies. In addition, the agreed future work programmes under the agreement have significant potential to promote increased transparency and to stimulate international convergence around best practices in public procurement.

With the improvements and changes introduced in the agreement, the GPA is effectively a distillation of best practices internationally, as recognised by participating WTO member governments. The re-negotiation of the GPA, in parallel with the UNCITRAL Model Law, created the opportunity for harmonisation. Consequently, the two instruments might also prove to be relevant to the current review of the World Bank Procurement Guidelines. The GPA also continues to serve as a model for procurement chapters in bilateral free trade agreements and regional trade agreements worldwide.

In this context, much useful work is also being done by the European Bank for Reconstruction and Development (EBRD) to promulgate good procurement practices as they are reflected in relevant international instruments, and in national experiences in the Bank's region of operations. The articles in this issue of *Law in transition* testify to the scope and usefulness of the work being done in this field, and to the challenges involved. The increasing convergence of international instruments concerning government procurement, and the scope of cooperation in this area, are good news for all who support the broad adoption of good procurement policies, with the economic and development benefits that they bring.

Measuring success in public procurement reform

Measuring success in public procurement reform

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In 2010 the EBRD conducted its first assessment of the public procurement sector in its countries of operations. A similar research project was completed between 2011-12, for the southern and eastern Mediterranean (SEMED) region – Egypt, Jordan, Morocco and Tunisia – upon these countries' inclusion in the Bank's mandate.

The public procurement sector assessments, which review the quality of public procurement laws and local procurement practice, are conducted periodically to gauge progress in the region, and to guide future reform projects. While the new regional sector assessment that covers all EBRD countries of operations will be initiated in 2014, in 2012 the EBRD's Legal Transition Team (LTT) returned to the EBRD's countries of operations, conducting an interim self-assessment of the national public procurement legislation, in order to gather data on the reform progress made since the 2010 regional sector assessment.

In this research exercise – which was limited to reviewing national public procurement laws – national regulatory authorities were interviewed in relation to the latest developments in their public procurement policies (self-assessment). This article aims to compare the results of the self-assessment of public procurement laws in the EBRD region with the situation in 2010, for countries of operations that were covered by the 2010 assessment and which also participated in the 2012 research: Albania, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Bulgaria, Croatia, Estonia, Former Yugoslav Republic of Macedonia (FYR Macedonia), Georgia, Hungary, Kazakhstan, Kyrgyz Republic, Latvia, Lithuania, Moldova, Montenegro, Poland, Romania, Russia, Serbia, Slovak Republic, Slovenia, Tajikistan, Turkey and Ukraine.

Why public procurement reform has become so important

Public procurement laws regulate the interaction between the public sector and the commercial market, and, in an era of fiscal austerity, governments are keener to ensure that procurement policies deliver "value for money" in public spending. In addition, public procurement regulations determine how a government's purchasing power is exercised over private sector enterprises, and how it influences private sector development. Therefore, the efficient and effective regulation of public procurement is an essential component of a public finance management system, encouraging transparency and competition in public contracts. Public procurement is a sensitive element of a country's commercial laws, as procurement and related regulation greatly influence access to business opportunities for private sector suppliers and contractors, in particular small and medium sized enterprises (SMEs). Consequently, as a part of its mandate to foster the development of the private sector, the EBRD seeks to promote healthy and modern procurement policies, to provide a full picture of the public procurement sector in its countries of operations, and to evaluate public procurement law and practice from a commercial perspective.

Assessment benchmark

There are several legal instruments in use in the area of public procurement across the EBRD region: the 2004-7 European Union Public Procurement Legislative Package (EU Directives), the World Trade Organisation (WTO) Agreement on Government Procurement (GPA) in its latest 2012 version, and the United Nations Commission on International Trade Law (UNCITRAL) 2011 Model Law on Public Procurement. To create the EBRD Core Principles for an Efficient Public Procurement Framework benchmark (the Core Principles benchmark), the assessment drew on the principles of these various instruments, supplemented when necessary by the procurement policies and rules of international organisations. The Core Principles benchmark indicators focus on the quality of the public procurement process, while using principles and requirements that have gained broad international recognition and which remain policy-neutral. Moreover, the assessment does not evaluate the compliance of national laws and practice against any of these specific international legal standards. Consequently, the Core Principles benchmark indicators:

- provide an impartial, uniform basis for regulatory comparisons across the EBRD region
- can be applied without considering the individual political objectives of governments
- can be used to assess legal frameworks which are in the process of development.

The assessment model comprised five key stages, in accordance with the EBRD approach to evaluating and analysing commercial laws and practice:

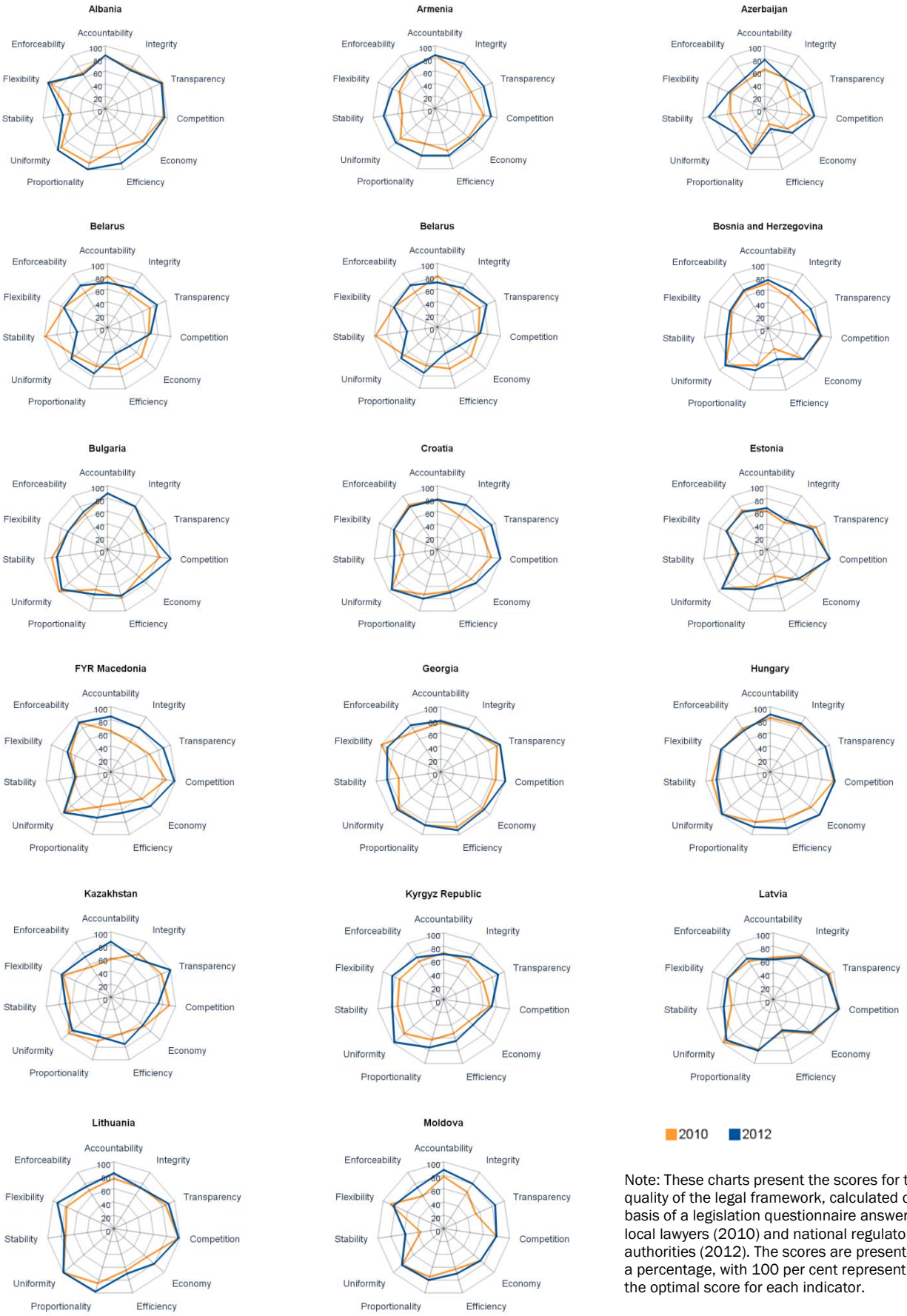
- establish best practices;
- produce a benchmark;
- develop and calibrate questionnaires;
- collect responses; and
- score, evaluate and analyse the data collected.

The assessment data provided compliance ratings (categorised by the score achieved) for each indicator: very high compliance (> 90 per cent of the benchmark); medium compliance (60-75 per cent of the benchmark); and very low compliance (< 50 per cent of the benchmark). The data were collected, processed and analysed through a dedicated online assessment database. Three types of charts – spider graphs, pie charts and bar charts – are used to present the assessment results. The complete results of the self-assessment will be presented and analysed in individual country profiles, which are planned to be published online, in English and Russian, on the EBRD web site later this year.

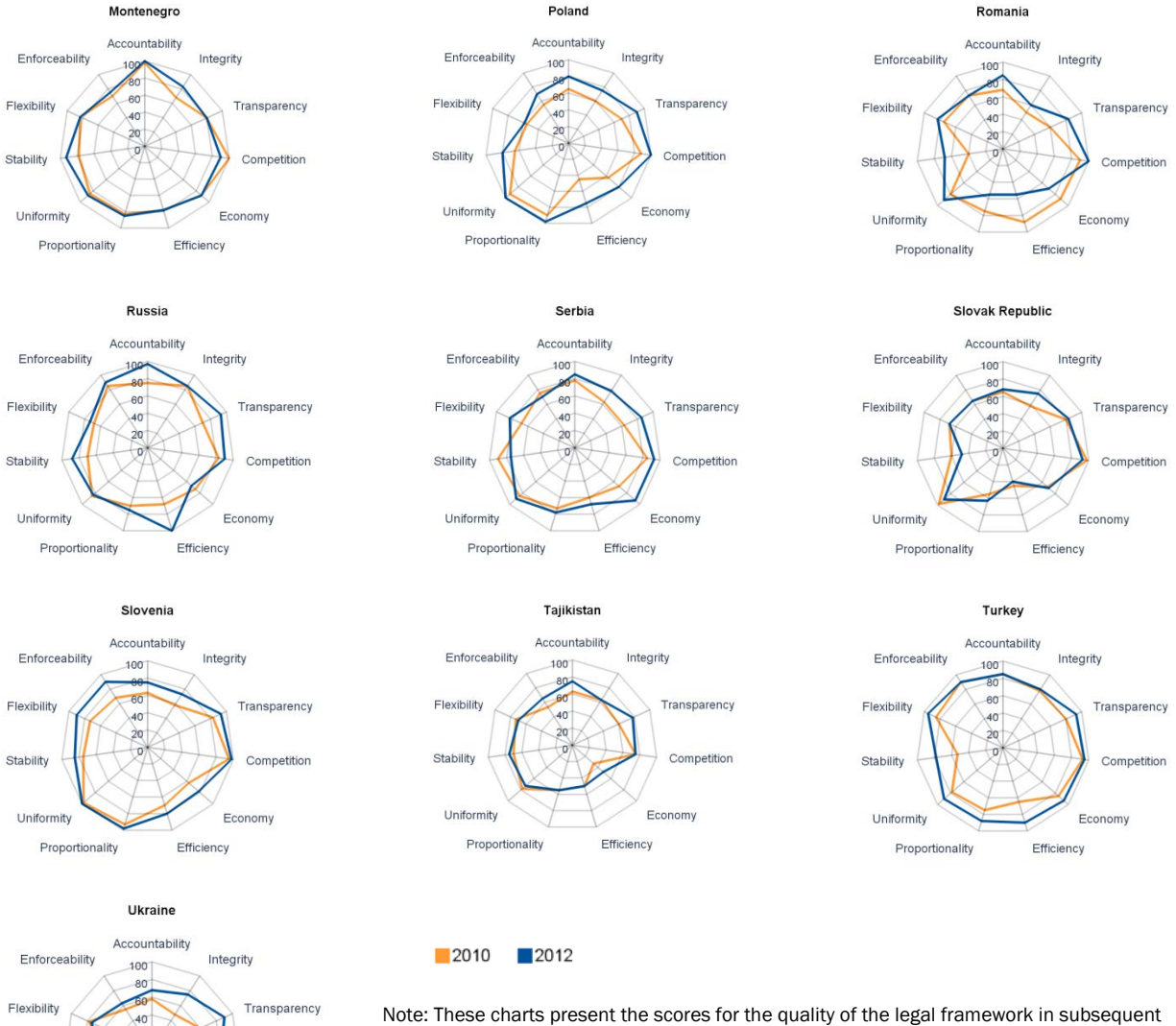
Monitoring reform progress: the objective of the self-assessment

The objective of the 2012 research was to review changes in basic policy concepts (scope, coverage, completeness, regulatory efficiency) in national laws, and to enable a comparative analysis of the quality of public procurement legislation, in terms of transparency safeguards, efficiency instruments and institutional and enforcement measures. Because it represents the first region-wide review since 2010, the results reveal which countries in the region have recently enacted the most comprehensive reforms. The 2012 assessment was conducted as a self-assessment, meaning that the data were collected through online interviews with representatives from the national regulatory authorities in each country. This process began in 2012, and the data review was finalised in 2013. Notably, the assessment does not include feedback from other procurement process stakeholders, such as contracting entities or procurement professionals, nor does it attempt to assess the law in practice. This article presents the initial results of the review of the region's reform progress, and comments on the elements of successful reform in the public procurement arena.

Chart 1: Reform progress in public procurement in the EBRD region, as identified by 2010 and 2012 research conducted by the Bank



Note: These charts present the scores for the quality of the legal framework, calculated on the basis of a legislation questionnaire answered by local lawyers (2010) and national regulatory authorities (2012). The scores are presented as a percentage, with 100 per cent representing the optimal score for each indicator.



Note: These charts present the scores for the quality of the legal framework in subsequent assessments of the national public procurement legislation, completed between 2009 and 2012. The scores have been calculated on the basis of a legislation questionnaire based on EBRD Core Principles, and answered by local lawyers (2010) and national regulatory authorities (2012). The scores are presented as a percentage, with 100 per cent representing the optimal score for each indicator.

Sources: EBRD 2010 Regional Public Procurement Sector Assessment, EBRD 2012 Regional Public Procurement Legislation Self-Assessment

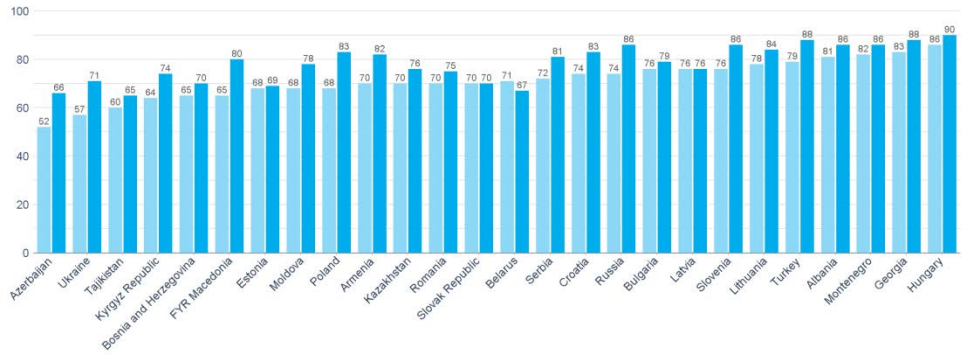
The spider diagrams above reflect the quality of the public procurement legal framework in each country, in both 2010 (orange) and 2012 (blue). Each graphic presents the scores for each of the 11 Core Principles benchmark indicators. Total scores are presented as a percentage, with 100 per cent representing the maximum score for each Core Principles benchmark indicator. The scores begin at zero at the centre of the chart, and reach 100 at the outside, so that, in the overall chart, a wider line represents a better score in the assessment. The amount of reform efforts in each country can be assessed by observing the width of the gap between the two lines.

Analysing the EBRD region as a whole, over the past three years certain countries stand out as reform leaders, while others have maintained more conservative legal frameworks.

The 2012 research data show that the countries that have previously been reform leaders – Hungary, Turkey and Georgia – continue to score well. Across the region the scores have improved, from an average of 71 per cent in 2010, to 78 per cent in 2012 – an overall increase of seven percentage points. None of the countries for which data are available for 2012 remain in low compliance, and the progress made indicates that, on average, countries in the region are in high compliance, compared to medium compliance in 2010.

The countries exhibiting the highest percentage increases in their overall score were Azerbaijan (20 per cent), Ukraine (20 per cent) and FYR Macedonia (19 per cent). Both Azerbaijan and Ukraine moved from low compliance with the benchmark to medium compliance, while FYR Macedonia progressed from medium to high compliance. The countries showing either a decrease in their score or no overall improvement were Belarus, Latvia and Slovak Republic. However, it should be noted that despite the tremendous progress made in Azerbaijan, the country's score remains below average for the EBRD region, and below all three of the countries showing no improvement at all.

Chart 2: Progress in national public procurement legislation development in transition countries from 2010 to 2013



Note: This chart presents the scores from 2010 and 2012 for the quality of the national legal framework (law on the books) for transition countries. The scores have been calculated on the basis of a legislation questionnaire, based on EBRD Core Principles and answered by local legal advisors (2010) and national regulatory authorities (2012). Total scores are presented as a percentage, with 100 per cent representing the highest performance.

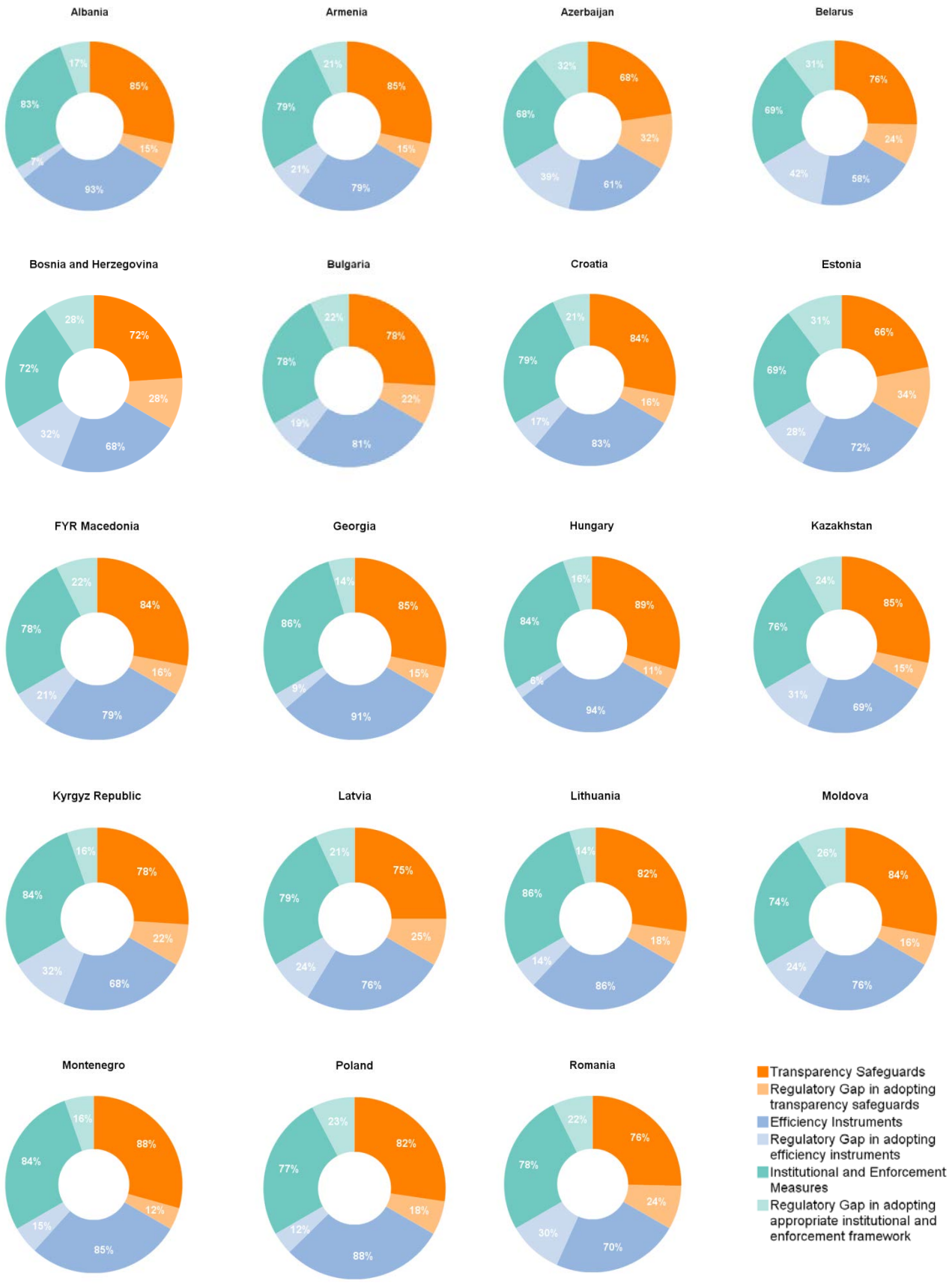
Sources: EBRD 2010 Regional Public Procurement Assessment, EBRD 2012 Regional Public Procurement Legislation Self-Assessment

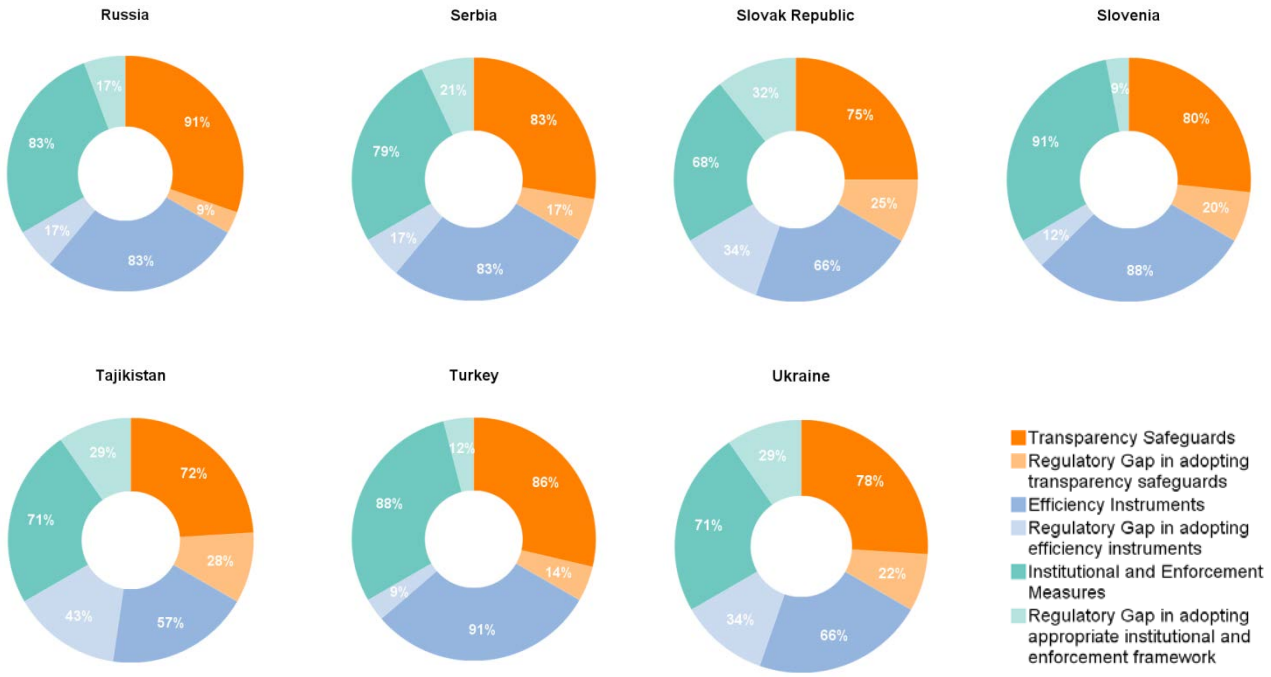
Adequacy of policy-making: aligning public procurement laws with local market and business culture challenges

To review the countries' key public procurement policy decisions, and to assess the strength of their national regulatory institutions, the benchmark indicators were grouped into three key evaluation categories: transparency safeguards (an average of the scores for the accountability, integrity and transparency indicators); efficiency instruments in the national regulatory framework (an average of the scores for the competition, economy, efficiency and proportionality indicators); and institutional and enforcement measures (an average of the scores for the quality of the enforceability, uniformity, flexibility and stability indicators).

Each of the three evaluation categories in the individual country pie charts presents the scores as a percentage of the maximum available for each category. The lighter shaded area in the pie chart represents the regulatory gap (the difference between the maximum possible score in a category and the achieved score) for the individual evaluation category.

Chart 3: Public procurement policy development: transparency safeguards, efficiency instruments and institutional and enforcement measures





Note: These charts present the results of the assessment of public procurement policies on the books in three fundamental evaluation categories: transparency safeguards, efficiency instruments, and institutional and enforcement measures. The scores have been calculated on the basis of a legislation questionnaire, based on EBRD Core Principles, and answered by the national regulatory authority. Total scores are presented as a percentage, with 100 per cent (one-third of the pie chart) representing the optimal score for each evaluation category. Regulatory gaps – the difference between the assessment results and the benchmark – are marked in light orange, light blue and light green, respectively.

Source: EBRD 2012 Regional Public Procurement Legislation Self-Assessment

The Core Principles benchmark indicators described above can be grouped into three basic policy categories: anti-corruption and transparency safeguards (accountability, integrity and transparency); efficiency instruments (competition, economy, efficiency and proportionality); and institutional and enforcement measures (uniformity, stability, flexibility and enforceability). Historically, transparency safeguards have always been a major element in procurement policy-making, and should still be considered of paramount importance as a regulatory factor, especially for countries where corruption is perceived to be a problem. The incorporation of efficiency instruments in public procurement regulation is the product of valid concerns about value for money in public spending, and expanding opportunities for business, but can typically only be a dominant policy feature in countries in which legal and business cultures are relatively well-developed, and which are less affected by corruption. Lastly, the development of appropriate institutional and enforcement measures enables the crucial step in implementing the procurement policy in practice, and which protects private sector suppliers and contractors from arbitrary decisions of government officials.

Viewing the scores together for these three basic policy evaluation categories provides a window through which to assess whether the national procurement policies have struck an appropriate balance between them. Reforms should focus on closing these three regulatory gaps in parallel, as this approach ensures that progress in some policies is not undermined by deficiencies in others. In general, the results show that few of the countries in the EBRD region have struck this balance well. Of the three reform leaders above, Azerbaijan and FYR Macedonia have been more successful with this approach than Ukraine. Croatia, Serbia and Turkey have made reform progress relatively evenly across the three categories.

The average regulatory gap for countries in the EBRD region in enacting transparency safeguards is 20 per cent. Although this represents an increase of nine per cent over the average in 2010, it is important to note that countries in the region still need to focus on integrating these anti-corruption protections into their procurement legislative frameworks. The largest improvements in this evaluation category were made by FYR Macedonia (28 per cent increase), Ukraine (28 per cent increase) and Moldova (22 per cent increase). Such large increases were possible because of low starting bases – these three countries were previously considered to be in low to medium compliance. All three countries have succeeded in achieving high compliance as a result of their reforms; however their regulatory gaps remain at over 15 per cent, signifying that more reform is still needed. Countries that showed a lower compliance in this category since 2010 were Albania, Bulgaria, Estonia and Latvia.

The average regulatory gap for countries in the EBRD region in the efficiency instruments category is 23 per cent, which is higher than the regulatory gap for transparency safeguards. At 77 per cent, the average score across the region has increased by six per cent since 2010. Leading reformers in this category are FYR Macedonia (20 per cent increase), Poland (18 per cent) and Ukraine (14 per cent). However, in the category of transparency safeguards all three countries have room to make more reforms to improve the efficiency of their legislative frameworks, particularly Ukraine, where the regulatory gap remains above 30 per cent. To put these scores in perspective, none of these three countries has surpassed the scores achieved by Georgia, Hungary and Turkey, which are overall leaders in the region in this category. The most significant decreases in this category were observed for Belarus, Kazakhstan and Romania.

Chart 4: Best score in EBRD assessment rankings of quality of public procurement laws (2010 and 2012)

	2010 EBRD Assessment		2012 EBRD Assessment
1	Hungary	1	Hungary
2	Montenegro	2	Turkey
3	Georgia	3	Georgia
4	Albania	4	Slovenia
5	Turkey	5	Russia
6	Lithuania	6	Montenegro
7	Bulgaria	7	Albania
8	Latvia	8	Lithuania
9	Croatia	9	Poland
10	Slovenia	10	Croatia

Note: This chart presents the summary rankings of the two EBRD assessments. The ranking of the countries of the EBRD region is based on the result for the quality of the national legislative framework ('law on the books'). The scores have been calculated on the basis of a legislation questionnaire and answered by local lawyers in 2010 and the national regulatory authorities in 2012.

Sources: EBRD 2010 Regional Public Procurement Assessment, EBRD 2012 Regional Public Procurement Legislation Self-Assessment

In terms of developing institutional and enforcement measures, the average regulatory gap for countries in the EBRD region is 22 per cent. This is also the category showing the least reform progress: the overall average score – 78 per cent – is up only five per cent from the 2010 average of 73 per cent. Countries that were able to demonstrate the most progress were Azerbaijan (19 per cent increase), Armenia (17 per cent), Romania (14 per cent) and Slovenia (14 per cent). Slovenia made particularly good progress; it achieved very high compliance with the benchmark and had the highest score in the region in this

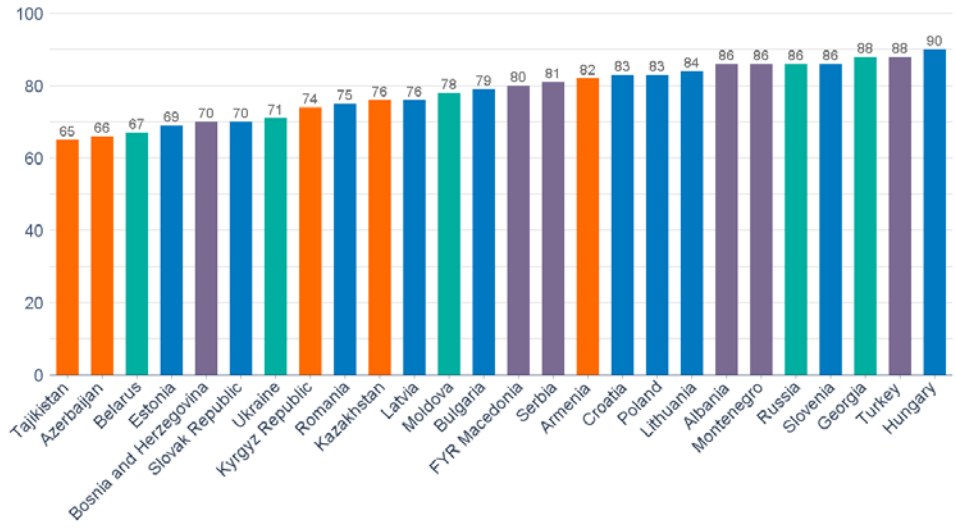
category. Countries showing the largest decreases (lower compliance) in this category were Belarus, Hungary and Slovak Republic. However, Hungary's score in this category remains high, and, overall, it is ranked in the top quartile of countries in the EBRD region.

In looking at overall reform progress in public procurement policies, it is evident that progress in the EBRD region over the last three years has focused on transparency safeguards, with less effort being put into developing efficiency instruments, and an inconsistent approach taken towards developing institutional and enforcement measures. While it is promising that the regulatory gaps in all three categories have begun to close, it is perhaps surprising that more progress was made regarding transparency safeguards than efficiency instruments, given the timing of these reforms in the wake of the global financial crisis. A greater focus on efficiency instruments would be a more cost-effective strategy for countries to pursue, while a greater emphasis on institutional and enforcement measures would ensure that countries would be able to enact their new policies, and benefit from improvements to their legislation. The fact that more progress has not been made regarding efficiency signifies that, unfortunately, countries in the EBRD region still do not consider procurement policy reforms as a means of achieving greater efficiency in the public sector. It also suggests that the link that should exist between the treasury and public finance management, and procurement regulatory agencies, has not been fully developed.

Motivations for reform

Examining the list of the top 10 countries in the EBRD region reveals the main political motivations behind recent reform progress in the region. Five of the top 10 countries in the ranking are either harmonising, or have harmonised, their policies with the EU *acquis communautaire* (EU Member States in the EBRD region or EU candidate countries Croatia, Hungary, Lithuania, Poland and Slovenia), while a further three countries (Albania, Montenegro and Turkey) are completing this same exercise.

Chart 5. Quality of public procurement laws in transition countries in the EBRD region as reported by national regulatory authorities in 2012



EU Member States in the EBRD region
Central Asian Republic and Mongolia
Western Balkans and Turkey
Eastern Europe, Caucasus and Russian Federation

Note: This chart presents the current scores for the quality of the national legal framework (law on the books) for transition countries. The scores have been calculated on the basis of a legislation questionnaire, based on the EBRD Core Principles, and answered by the national regulatory authority. Total scores are presented as a percentage, with 100 per cent representing the highest performance.

Source: EBRD 2012 Regional Public Procurement Legislation Self-Assessment

Economic concerns, and a desire to achieve value for money in procurement spending, were the primary factors driving reform in Georgia and Turkey, while Russia's impetus for reform was due to a need to address deficiencies in the previous procurement regime. Beyond EU-influenced countries (including EU member states, candidate countries and European Neighbourhood and Partnership Instrument countries), the most significant progress was made by Azerbaijan and Kyrgyz Republic. Another major political motivation for reform is accession to the WTO GPA. The GPA text that was adopted in 2012, which provides greater flexibility for transition countries, has led to an increased interest in the GPA among the EBRD countries of operations. In fact, a number of countries in the EBRD region are currently in the GPA accession process: Georgia, Jordan, Kyrgyz Republic, Moldova, Montenegro, Tajikistan and Ukraine.

Scope of regulation in national laws

The assessment also revealed a number of findings on general system features. One of the most important of these was the scope of application of public procurement legislation. The scope of the law can be thought of in two ways: (1) the extent to which the regulatory framework covers all public sector procurement; and (2) the extent to which the regulatory framework covers the three main phases of the procurement process in the public sector.

First, the Core Principles benchmark encourages procurement policy to extend to national and local government procurement, utilities sector procurement, and publicly owned institutions procurement. While in 2010, in a number of countries, the legislative framework only covered government procurement, by 2012 more countries had moved towards not only regulating utilities sector procurement, but also towards providing specific procurement rules for this sector. Less progress has been made in terms of extending coverage to publicly owned institutions. In 2012, in general, as in 2010, the EU member states in the region, as well as the EU candidate countries, demonstrated the most comprehensive and consistent approach. However, several countries did not cover the entire public sector, while Kazakhstan and Ukraine included extensive exceptions from coverage in their laws. Chart 6 also includes an indication of whether countries have established a central procurement body (CPB). Although some international standards promote CPBs for economic reasons, this tool has still not been fully incorporated by countries in the EBRD region. For example, countries shaded in light blue have a provision in their laws regarding a CPB, but have yet to establish one in order to gain the potential economic benefits.

Chart 6: Regulating public sector procurement - extent of coverage of national laws

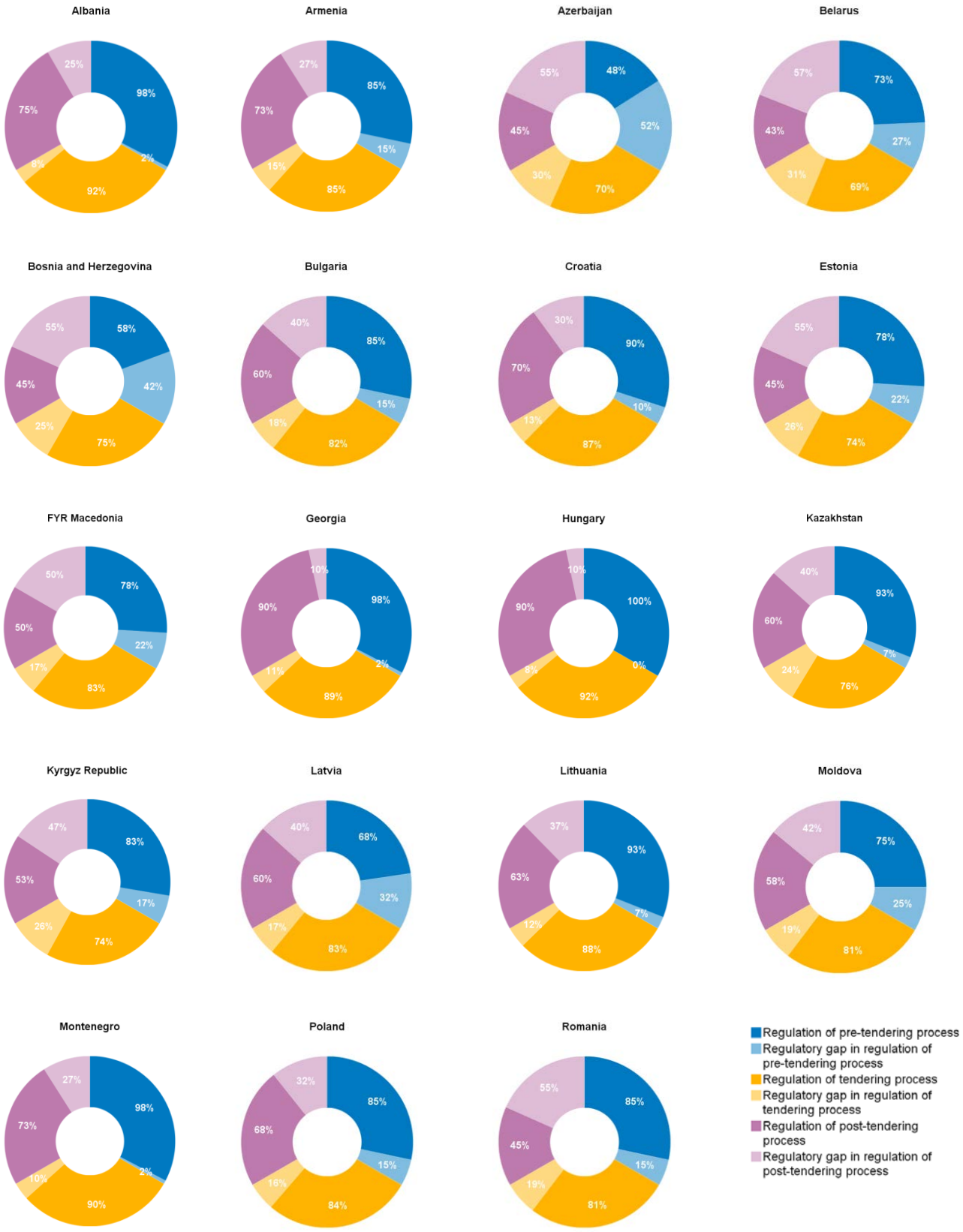
Note: This table presents desirable features of public procurement legislation for each country in the region. Marks have been allocated on the basis of a legislation questionnaire and answered by the national regulatory authority. The scores are graded from what is considered to be the least satisfactory (marked in red), to the most satisfactory (marked in dark blue); the latter representing optimum quality of public procurement laws.

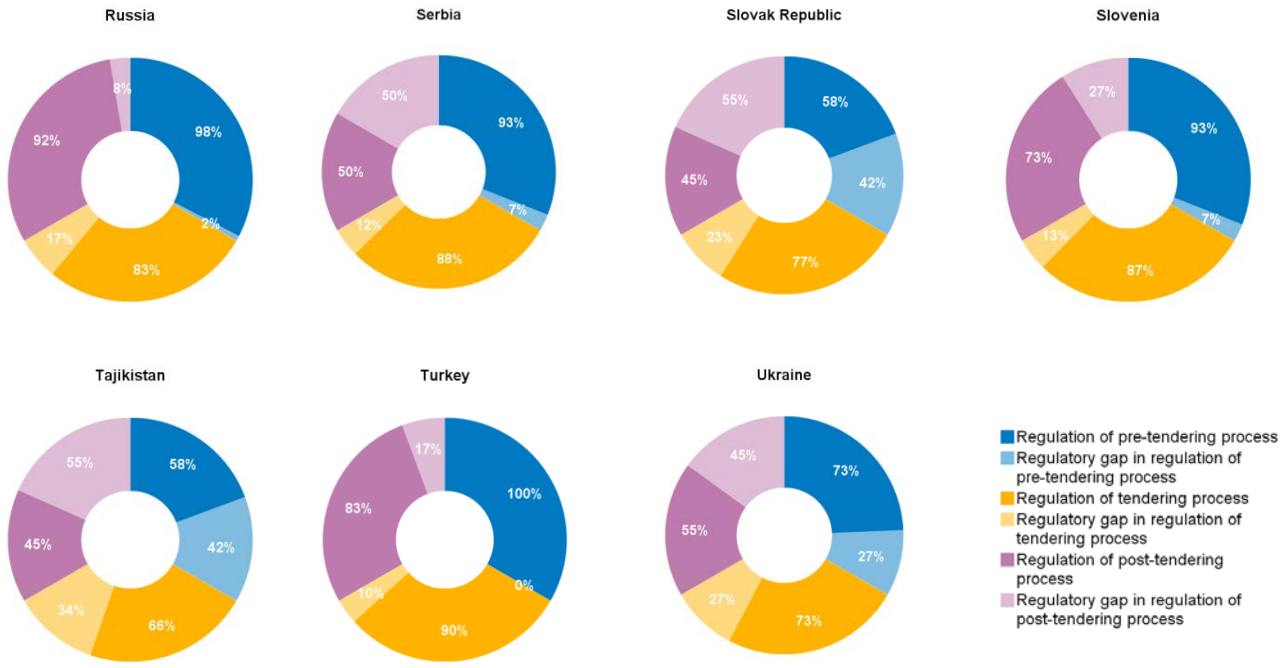
Source: EBRD 2012 Regional Public Procurement Legislation Self-Assessment

Second, the Core Principles benchmark measures the extent to which the national legislation covers the three main phases of the procurement process: pre-tendering, tendering and post-tendering. Traditionally, the tendering phase is the best regulated of these phases, while planning and preparation of procurement, and public contract management, are less well-regulated, allowing contracting entities more freedom and discretion.

The 2012 assessment revealed that several countries have done very well in terms of regulating the pre-tendering process, which involves requiring procurement planning and appropriate budgetary authorisation. Both Hungary and Turkey achieved a 100 per cent score on their regulation of the pre-tendering process. Albania, Georgia, Montenegro and Russia are close behind, at 98 per cent. Several countries lack provisions to address the pre-tendering process; notably Azerbaijan (48 per cent), Bosnia and Herzegovina (58 per cent), Slovakia (58 per cent) and Tajikistan (58 per cent). Well-developed regulation of the pre-tendering phase is frequently linked to successful implementation of electronic procurement (eProcurement) tools supporting these processes; Albania, Georgia and Montenegro are presently implementing comprehensive eProcurement reforms.

Chart 7: Regulation of public procurement phases: pre-tendering, tendering and post-tendering





Note: These charts show the scores for the quality of the regulation of the three main phases of the public procurement process: pre-tendering, tendering and post-tendering. The scores have been calculated on the basis of a legislation questionnaire and answered by the national regulatory authority. Total scores are presented as a percentage, with 100 per cent (one-third of the pie chart) representing the optimal score for each procurement phase. Regulatory gaps – the difference between the assessment results and the benchmark –are marked in light blue, light yellow and light pink, respectively.

Source: EBRD 2012 Regional Public Procurement Legislation Self-Assessment

Countries placed at the top of the region for their regulation of the tendering process were Hungary (92 per cent), Albania (92 per cent), Montenegro (90 per cent) and Turkey (90 per cent). Given their focus on the competition and fairness in tendering, the EU Directives did not have as significant an impact on regulation of the tendering process in the reviewed countries as would be expected. The maximum regulatory gap of 10 per cent would be expected among the EU Member States in the EBRD region, but in fact the gap identified in these countries is wider - between 15 and 20 per cent of the benchmark. Countries in which laws contained the least extensive regulation of the tendering process were Tajikistan (66 per cent), Belarus (69 per cent) and Azerbaijan (70 per cent).

Lastly, of the three procurement phases, the least regulated phase among countries in the EBRD region is the post-tendering phase. This means that, in general, countries do not provide for contract management, or enact provisions related to the public contract after the tendering phase is completed. Moreover, compared to the results of the 2010 assessment, little reform progress has been made overall in terms of regulating this phase.

In the 2012 self-assessment Russia is a leader in regulating the post-tendering phase (94 per cent), followed by Georgia (87 per cent) and Hungary (87 per cent). Six countries – Belarus, Bosnia and Herzegovina, Estonia, FYR Macedonia, Serbia and Slovak Republic – demonstrated very low compliance rate with regard to their regulation of this procurement phase.

Flexibility of procurement procedures

The assessment also measured the flexibility of the public procurement legislative framework, in order to gauge the extent to which the law offers procurement procedures that are suitable for application to different types of contracts. From an efficiency viewpoint, it is appropriate to use a different procurement method for standard purchases than for complex projects. The law should also ensure that specialised and transparent negotiating procedures are available to the country's contracting entities for contracting complex projects.

Although some progress has been made in this area, the legal frameworks in countries such as Belarus, Kazakhstan and Russia remain inflexible. Other countries, such as Georgia and Kyrgyz Republic, rely too heavily on reverse auctions, which are not appropriate for every public contract, complex infrastructure projects, in particular. Bosnia and Herzegovina, Tajikistan and Ukraine also need to enact further reforms to better align the procurement methods provided for by national laws with different project types.

Availability of review and remedies procedures

Another crucial regulatory issue is enforceability of public procurement regulations. As public procurement systems are located at the intersection of the public and private sectors, impartial and robust review mechanisms are essential in order to ensure the enforceability of the public procurement regime. Consequently, the EBRD assessment considered issues of enforceability of public procurement regulation, in terms of adequate public procurement review and remedies systems. Significant progress has been made in the region regarding this element of the assessment, with a majority of countries achieving good compliance. The 2012 self-assessment revealed that future reforms in Azerbaijan, Belarus, Georgia, Kazakhstan, Tajikistan and Ukraine should include improving review and remedies procedures and aim to increase private sector trust in the impartiality of national remedies bodies.

Development of eProcurement tools

Several countries in the EBRD region are attempting to implement eProcurement solutions for their public procurement sector. Presently, in the EBRD region, only Albania and Georgia have adopted regulations and eProcurement tools to cover all tenders in public

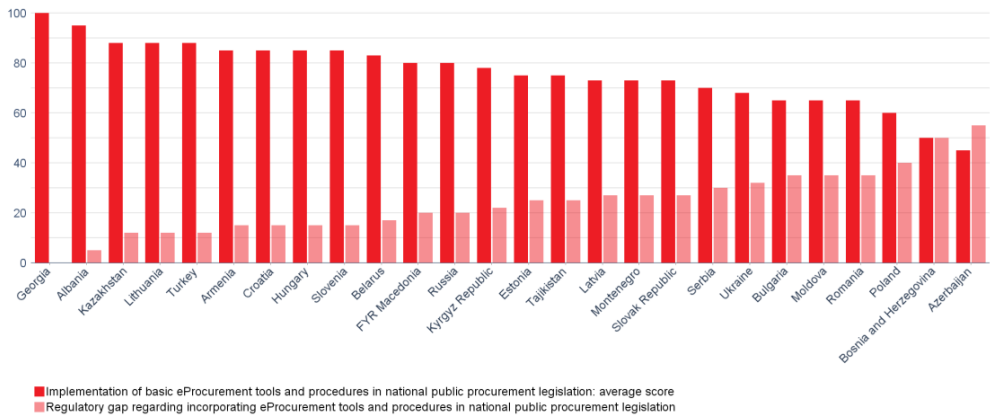
sector, although a number of other countries, such as Armenia, Russia and Turkey, are gradually moving towards comprehensive electronic public procurement systems.

Many countries in the EBRD region require the online publication of contract notices, including all EU Member States in the EBRD region, while some require communication between public client and private suppliers and contractors to be exchanged electronically, in a transparent and traceable way. However, in a majority of countries in the EBRD region it is still left to the individual decision of each contracting entity to decide whether to make use of eProcurement tools.

In the 2012 self-assessment a review of the availability of the eProcurement solutions for public sector has been based on the assumption that the eProcurement is the replacement of paper-based public procurement procedures with online procedures (e-notices, e-communication, e-tenders, e-procedures, e-records, e-reporting) and may also include incorporation of the special ITC procurement tools in the public procurement procedures, such as e-auctions and e-purchasing.

The legal questionnaire covered access to basic online procedures: electronically published contract notices, tender documents and records of procurement decisions as well as access to online proposal submissions and tender documents clarification. The assessment questionnaire did not discuss implementation of specific eProcurement tools such as e-auctions, e-catalogues for framework agreements, or dynamic purchase systems.

Chart 8: Implementation of eProcurement in national public procurement regulatory framework



Note: This chart shows the scores for the development and incorporation of the eProcurement tools in the EBRD region. The scores have been calculated on the basis of a legislation questionnaire answered by the national regulatory authority. Total scores are presented as a percentage, with 100 per cent representing the optimal score for each procurement phase. Regulatory gap marked in light colour underlines the difference between the assessment results and the Core Principles benchmark.

Source: EBRD 2012 Regional Public Procurement Legislation Self-Assessment

Conclusion

In evaluating reform progress in the EBRD region, the fundamental question is: *When is regulatory reform considered to be successful?* In evaluating public procurement reform progress, we have analysed at pie charts summarising assessment results and regulatory gaps identified in national legislation. We believe that the review results for key policy evaluation categories – transparency safeguards, efficiency instruments and institutional and enforcement measures – are fundamental in answering this key question.

In modern public procurement policies transparency and anti-corruption safeguards must be balanced with instruments ensuring efficiency and economy of procurement procedures. Both of these considerations must be supported by an institutional framework that is capable of putting the legal framework effectively into practice. This last element –

incorporating institutional and enforcement measures – is an increasingly important element of reform success. New, revised laws, even if they incorporate all transparency safeguards and efficiency instruments recommended by international best practice, will remain ineffective if an adequate institutional framework – including regulatory authorities that provide professional capacity-building for procurement officers, and enforcement measures, such as monitoring procedures and complains mechanisms – is not in place. As a result of progress in procurement practices, building a modern procurement system now requires that national public procurement institutional frameworks include central purchasing agencies and eProcurement platform operators – in addition to having appropriate regulatory authorities, monitoring units, and remedies bodies for hearing complaints from suppliers and contractors.

Based on the EBRD assessments completed in 2010 and 2012, it is clear that a key to reform success is keeping a good balance between new modern procedures introduced by law, and institutional measures established to have them implemented in practice. In this respect, countries in the EBRD region with small regulatory gaps, and with similar regulatory gaps in each evaluation category, are more successful with their reform efforts, compared to countries scoring very well in one category while having substantial regulatory gaps in the other two categories. In other words, adopting laws which provide for new and better purchasing practices, aimed at improving the efficiency of procurement, will not, in themselves, make these purchasing practices readily accepted by and therefore popular with contracting entities, unless secondary legislation, standard documents and training facilities are also provided to contracting entities.

Another key aspect in assessing reform is whether it establishes a modern procurement system that enables the public sector to benefit from market best practice. With new procurement practices developing rapidly, planning reforms in the public procurement sector designed to bring the framework into line with international best practice is a challenging exercise – in particular when the reform plan encompasses implementing eProcurement tools and modern purchasing techniques (framework agreements and e-catalogues). While limited data is available regarding the efficiency of framework agreements in the EBRD region, the results for implementing electronic tendering are promising, considering the progress made in Albania, Georgia, FYR Macedonia and Turkey. Thus, future reforms should focus on developing eProcurement instruments in order to close or balance the regulatory gaps that were identified in the 2010 EBRD assessment, and which were still evident in the results of the 2012 review.

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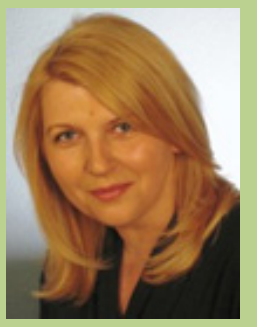

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A reform tool: the 2011 UNCITRAL Model Law on Public Procurement and its Guide to Enactment

A reform tool: the 2011 UNCITRAL Model Law on Public Procurement and its Guide to Enactment

Caroline Nicholas[1]

UNCITRAL issued a Model Law on Public Procurement (the Model Law) in 2011, and Guide to Enactment of the text followed in 2012.[2] These documents updated and replaced UNCITRAL's Model Law on Procurement of Goods and Construction (1993), and the better known Model Law on Procurement of Goods, Construction and Services (1994).[3] The main changes made in the revision process reflect new practices – in particular regarding electronic procurement (e-procurement) and related aspects of electronic commerce, and the experience gained in the use of the Model Law as a basis for law reform.[4]

The Guide to Enactment is designed to complement the Model Law and assist enacting states in implementing the model into national law. It therefore explains the objectives of the Model Law and how its provisions are designed to achieve those objectives. The Guide also identifies regulations, rules and additional guidance to support legislation based on the Model Law, the main issues that should be addressed in those supplementary texts, and the legal and other infrastructure that will be needed to support the effective implementation of the law.[5]

The Guide initially explains the two main purposes for which the Model Law was produced. First, it should serve as a model for all states for the evaluation and modernisation of their procurement laws and practices, and the establishment of procurement legislation where none currently exists. The second purpose is to support the harmonisation of procurement regulation internationally, and thereby to promote international trade.[6]

This article will consider how to ensure that the Model Law is used to meet the needs of governments reforming their public procurement policies, drawing on the advice set out in the Guide to Enactment.

Employing the Model Law in a way that meets the needs of governments interested in reforming their procurement systems

The Model Law is intended to provide all of the essential procedures and principles for conducting procurement proceedings in the various types of circumstances likely to be encountered by procuring entities. In this regard, the Model Law is a "framework" law that does not in itself set out all the rules and regulations that may be necessary to implement those procedures in national laws. Accordingly, legislation based on the Model Law should form part of a coherent and cohesive procurement system that includes regulations, other supporting legal infrastructure, and guidance and other capacity-building tools as well as appropriate institutions.[7]

There are two main aspects of employing the Model Law standards: first, designing the public procurement law to suit the country's needs without compromising its substance, and, second, ensuring its effective implementation and use. It is in this context that the Guide to Enactment plays a key role: it is in fact a guide both to the enactment and – although not intended to be comprehensive – use of the Model Law.

As regards designing the law itself, the importance of the country context has been well ventilated in the literature.[8] The Preface to the Guide records that: "as there are wide variations among States in such matters as size of the State and the domestic economy, in legal and administrative traditions, in levels of economic development and in geographical factors, options are provided for in the Model Law to suit local circumstances, and the Guide explains the issues that may be taken into account in deciding how those options may be exercised, and indicates provisions of the Model Law that might have to be varied to take into account particular local circumstances."

While it is therefore possible to "cherry pick" elements of the Model Law and to use them in domestic laws based on a different approach, if a domestic law is to fulfil the objectives of the Model Law, it should contain certain minimum provisions. The Guide explains that these, all provided for in the Model Law, are:

- the applicable law, procurement regulations and other relevant information are to be made publicly available
- requirements for prior publication of announcements for each procurement procedure (with relevant details) and ex post facto notice of the award of procurement contracts
- requirements for items to be procured to be described objectively, and without reference to specific brand names as a general rule, so as to allow submissions to be prepared and compared on a common and objective basis
- requirements for qualification procedures and permissible criteria to determine which suppliers or contractors will be able to participate, and the particular criteria that will determine whether or not suppliers or contractors are qualified in a particular procurement procedure to be advised to all potential suppliers or contractors
- a requirement for open tendering to be the recommended procurement method and for the objective justification for the use of any other procurement method
- the availability of other procurement methods to cover the main circumstances likely to arise (simple or low-value procurement, urgent and emergency procurement, repeated procurement and the procurement of complex or specialised items or services) and conditions for use of these procurement methods
- a requirement for standard procedures for the conduct of each procurement procedure
- a requirement for communications with suppliers or contractors to be in a form and manner that does not impede access to the procurement
- a requirement for mandatory standstill period between the identification of the winning supplier or contractor and the award of the contract or framework agreement, in order to allow any non-compliance with the provisions of the Model Law to be addressed prior to any such contract entering into force

- mandatory challenge and appeal procedures if rules or procedures are breached.[9]

This section of the Guide includes cross references to the provisions of the Model Law that contain these provisions, in order to assist the reader.

Within the flexibility that basing a text on these key provisions implies, there are several other major decisions that an enacting state needs to take in order to delineate the legal framework for the procurement system. A full examination of all such decisions is beyond the scope of this article, but some of the most critical are considered below. Others are discussed in the Guide.

What procurement methods are most appropriate for the local market?

A key issue is the procurement methods that are to be enacted. The Model Law contains 10 procurement methods and three types of framework agreements, with further options available within some methods. Clearly, it will be unnecessary, in almost all cases, to enact all of them (and making such a large number of procedures available to procurement officials is likely to make decision-taking excessively complex and to compromise capacity-building).[10] The Guide includes commentary aimed at enabling enacting states to decide whether or not each method is appropriate for their local circumstances.

In principle, open tendering must always feature in the procurement law: the procedures that this method entails are considered to be the "gold standard" for procurement without special features.[11] Low value and simple procurement, emergency and other urgent procurement, and more specialised or complex procurement, among other situations, raise special features that can justify the use of other methods. The Guide observes that these situations can be considered likely to arise in all states, and therefore a method for all of them should be provided.

The Model Law's procurement methods include both tendering-based methods (restricted tendering, two-stage tendering and open framework agreements within other procurement methods) and request for proposals methods (request for proposals without negotiation, request for proposals with dialogue and request for proposals with consecutive negotiations). Other methods in the Model Law include competitive negotiations, request for quotations, electronic reverse auctions and single source procurement. The Guide notes that in the Model Law a set of procurement methods and purchasing techniques, such as framework agreements, can be considered as a toolbox. The procuring entity should select the appropriate tool for the public contract to be awarded from those that are enacted as the toolbox in the state concerned.

In addition to selecting a reasonable number of methods, it is noted that the conditions for use and the functionality of certain methods overlap, so states are encouraged to select those that are most appropriate in their circumstances. Tendering-based methods, request for proposals-based methods and those involving negotiations require different skills and capacities. For example, in tendering-based methods, the procuring entity retains control of, and responsibility for, describing the solution that will meet its needs. On the other hand, in request for proposals-based methods, the procuring entity issues a description with minimum technical requirements and standards, and the suppliers or contractors are responsible for ensuring that their proposed solutions in fact meet the procuring entity's needs. Tendering-based methods will then compare like with like, whereas in request for proposals-based methods, the procuring entity will compare different solutions. Assessing the solutions in the latter case will generally be more demanding than assessing the single solution in tendering procedures.[12, 13]

Even within tendering procedures, some methods are more complex to operate than others. Two-stage tendering, for example, allows the procuring entity to issue solicitation documents with a full or partially developed set of technical specifications and other terms and conditions, to examine responses to those specifications and to hold discussions on them with suppliers and contractors. Thereafter, the procuring entity refines and finalises the specifications and terms and conditions, and then invites tenders in the normal manner. Although these discussions do not involve price, operating this method requires skills that open tendering does not. Here, the Guide notes that, "in deciding whether to use open tendering, two-stage tendering or request for proposals with dialogue, the procuring

entity must assess whether it wishes to retain control of the technical solution in the procurement of relatively complex subject matter. Where it wishes to retain such control but also to refine the description and technical specifications issued at the outset of the procedure to achieve the best solution through discussions with suppliers or contractors, a two-stage tendering procedure, rather than an open tendering procedure, may be the appropriate approach."[14] States will need to consider these capacity issues when deciding which methods are appropriate to enact. The extent to which the state wishes to impose standardisation (which indicates that it should require procuring entities to retain control over design and specifications) is another of the practical issues that should be taken into account.

Similarly, restricted tendering involves a more complex solicitation process than open tendering. In restricted tendering, the procurement official must ensure that either (a) s/he invites all potential suppliers or contractors for an item or service to be procured (where that item or service is complex or specialised and available in a limited market); or (b) s/he invites a sufficient number of potential suppliers or contractors to ensure effective competition, and selects them in a non-discriminatory way. The Guide comments on the difficulties associated with complying with these procedural, yet nonetheless key, requirements. The risks of failing to follow them include a possible challenge under Chapter VIII of the Model Law, which would remove the procedural time saving that using restricted rather than open tendering is designed to achieve,[15] and – perhaps more importantly – compromising effective competition.[16]

The Guide also suggests that governments may consider phasing in more complex procurement procedures to allow for capacity acquisition. For example, they may start by enacting "tendering methods for all other than urgent and very low-value procurement (for which less structured or regulated methods are presented in the Model Law); the capacity acquired in operating these methods will allow the introduction at a later stage of methods involving negotiations or dialogue, including request for proposals".[17]

Concerning electronic reverse auctions and framework agreements, the Guide again encourages governments to consider a phased approach to the introduction of these relatively novel tools. In the case of electronic reverse auctions, the Guide suggests that states start with price-only auctions before considering more complex variants, where both quality and price are auctioned, again in order to develop the skills and capacity necessary to use more complex variants.[18] The guidance on enacting and using framework agreements explains the complexity of the decisions required to realise the potential benefits of the three types of framework agreements permitted by the Model Law, given the multiplicity of structures and procedures that can be put in place to operate them, which again indicates that a phased approach is warranted.[19]

Challenge and appeal mechanisms

A second key issue is to ensure that public procurement laws, including those based on the UNCITRAL model, fulfil the requirements in UNCAC for states to "establish an effective system of review".[20] However, as the Guide notes, the system needs to be "accommodated within the widely differing conceptual and structural frameworks of legal systems and systems of State administration throughout the world".[21] The Guide explains that key elements of an effective challenge mechanism include: "intervention without delay; the power to suspend or cancel the procurement proceedings and to prevent … the entry into force of a procurement contract while the dispute remains outstanding; the power to implement other interim measures, such as giving restraint orders and imposing financial sanctions for non-compliance; the power to award damages if intervention is no longer possible; and the ability to proceed swiftly within a reasonably short period of time."[22] While the Model Law requires the challenge mechanism to encompass all of these elements, the Guide notes that the structure that will suit any enacting state will need to reflect its legal tradition in general and some specific features, such as: whether there are specialised bodies before which challenges to administrative acts can be filed, or specialist courts or tribunals for procurement matters; whether there are administrative sanctions for breaches of procurement law; whether challenges proceed by way of administrative review, or independent (and non-judicial) review, and/or judicial review of procurement decisions through the ordinary courts; and whether there is a mechanism to

allow for criminal proceedings for relevant violations of procurement laws by procuring entities.[23]

In addition, the Model Law does not regulate court procedures. The Guide also notes that states may wish to address the question of sequencing – that is, whether, for example, judicial review may be sought only after opportunities for other challenges have been exhausted, or whether suppliers or contractors can elect to present their challenge to any of bodies in the state concerned. Given the general approach of deferring the structure of a challenge mechanism to the enacting state, the Guide does not discuss the merits and demerits of sequencing, beyond noting that parallel proceedings are discouraged.[24]

A question that led to considerable debate while the Model Law was being developed by the UNCITRAL Working Group was that of financial compensation for breaches of the Model Law's procedures as part of the challenge mechanism. The Guide notes that corrective action should be regarded as the "primary and most desirable remedy".[25] Where corrective action is no longer possible, the Guide suggests that financial compensation may be part of the appropriate remedy. The point of debate was whether financial compensation should extend to anticipatory losses, such as the profit expected under the contract concerned. The main arguments considered were: (a) that a system without provision for any financial compensation beyond the costs of filing a complaint would not be effective because adequate remedies would not be available in all situations (for example, where a contract had entered into force and it was not considered appropriate to interfere in the contract); and (b) preventing excess complaints that would unnecessarily disrupt the procurement process. In essence, the question was how to balance the interests of suppliers and contractors, with those of procuring entities; an additional consideration was the implications for the public interest in respect of how the question was resolved. After considerable debate, two options were set out in the Model Law, that enacting states could choose between. The first limits financial compensation to any reasonable costs incurred by the supplier or contractor in making a successful challenge; the second allows financial compensation for any loss or damage sustained for a breach that was successfully challenged, which might include the profits that the supplier or contractor would have made had it been awarded the contract concerned. The Guide explains the policy considerations summarised above, without taking a stance on which is preferable; the enacting state must therefore choose the option that reflects local circumstances; for example whether the key need in the state is (a) or (b) above.[26]

Enacting the Model Law into a national system

At the drafting level, the Guide addresses other options that may be exercised to reflect the legal tradition in an enacting state: the inclusion of a preamble, the extent of definitions in the law, the use of terminology when referring to procurement methods and stages in the procedure, and how to cross refer to other laws such as insolvency, e-commerce or banking law. Concerning terminology, UNCITRAL has issued a glossary of procurement terms to assist users of the Model Law.[27]

Similarly, the administrative tradition in a state may require decisions of procurement officials to be justified in more detail than the Model Law requires. If so, the law or procurement regulations should address the relevant requirements. More generally, the legal tradition of an enacting state may require a more detailed code than a law based on the Model Law would give. Therefore the enacting state may choose to include items that could be addressed in the procurement regulations in its primary law.

Enacting states are encouraged to exercise caution in including provisions in their primary law that may need to be updated in the short-term, such as thresholds for low-value procurement and provisions involving technical aspects of e-procurement. Such provisions are more effectively set out in legal rules (often termed "regulations") that can be updated at the administrative level. UNCITRAL has also issued a paper on the suggested contents of procurement regulations, which may assist enacting states in expanding the scope of the primary law, so that the regulatory framework is sufficiently detailed.[28]

Effective development of national laws based on the Model Law

Three main supports are needed for the effective implementation and use of the Model Law:

- regulations and other laws required to support the primary procurement law
- additional guidance to support the legal structure in the national context
- institutional and administrative support for that legal structure.

Concerning the first support, the Guide discusses the necessary regulations and other laws, explaining that the Model Law is drafted on the assumption that certain other laws are in force or will be enacted.[29] Such laws may include administrative, contract, criminal and judicial-procedure law, and anti-corruption provisions; provisions giving the authority to share information between agencies; provisions implementing international agreements; and provisions enabling e-government. For example, a public procurement law that allows for e-communications must be supported by an e-commerce law that ensures that these communications are legally recognised. The Model Law also requires that any socio-economic policies that may be pursued through public procurement be authorised in the procurement regulations or other laws, and that any legal requirements for tender securities are appropriately reflected in the procurement law.

The commentary in the Guide to Article 4 of the Model Law discusses procurement regulations, the main purpose of which is to enable an enacting state to tailor its detailed rules for procurement procedures to its own particular needs and circumstances within the overall framework established by the primary law. The commentary explains the main procedures in the Model Law for which regulations are anticipated, including: the manner of publication of the information that the procuring entity must publish; measures to secure authenticity, integrity and confidentiality of information generated and transmitted during the procurement process; the grounds for domestic-only procurement and the use of margins of preference; socio-economic policies that can or must be promoted through procurement; the duration of the standstill period, thresholds for request-for-quotations; and the maximum duration of framework agreements. Without such regulations, the Model Law cannot work as intended.[30] For example, request-for-quotations under the Model Law cannot be used without a threshold set out in the procurement regulations. In addition, states implementing newer techniques, such as framework agreements, may wish to apply restrictions when they are first used, so as to allow for a phased introduction as discussed above. As also noted above, the Guide is supplemented by a paper discussing the regulations that are considered to be necessary to support the Model Law.[31]

In respect of the second support – additional guidance to support the primary legal structure – the Guide states that the effective implementation and operational efficacy of the Model Law will be enhanced by the issue of internal rules, guidance notes and manuals. These documents may operate to standardize procedures, to harmonize specifications and conditions of contract and to build capacity. Standard forms and sample documents are also recommended: for example, those issued by the multilateral development banks and other agencies such as the OECD, FIDIC, etc.[32]

Elsewhere, the Guide notes that developing procurement officials' capacity to exercise the discretion that arises in the procurement process, such as in designing qualification, responsiveness and evaluation criteria, and in selecting the procurement method (and manner of solicitation in relevant cases), requires guidance and training – these issues are, by definition, incapable of resolution through regulation.[33] Concerning the choice of procurement methods and solicitation, the commentary described above, as well as Chapter II of the Model Law generally, highlights issues that may usefully form the subject of guidance. In addition, procuring entities may need to be directed to take account of and apply employment and equality legislation, environmental requirements, and other requirements in the procurement process.

An example of a capacity-related issue discussed in the Guide is whether or not the law should require major procurement decisions – such as on the use of a procurement method other than open tendering[34] – to be subject to a prior approval mechanism. The Guide explains that cited advantages of prior approval mechanisms include allowing for

the detection of errors and problems at an early stage, enhancing uniformity and supporting capacity development through the justification and consideration of the actions or decisions concerned when seeking approval. It adds that the main reasons cited against the use of a prior approval system are that it may prevent the longer term acquisition of decision-making capacity, and may dilute accountability.[35]

The Guide notes that the use of this type of control – obtaining approval from outside the procuring entity – is generally decreasing. Many donor agencies now promote an approach that leaves decisions to officials in procuring entities themselves, with control being provided through a requirement to justify the decisions concerned in a mandatory record of the procurement, and by conducting audits and evaluations both of the records maintained and of outcomes.[36] The Model Law therefore no longer contains prior approval provisions, other than as options for the use of single source procurement to promote socio-economic policies, for the use of request for proposals with competitive dialogue and for actions bringing the procurement contract into force.

The guidance set out above, discussing the relevant articles of the Model Law, is intended to allow states to decide whether to include these options for a prior approval method or, indeed, for further approval requirements – depending on the circumstances, such as existing capacity – in the country concerned. The guidance also explains that any such requirement should be in the procurement law (to avoid the corruption risk of "unofficial" requirements for approvals, and to promote transparency, among other things, and advises on structural and procedural requirements). It emphasises the need for independence on the part of approving bodies (not just from the procurement officials in the relevant departments, but also from bodies that might sit in judgment on the procurement procedures if a challenge is filed).[37]

For the third support, the Guide discusses administrative issues that have a practical bearing on public procurement, such as the interaction of procurement and public financial management and budgeting systems, the need for coordination between the procurement authorities and competition authorities to evaluate the impact of the public procurement system on competition within the state, and ensuring appropriate due process protections in sanctions and debarment actions.

The Guide also recommends the establishment of a public procurement agency (PPA) or similar body to oversee the implementation of rules, policies and practices for procurement to which the Model Law applies.[38] As is the case with all institutional questions under the Model Law, the structure and composition of the body concerned is left to the enacting state, with the caveat that there should be separation of policy-making and advisory bodies and those handling challenge mechanisms. Suggested functions of a PPA include ensuring an appropriate regulatory framework, standardisation of procedures, monitoring the outcomes and performance of the public procurement system, providing training and other capacity-building measures, and providing an advisory function to procurement officials.

The above measures address implementation at the national level. In addition, enacting states are likely to have requirements for their procurement systems imposed by regional or international bodies or agreements. For states that have ratified UNCAC, no amendment to the Model Law is necessary to accommodate the UNCAC requirements: as noted above, the Model Law has been designed to fulfil those requirements. Other relevant agreements and bodies include the WTO Agreement on Government Procurement (GPA) and regional free trade agreements,[39] the EU Procurement Directives and the procurement rules and policies of the multilateral development banks. The provisions of all of these texts were taken into account when the Model Law was being developed, and the Model Law was drafted to maximise consistency with the WTO GPA in particular.[40]

The Guide operates as a tool to allow a fuller understanding of the policy considerations and choices made in the Model Law, and how they were arrived at, but it cannot operate so as to answer every variable encountered in every national system. Successful procurement reform depends both on those drafting the national procurement law and on those implementing, guiding and using that law. The critical difference between the law and the system should be re-emphasised. It is well accepted that countries with good

procurement laws will not always have good procurement systems. For example, it has been observed that: "There are few countries in the world with procurement law systems as detailed and as developed as the U.S. has – and yet the U.S. is plagued with persistent weaknesses in procurement planning and contract oversight, and even conducting competitions for award is often challenging."[41]

In the light of these considerations, the UNCITRAL Secretariat is supporting an initiative led by the European Bank for Reconstruction and Development, which aims to promote and support public procurement reform by implementing the Model Law in the Commonwealth of Independent States (CIS) countries and Mongolia.[42] This project applies in-depth analysis of existing procurement systems using local knowledge prior to making recommendations on revisions to particular legal frameworks and other elements, thus putting into practice the principles of national ownership in aid effectiveness[43] and the recommendations of the Guide.

Thus, for states attempting to ensure that their procurement laws operate to produce effective procurement systems, it is necessary – as the explanation above highlights – to base enactment decisions on practical issues. Using the procurement law to its full extent will then require capacity development and robust political commitment to support the changes needed for effective implementation.

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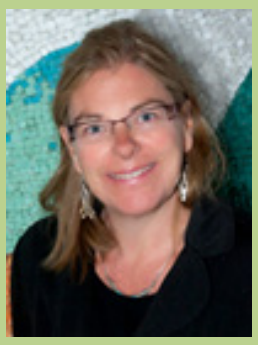

[1] Secretary, UNCITRAL Working Group I, and a member of the UN Secretariat staff. The opinions expressed in this paper are personal and are not to be viewed as representing official views of the United Nations.
[2] Both texts, and the 1994 Model Law, are available on the UNCITRAL website, at http://www.uncitral.org/uncitral/uncitral_texts/procurement_infrastructure.html. Interactive text of the Model Law is also available at: http://www.ppi-ebrd-uncitral.com/index.php/en/uncitral-model-law/2011-uncitral-model-law.
[3] See Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 and corrigendum (A/49/17 and Corr.1), annex I. The full text is available at http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/1994Model.html. The UNCITRAL Model Law on Procurement of Goods and Construction (document A/48/17) is available at the same location. This text addressed the regulation of public procurement in the area of goods and construction but did not contain provisions on non-construction services.
[4] The Working Group was given a flexible mandate to identify the issues to be addressed in its considerations (see A/59/17, paras 80-2, available at http://www.uncitral.org/uncitral/en/commission/sessions/37th.html).
[5] See Guide, Preface.
[6] See the Guide, Part I, General remarks, para. 5, at p. 2.
[7] See the Guide, Part I, General remarks, para. 47, at p. 12.
[8] An early example is Arrowsmith, Linarelli and Wallace (eds), 2000, *Regulating Public Procurement: National and International Perspectives*, Kluwer Law International.
[9] See Guide, Part I, General remarks, Essential elements and procedures of the Model Law, at p. 13.
[10] See Guide, Part II, Chapter II, Enactment: policy considerations, at pp. 115-16, especially paras 5 and 6.

[11] The Guide describes the key features of open tendering as "the unrestricted solicitation of participation by suppliers or contractors; a comprehensive description and specification in the solicitation documents of what is to be procured, thus providing a common basis on which suppliers and contractors are to prepare their tenders; full disclosure to suppliers or contractors of the criteria to be used in evaluating and comparing tenders and in selecting the successful tender; the strict prohibition against negotiations between the procuring entity and suppliers or contractors as to the substance of their tenders; the public opening of tenders at the deadline for submission; and the disclosure of any formalities required for entry into force of the procurement contract." See Guide, Chapter III, Open tendering, Introduction, para. 1, at p. 128.
[12] This analysis is, in many ways, an over-simplification, in that functional specifications are becoming more common even in tendering procedures, and as expert advice (usually external) will be required to draft the specifications for more complex items in any event. Nonetheless, the point is that the procedural aspects of running the procedures are more demanding in request for proposals methods than for other procurement methods.
[13] See the Guide, Part II, Chapter II, Enactment: policy considerations, at p. 116, and the commentary to Article 28 of the Model Law. See also General rules applicable to the selection of a procurement method, para. 6, at p. 120.
[14] See the Guide, commentary to Article 28 of the Model Law, para. 6, at p. 119.
[15] See, further, Chapter IV. Procedures for restricted tendering, etc, Issues regarding implementation and use, paras 17-23, at pp. 147-9.
[16] Maximising competition in the circumstances is one of the main requirements when selecting a procurement method: see Article 28 of the Model Law.
[17] See the Guide, Part II, Chapter II, Enactment: policy considerations, para. 6, at p. 100.
[18] See Guide, Part II, Chapter VI, Electronic Reverse auctions, Introduction, "Issues regarding implementation and use", para. 13(b), at p. 200.
[19] See Guide, Part II, Chapter VII, Framework agreements procedures, Introduction, "Enactment: policy considerations", paras 4-13, at pp. 218-21.
[20] UNCAC, Article 9(1)(d).
[21] See Guide, Part II, Chapter VIII, challenge proceedings, Introduction, Enactment: policy considerations, para. 9, at p. 270.
[22] *Ibid*., para. 8.
[23] See Guide, Part II, Chapter VIII, Challenge proceedings, Introduction, Enactment: policy considerations, para. 6, at p. 269.
[24] See Guide, Part II, Chapter VIII, Challenge proceedings, Introduction, Issues regarding implementation and use, para. 34, at p. 277.
[25] See Guide, Part II, Chapter VIII, Challenge proceedings, Article 67: Application for review before an independent body, para. 27, at p. 294.
[26] See Guide, Part II, Chapter VIII, Challenge proceedings, Article 67: Application for review before an independent body, para. 28, at p. 294.
[27] See the "Glossary of procurement-related terms used in the UNCITRAL Model Law on Public Procurement ", document A/ CN.9/771, available at the time of writing (October 2013) available at http://www.uncitral.org/uncitral/commission/sessions/46th.html , and the "Glossary of procurement-related terms used in the UNCITRAL Model Law on Public Procurement", published at: http://www.ppi-ebrd-uncitral.com/index.php/en/uncitral-model-law/procurement-glossary.
[28] The paper, entitled "Guidance on procurement regulations to be promulgated in accordance with article 4 of the UNCITRAL Model Law on Public Procurement", document A/ CN.9/770, is at the time of writing (October 2013) available at http://www.uncitral.org/uncitral/commission/sessions/46th.html.
[29] See Guide, Part I, Implementation and use of the UNCITRAL Model Law on Public Procurement, Regulations and other laws required to support the Model Law, paras 60 *et seq* at p. 15.
[30] See Guide, Part II, Article 4: Procurement regulations, para. 4, at p. 55.
[31] Footnote 43, *supra*.
[32] See Guide, Part I, Additional guidance to support the legal structure, at p. 16.
[33] *Ibid*.
[34] Open tendering is described below, and in footnote 24.
[35] See Guide, Part I, General remarks, Institutional support, paras 71-2, at p.18.
[36] The Model Law requires such a record: see Article 25.
[37] See Guide, Part I, General remarks, Institutional support, paras 73-8, at p. 20, and the Introduction in Chapter VIII, at p. 268.
[38] See Guide, Part I, Institutional support, at p. 18.
[39] The text of the GPA and other explanatory information are available on the WTO website at http://www.wto.org/english/tratop_e/gproc_e/negotiations_e.htm.
[40] See further, commentary on the international context of the Model Law, at p. 9.

[41] See Daniel I. Gordon (2013), *Anti-Corruption Internationally: Challenges In Procurement Markets Abroad – Part II: The Path Forward for Using Procurement Law to Help with Development and the Fight Against Corruption*, West Government Contracts Year In Review Conference Covering 2012. Thomson Reuters.
[42] http://www.ppi-ebrd-uncitral.com/.
[43] For an introduction to this project, along with background documents, see http://www.oecd.org/dac/effectiveness/.

Supporting reforms: the EBRD-UNCITRAL Public Procurement Initiative

Supporting reforms: the EBRD-UNCITRAL Public Procurement Initiative

Richard Gargrave
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The EBRD-UNCITRAL Initiative on Enhancing Public Procurement Regulation in the CIS countries and Mongolia (the EBRD-UNCITRAL Initiative) is a technical cooperation programme that brings together the expertise of both UNCITRAL in international commercial law standard setting, and of the EBRD Legal Transition Programme in supporting reforms of economy in transition countries, in order to encourage the development of modern public procurement policies in those countries.

Through the EBRD-UNCITRAL Initiative – launched on 19 May 2011 in Astana, Kazakhstan, during the EBRD Annual Meeting and Business Forum – the EBRD and UNCITRAL promote the 2011 UNCITRAL Model Law on Public Procurement, which is a new public procurement policy standard, based on international best practice.[1]

The first part of this article describes the EBRD-UNCITRAL Initiative's unique formula of international cooperation, and the action plan designed to improve the performance of local public procurement systems.

The second part of the article discusses challenges faced by the EBRD-UNCITRAL Initiative's expert team working on the sub-project in Armenia, and how the 2011 UNCITRAL Model Law is used as a tool to assist in implementing the World Trade Organisation (WTO) Agreement on Government Procurement (GPA), and the promotion of an understanding of the links between reform of the legislative framework for national public procurement systems and the implementation of electronic procurement (eProcurement) tools in those systems.

The EBRD-UNCITRAL Public Procurement Initiative

The EBRD-UNCITRAL Initiative embraces a series of public procurement reform-related activities, which have been selected based on their potential transition impact and their relevance to the specific procurement problems in particular countries. Following expressions of interest from governments in the CIS region, the EBRD-UNCITRAL Initiative is currently active in Armenia, Moldova, Mongolia, Kyrgyz Republic and Tajikistan. The Initiative has also encouraged Azerbaijan, Belarus, Kazakhstan and Russia to reform their procurement systems.

The EBRD-UNCITRAL Initiative advocates the benefits of public procurement reform in an era of fiscal restraint, in order to improve the performance of local public procurement systems. It encourages the use of the 2011 UNCITRAL Model Law as a tool to implement the requirements of the current GPA, and of the 2005 United Nations Convention against Corruption. The EBRD-UNCITRAL Initiative actively involves other international organisations, including the World Bank, the Organisation for Economic Co-operation and

Development's (OECD's) Anti-Corruption Network and SIGMA[2], and the Asian Development Bank, in supporting the reform efforts.

Presently, the EBRD-UNCITRAL Initiative's reform support programme comprises of: (a) comparative legal diagnostics of national public procurement legislation in the CIS and Mongolia region; (b) a regional series of workshops on developing public procurement regulations; and (c) country-specific technical cooperation projects developed with relevant governments in the region to help modernise their public procurement laws and practices in compliance with new policy standards recommended by the 2011 UNCITRAL Model Law.

Why reform public procurement?

It involves a strategic government activity.

- Public procurement has a significant impact on economic performance and national development.
- Public contracts are the basis for the provision of essential everyday services to the public (such as electricity, transport and communication).

Public contracts are the basis for major and expensive public sector projects (such as infrastructure, education and health).

Significant monetary amounts are involved.

- 10 to 20 per cent of GDP; 45 per cent of government spending (World Bank, OECD).
- Systemic corruption: 20-30 per cent of budgets for public contracts are wasted (World Bank).
- Capacity problems: 80 per cent of waste is due to inefficiency, and not corruption (research on the Italian public procurement system).

Why use the 2011 UNCITRAL Model Law?

- It was negotiated through intergovernmental meetings.
- All regions and countries of the world shared their experience.
- It reflects global best practice in public procurement, tested by several governments.
- Policy recommendations are suitable for all countries, including transition countries.

The 2011 UNCITRAL Model Law is a modern procurement policy, based on leading international practice, which was built as a template for national procurement legislation. The UNCITRAL Model Law provisions have sufficient detail for national law development and are adaptable to allow for different international obligations and policy goals (WTO, European Union, international financial institutions).

Benchmarking national laws in the CIS region and Mongolia against new policy standards expressed in the 2011 UNCITRAL Model Law

In 2011 the EBRD-UNCITRAL Initiative conducted a review of public procurement legal frameworks in the CIS region, in order to provide a comparative gap analysis and identify policy areas which, inconsistently with current public procurement best practice, negatively influence the efficiency of public procurement. The aim of this action was to provide governments wishing to reform their public procurement sectors with current and impartial data on their reform needs and to identify realistic reform objectives.

The analysis commenced in September 2011, and by June 2013 the EBRD-UNCITRAL Initiative experts had reviewed national laws in Armenia, Azerbaijan, Moldova, Mongolia, Kazakhstan, Kyrgyz Republic, Russia and Tajikistan, and had benchmarked them against the key principles of the 2011 UNCITRAL Model Law.

Diagnostic reports presenting results of the assessments are available on the EBRD-UNCITRAL Initiative website – http://www.ppi-ebrd-uncitral.com/ (where such publication is permitted by the relevant governments).

This legislation benchmarking identified areas which were inconsistent with leading international practices expressed in the 2011 UNCITRAL Model Law, and provided key public procurement reform suggestions for inclusion in the governments' reform agendas, including those which could be addressed by technical cooperation projects carried out in collaboration with international stakeholders.

DIAGNOSTIC PROCESS

Step 1 – Procurement regulation review
Each selected country was assessed against the key standards of the 2011 UNCITRAL Model Law on Public Procurement and international best practice in public procurement, as recommended in the Guide to the Enactment of the Model Law, adopted in 2012. The assessment was based on data provided by local legal experts. The main tool used for data evaluation was the Quality of Legislation Questionnaire, which, after being completed by local experts, allowed for comparative diagnosis. It is a basis for the identification of gaps and shortcomings in the legal framework compared with the Model Law.

Step 2 – Legal diagnostics reports
The diagnostics reports present the results of the legal analysis of the national public procurement legal and institutional framework in each country, based on the results from the questionnaire. The reports provide an overview of the quality of public procurement legislation in each country compared to UNCITRAL best practice and to other evaluated countries. This assessment is also intended to identify which sector needs can be addressed by technical cooperation projects carried out together with international stakeholders.

Step 3 – Inputs to the reform agenda – country-specific recommendations
The diagnostics reports include recommendations for local government and key decision makers. The recommendations are oriented towards improvement in the country-specific public procurement regulatory framework. The implementation of recommendations should also improve the framework against international best practice, and open the way to accession to international trade and finance institutions. Key recommendations form an action plan for the implementation of the reform agenda.

Facilitating reforms: regional series of workshops on public procurement policy

With the aim of facilitating interest in reforms, the results of the legal review of national procurement laws and policy development recommendations were discussed with the governments during public procurement policy workshops. The policy workshops were facilitated by the EBRD-UNCITRAL Initiative, in cooperation with the World Bank, and ran between October 2011 and June 2013. The EBRD-UNCITRAL Initiative team, the UNCITRAL Secretariat representatives and renowned academic advisers participated in the workshops and contributed to the open and constructive discussions, training materials and publications.

One lesson learned from these discussions was that governments are frequently very interested in learning about issues such as how updating their procurement laws will help their WTO GPA accession, what are the modern standards for public procurement review and remedies, and how the UNCITRAL Model Law can be utilised to provide a basis for the development of eProcurement reform. Consequently, these topics were included in all subsequent workshop discussions, and it is expected that they will be key components of the respective policy reform agendas of the participating governments.

Working with key stakeholders to develop reform agenda: lessons learned

1. **Participation and support of key government representatives at the policy workshops is essential for deciding on public procurement reform agendas.**

At the workshop in Bishkek, Kyrgyz Republic, hosted by the World Bank and the EBRD-UNCITRAL initiative on 8 October 2013, the First Vice Prime Minister, Joomart Otorbaev, stated that public procurement reform had become the first priority of the government. The Minister of Finance, Olga Lavrova, informed the audience that the Ministry of Finance established the working group for developing the public procurement reform. Thanks to high-level support for the reform, the Kyrgyz Republic reform project in public procurement is progressing very well, and is being supported by the Asian Development Bank, the EBRD-UNCITRAL Initiative and the World Bank.

2. **Working together with international financial institutions is beneficial for facilitating reform progress.**

The workshops in Mongolia, Tajikistan and Kyrgyz Republic were organised in close cooperation with the World Bank and the Asian Development Bank. The message from the EBRD-UNCITRAL initiative diagnostic reports is reinforced by other financial institutions supporting public procurement reforms: at the workshop in Dushanbe, Tajikistan, Majed El-Bayya, the Lead Procurement Specialist, Lisa Miller, the Senior Counsel, and Nagaraju Duthaluri, Lead Procurement Specialist from the World Bank, presented recommendations from country procurement status assessments, which reflected the reform agenda recommended by the EBRD-UNCITRAL Initiative.

3. **The EBRD-UNCITRAL Initiative partners bring specific expertise and effective support.**

The discussions at the workshops drew on the expertise of specialists from the EBRD-UNCITRAL Initiative partners: the OSCE, and the OECD's Anti-Corruption Network and SIGMA. At the workshop in Baku, Azerbaijan, hosted by the EBRD-UNCITRAL initiative and OECD SIGMA on 28 May 2012, Edelmira Campos Nunez, Economic and Environmental Affairs Adviser, OSCE, Office of Economic and Environmental Activities (OCEEA), presented the OSCE's perspective on good governance for public procurement. At the workshop in Chisinau, Moldova, Florin-Bogdan Munteanu, Prosecutor from the National Anti-Corruption Directorate of Romania, explained how the anti-corruption agenda should be integrated into national procurement policies.

Supporting reforms: technical cooperation projects in the CIS region and Mongolia

Based on the policy workshop discussions, an action plan can be developed to provide a basis for a technical cooperation project with the national authorities responsible for public procurement policies. Depending on the particular reform needs in the country, the EBRD-UNCITRAL Initiative technical cooperation projects support:

a) legislative reform

b) regulatory and institutional capacity building

c) public procurement review, and capacity building of the review and remedies system

d) development of a procurement function, including eProcurement.

Based on the public procurement reform agenda shaped at the policy workshops organised under the EBRD-UNCITRAL Initiative, a public procurement reform agenda, along with proposals for country-specific technical cooperation projects, was developed with the Armenian, Kyrgyz, Moldovan and Tajik governments.

In Moldova the EBRD-UNCITRAL Initiative will support reform work, cooperating with a project established by the United Nation Development Programme (UNDP). The Mongolian government has also expressed interest in cooperating with the EBRD-UNCITRAL Initiative, and a country project is currently being developed.

In the Kyrgyz Republic the EBRD UNCITRAL Initiative country project will provide policy advice on the development of primary and secondary legislation on public procurement and reform implementation support. The EBRD-UNCITRAL Initiative will coordinate with the World Bank and the Asian Development Bank (ADB) to provide assistance with comprehensive public procurement reform undertaken by the Kyrgyz government, which is to be finalised by January 2015, when the country's accession to the WTO GPA is due.

In Tajikistan the EBRD-UNCITRAL Initiative aims to facilitate the cooperation of international donors (the World Bank, UNDP and ADB) in order to assist the Tajik government in modernising its public procurement regulation, and completing the WTO GPA negotiation by 2015. The Tajik reform project is closely linked to the Public Finance Management Modernisation Project, which is currently in progress and is funded by the World Bank. The Tajik reform project under the EBRD-UNCITRAL Initiative will support the implementation and development of the Tajikistan government's strategy for eProcurement reform.

In Mongolia the EBRD-UNCITRAL Initiative will work with the World Bank and the ADB to develop a technical cooperation project supporting comprehensive public procurement reforms currently being undertaken by the Mongolian government. The preparatory phase of the country project is expected to commence in 2014.

The EBRD-UNCITRAL Initiative policy advice work is most advanced in Armenia. The Initiative team assessed the Armenian public procurement legislation in September 2011. The legal diagnostic report was discussed with the Armenian authorities at a policy workshop in October 2011. The workshop helped develop a strategy to finalise public procurement reforms in Armenia and establish effective cooperation among the EBRD, the World Bank and the OECD's SIGMA. The latter two organisations have both supported reforms in the Armenian public procurement sector since 2006.

The EBRD-UNCITRAL Initiative technical cooperation project in Armenia – established in 2012 and to be completed by 2014 – covers three components: (a) capacity building for the public procurement regulatory agency; (b) support in drafting secondary legislation and standard documents; and (c) policy advice to the Ministry of Finance and the Procurement Support Centre on completing eProcurement reforms. Details of the project can be found at: http://www.ppi-ebrd-uncitral.com/index.php/en/armenia/country-project-armenia.

The project's preparatory phase provided regulatory capacity building in 2011 and 2012, and support in drafting secondary legislation in 2012 and 2013.

The EBRD-UNCITRAL Initiative team assisted with the preparation of a reform road map for finalising public procurement reforms in Armenia. This road map was approved by the Minister of Finance, and forms an official reform strategy for public procurement in Armenia for the second stage of the government's reform project in public procurement, which will be jointly supported by international donors.

The following second part of this article explains challenges faced by the EBRD-UNCITRAL Initiative's first technical cooperation project in Armenia, and discusses lessons learned from completed components of the project.

Lessons learned from the first reform support project in Armenia

Challenges of public procurement reform in Armenia

Armenia has been steadily implementing broad reforms in the public procurement sector since 2006, with a view to opening the sector up to competition, and improving efficiency and economy in procurement. The public procurement legislative framework in Armenia includes the Public Procurement Law, adopted in 2010, and several decrees issued by the Ministry of Finance (together, the PPL). The current law came into force on 1 January 2011, and was developed to meet the basic requirements of the 1994 WTO GPA. It includes several legal instruments of the 2004 EU Public Procurement Directives.

Despite these reform efforts, in the EBRD's 2010 assessment the PPL in Armenia scored 73 per cent compliance, placing Armenia in medium compliance with international best practice. In addition, an analysis of the institutional framework revealed that there are areas with significant regulatory gaps that need to be improved. The assessment also revealed that there is a shortfall in both performance and regulation: improvements in the integrity and accountability of public procurement were needed.

To help address these needs, cooperation with the Armenian government was established in 2011, when, under new primary legislation, the government decided to decentralise the public procurement system and introduce eProcurement procedures. As a result of this ambitious agenda, the public procurement regulatory authority in the Ministry of Finance

found itself overwhelmed with reform implementation problems, a lack of regulatory capacity, and difficulties in developing secondary legislation and operational policies.

The EBRD-UNCITRAL Initiative prepared a detailed legal analysis of the Armenian public procurement laws in September 2011, and discussed it with the government at the policy workshop held in Yerevan in October 2011.

The Initiative experts discussed with government officials the regulatory shortcomings of the existing framework, and made recommendations about how to deal with these problems, in order to further progress the public procurement reform strategy adopted by the Armenian government in 2006. The workshop discussions focused on an action plan for finalising public procurement reforms in Armenia, and established effective cooperation among the EBRD-UNCITRAL Initiative, the World Bank, the OECD's SIGMA and the EU delegation.

Based on the workshop outcomes, and following a preparatory mission to Armenia in November 2011, a country-specific technical cooperation project was developed in order to assist the public procurement regulatory authority in the Ministry of Finance in implementing the reforms.

Armenian public procurement reform strategy: combine decentralisation with introducing eProcurement tools

Before the reforms, all public contracts in Armenia were procured by a specialised central purchasing agency, and were conducted traditionally, in paper-based procurement procedures, except for contract notices that were published on the web site of the Ministry of Finance. The 2006 Armenian reform strategy advocated a new institutional framework and full decentralisation, with contracting entities in full charge of their individual public budgets, and conducting their public procurement procedures in the eProcurement system. It was considered that this radical change – from total centralisation to decentralisation – would be possible due to the introduction of an eProcurement platform available to all contracting entities, and supporting the entire procurement procedure: from the preparation of the procurement, notices, selection of suppliers and contractors to be awarded public contracts, contract award, and through to contract performance review.

The 2006 reform strategy envisaged the adoption of the new public procurement regulatory framework, which would be compliant with the GPA standards, and the introduction of the eProcurement reform in two phases: the implementation of both e-tendering and e-purchasing tools. However, while the reform strategy described eProcurement tools as supporting the entire cycle of the public procurement process, the e-tendering and e-purchasing functionalities listed in the same strategy did not cover the entire procurement process. This omission in the reform planning caused serious problems at a later stage. Also, to allow for the phased implementation of eProcurement, the 2006 strategy decided on the optional use of eProcurement tools throughout the first two years, with mandatory use of the eProcurement procedures by all contracting entities following full implementation of the eProcurement reform strategy. Within the first two years newly appointed contracting entities could elect to either use procurement procedures available on the eProcurement platform or to conduct their procurement in paper-based format.

While this process is reasonable in principle, this decision caught newly appointed contracting entities unprepared: government entities and municipalities had never before conducted their own procurement, and their personnel had no experience in conducting procurement procedures. While some training on how to use new eProcurement tools had been envisaged in reform planning, and would be delivered to contracting entities by 2011, decentralisation of the public procurement system was not supported with a government-sponsored training scheme for public procurement officers, and, as such, contracting entities had no trained procurement officers to conduct their procurement procedures, either in paper-based or electronic format. To support decentralisation, a public procurement training unit was created in the Procurement Support Centre, working on the assumption that contracting entities would send their personnel to be trained and would self-fund this training. In 2011, when the new primary law entered into force, no official training curriculum had been developed for procurement officers, and no guidelines for contracting entities were readily available.

The reform created new regulatory institutions: a regulatory authority, a Procurement Support Centre, and a review body. However, the primary legislation left the roles of these bodies to be prescribed in the secondary legislation, and did not provide procedures for them to perform their new duties in the decentralised procurement system. In addition, newly appointed institutions, without their own capacity building programmes, were struggling to perform their functions, and did not have the regulatory capacity to fully implement the reforms or to address the operational needs of contracting entities.

In addition, while the 2006 strategy established a reasonable legal and institutional framework, it did not consider the issue of the eProcurement platform business model: whether it would be government owned, managed or a mixed system. A single point of access, government-owned platform was selected without clear planning about how the eProcurement system would be purchased and owned, or about how maintenance and future development, or the purchase of additional modules, would be financed. In the eProcurement reform process key issues relating to the selection of the software appropriate to market needs were considered, and decisions concerning the ownership of the eProcurement platform, as well as maintenance and development costs, were made.

In addition, best practice requires ensuring interoperability (a supplier registered in one country is enabled to submit tenders and proposals in another country) and publishing procurement opportunities, not only in the official national language, but also in languages of international trade (providing wider access to procurement information, including procurement opportunities, and opportunities for online tender submission). In Armenia, following cooperation with the World Bank, a licence for an e-tendering module, and arrangements for its implementation, were purchased in 2008, and this contributed to the implementation of Phase 1 of the reform strategy. However, only one module in the complete eProcurement system offered by the supplier was purchased, and the 2006 strategy did not foresee how to continue eProcurement implementation, how to purchase further modules, or how the system would be maintained and developed.

2012 road map for finalising reforms

To help address regulatory gaps and shortcomings in reform planning, the EBRD-UNCITRAL Initiative team prepared an analytic report on reform implementation problems, and conducted practical regulatory training for the newly appointed regulatory authority in the Ministry of Finance and for the Procurement Support Centre. In addition to the regulatory training, the Initiative experts worked with specialists from the regulatory authority in the Ministry of Finance to prepare a road map for finalising public procurement reforms in Armenia.

The road map recommended refocusing back on the 2006 strategy and its objectives, and proposed a comprehensive action plan for the government of Armenia and IFI stakeholders to fully implement reforms within the following two years for several key operational components: electronic tendering, the introduction of procurement planning, basic framework agreements and online framework agreements with e-catalogues, reporting, monitoring, and contract management.

In particular, the road map set out the scope of the secondary legislation, and described standard documents and operational policies needed to complete the implementation of Phase 1 of the reform project, and to prepare the implementation of Phase 2 of the reform strategy. This included actions that would be necessary to upgrade the eProcurement platform purchased in 2008 to accommodate electronic procedures prescribed in the new legislation, and training and capacity building activities for stakeholders that would be necessary in a decentralised public procurement function. The road map also recommended balanced decentralisation, with central purchasing based on framework agreements – compliant with current best practice – as successfully implemented in the eProcurement environment across the EU member states.

In parallel with working on the road map, the drafting of secondary legislation for completing Phase 1 of the reforms continued, and in December 2012 draft laws covering a range of topics – procurement planning, e-tendering procedures, and framework agreements establishing the terms of use of the eProcurement platform and prescribing roles and responsibilities of the platform operator, contracting entities and tenderers in electronic procurement procedures – were ready to be circulated to local stakeholders.

While new draft laws were discussed with stakeholders, the EBRD-UNCITRAL Initiative expert team focused on working with the Procurement Support Centre in preparing an upgrade of the eProcurement platform, in order to accommodate the electronic procedures prescribed in the new legislation. To benefit from the experience of EU

member states and from best practice in eProcurement, the Initiative experts suggested cooperation with the governments of Cyprus and Portugal, which had already successfully implemented structural public procurement reforms, including introducing eProcurement tools. Through the support of the EU delegation to Armenia, the EBRD UNCITRAL Initiative, in cooperation with the European Commission's Technical Assistance and Information Exchange (TAIEX), organised capacity building sessions, and Cypriot and Portuguese colleagues shared their practical experience from eProcurement reform implementation in their countries with Armenian specialists.

At the time of writing, the preparation of the platform upgrade was being finalised, and the technical specification for the contracting for the upgrade of the platform had been completed. The World Bank agreed to provide another grant to fund an upgrade of the platform. When upgrade work on the platform is completed the ADB will sponsor a pilot of new eProcurement procedures with selected contracting entities, while the OECD's SIGMA, USAID and the World Bank will develop a dedicated training programme for contracting entities and suppliers, to be made available from January 2014. The EBRD-UNCITRAL Initiative policy experts will continue advising the Armenian government in order to address any implementation problems with the new electronic procedures. The project in Armenia will conclude in mid-2014, through the preparation of recommendations for amendments in the primary public procurement legislation, which are necessary in order to adjust the primary law to the new standards of the revised 2012 GPA, and to the results of a feedback session with stakeholders on the performance of the new regulatory framework in practice.

Lessons learned

Through the country project in Armenia, the EBRD-UNCITRAL Initiative team learned several lessons – and tested the 2011 UNCITRAL Model Law's recommendations – concerning framework agreements and electronic communication and submissions in particular, as well as the Multilateral Development Bank standards for implementing eProcurement reform in the public sector.

1. Policy choices in the public procurement primary legislation should be consistent, and be based on current best practice.

In Armenia the new primary law envisaged a fully decentralised system, incorporating framework agreements. However, a balanced decentralisation, with central purchasing based on framework agreements, represents current procurement best practice, which has been successfully implemented in the eProcurement environment across the EU member states.

2. Decentralisation of a public procurement function requires a new institutional framework and new, efficient, operational procedures.

Prior to the reforms – when the procurement function was centralised and was delivered by an internal department of the Ministry of Finance – there was no need for laws regulating the allocation of roles and responsibilities in the procurement process, procurement planning, or reporting on the procurement results, because all of these matters were internal matters of the Ministry of Finance, and were regulated by internal procedures. In this centralised system public procurement officers were personnel of the Ministry, accountable to the department director, and their management reported on their performance directly to the Minister.

In a decentralised procurement system secondary legislation must prescribe how contracting entities should perform the procurement function, what their planning and reporting obligations are, and how they should report to the national regulatory authority. Without these regulations the national regulatory authority has no access to information

about how the procurement function is conducted. In a decentralised system the national regulatory authority does not conduct public procurement, but rather ensures that the procurement procedures of individual contracting entities are compliant with the law.

This is achieved through monitoring and audit procedures, which need to be prescribed by the law and must be efficiently implemented. The experiences of several countries demonstrated that, in a decentralised system, efficiency of monitoring is a key policy question. In order not to create unnecessary bureaucracy, delays and massive costs of human resources allocated to reviewing reports submitted by contracting entities upon the completion of procurement procedures, governments should employ more transparent and less expensive computerised systems, with real-time, online reporting conducted at the central level by a few, well-trained and well-paid analysts of the national regulatory authority.

3. Decentralisation of a public procurement system can be combined with the implementation of eProcurement tools, if newly appointed contracting entities are trained in both how to conduct procurement and how to use eProcurement tools.

There is a high risk of irregularities and non-compliance if insufficient training is provided in conducting procurement processes, and where there are no professional procurement officers at contracting entities. In addition, if the eProcurement system is not implemented in tandem with sufficient support for how to conduct procurement procedures on the eProcurement platform, the contracting entities will experience operational difficulties, since they have no previous procurement experience and skill, and are learning both how to conduct procurement procedures and how to use new IT systems with which they are unfamiliar.

The story of public procurement reform in Armenia clearly demonstrates that high-level political support is essential in order to initiate reforms in the public sector, and sufficient and well-prepared human resources are necessary to implement them. If reform is ambitious, and will affect the entire public procurement sector, it should be very well thought through, and necessary change management instruments must be put in place – and be made effective – well in advance of the entry into force of the new primary legislation. In the case of Armenia the political objective of the reforms – accession to the WTO GPA – has been accomplished, but the goal of a more efficient and modern public procurement system will take longer to achieve.

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[1] More information about the 2011 UNCITRAL Model Law can be found at: http://www.ppi-ebrd-uncitral.com/index.php/en/uncitral-model-law/overview.
[2] Support for Improvement in Governance and Management is a joint initiative of the OECD and the EU.

The WTO Agreement on Government Procurement in the EBRD region

The WTO Agreement on Government Procurement in the EBRD region

Johannes S. Schnitzer

The recently revised World Trade Organisation (WTO) Agreement on Government Procurement (GPA) has proven to be one of the most important drivers of legal reforms in the area of public procurement for countries in the EBRD region. This is especially true since countries seeking accession to the GPA must ensure that their national procurement regimes comply with the requirements of the GPA, which is based on the fundamental principles of non-discrimination, transparency, competition and integrity.

This article is supplemented by a comprehensive comparison of the GPA and the UNCITRAL Model Law on Public Procurement,[1] which shows that basing national public procurement law on the UNCITRAL standards will not involve any incompatibility with the requirements of the GPA and will greatly assist countries in complying with GPA requirements.

Introduction

Government bodies, in order to carry out their functions, need to purchase goods, services and works. This government activity – which is estimated to account for more than 15 per cent of GDP in many countries in the EBRD region – is referred to as public procurement (or government procurement). Public procurement has been brought into focus in international trade within the last decade, and is becoming a central pillar of the international trading system. This is particularly true for the EBRD region. The reasons for this include not only the sheer volumes involved in public procurement, but also that governments are increasingly aware of the economic costs of inadequate public procurement regulations and processes. Public procurement has therefore been identified as an important factor contributing towards moving away from the current global economic downturn and accelerating the economic recovery, in particular through investment in public infrastructure projects. Public procurement is thus acknowledged as an important tool for economic development, as well as an instrument of good governance. The EBRD, as a major investor in the EBRD region, is therefore particularly interested in promoting international public procurement best practice.

Importantly, the GPA[2] (as further explained below) requires parties to ensure the conformity of their laws and regulations with the GPA obligations by enacting binding rules. Each country wishing to accede to the GPA must therefore ensure that the country's public procurement regime complies with minimum procurement rules that ensure non-discrimination, transparency, competition and integrity. Countries intending to become parties to the GPA are therefore currently confronted with the task of reforming their public procurement legislation in line with the GPA requirements. In this respect, these countries

frequently face the question of whether basing national public procurement legislation on the 2011 UNCITRAL Model Law on Public Procurement (UNCITRAL Model Law)[3] will involve any incompatibility with the requirements of the GPA, and, if so, the further question of how they should bring their national procurement legislation into line with both the GPA and the UNCITRAL Model Law.

This paper focuses on why the accession to the GPA should be an important public procurement objective of governments in the EBRD region, and how the GPA and the UNCITRAL Model Law interrelate. This analysis is supplemented by a comprehensive comparison of the UNCITRAL Model Law and the GPA, which illustrates, in the form of several charts, the similarities and differences between the two regimes. The comparison is primarily aimed at serving as a guideline for countries that intend to remedy inadequate or outdated procurement legislation and/or are seeking accession to the GPA.

Public procurement law reform in the EBRD region has gained momentum

Public procurement law reform has gained momentum within the last couple of years. This is particularly true for the EBRD region, where many countries already have updated, or are currently in the process of updating, their national public procurement legislation to international best practice. In this respect the EBRD is the principal provider of technical assistance to governments in the region, in reforming and updating legal frameworks for public procurement to achieve compliance with international public procurement best practice.

It is also propitious to the cause of public procurement law reform that the two most important international standard-setting instruments for public procurement policy were recently revised. On the one hand, governments reforming their public procurement law regimes have the option of basing their procurement legislation on the UNCITRAL Model Law, which replaced the 1994 standards and serves as a template available to national governments seeking to introduce or reform public procurement legislation for their internal markets. On the other hand, the GPA, which was revised in 2012, is arguably the most important binding international agreement in the area of public procurement; governments can meet the GPA political requirements using standards from the UNCITRAL Model Law as these two instruments are harmonised.

The GPA as one of the most important drivers for public procurement law reform

Why join the GPA?

The GPA has been one of the most important drivers for public procurement law reform in many countries, worldwide. It is a plurilateral agreement within the WTO system, and provides a framework for the conduct of international trade with governments. Currently, 43 WTO members are bound by the GPA.[4]

The GPA's principal (and most obvious) objective is to open up national procurement to international competition by giving enforceable access to other GPA parties' procurement markets. The total value of market access opportunities from GPA accession is enormous: it is estimated to be in the range of $US 380-970 billion. Membership allows the companies of a GPA party to enjoy access to a huge new global market. Accession to the GPA therefore constitutes an important step in the development of the acceding country's market economy and in its integration within the international trading system.

Interestingly, many countries in the EBRD region already grant foreign companies access to their national procurement markets. These countries simply do not distinguish between domestic and foreign companies in their public procurement laws (for example, this is the case in Georgia, Montenegro and Ukraine). However, conversely, many GPA countries are either obliged or allowed to discriminate against companies from non-GPA parties in their public procurement processes (in the United States, for example, this concept is referred

to as a "walled garden", and means that government bodies are not, in principle, permitted to purchase from companies from a non-GPA member). GPA accession for countries in the EBRD region can therefore be an important tool to overcome such discrimination and achieve greater fairness in international trade.

Why join the GPA now?

There is renewed high level of interest in accession to the GPA in the EBRD region. One of the main reasons for this is the revision of the GPA text, which was completed in 2012. The update of the GPA has brought a streamlined and modernised regime, enhancing its flexibility and user-friendliness. Improvements include the use of electronic tools (eProcurement) and the right of procuring entities to shorten notice periods when electronic tools are used to improve effectiveness and transparency. Furthermore, the new text of the GPA enhances transitional measures for developing countries, including price preferences and offsets, the phased-in addition of specific procuring entities, and the setting of procurements and thresholds at a provisionally higher level than the permanent level.

A further reason for the high level of interest in accession is that expansion of membership is very likely to expand coverage significantly. China's accession is well advanced and is expected to be completed in the near future. China becoming a GPA party alone would add billions of dollars annually to the value of total procurements covered. The GPA is particularly relevant for the EBRD region, given that Albania, Georgia, Kyrgyz Republic, Moldova, Montenegro and Ukraine are currently seeking accession to this agreement. Other countries in the EBRD region (for instance, the Former Yugoslav Republic of Macedonia, Mongolia and Russia) have provisions in their respective WTO Accession Protocols which call for them to seek accession to the GPA in the near future.

Lastly, joining the GPA is also a logical and natural step for countries that are in the process of reforming their domestic laws and adapting them to international best public procurement practice. Being a party to the GPA can be seen by foreign investors as a "stamp of approval", indicating that the domestic public procurement regime is consistent with international best practice. It is therefore only natural that a number of countries in the EBRD region, which are currently in the process of modernising their domestic procurement laws, are likely to also be joining the club of GPA members within the next couple of years.

How does a country become a party to the GPA?

Completion of the GPA accession process generally involves two key elements (three key elements for developing countries):

First, the acceding member must agree with the existing GPA members on the coverage offer. The coverage offer, which needs to be negotiated in a series of bilateral and plurilateral consultations, sets out which procuring entities are obliged to tender which kind of procurements (that is, goods, services and works) in accordance with the GPA, and which exceptions and derogations apply. Coverage under the GPA therefore depends on the respective GPA party's coverage commitments, and is defined in Appendix I of the GPA, which is divided into seven detailed annexes. The annexes regarding coverage are:

- Annexes 1, 2 and 3: central, sub-central and other entities
- Annexes 4, 5 and 6: goods, services and construction services (works)
- Annex 7: general notes (special exclusions and other matters).

Negotiating the coverage offer usually requires a certain degree of preparation and political coordination between all stakeholders. Practical experience shows that both the monetary threshold level above which the GPA applies to a particular procurement and entity coverage under Annex 3, "Other entities", are often crucial issues in accession negotiations. In particular, the latter concerns the coverage of state-owned enterprises and/or utility companies (frequently in the area of energy, transport and related sectors). Practical experience also shows that an acceding party is frequently asked to submit one or more revised offers for the purpose of clarifying or improving its initial offer. Generally, the process of coverage negotiations is highly flexible and leaves room for individual approaches.

Second, the GPA requires acceding parties to ensure the conformity of their laws and regulations with the GPA obligations. This may require changes to existing national public procurement rules. The GPA generally takes the approach of only laying down common ground rules that acceding parties must comply with. In this regard, one of the most important GPA requirements is compliance with the core principle of national treatment and non-discrimination, which obliges GPA parties not to treat suppliers from the other GPA parties less favourably than national suppliers, nor to treat the industry of one GPA party less favourably than that of another (in both cases, subject to limitations in coverage). Another important requirement is compliance with procedural provisions. These procedural provisions include certain aspects of the procurement process (transparency), and enforcement – namely provisions on domestic review, which must provide for timely, effective and non-discriminatory administrative or judicial review procedures through which a supplier may challenge a breach of the GPA.

An acceding party is required to submit information regarding its domestic public procurement legislation, in the form of replies to the "Checklist of issues". This allows the review of the acceding party's national public procurement legislation. Bilateral and plurilateral consultations usually provide a forum to clarify, as necessary, any aspects of the domestic public procurement legislation. Consultations may lead to the acceding party being asked to amend its legislation to ensure conformity with GPA requirements. The involvement of an independent body to compare the party's national public procurement legislation with the requirements of the GPA has proven to be beneficial in the past. In the case of Armenia, such assistance was provided by SIGMA – a governance institute associated with the Organisation for Economic Co-operation and Development, and supported by the European Union (EU). Clearly, it would make sense that the EBRD (alone or together with SIGMA or another governance institute) be involved in conducting analysis of the domestic public procurement laws of acceding parties with respect to the GPA. This is because the EBRD has been at the forefront of the process of supporting legal and institutional reform in the EBRD countries of operations, by providing assistance to governments to ensure that national public procurement regulations are in line with international standards and best practice. Third, if the acceding country is a least-developed developing country, it must agree on any transitional measures that apply.

How long does it take to join the GPA?

The time frame for completion of GPA accession varies from party to party. Substantive negotiations, as the case of Armenia shows, may be completed in less than a year. Accession may well take longer; for example in the case of governmental re-organisations, or if accession negotiations raise more complex issues.

The GPA's common purpose with the UNCITRAL Model Law

What is the purpose of the UNCITRAL Model Law?

The UNCITRAL Model Law is one of the most commonly recognised public procurement codes internationally. One of its main purposes is to serve as a template available to national governments seeking to introduce or reform public procurement legislation for their internal markets. It is non-binding (in contrast with the GPA), and summarises established international principles of public procurement good practice. Provisions of the UNCITRAL Model Law are generally adopted as they are laid out in the text into the relevant national laws. The UNCITRAL Model Law provides states with a varied menu of options from which to choose, in order to address different procurement situations and to suit local circumstances. The updated 2011 standard reflects modern practices, such as eProcurement (including electronic communication, electronic submission and electronic reverse auctions) and framework agreements. It is supplemented by a comprehensive, consensus-based methodology (formulated in the "Guide to enactment"), which provides background and explanatory information on the UNCITRAL Model Law.

Why is the UNCITRAL Model Law relevant in the context of the GPA?

Many countries, in particular those in Central and Eastern Europe (which are within the EBRD region), based their public procurement laws on the 1994 UNCITRAL Model Law prior to amending their national public procurement legislation upon joining the EU. Furthermore, a number of countries in the EBRD region are, as mentioned above, currently seeking accession to the GPA. Importantly, many of these countries have also based, or intend to base, their public procurement laws on the non-binding UNCITRAL Model Law.

Thus, neither the UNCITRAL Model Law nor the GPA can be seen in isolation. This is why the drafters of the UNCITRAL Model Law have sought to enhance the usefulness of this template law by harmonising its text to the greatest extent possible with other international texts on procurement, particularly the GPA. The rationale for this is that acceding parties to the GPA, having based their national public procurement legislation on the UNCITRAL Model Law, do not – or do not significantly – need to amend their domestic law.

In this respect, the question which arises, in particular, is whether basing national public procurement legislation on the UNCITRAL Model Law will involve any incompatibility with the requirements of the GPA, and if so, the further question of how national procurement legislation should be brought into line with both the GPA and the UNCITRAL Model Law.[5]

Comparison of the UNCITRAL Model Law and the GPA

In order to address these key questions, the EBRD, together with UNCITRAL, as part of the EBRD and UNCITRAL Initiative on Enhancing Public Procurement Regulation in the CIS countries and Mongolia, decided to conduct an in-depth comparison of the UNCITRAL Model Law and the GPA. The comparison illustrates the similarities and differences between the two regimes. It aims to serve as a guide for countries that intend to remedy inadequate or outdated public procurement legislation, or are seeking accession to the GPA. The comparison is covering the following topics:

- objectives, implementation and ambit
- general principles
- scope and coverage
- award procedures

- remedies and enforcement
- electronic procurement
- socio-economic policies
- efforts to attract developing countries.

The comparison between the UNCITRAL Model Law and the GPA shows that the same principles underpin the rules set out in both texts. Basic principles such as transparency, economy and efficiency, competition, non-discrimination, proportionality, integrity and accountability are key features of both the UNCITRAL Model Law and the GPA. These principles also inform regulations in the texts in connection with scope and coverage, award procedures, remedies and enforcement, and socio-economic policies. Both texts allow for eProcurement – including electronic communication, electronic submission and electronic auctions – and recognise that the existence of effective mechanisms to monitor compliance with the texts' rules, and to enforce them if necessary, is a key feature of an effective public procurement system.

Potential users of the UNCITRAL Model Law can be assured that the texts of the UNCITRAL Model Law and the GPA share many similarities, and are therefore largely consistent. Differences between the UNCITRAL Model Law and the GPA – which exist only at the peripheries – are illustrated in the comparison.[6] Given the high degree of synergies between the two codes, basing national procurement legislation on the UNCITRAL Model Law will greatly assist countries which need to comply with GPA requirements upon GPA accession.

Conclusion

Both the GPA and the UNCITRAL Model law – which constitute the two most important international codes on public procurement – have been updated recently. These updates were positive developments, supplying important impetus to many countries in the EBRD region to continue reforming their public procurement legislation. The growing importance of a tool, such as the GPA, to work against a downward spiral of protectionist measures has been acknowledged by many countries in the EBRD region. The GPA, besides being the best available bulwark against closure of national procurement markets, has also been widely accepted as an important tool for the promotion of good governance.

Countries seeking accession to the GPA must ensure that their national procurement regimes comply with the requirements of the GPA, which is based on the fundamental principles of non-discrimination, transparency, competition and integrity. The UNCITRAL Model law is harmonised, to the greatest extent possible, with the GPA, and is therefore ideally suited to serve as a template for countries that need to update their domestic procurement legislation to comply with the requirements of the GPA. While there are some differences, the texts of the UNCITRAL Model Law and the GPA are largely consistent. Basing national procurement legislation on the UNCITRAL Model Law will not involve any substantive incompatibility with the requirements of the GPA, and will greatly assist countries that intend to accede to the GPA in complying with GPA requirements.

The EBRD has been at the forefront in the field of public procurement reform in the EBRD region over the last decade, providing assistance to governments to ensure national public procurement regulations are in line with the GPA and the UNCITRAL Model Law. There is no reason why the EBRD should not continue to provide this kind of assistance, which has proven to be of great benefit to a variety of EBRD countries of operations so far.

Joining the GPA is a logical and natural step for countries in the EBRD region that are in the process of reforming their domestic laws and are adapting their legal regimes to international best public procurement practice.

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[1] The comparison can be found at http://www.ppi-ebrd-uncitral.com/index.php.
[2] The full text is available at http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm.
[3] The full text is available at http://www.uncitral.org/uncitral/uncitral_texts/procurement_infrastructure/2011Model.html.
[4] The current GPA parties (that is, those WTO members that have accepted to be bound by it) are Armenia, Canada, the European Union, including its 28 Member States, Hong Kong China; Iceland, Israel, Japan, Korea, Liechtenstein, the Netherlands with respect to Aruba, Norway, Singapore, Switzerland, Chinese Taipei, and the United States.
[5] The UNCITRAL Model Law recognises, and explicitly deals with, the possibility that a country which based its law on the non-binding UNCITRAL Model Law intends to become a party to a binding international public procurement agreement. In such cases, there are provisions in the UNCITRAL Model Law which can be incorporated into national law to establish the general prevalence of an international agreement related to public procurement – entered into by the enacting state with other states – over the provisions of the national legislation. Hence, international agreements (for instance, the GPA) made by the enacting state take precedence over its procurement law to the extent that they are inconsistent.
[6] The main substantive differences relate to: the scope of the principle of non-discrimination; the procuring entities covered; procurement methods, including the right to negotiate; provisions on framework agreements; and certain aspects of remedies and enforcement.

Ukraine’s joining the WTO Government Procurement Agreement

Ukraine's joining the WTO Government Procurement Agreement

Natalya Shymko

Ukraine's joining of the World Trade Organisation (WTO) in 2008 represented the logical and successful completion of a long negotiation process to join the biggest global trade system. As a WTO member Ukraine has clearly stated its intention to liberalise its trade with the EU to the fullest extent possible in order to achieve EU membership in the future (as stipulated in the Ukrainian legislation, On the Main Principles of the Domestic and Foreign Policy of Ukraine, and underlined on numerous occasions by the president, the Supreme Council (parliament) and the Cabinet of Ministers of Ukraine). Accordingly, Ukraine is committed to further integration in the WTO system. In particular, it seeks to join the WTO Agreement on Government Procurement (GPA) as soon as possible.

The WTO system is a key element of the post-Second World War global economic order, which has made a significant contribution to global financial stability due to the establishment of predictable and stable conditions for the mutual opening of markets. Notwithstanding the recent global financial crisis, the WTO, as a multilateral trade system, remains quite stable and closely linked to national and international economic processes.

The goals of Ukraine's joining were obvious for an economy going through reforms; in particular:

- integration in the global economy to ensure stability and predictability of business and international trade
- improvement of the investment climate in order to increase foreign investment in the Ukrainian economy
- ensuring technical modernisation of national industries
- increasing the export potential and actual exports of high-tech products, with diversification of exports from predominantly resource-based industries (metals and other natural resources) to more science-intensive and value-added products
- the possibility to protect exporters in trade disputes according to WTO rules (Dispute Settlement Understanding)
- receiving the status of a full participant of international trade, which will enhance the possibilities for participation in regional unions and associations
- reducing tariff and non-tariff limitations for the access of Ukrainian goods to the most important global markets and, consequently, increasing foreign currency revenues from the export of Ukrainian products
- obtaining the most favourable position in the trading space of all WTO members; that is, improving trade conditions with 159 countries (as of 1 July 2013), accounting for approximately 92.7 per cent of global trade volume (http://www.wto.org/english/res_e/statis_e/its2012_e/charts_e/chart07.pdf).

The international obligations of Ukraine are also an important factor in the interaction between Ukraine and the WTO. In particular, according to Articles 4, 5 and 9 of the Partnership and Cooperation Agreement between Ukraine and the European Union (EU), Ukraine's joining of the WTO was a precondition to the opening of the negotiations on the Free Trade and Association Agreement between Ukraine and the EU (both agreements

have been initialled and are expected to be signed at the EU summit in Vilnius in November 2013). In addition, Ukraine's membership in the WTO had a positive effect on the signing of the Free Trade Agreement between Ukraine and the European Free Trade Association (which came into force in 2012), and the CIS Free Trade Agreement, both of which are largely based on WTO agreements. Most other negotiations over bilateral free trade agreements between Ukraine and other countries (such as Canada, Singapore and Mexico) are also based on WTO agreements.

As a WTO member Ukraine has clearly stated its intention to liberalise its trade with the EU to the fullest extent possible in order to achieve EU membership in the future (as stipulated in the Ukrainian legislation, On the Main Principles of the Domestic and Foreign Policy of Ukraine, and underlined on numerous occasions by the president, the Supreme Council (parliament) and the Cabinet of Ministers of Ukraine). Accordingly, Ukraine is committed to further integration in the WTO system. In particular, it seeks to join the WTO Agreement on Government Procurement (GPA) as soon as possible.

In general, it should be noted that the very existence of a separate agreement on government procurement in the WTO system reflects the significant role of the public sector in most economies of the world – a role which increased, particularly after the recent global financial crisis. Government procurement is an important aspect of international trade, given the size of this market (generally between 10 and 15 per cent of GDP, according to the WTO's official web site, www.wto.org/english/tratop_e/gproc_e/gproc_e.htm, and 14.4 per cent of Ukraine's GDP in 2012), where both domestic and foreign businesses have commercial interests.

In addition to creating opportunities for business, public procurement has a large effect on the efficiency of public spending, and is, in this context, a significant factor in maintaining public trust in state governance.

However, despite the importance of public procurement in the business volumes of countries participating in international trade, it was, for a long period of time, excluded from the scope of multilateral trade agreements – from the initial 1947 General Agreement on Tariffs and Trade (GATT), to the famous Uruguay Round in 1994, in which the WTO was established in its current form. Despite this history of exclusion of public procurement from multilateral trade agreements, the WTO member countries continued intensive negotiations, proceeding from the idea that transparency and fair competition, as the main principles of international trade in the WTO system, must also be observed in the public procurement sphere.

These principles of public (government) procurement were first defined in the Tokyo Round of GATT member countries in 1979, and were later accepted as mandatory for member countries (except for developing states) at the WTO Uruguay Round, in the GPA, which was adopted in April 1994 (effective from 1996, while the current version was approved in 2012). Forty-three countries have joined the GPA as at the date of this publication, while a further 27 countries (including Ukraine) have the status of observers and potential GPA members. It is representative that GPA members include the most developed countries of the world, such as EU member states, the United States, South Korea and Japan.

The GPA opens up the public procurement markets – in many sectors – of its member countries to international competition, and effectively turns the public procurement sphere into a sector of the global economy. The core principles of the GPA are observance of national rules and non-discrimination. It requires equal treatment of domestic and foreign suppliers, and no discriminatory provisions in any laws, regulations, procedures or measures relating to public procurement.

The mandatory principles of the GPA also include non-discrimination of suppliers based on their status or country, and the requirement that procurement should be carried out on a predominantly competitive basis, with transparency ensured at each stage of the bidding (tender) process.

The GPA is not intended to limit national independence concerning organisational and legal regulation of the bidding procedure and the institutional framework of public procurement. Joining the GPA helps countries to improve their national legislation, in order

to modify and adapt local customs of trade to established international trade practice. Subject to the WTO international rules, each country adopts its own procurement regulations to protect its respective national interests, and to exert control over tender procedures and the activity of contractors and suppliers that win the tenders, as well as to regulate the review of decisions.

Important tasks of the Ukraine government include developing an integrated public procurement system in Ukraine based on transparent procurement procedures, facilitating the development of a competitive environment in the national economy – which would enable more efficient spending of public funds – and fulfilling a number of conditions necessary to harmonise Ukrainian legislation in this sphere with international law – in particular EU legislation and WTO rules.

Therefore, Ukraine's interest in joining the GPA is linked to the government's aim of achieving these domestic economic goals, which are interrelated with external goals; in particular to build a national public procurement system based on modern WTO rules. Becoming a GPA participant would, on the one hand, facilitate the development of competition in the economy, increase the efficiency and transparency of public spending, and help Ukrainian businesses enter public procurement markets of other GPA countries.

On the other hand, joining the GPA would help Ukraine to fulfil its international obligations in its relations with both the WTO and the EU, since EU membership is a strategic priority for Ukraine.

A major step in the establishment of the legal framework for public procurement in Ukraine was the adoption of the new version of the Law of Ukraine, On Public Procurement (PPL), in 2010, which was drafted in accordance with the EU Public Procurement Directives and the GPA. In addition, Ukraine adopted a special law in 2012 – the Law of Ukraine, On Peculiarities of Procurement in Certain Spheres of Economic Activity – which regulates procurement by enterprises holding a monopoly position in the most socially important markets for goods and services. About 20 regulations implementing the PPL were adopted between 2010 and 2012.

For the first time in the history of public procurement regulation in Ukraine, basic procurement principles were defined in a separate list, in Article 3 of the PPL.

These principles are also fundamental to the GPA, namely:

- fair competition between bidders
- value for money
- openness and transparency in all stages of procurement
- non-discrimination of bidders
- objective and unbiased evaluation of bids
- prevention of corruption and abuse.

Article 5 of the PPL establishes the principle of non-discrimination in public procurement based on national status. According to the PPL, any foreign supplier can participate in public procurement procedures on an equal footing with domestic suppliers, and contracting authorities are not permitted to establish discriminatory requirements, including on the basis of the nationality of suppliers. This principle corresponds with the main WTO principles, including the GPA.

An important aspect of the PPL is the mechanism of pre-court review of complaints from participants in public procurement procedures, regarding possible violations in the course of public procurement, which is also foreseen in the GPA. This review is conducted by the Antimonopoly Committee of Ukraine, while the review process is described in Article 18 of the PPL.

Transparency is guaranteed in Article 10 of the PPL, according to which notices and other procurement information shall be published in a special bulletin called the Public Procurement Herald, and, at the same time, made publicly accessible on the official public procurement web portal (www.tender.me.gov.ua). International experts have recognised that a significant volume of information about public procurement is subject to mandatory disclosure, including all notices (such as procurement, award and results), tender documents and changes to them, bid opening and evaluation protocols, reports, and review decisions.

In general, public procurement rules in Ukraine largely include the same provisions as the GPA. For example, they:

- describe procurement algorithms
- define exceptions from the scope of application of the PPL (there are currently 36 exceptions in the Ukrainian PPL)
- require that award criteria be announced in advance
- require that bidders be informed about reasons for adopted decisions upon request.

The GPA also includes requirements for the preparation of tender documents and recommendations for the preparation of qualification and technical requirements, as well as pre-qualification rules. This is also reflected in the Ukrainian PPL.

Lastly, the GPA envisages the functioning of a separate public procurement coordination body. The Ministry of Economic Development and Trade is defined as such a body in Ukraine.

Therefore, it can be seen that the new Ukrainian PPL is a sufficient initial basis for negotiations on Ukraine joining the GPA.

Ukraine commenced the GPA joining process in 2008, when it joined the WTO. According to paragraph 358 of Ukraine's WTO Joining Protocol – ratified by the Law of Ukraine No.250-VI, dated 10 April 2008 – after joining the WTO, Ukraine shall open negotiations on joining the GPA, receive GPA observer status upon joining the WTO, and prepare its request and present a GPA offer within one year of joining the WTO.

With the purpose of ensuring proper implementation of the Protocol, including paragraph 358, the Cabinet of Ministers of Ukraine, by its Decree No. 1570-p of 17 December 2008, approved the Plan of Priority Actions to Fulfil Ukraine's WTO Membership Obligations (Action Plan). Action 1 of this plan foresees opening negotiations on Ukraine joining the GPA.

At the official meeting of the WTO Government Procurement Committee on 25 February 2009, pursuant to the aforementioned paragraph and Action 1 of the Action Plan, Ukraine received GPA observer status, making it possible for Ukraine to officially participate in all activities of the Committee, and to have access to all documents disseminated by the Committee and GPA member countries in the public procurement sphere. The Ministry of Economic Development and Trade (Ministry), was nominated as the public procurement coordination body – the agency in the Ukrainian government responsible for the GPA joining.

On 28 January 2011, according to the WTO procedure for the opening of GPA joining negotiations (WTO Government Procurement Committee document GPA/1, 5 March 1996), the Ministry prepared a formal letter on behalf of Ukraine requesting to start the negotiations, and sent it to the WTO. At the Committee's meeting on 9 March 2011, GPA member countries considered Ukraine's request, and approved the opening of negotiations.

On 2 August 2011, according to the WTO procedure for the opening of GPA joining negotiations, the Ministry prepared answers to the questionnaire (WTO Government Procurement Committee document GPA/35, dated 21 June 2000) and sent those responses to the Committee. Between 10 and 11 October 2011, in the frame of these negotiations, a seminar under the title Ukraine's Joining of the WTO GPA was organised in Kiev, by the Ministry and the WTO Institute for Training and Technical Cooperation, with the support of the Commercial Law Development Programme of the US Department of Commerce.

The EBRD and the EU Delegation in Ukraine collaborative website for supporting public procurement reform: http://ukraine.ppl.ebrd.com/

From 2012, substantial assistance to the Ministry in the GPA joining process has been provided by the European Bank for Reconstruction and Development. In particular, in the spring and summer of 2012, EBRD experts conducted trainings and discussions on specific aspects of the preparation of the GPA initial offer. The purpose of these trainings was to present the experience of other countries in the process of preparing and conducting GPA joining negotiations, given the need for a proper understanding of the procedural side of such negotiations.

Upon the Ministry's request, a significant part of the EBRD's assistance was related to the presentation of the content and the implementation aspects of the new version of the GPA. Consequently, important and useful information about the GPA was presented to a wide circle of specialists from the Ministry and the Antimonopoly Committee, as well as other Ukrainian public procurement experts. This information was presented in a number of conferences, and during a special training program on best international standards of public procurement, which was organised and run by the EBRD, with the assistance of the EU Project: Harmonisation of Competition and Public Procurement Systems in Ukraine with EU Standards.

In the autumn of 2012, specialists in the Ministry, together with EBRD experts, drafted the initial WTO GPA joining offer of Ukraine. The draft offer was based on provisions of the Ukrainian PPL, the obligations of Ukraine under the European Free Trade Association (EFTA) Free Trade Agreement (effective since 1 June 2012), and the agreements achieved in the frame of the free trade negotiations with the EU. In December 2012 the initial offer of Ukraine was officially submitted to the WTO's Committee on Government Procurement.

As at the date of this publication, specialists in the Ministry are working to address comments on the initial offer that were received from WTO GPA members. The events described above demonstrate the substantial progress achieved in recent years in the context of Ukraine's joining of the GPA, which has been achieved through active expert support from the EBRD and the support projects established by the EU Delegation in Ukraine, consistent work of specialists from the Public Procurement Department of the Ministry, and productive cooperation between the Ministry and the EBRD.

In 2013 the EBRD continues providing support to Ukraine in the WTO GPA joining process. In particular, it is expected that EBRD experts will prepare a comparative gap analysis of the Ukrainian legislation with the GPA, which will be helpful in acquiring a common understanding of potential problems during negotiations.

The EBRD – in its important role in supporting development and economic growth through the provision of funding and know-how to transition economies (including Ukraine) – also uses procurement procedures in the projects and programmes that it funds. These EBRD procurement rules are in line with the GPA rules, and Bank experts have extensive practical experience in their application, which can be useful for Ukrainian specialists, including in the course of Ukraine's GPA joining negotiations.

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Reform in Georgia: ‘Everyone sees Everything’

Reform in Georgia: ‘Everyone sees Everything’

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The Georgian public procurement system has been transformed, from one that was labelled “high-risk” in 2009, to one that achieved the highest rating in the latest EBRD regional assessment of the public procurement sector. This article tells the story of how such a dramatic reform occurred, and then presents the results of the most recent EBRD assessment, which illustrates how this reform has helped bring Georgia into line with international best practice in public procurement.

Georgia faced a dilemma in 2009. Its public procurement system was failing to provide the government with an efficient means for contracting goods and services. Moreover, it lacked the transparency necessary to produce confidence in society that it was worthwhile to participate in the system. The Georgian government decided to turn to an electronic procurement system (eProcurement) for a solution to both of these problems. As a result, today Georgia is one of the few countries in the world in which paper-based public tenders have been fully eliminated; all tendering is now conducted electronically. Over the course of its short history, the Georgian Electronic Government Procurement System (Ge-GP) has introduced principles of non-discrimination and fair evaluation, and has ensured unprecedented levels of transparency and efficiency in public expenditure.

Before the reforms

The first Georgian Law on Public Procurement (LSP) was adopted in 1999, and was based on the UNCITRAL Model Law on Procurement of Goods, Construction and Services. In 2006 the LSP was significantly amended, abandoning UNCITRAL standards. Two years later, in 2008, the World Bank published an assessment of Georgia’s procurement system. This assessment evaluated the existing procurement system as “a high-risk environment” that needed substantial improvements and reforms to bring the system into line with international best practice. The Georgian procurement system at that time was still considered to be a legacy of the post-Soviet period. It allowed for discrimination, and corruption was deeply ingrained in the system. Kickbacks were not unusual, and bribery, trade of influence and the accepting of illegal gifts were rife.

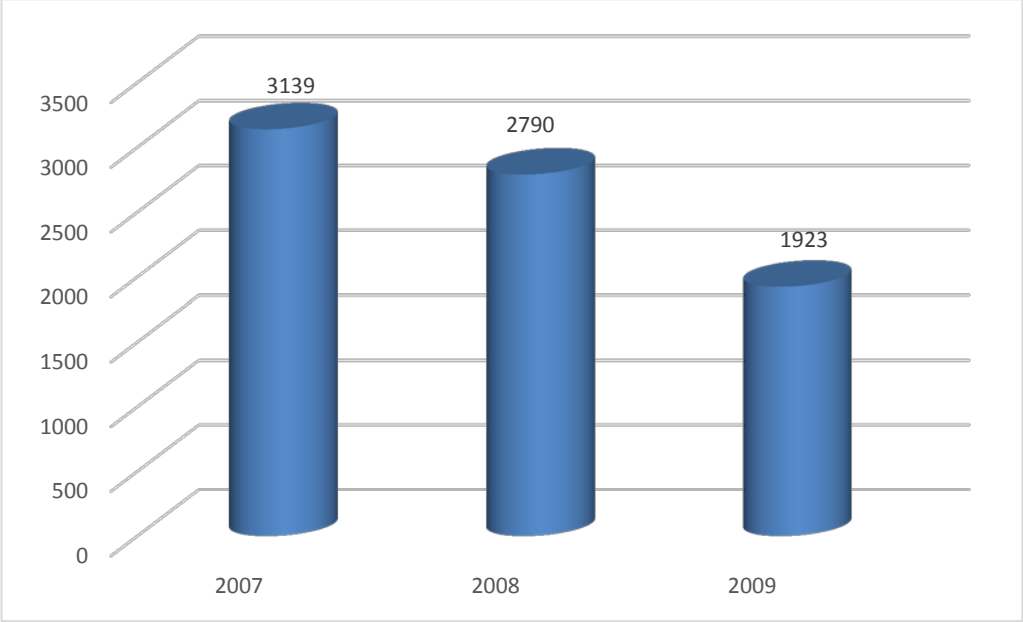
Table 1: Problems with the old, paper-based, tendering system

There were cases of discriminatory treatment due to the absence of sufficient transparency.
Corruption was common.
There were cases of favouritism and other unsound practices.
The public distrusted the government procurement system.
Access to information on public tenders was very limited.
The logistics of participating in a tender were burdensome.
The costs of participation in tenders were high.
Competition was limited.

Source: Official website of the Competition and State Procurement Agency of Georgia, http://procurement.gov.ge

Furthermore, formal requirements created unjustified administrative costs and barriers for conducting and participating in the tender process. Suppliers had to spend time and money contacting various administrative bodies to obtain qualification documents, which were often not even necessary for the evaluation of tenders. In addition to these expenses, suppliers had to pay a tender participation fee (Lari 200; approximately US$ 120). As a result, many companies were discouraged from participating in public tenders, and the process gave rise to monopolistic tendencies and the formation of a group of privileged suppliers working exclusively for the government. The number of open tenders was decreasing dramatically, while direct contracting flourished.

Table 2: Number of announced tenders in Georgia, 2007-9[1]



Source: Official website of the Competition and State Procurement Agency of Georgia, http://procurement.gov.ge

All of the tendering procedures were conducted through the use of paper documents. As a result, the State Procurement Agency[2] (the Agency) had accumulated approximately 20 million paper documents by the beginning of 2011. It was practically impossible to process and analyse information in these documents. The small staff of the Agency, whose mandate was to monitor and supervise the procurement processes, struggled to determine whether procedures conformed to existing requirements, creating a high risk of corruption. At the end of each tender procedure, documentation collected from bidders – other than the winner of the tender – was practically useless, and represented a waste of time and material resources.

In addition to the collection of numerous official documents, participation in paper-based tenders required suppliers to make multiple visits to contracting entities and other administrative bodies. A bidder needed to visit the contracting entity at least three times to participate in a tender (to obtain the tender documents, to submit the proposal, and to witness the opening of the tenders). Subsequently, the winner of the tender needed to visit one more time to sign the public contract. The cost and time involved in making all of these visits should not be underestimated. Companies from the regions were significantly disadvantaged, compared to those located in the capital, Tbilisi, where the majority of public tenders were conducted.

At the beginning of 2010, the Private Sector Development Project of the Agency and GTZ[3] surveyed Georgian suppliers and contractors, identifying the main factors preventing private sector companies from participating in public procurement. These factors were:

- cost and technical requirements for participation in procurement is too high (72 per cent of respondents)
- too much documentation/information requested (70 per cent of respondents)

- delays in handling of contract payments (70 per cent of respondents)
- lack of transparency (59 per cent of respondents)
- difficulty accessing procurement information (54 per cent of respondents)
- procurement information not correctly formulated (50 per cent of respondents)
- procurement officers respond with insufficient information (26 per cent of respondents in Tbilisi; 70 per cent of respondents in the rest of Georgia).

In sum, the public procurement system that was in place before the reforms was inappropriate and inadequate for a country in transition. The numerous deficiencies undermined public confidence in procurement institutions and damaged the stability of the system. No efforts were made to address the lack of transparency. In fact, almost all core international principles of efficient public procurement activities were absent. The system was unable to meet the numerous challenges faced by Georgia, and was in need of urgent reform.

Public procurement reforms: introducing electronic tendering in Georgia

The reforms introducing the Ge-GP aimed to achieve five clear goals, which are broadly in line with international best practice, such as those of the European Union (EU) public procurement *acquis (acquis communautaire)*:

- Transparency: it was necessary to ensure that public funds were spent in a transparent and efficient way, and that civil society had direct and unlimited access to this information. The main slogan and motto of the Ge-GP is simple – "*everyone sees everything*" – which literally means that any document related to public procurement shall be subject to open access and be available online.
- Non-discrimination and fair evaluation: it was necessary to introduce procedures that would ensure that all suppliers were treated equally, and which eliminated the possibility of discriminatory treatment. Previously, in certain cases, suppliers were unfairly disqualified when they received a low grade, which was based on a highly subjective and opaque bid evaluation system. It was imperative to exclude the possibility of subjective decision-making from the process.
- Simplified and easy-to-follow procedures: participation in paper-based tenders was associated with complicated procedures, and was largely regarded as a waste of time and resources, which made many companies reluctant to participate in tenders. It was necessary to simplify the procedures and remove the administrative barriers. The computer literacy level in Georgia was low, especially in rural areas, as was the level of internet penetration. Therefore, the system needed to be simple, be easy to understand and be based on procurement logic.
- Getting rid of paper: the process of submitting paper documents to the Agency and obtaining information from suppliers was inefficient, complicated and time-consuming. Moreover, the documents produced were an unreliable source of information. It was also difficult to make the paper-based data available to the public (due to the arduous process of searching for documents, processing them, copying them, and otherwise physically handling them).
- Getting rid of corruption: Public procurement processes are highly susceptible to corruption. Bribery and other forms of corruption can occur at different stages of the process – from formulation of tender requirements to the awarding and management of contracts. These risks are magnified in non-transparent, paper-based procurement systems. Therefore, it was necessary to remove the features that made the system particularly susceptible to corruption.

Two methods of introducing the electronic system of public procurement were considered. The first provided for the introduction of an expensive, "off-the-shelf" foreign model, which would lead to the gradual introduction of e-tenders. The second model would be an "in-house" creation, which would allow for the introduction of the system in the shortest possible period of time, at minimal cost. The latter option was ultimately chosen, because it seemed most suited to the rapidly reforming, liberal business climate of Georgia.

The Ge-GP system was launched in January 2010, and by October of that year the first e-tender had already been announced. By 1 December 2010, less than one year later, it became possible to fully remove paper-based tenders and to hold all state tenders through the electronic system. Because the procurement system in Georgia is decentralised, the LSP applies to procurements financed by the state budget, autonomous republics and local budgets, including grants and credits received through international agreements with foreign states or international organisations. The Agency is responsible for coordinating and monitoring public procurement. It supervises the compliance of procedures related to public procurement, provides dispute settlement, develops legal acts, and designs and implements training programmes, among other tasks. The head of the Agency is appointed and dismissed by the prime minister.

Table 3: Structure of contracting entities covered by the Georgian eProcurement System (Ge-GP)

Type of contracting entity	Electronic procurement coverage
Central administration (ministries, etc.)	Mandatory
Local administration (municipalities, etc.)	Mandatory
Autonomous republics administration	Mandatory
Legal entities of public law (agencies, inspections, etc.)	Mandatory
State-owned enterprises	Mandatory
Non-profit, non-commercial legal entities	Mandatory, if financed through state budget

Source: Official website of the Competition and State Procurement Agency of Georgia, http://procurement.gov.ge

The earlier versions of the LSP required a tender only in cases of goods and services with a value exceeding Lari 100,000 (approximately US$ 60,000) and works with a value exceeding Lari 200,000 (approximately US$ 120,000). After the reforms, these thresholds were significantly decreased, and now tenders should be conducted electronically if their estimated value is more than Lari 5,000 (approximately US$ 3,000). The use of the eProcurement system is mandatory by law for conducting electronic tendering and simplified electronic tendering. Electronic tendering is applicable to contracts above Lari 200,000 (approximately US$ 120,000), while simplified electronic tendering is used for contracts of less than Lari 200,000. The main differences between the two procedures include the formality of the procedure and deadlines for bid preparation (20 days for electronic tendering and three days for simplified electronic tendering). The new system led to a remarkable increase in the number of tenders held. 2,790 tenders were conducted in 2008, 1,923 tenders in 2009, while in 2011 the number of electronic tenders exceeded 33,000.

The Ge-GP system is multilingual; the public procurement information on tenders is accessible in Georgian, Armenian, Russian, Turkish and English. The main benefit of the system is its simplicity and transparency. Registering with the Ge-GP system is even easier than registering with Facebook. A computer with internet access is all a supplier needs to learn about and participate in a public tender from any place in the world.

All procurement-related information is available online, to any interested person, including:

- annual procurement plans of all 4,016 contracting entities
- tender notices
- tender documentation
- bids and bidding documents
- decisions of tender evaluation commissions
- all relevant correspondence
- all contracts and changes to the contracts
- payments made through the Treasury.

The availability of such information helps suppliers to be well-prepared for bidding and to plan their sales strategies. More than 16,000 registered active users – both contracting entities and suppliers – make use of the Ge-GP.

In short, the Ge-GP simplified procurement procedures and minimised administrative requirements. The legislation provides that the list of required documents be short and well justified. Qualification criteria and technical requirements are verified on a pass/fail basis for the winning bidder after completion of a reverse e-auction procedure. The need for bidders to visit contracting entities in person has been minimised. Now, only the winner has to make one visit to the contracting entity. Notably, these innovations led to a dramatic drop in the tender participation fee, which, at US$ 30, is four times lower than it was in the old paper environment.

Quality of public procurement regulation in Georgia

This section presents the results of the latest EBRD assessment, which aimed to assess the progress of reform, and to report on the extent to which reforms in Georgia have succeeded in bringing the country's public procurement legal framework into line with international best practice.

Legislative framework

The new Georgian Law on Public Procurement (LSP) entered into force in 2010, as an integral part of the country's public procurement reforms. Chart 1, below, presents the scores for the quality of the public procurement legal framework, compared to results achieved by the national framework in 2009 and 2011. On average, Georgia's new laws scored a high level of compliance: benchmark indicators scored high compliance to very high compliance, with transparency, competition and enforcement indicators achieving scores close to the maximum. Consequently, only two indicators still report gaps in the Georgian regulation above 20 per cent. These are the indicators of accountability (22.5 per cent) and integrity (22.5 per cent). First, the public procurement regulation does not promote accountability across all stages of the public procurement process and, as such, the balancing of the required public and business dimensions of the process is not achieved. Second, the public procurement legal framework does not employ enough initiatives to promote the integrity of procurement officials of the contracting entities.

Chart 1: Quality of the new Georgian public procurement legal framework

Note: The chart presents the scores for the quality of the legal framework. The scores have been calculated on the basis of a legislation questionnaire (EBRD Core Principles benchmark) answered by national regulatory authority in 2012. The scores are presented as a percentage, with 100 per cent representing the optimal score for each indicator.

Source: 2012 EBRD Regional Self-Assessment of Public Procurement Legislation

Institutional framework

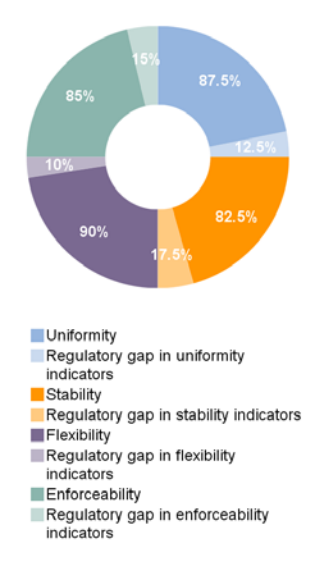
Competition and State Procurement Agency

The Competition and State Procurement Agency (CSPA) is the national public procurement regulatory authority in Georgia; it manages the eProcurement system for the public sector and prepares and manages central purchasing initiatives for the government of Georgia. The chairman of the CSPA is appointed by the prime minister of Georgia.

Dispute Resolution Board

The Dispute Resolution Board (DRB) acts as the review and remedies body for public procurement procedures. The DRB was created on 6 December 2010, to provide review and remedies for public procurement procedures. The DRB consists of six members; representatives of the CSPA and the NGO[4] sector. The chairman of the DRB appoints two members of the DRB from the CPSA. The NGO sector selects three members to serve as members of the DRB. Any entity or person interested in participating in a public procurement procedure may – if the LSP was violated or their rights were infringed by the contracting entities – appeal the actions of a procurement entity or a tender committee to the DRB. The administrative review and remedies procedures – which are simple, straightforward and free of charge to participants – are applied by the DRB, and judicial review is available to tenderers, as an alternative process. Georgian civil legislation enables tenderers to seek compensation (including loss of profit) in the event that a successful complaint has been brought against the contracting entity; the tenderer may seek remedial action and compensation in the civil court. In 2013 Georgia scored a high level of compliance (79 per cent) for the quality of its review and remedies legislation. Georgia secured eleventh place on this measure – two percentage points above Latvia, level with Estonia, two percentage points below Croatia, and 19 percentage points below top-ranked Turkey. Unfortunately, due to the appointment procedures system for the DRB members, the DRB cannot be classified as a tribunal – that is, an independent public procurement review and remedies body.

Chart 2: Quality of the public procurement institutional and enforcement framework in Georgia



Note: Chart 2 presents the scores for the quality of the public procurement institutional and enforcement framework. The scores have been calculated on the basis of a legislation questionnaire, based on the EBRD Core Principles benchmark for an Efficient Public Procurement Framework, and answered by the appropriate regulatory authority. The scores are presented as a percentage, with 100 per cent (one quarter of the pie chart) representing the optimal score for each of the four institutional and enforcement measures. The regulatory gap – the difference between the assessment results and the benchmark – is marked in light blue, light orange and light green respectively.

Source: 2012 EBRD Regional Self-Assessment of Public Procurement Legislation

Scope of regulation

The 2010 LSP covers central and local government. Application to the utilities sector is only partial. In 2012 procurement plans were implemented as mandatory for contracting entities, and since then the LSP covers most of the public procurement cycle: pre-tendering, tendering and post-tendering phases, including contract management.

Pre-tendering: The Georgian LSP regulates, in detail, the procurement procedures for the pre-tendering phase of the public procurement process. In Georgia, the LSP requires the mandatory planning of all public procurements, with contracting entities' updated annual procurement plans published online at the beginning of each financial year. These procurement plans provide detailed information about planned future procurements.[5] Moreover, the LSP requires each contracting entity to prepare a contract profile and procurement plan prior to the launching of each tender process. If the contract payments for the procurement fall due beyond the current financial year, additional budgetary authorisation will be required. Furthermore, for each procurement, a draft contract must be published, together with the tender notice and tender documentation. Georgian procurement legislation provides for contract valuation methods that take into account the whole-of-life costs of the purchase or works, and requires aggregation of lots. Both of

these requirements seek to secure additional "value for money" from public procurements and contracts. However, although the LSP allows the use of international standard contract forms, the use of these contracts is considered on a case-by-case basis, and is informed by the circumstances of the individual procurement and the LSP regulation specific to the particular procurement case.

Tendering: The Georgian LSP provides for several tendering procedures. The eProcurement system in Georgia enables only reverse auctions as a basic selection procedure, with other procurement procedures currently under development. The LSP regulates the appointment and composition of the tender evaluation committee, with all tenders submitted and evaluated via the eProcurement platform. The LSP requires that all procurement-related decisions be published online in real time, and that a contract award notice be published for every contract finalised by a contracting entity.

Post-tendering: The Georgian LSP regulates, to a certain extent, post-tendering, with specific emphasis on the management of amendments and extensions to public contracts. The LSP stipulates that contracting entities should provide and make allowances for the management of public contracts, and requires all procurement monitoring and administration to be undertaken electronically.[6] In addition, the LSP requires mandatory scrutiny of all contract variations by an official body, with all change of contract reports automatically generated by the business intelligence module of the Ge-GP purchasing system, and shared with the Chief Auditor's Office.

Procurement methods and procedures prescribed by law

The methods and procedures available to contracting entities for contracting public sector contracts include:

- open tender, based on reverse auction
- direct contracting.

The LSP requires the public procurement process to be conducted on an eProcurement platform.[7] Open tender, based on reverse auction, is the default procurement method for the purchasing of goods, services and works with a value exceeding Lari 5,000 (approximately US$ 3,000). For purchases below Lari 5,000, a simplified method of direct contracting is used. The LSP incorporates a clear test as to the choice between open tender and direct contracting. Moreover, the LSP forbids the preferential treatment of domestic bids, and prohibits a change of procedure once the procurement process has been launched.

Public procurement process regulation

In addition to stipulating clear deadlines for the submission of tenders, the LSP also requires a standstill period after the decision is made to eliminate tenderers from further participation in the public procurement process. While the LSP does not regulate submission deadlines, the eProcurement procedures impose strict submission deadlines in order to accomplish the procedure within a reasonable time. The LSP does not yet fully allow for standard contractual terms and conditions, standard terms of reference, or standard tender documents for all types of procurement. In its current form the Georgian LSP provides only minimum requirements for tender documentation and conditions of contract. The LSP provides for formalities to be kept simple, and includes clear requirements on the use of languages in tender and contract documents. The LSP includes standard forms of contract notices, with minimum requirements for tendering documents, and provides for publishing the tender documents well in advance of the submission deadline. In addition, the eProcurement system uses standard forms of procurement reports, which also ensures that procurement records are not manipulated, and that they are easily accessible. The LSP does not establish a separate central purchasing body, but the CSPA is authorised to undertake central purchasing functions.

The LSP requires mandatory eProcurement procedures, with relevant information published at every stage of the procurement procedure. The LSP does require the contracting entity to specify a reason for cancelling the procurement procedure, which will be published in the tender committee meeting minutes on the eProcurement system. Unhelpfully, the LSP does not forbid the cancellation of the process and the rejection of all

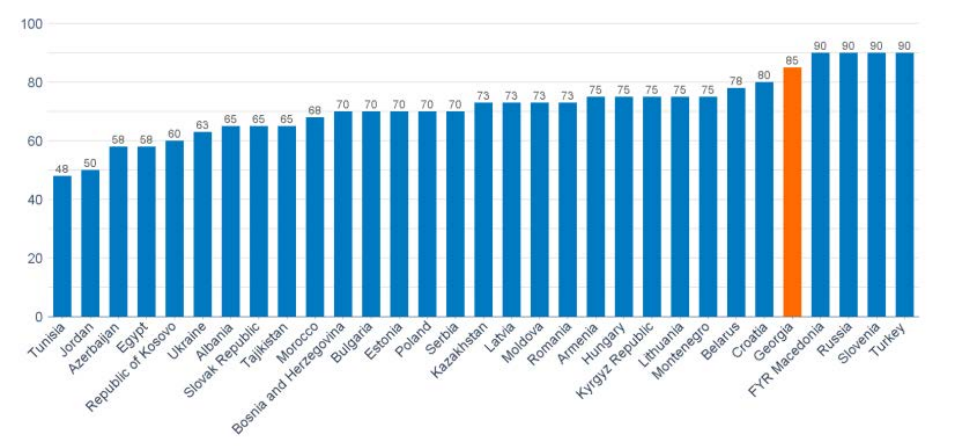
offers if at least one valid tender has been received. However, contracting entities are required to inform the participants upon cancelling the public procurement, with notification undertaken automatically through the system, which also maintains real-time records of the public procurement process.

In Georgia, procurement officers should avoid any conflict of interest while conducting public procurement procedures, with the LSP containing provisions aimed at curbing or controlling corruption in the public procurement process. These provisions are strengthened by criminal legislation containing provision for whistleblowers. Although the LSP does not require procurement processes to be conducted by specific procurement officers, with duties clearly separated from the decision-making process and supply management, a presidential decree on conducting eProcurement procedures requires that every contracting entity must appoint a procurement specialist, or create a unit dealing with public procurement. In addition, although the LSP does not contain specific requirements about public contract information, the Administrative Code of Georgia contains specific provisions regarding confidentiality. Although no mention is made in the LSP to stipulate that pay levels for procurement staff should be comparable to similar public or private sector technical specialists, the LSP does require that the CPSA ensure that adequate formal training programmes exist for entry-level and higher level procurement staff.

Overview

The 2012 EBRD Regional Self-Assessment results confirm that public procurement reform in Georgia is successful, and a continued improvement of the public procurement regulatory framework can be observed since initiation of the procurement reform in 2009: national legal and institutional framework for public procurement has improved with respect to eight of the indicators in the EBRD Core Principles benchmark, since the 2010 assessment. This is clearly an achievement of the Georgian government, and a positive result of the political will to improve public sector purchasing, and to combine a public procurement reform with wider fiscal reform of the public sector. In Georgia, modern purchasing techniques, such as eProcurement, have been systematically implemented into the general e-government structure, and provide an example of what can be achieved in terms of adopting modern efficiency instruments in the public procurement sector. The Georgian institutional framework is not yet fully compliant with international standards, and practices adopted for procurement procedures are not yet at the standards of the 2012 WTO GPA, in terms of submission deadlines, length of the standstill period, and some regulatory gaps in the institutional framework.

Chart 3: Quality of the national public procurement legal framework in Georgia compared to other countries in the EBRD region



Note: Chart 3 presents the scores for the quality of the national legal framework (law on the books) as compared to other countries in the EBRD region. The scores have been calculated on the basis of a legislation questionnaire, based on EBRD Core Principles for an Efficient Public Procurement Framework, and answered by the appropriate regulatory authority. Total scores are presented as a percentage, with 100 per cent representing the highest performance.

Source: 2012 EBRD Regional Self-Assessment of Public Procurement Legislation

However, the overall development of the public procurement system in Georgia is impressive, and if reform is continued, this may bring the Georgian LSP into full compliance with international best practice relatively easily, and may therefore ensure Georgia's successful negotiation of its WTO GPA accession.

The results of the 2012 assessment suggest that Georgian reform is presently the most successful in the region, and if this reform is continued with a similar impetus as was evident between 2009 and 2012, it should ensure that the country continues to lead the region in public procurement regulation.

Results of the reforms

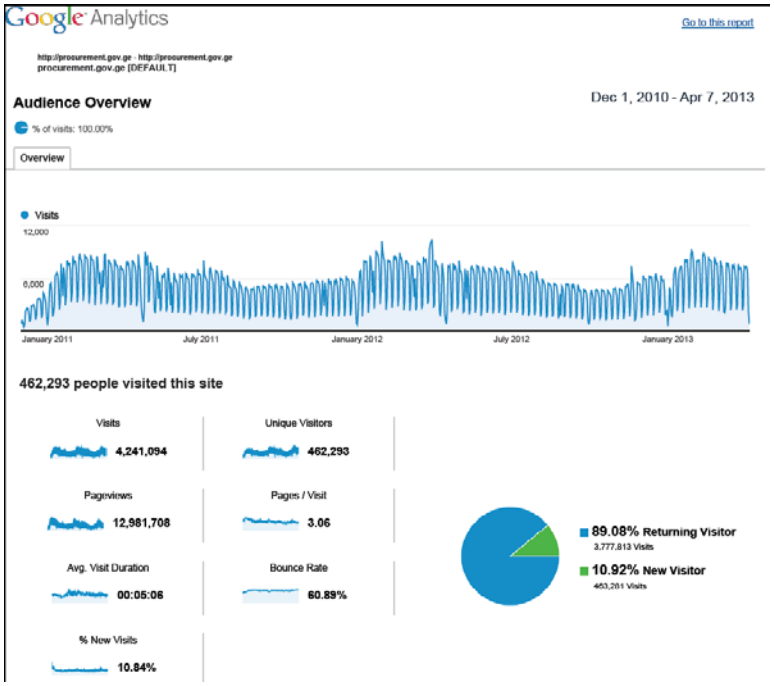
As a direct result of the Ge-GP reforms, the majority of public funds in Georgia are now spent through open and transparent procedures. New electronic procedures provide equal opportunities for bidders regardless of their geographic location, and encourage fair competition between suppliers and contractors. One of the most important effects of the Ge-GP system is that the high level of transparency it introduces to procurement procedures decreases the risk of corruption. Only a few instances of large-scale, organised corruption have been detected since the introduction of the Ge-GP system. Its implementation has also had important efficiency implications – by March 2013, the savings generated by the Ge-GP amounted to approximately Lari 360 million (US$ 220 million), which was around 12 per cent of the total value of announced tenders.

The official website of the Agency (www.procurement.gov.ge), which is the way to access the Ge-GP, is consistently among the most visited government electronic resources in Georgia. Since the beginning of the operation of the Ge-GP, in December 2010, there have been almost half a million unique visitors to the site, while there have been almost 13 million total page views. Notably, the number of visits from foreign countries exceeded 115,000. By the end of the August 2013, the Ge-GP was available in three additional languages (Turkish, Russian and Armenian) to enable companies from neighbouring countries to navigate the system in their local language. The number of foreign companies registered with the Ge-GP exceeds 200, while some 100 contracts have already been awarded to foreign bidders.

The new eProcurement system has radically transformed the method of collecting and analysing the procurement documents emanating from contracting entities. Previously, contracting entities were required to provide the Agency with information on their procurement activities by sending in paper documents on a quarterly basis, which then had to be reviewed and scanned.

Since 2011 this information is automatically transmitted to the Ge-GP Business Intelligence Module. Consequently, the Agency is able to quickly process this data and produce more than 70 real -time reports on the different aspects of public procurement in Georgia.

Table 4: Electronic procurement audience overview as at 10 April 2013



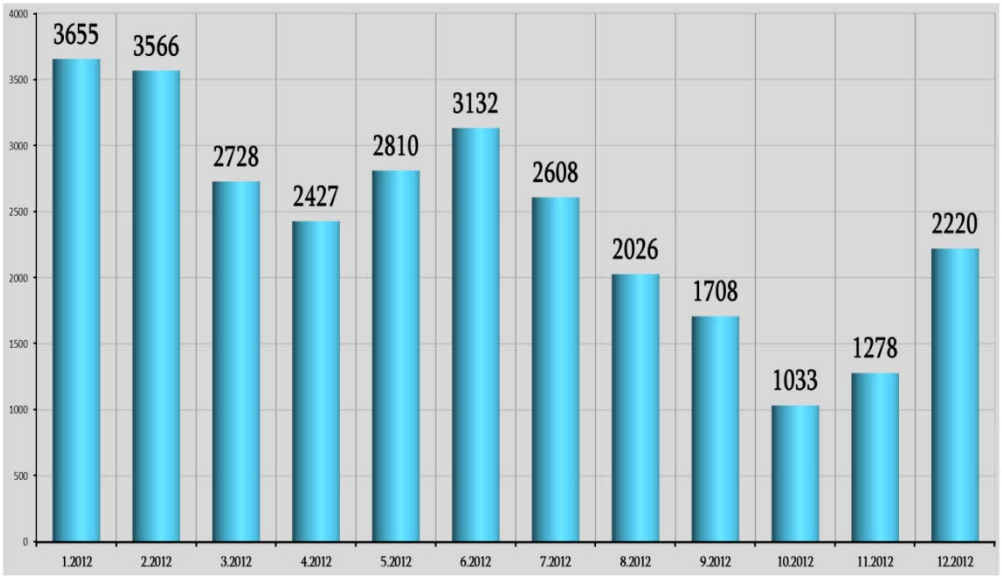
Source: Official website of the Competition and State Procurement Agency of Georgia, http://procurement.gov.ge

Statistical information on the various steps of public procurement is gathered automatically by the system through the posting of data such as annual procurement plans, tender notices, tender documentation, bid amounts, bid evaluations, contract awards, relevant correspondence and appeals. The system can then generate annual or quarterly reports under different headings. Examples of such reports are:

- number of contracting entities
- number of suppliers
- number of tenders
- estimated value by total and for each coded commodity, service or construction works, contracted price, savings in Georgian lari (GEL)
- breakdown of the percentage of tenders by type, by most savings, top contracting entities, most successful bidders, number of successful appeals, number of rejected appeals, etc.

These reports can then be analysed to detect trends, identify problem areas, improve budgeting, and so forth. Some of the reports are presented below. The total number of tenders announced through the Ge-GP is 70,870 – on average more than 30,000 e-tenders per year. The average number of tenders per year has increased by more than 10 times compared to the previous system.

Table 5: Number of e-tenders in Georgia in 2012

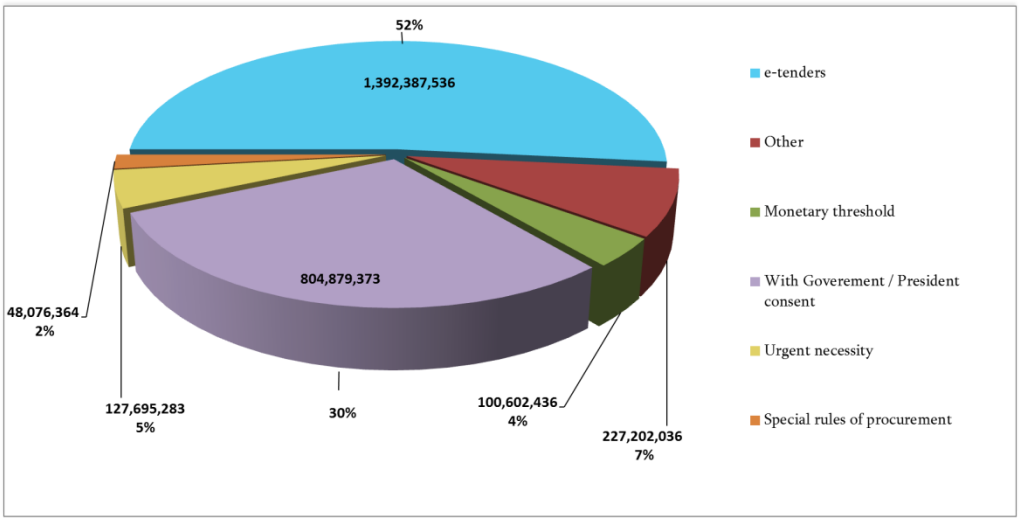


Source: Official website of the Competition and State Procurement Agency of Georgia, http://procurement.gov.ge

According to 2012 data, the largest number of public contracts (1,847) was awarded through e-tenders announced for the procurement of construction works. The average participation rate per tender is still not very high, while, as Table 7 shows, the highest level of competition is achieved in tenders for cleaning services and construction works.

A relatively low level of competition might be explained by the rapid increase in the average number of tenders per year in recent years, and by the fact that a majority of local companies are still registering in the Ge-GP. By the end of 2012, the majority of suppliers registered were limited liability companies (LLCs). These 6,893 LLCs represented around 62 per cent of all Ge-GP suppliers. This number represents just 12 per cent of all Georgian LLCs that were active as taxpayers in 2012. Thus, there is clear potential for increasing competition, by increasing participation from these companies. The number of registrations with the Ge-GP is increasing every year (more than 3,500 suppliers were registered in 2012), but there is still room to increase the number of registered suppliers and, consequently, the level of competition in tenders.

Table 6: Top procurement categories in Georgia by average participation rate

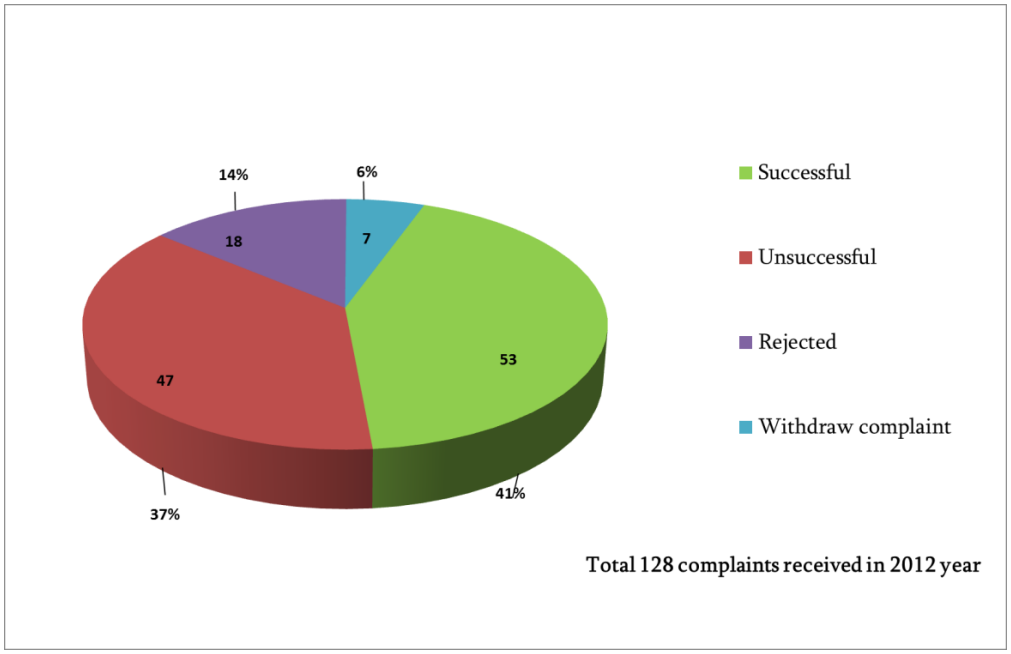


Source: Official website of the Competition and State Procurement Agency of Georgia, http://procurement.gov.ge

Simplification of dispute settlement procedures, and the creation of the online workflows for the Dispute Resolution Board (DRB), has led to an increase in the number of complaints by more than 14 times in less than two years. There were only nine disputes in 2010, compared to 67 in 2011, and 128 in 2012. This trend is continuing, which indicates an increase in the level of public trust for DRB activities. The effectiveness of the DRB can be measured according to the number of complaints it deals with, the speed with which it makes its decisions, and the level of satisfaction experienced by the parties. A complaint is unlikely to be made if there is a low degree of trust in the impartiality of the appeal body, in the transparency of the decisions, and in the assurance that if a complaint is upheld there will be no repercussions when bidding in the future. The latest figures from the DRB indicate that the number of complaints has continued to rise in 2013, and that the 10-day decision-making period stipulated in the LSP is being achieved.[8]

Appellants were successful in a majority of complaints. The DRB ensures that decisions made are expedient, impartial and efficient. It is likely that there are few countries in which public procurement-related disputes are resolved in a more expedient and efficient manner, and with a higher level of participation by civil society.

Table 8: Results of public procurement review and remedies procedures in 2012 (Georgia)



Source: Official website of the Competition and State Procurement Agency of Georgia, http://procurement.gov.ge

Reform of the public procurement system in Georgia saw the rapid implementation of a transparent system, with easy to follow procedures. The full involvement by society was realised by making the system and its data accessible ("everyone sees everything"), and allowing for direct participation in the monitoring of procurement procedures (anyone can freeze a tender on the basis of suspicion of bribery). Unfair treatment based on the geographical location of the supplier or contractor was eliminated. Previously, regional companies were, for the most part, unable to participate in tenders announced outside their region. There were only occasional cases where regional companies won a tender announced in the capital or elsewhere outside of their region. After the reforms, as a result of the simplification of tendering procedures and minimisation of compliance costs, there are now thousands of cases where a company based in one region wins a tender in another region in Georgia.

The decision to move to an eProcurement platform has created additional benefits for the country. The mandatory nature of the system provides for automatic inventory-taking of contracting entities, enabling an unbiased assessment of each entity's needs. An internet connection became mandatory for all contracting entities, which is particularly important for the mountainous regions and back-country districts.

The same followed for suppliers, who must also have access to the internet in order to participate in e-tenders. As a result, up to 10,000 contracting entities and suppliers are intensively using the internet, not only for participation in tenders, but also for conducting other system-related procedures, such as uploading reports or filing complaints with the eDRB. The system has also successfully exposed thousands of registered suppliers to the use of modern electronic transactions, such as online payments and electronic guarantees. Some of these practices, such as electronic guarantees, are now widely used in Georgia.

This tremendous reform effort has successfully introduced principles that are essential to a successful public procurement system: transparency, competition and efficiency. Although progress remains to be made – as seen in the results of the EBRD assessment presented below – the success story of procurement reform in Georgia illustrates the results that can be achieved through the introduction of eProcurement tools, and a desire to transform the public procurement system into one that can adequately meet the challenges of a country in transition.

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[1] SPA Supervisory Board Report, 2009.
[2] Now known as the Competition and State Procurement Agency (CSPA) following the merger of the State Procurement Agency and the Free Trade and Competition Agency, in January 2012.
[3] Now GIZ (Deutsche Gesellschaft für Internationale Zusammenarbeit GmbH).
[4] Non-governmental organisations.
[5] This requirement is the equivalent to an EU acquis buyer's profile.
[6] Since 1 December 2010 all contracts have been monitored and managed through the Ge-GP purchasing system.
[7] From 1 December 2010 all tenders have been conducted online through the Ge-GP purchasing system.
[8] Assessment Report 2011, Review of the implementation of the PFM SPSP, The EU's ENPI Programme for Georgia, p.34.

Croatia:

reforms to meet the terms of the EU *acquis*

Croatia: reforms to meet the terms of the EU *acquis*

Jelena Madir
Luka Rimac

Public procurement accounts for a significant proportion of Croatia's economy, representing approximately nine per cent of the country's GDP.[1] Consequently, the development and maintenance of a well-functioning public procurement system in the country is of paramount importance. Since the enactment of the first public procurement law in 2001, Croatia's procurement regime has undergone a number of reforms, reflecting the government's attempts to develop a legal framework that balances competition and transparency safeguards with efficiency. However, even with the completion of the alignment with the European Union (EU) *acquis communautaire*, enforcing compliance continues to be a formidable challenge. Consequently, capacity building, monitoring and overcoming an overly formalistic approach of contracting authorities are the more difficult steps that may take longer to achieve, and will probably remain areas of focus for the Croatian government over the next several years.

This article first describes the new legal and institutional framework for public procurement in Croatia. It then describes the progress in development of procurement policies as observed by the EBRD legal research and the Procurement Department. Lastly, the article analyses two recently-run tenders in connection with the privatisations of two major state-owned companies, and discusses some of the challenging issues surrounding the public procurement regime in the country.

Legal framework

The area of public procurement was completely unknown in Croatia until the country gained its independence in 1991. Major advances in the area occurred after 1997, when the parliament adopted the first law that regulated public procurement in a more comprehensive manner; the law commenced in 1998.[2] In 2001 the parliament enacted a new law on public procurement, based on the Public Procurement Directives of the European Commission.[3] The law established two central public procurement institutions: the Public Procurement Office (the Office), which was authorised to supervise the implementation of the public procurement laws;[4] and the Public Procurement Supervisory Commission (the Commission), which was authorised to review public procurement complaints.[5]

Since then, the public procurement law has undergone a number of amendments, all of which have aimed to further align Croatia's procurement legislation with the relevant EC public procurement directives. These amendments were also accompanied by a number of secondary legislation and regulations, such as the regulation on the list of subjects required to comply with the public procurement law[6] and the regulation on the supervision of the implementation of the public procurement law[7]. Croatia's public procurement legislation was further amended in 2011, when the parliament enacted the new Public

Procurement Act (the Act), which came into force on 1 January 2012.[8] The Act finalised the alignment of the country's public procurement regime with the requirements of the EC public procurement directives.

Key changes introduced by the Act

Procurement plan

The Act introduced a number of changes related to the procurement plan. Notably, the Act requires the contracting authority/entity to adopt the procurement plan for the budget or business year, which must include at least the following information: (1) the subject matter of procurement; (2) the file reference number of the procurement; (3) the estimated value of the procurement, if available; (4) the type of public procurement procedure; (5) whether a public procurement contract or a framework agreement is being entered into; (6) the planned commencement of the procedure; and (7) the anticipated term of the public procurement contract or the framework agreement, as applicable.[9] Interestingly, unlike the requirements of the former Public Procurement Act, the procurement plan is no longer required to contain information about the sources of the planned finances or how they align with the financial statements/plans of the contracting authority/entity.[10] However, given that the above items refer to the minimal required information, nothing in the Act prevents the inclusion of the information about the sources of the financing of the plan, which would give the plan more credibility.

If necessary, the contracting authority/entity may change the procurement plan, and all changes must be visibly indicated in relation to the original plan.[11] Notably, the Act introduces the obligation on the contracting authority/entity to publish the procurement plan on the internet within a period of 60 days from the day of the adoption of the budget or the financial plan. Similarly, any changes to the procurement plan must be immediately published on the internet by the contracting authority/entity.[12] The published procurement plan, and all of its changes, must be available on the internet at least until 30 June of the following year.[13]

Further, the contracting authority/entity is required to promptly submit to the central state administration body entrusted with the public procurement supervision (the Competent Authority) details of the URL of the web site on which the procurement plan has been published and to provide any subsequent changes to the URL. With the aim of further increasing the transparency of the process, the Act requires the Competent Authority to include on its web site links to the web sites on which the procurement plans of all contracting authorities are available.[14]

If, however, the contracting authority/entity is unable to publish on the internet, it must submit its procurement plans and any changes to those plans electronically to the Competent Authority, which will then publish them on its web site.[15] Unsurprisingly, provisions related to the publishing of the procurement plan will not apply to the contracts that involve, require or contain "classified information".[16]

Lastly, with respect to fines, the Act stipulates that any legal entity or unit of local and regional self-government will be fined an amount from HRK 50,000 to HRK 1,000,000 (approximately €6,578 to €131,578) if it fails to submit to the central state administration body, immediately after publication, details of the URL of the web site on which the procurement plan is published and any subsequent changes to the URL, or if it fails to submit its procurement plan and any changes to it by electronic means.[17] Further, the responsible person in the legal entity or in the state body or unit of local and regional self-government will be fined between HRK 10,000 and HRK 100,000 (approximately €1,315 and €13,157).[18]

Register of public procurement contracts and framework agreements

The Act introduces the requirement for the contracting authority/entity to maintain the register of public procurement contracts and framework agreements (the Register), and to update the information in the register at least every six months.[19] Further, the Register must be published on the internet.[20]

The Register must include at least the following information: (1) the subject matter of procurement; (2) the file reference that the contracting authority/entity allocated to the procurement and the number under which the procurement was published; (3) the type of public procurement procedure conducted; (4) the amount of the awarded public procurement contract or framework agreement, as applicable; (5) the date of the conclusion and the term for which the public procurement contract or the framework agreement was concluded; (6) the name of the tenderer to whom the public procurement contract was awarded, the name of the entity with which the framework agreement was concluded, the name of the tenderer to whom the public procurement contract – based on a framework agreement – was awarded, and the name of the subcontractor, if any; (7) the final date of the supply of goods, provision of services or execution of works; and (8) the final amount which the contracting authority/entity paid on the basis of the public procurement contract, and, where this amount is higher than the contracted amount, an explanation for that difference.[21]

This information for an individual public procurement contract must be available in the Register for a period of at least three years from the date of the final execution of the related contract.[22] Further, after the first publication of the Register, the contracting authority/entity must submit to the Competent Authority details of the URL of the web site on which the Register has been published and provide any subsequent changes to the URL. As in the case of the procurement plan, the Act requires the Competent Authority to include on its web site the links to web sites on which the registers of all contracting authorities are available.[23]

If, however, the contracting authority/entity is unable to publish on the internet, it has to submit electronically, every six months, updated registers of public contracts and framework agreements to the Competent Authority, which will publish them on its web site.[24]

These register-related requirements do not, however, apply to contracts awarded in accordance with the rules governing public-private partnerships or the rules governing concessions.[25]

Lastly, the same fines apply for non-compliance with these provisions as for non-compliance with the procurement plan-related provisions; that is, a fine between HRK 50,000 and HRK 1,000,000 (approximately €6,578 and €131,578) for a legal entity[26] and between HRK 10,000 and HRK 100,000 (approximately €1,315 and €13,157) for the responsible person within the relevant entity.[27]

The award criteria

The Act excludes the requirement for the contracting authority/entity to prepare a report on the award criteria on the basis of the economically most advantageous offer.[28] However, if the economically most advantageous offer is chosen, the award criteria must not be discriminatory, and they must be related to the subject matter of procurement.[29] Further, in the case of public service contracts and public supply contracts, the award criteria must be without prejudice to the implementation of the legislation prescribing remuneration for specific services (for example, services performed by architects, engineers or lawyers, or a fixed price for specific supplies such as school books).[30]

Public Procurement Office

The Public Procurement Office is a special agency of the government of Croatia, authorised to execute the implementation, oversight and application of the Act and any such subordinate legislation as may be passed in the field of procurement. The Office: establishes the overall procurement requirements for products and services of entities bound by the public procurement regime; plans the implementation of procurement procedures; conducts market research; manages the database of awarded contracts and framework agreements and submits statistical reports to the government; implements advanced technologies in the public procurement process; drafts tender documentation; controls the performance under the signed contracts and framework agreements; analyses the efficiency of the public procurement regime through continuous monitoring; and performs any other tasks as may fall within the scope of its competence.[31]

The Office has adopted a practice whereby approximately every two years it settles and publishes its strategic plan for the following two years. The Strategic Plan for the period 2013-15 contains the following areas of focus for the Office: standardisation within the procurement categories; further improvements in the area of electronic procurement; ensuring that the procurement process renders the best "value for money"; increasing transparency (to be achieved by continuous publication of the relevant materials and technical consultations); encouragement of competitiveness and assistance to small and medium enterprises; and ongoing training and education of the Office's employees.[32]

Public Procurement Supervisory Commission

The Public Procurement Supervisory Commission was established by the Act as an autonomous and independent national body of second instance which exercises its jurisdiction by deciding on complaints concerning public procurement procedures.[33] The Commission has the characteristics of both judiciary and administrative body.

The Commission has nine members, one of whom acts as the Head, while two act as Deputy Heads.[34] They are appointed by the parliament, at the recommendation of the Croatian government, for a period of five years, with the possibility of one extension of their mandate.[35]

Any candidate that has participated in a tendering procedure may, within the deadlines prescribed by the Act,[36] file with the Commission an objection to such decision on the grounds of irregularities in the tendering procedure. The Commission's decision may be challenged before a competent administrative court.[37]

Once a year, but no later than 30 June of the relevant year, the Commission must submit to the Croatian parliament a report on its work for the preceding year.[38] This report must contain, amongst other things, information concerning the number of received complaints, the number of resolved cases, the number of unresolved cases, the number of decisions prescribing interim measures, the number of fines imposed and their amounts, the number of hearings held, and the average length of time taken for decisions to be made.[39] Moreover, the Commission must, at least twice a year, post on its web site the information on the most frequent reasons for the complaints and the most frequent irregularities detected in the tendering procedures.[40]

Reform progress in Croatia: 2010-13

The charts below – based on the EBRD 2010 Regional Public Procurement Assessment and the 2012 Regional Self-Assessment of Public Procurement Legislation – illustrate the progress of public procurement reform in Croatia. The results of the assessments confirm that Croatia's public procurement laws improved or remained constant across almost all of the key indicators of the EBRD Core Principles benchmark. Notably, the new law, passed in 2011, made large strides regarding integrity, transparency, and economy indicators. Specific improvements include:

- stipulating that tender documents be made available free of charge online
- allowing electronic communication in public procurement procedures
- providing for contract valuation methods to take into account whole-of-life costs of the purchase or works

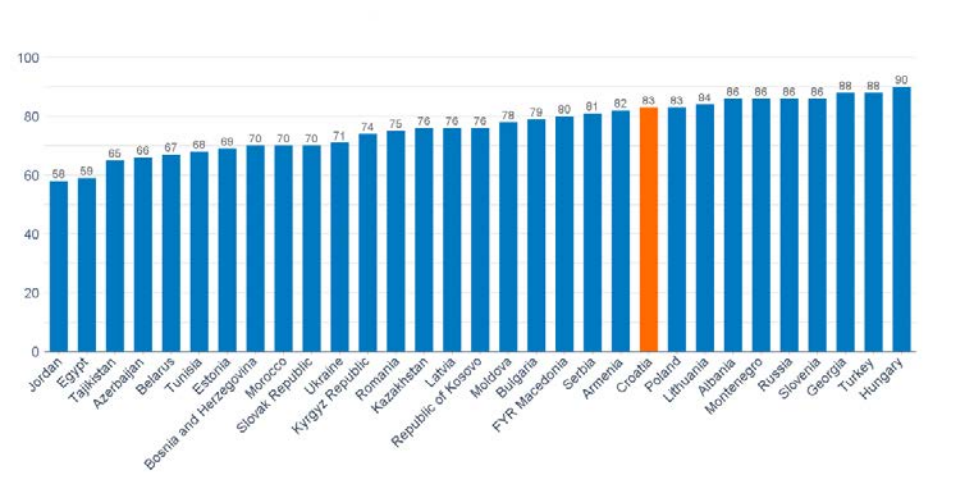
Chart 1: Croatia – Public procurement reform progress

Note: The chart present the scores for the quality of the legal framework in subsequent assessments of the national public procurement legislation, completed between 2009 and 2012. The scores have been calculated on the basis of a legislation questionnaire based on the EBRD Core Principles, and answered by local legal advisors (2010) and national regulatory authorities (2012). The scores are presented as a percentage, with 100 per cent representing the optimal score for each indicator.

Sources: EBRD 2010 Regional Public Procurement Sector Assessment, EBRD 2012 Regional Public Procurement Legislation Self-Assessment

The Chart 2 below presents results of the latest assessment of the quality of the national public procurement legal framework compared to other countries in the EBRD region. Croatia is in the top third of countries, with a total score of 89 per cent compliance rate.

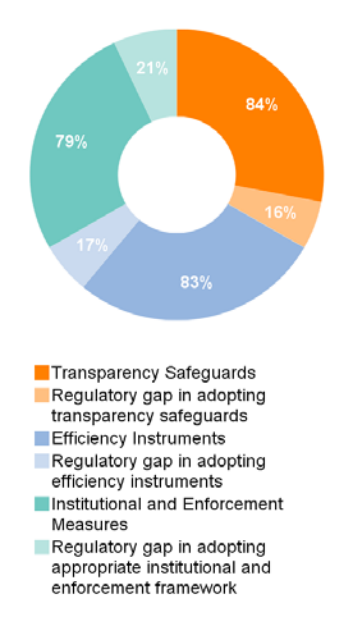
Chart 2: Croatia – Quality of national legal framework as compared to transition countries in the region



Source: EBRD 2012 Regional Public Procurement Legislation Self-Assessment

The recent review confirms that the enactment of a new public procurement law in Croatia improved upon the previous PPL, achieving an overall improvement of 8 percentage points. Although Croatia's national public procurement legal framework is still below a maximum score, it continues to improve in the key indicators of the quality of public procurement regulation. This reform has been largely driven by Croatia's need to bring its legislation into line with EU Directives; consequently, Croatia now enters the EU with scores for public procurement legislation that are above the regional average in almost all key indicators.

Chart 3: Croatia – Public procurement policy: transparency safeguards, efficiency instruments, and institutional and enforcement measures



Note: The scores have been calculated on the basis of a legislation questionnaire, based on EBRD Core Principles, and answered by the national regulatory authority. Total scores are presented as a percentage, with 100 per cent (one-third of the pie chart) representing the optimal score for each evaluation category. Regulatory gaps – the difference between the assessment results and the benchmark – are marked in light orange, light blue and light green, respectively.

Source: EBRD 2012 Regional Public Procurement Legislation Self-Assessment

The doughnut chart presents the results of the EBRD assessment for three fundamental for public procurement laws evaluation categories: transparency safeguards, efficiency instruments and institutional and enforcement measures.

The Croatian PPL scored high compliance in all three categories. The regulatory gaps that remain signify that some reform is still needed. However, it is notable that the gaps are similar in size. Croatia has thus reformed its law evenly with regard to these three categories, which indicates that a balance has been struck between transparency and efficiency, and that the appropriate institutional and enforcement framework exists to implement the new laws in practice. Croatia's national regulatory framework governing public procurement could improve in the areas currently identified by two key regulatory gaps: a lack of thorough regulation of the post-tendering process, and a review and remedies system that could be simplified and made less expensive for suppliers.

Although Croatia's legal reform has brought its public procurement legislation into line with EU Directives and basic WTO GPA requirements, Croatian government should continue reforms to bring public procurement legal framework in fully into line with international best practice.

Benefits of the procurement law reform in Croatia

An interview with Veljko Sikirica, Senior Procurement Specialist, in charge of the policy dialogue with Western Balkans countries and Turkey for the EBRD Procurement Department

Did EU policies prompt improvements in Croatia's national framework?

Croatia has dedicated significant resources to accomplishing the alignment of its public procurement law with the EU *acquis communautaire*. It committed more than 11 years, from the enactment of the first public procurement law in 2001, submitting its procurement regime to iterative scrutiny and reforms, before reaching, at the end of 2012 – six months before accession to EU – a satisfactory legal framework. This framework intends to balance key universal procurement principles – such as economy, efficiency, transparency and competition – into the Public Procurement Act of Croatia (the Act) that finally became aligned with the Public Procurement Directives of the European Commission. This complex exercise reached fruition with the formal delivery of a compliance regime at the regulatory level; however, enforcing compliance continues to be a formidable challenge.

There is no doubt that the driving force and inspiration behind procurement law reform was the prospect of EU membership. Since alignment of procurement policy was one of the critical requirements of EU membership, obstacles in this area needed to be resolved. The importance of EU membership is further corroborated by the observation that other policies that are not affected by EU membership requirements were not advanced with the same level of rigour.

Croatia has engaged in a remarkable level of legislative activity in an effort to fulfil the criteria for EU accession. However the effect of the financial crisis was to stifle the pace of the reforms, especially when additional resources were necessary.

Conversely, internal pressure on public expenditure as a result of the financial crisis, as well as the prospect of closing the EU negotiations, tended to accelerate the legislative process. In particular, improvements in the linkages between strategies, policies and the budget, together with better consultation practices and the introduction of impact assessment, were critical in incremental improvement towards a better regulatory policy.

However, the fact that prospective EU membership has been the main driver of the reforms raises questions about sustainability and ownership, while at the same time creating opportunities for change and modernisation.

Now, after accession has been consummated, administrative actions will be judged on the same criteria and to the same standards that apply to all member states. The legal framework must still be tested to determine the extent to which it has overcome the traditional, formalistic and detailed approach, which inhibits management effectiveness, increases costs, and creates various legal issues.

The existing administrative organisation still seems to be complex, procedures continue to be complicated and formalistic and decision-making appears to remain highly centralised and politicised. Corruption and a lack of transparency continue to be characteristics of the public administration, which consequently challenge the full implementation of the procurement reform. Regarding anti-corruption initiatives, intense legal activity has been carried out to improve transparency and ethics in the public administration. The anti-corruption policy and strategy have been largely influenced by EU accession and, again, the sustainability of the policy needs to be monitored.

On the prevention side, communication policy needs to be improved in order to address corruption. A greater commitment and more resources are needed to succeed. Monitoring and evaluation methods and skills need to be developed. Concerted efforts for improving integrity and fighting corruption, while fostering ownership, are critical in building the public procurement system.

Public administrations worldwide tend to carry the stigma of being part of the problem rather than the solution when it comes to successful implementation of legal reforms. In Croatia politicisation of the civil service, the unclear and inefficient administrative organisation, inadequate managerial skills, insufficient capacity of many civil servants, heavy and formalistic bureaucracy, corruption, and lack of transparency continue to be characteristics of the public administration that inhibit the full implementation of the procurement reforms.

Human resources management requires more attention. There are opportunities for improvement in the areas of staffing levels, training, skills and support from management, in order to promote activity away from mainly bureaucratic procedures. Change is possible and achievable, provided that it is prioritised, and that a commitment to ongoing action is maintained.

Changing the administrative culture requires strong political commitment, qualified and motivated staff, an effective communication strategy, effective coordination, appropriate budgetary allocation, coherent action, and time. Without these elements effective reform could be compromised.

Integrity issues, corruption and organised crime have been major challenges for Croatia's EU accession. Further tangible results in the judiciary, and in the fight against corruption and organised crime, are essential for building credibility. Several cases of high-level corruption have been shown to have had deep roots in the public sector. Local governments, public works (highways), urban planning and construction, state companies, customs, and military acquisitions have been identified as the areas with the highest corruption risk. Corruption has been the result of a long culture of secrecy, political manipulation, control over the media, conflicts of interest, poor political accountability, and an inefficient judiciary that lacks independence. Impunity has been deeply embedded in Croatia, over many years, and as such it is not easy to eradicate. Corruption is still considered to be the main problem affecting the business environment.

In response to high-level corruption, action was taken, and relevant pieces of legislation were adopted or amended. Over time it will become evident whether these actions were the result of a clear political commitment to deal with corruption, or whether they were mainly the result of EU accession pressure. Again, ownership and sustainability of the implementation are at stake.

The decision-making process in the public administration is still centralised at the highest – usually political – levels. Therefore, the risk of non-transparent decisions, influenced by private interests, is also high and susceptible to corruption. Procurement practices, such as the abuse of urgent procedures, should be stopped, and procedures that invite open and competitive participation should predominate.

Another issue concerns the concept of conflict of interest and, in particular, the definition of the line of separation. For example, some major infrastructure projects have been excluded from the budget on the grounds that they were being undertaken by state companies which raise more than 50 per cent of their funds from their own revenues, thereby avoiding the public procurement process.

Despite some weaknesses, the reform of Croatia's legal and institutional framework is almost complete. The challenge now is to make the system work and to demonstrate visible results.

Will the latest achievements and changes to the national procurement framework in Croatia enable a Croatian national procurement system to be used for EBRD transactions?

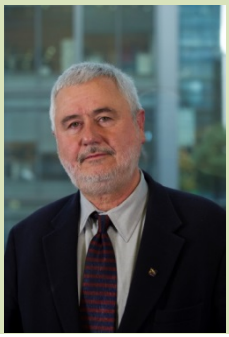
Determining the functionality of Croatia's reformed public procurement system, and its compatibility with the procurement systems of EU member states, demands a brief reflection on the Public Procurement Directives of the European Commission. These directives were introduced to further the EU's policy of enabling enterprises from all EU member states to compete fairly in public procurement markets. The most important objective of this policy is to prevent discrimination by procuring entities in favour of their

own national enterprises. The Public Procurement Directives support this by, among other things, requiring major contracts to be advertised, to be open to competition, and to be awarded through transparent procedures, without discrimination.

The EBRD's procurement policies and rules (PP&R), and the EU's Public Procurement Directives, are both aligned with the World Trade Organisation (WTO) Agreement on Government Procurement (GPA). The GPA establishes a framework of rights and obligations with respect to laws, regulations, procedures and practices regarding public procurement.

While there has been noticeable progress in the latest achievements and changes to the national public procurement framework in Croatia, which will most likely improve the overall results of public procurement, there are still opportunities for improvement, especially in the implementation of the new regulatory framework and in institutional capacity building. In the near future there will be a further round of the alignment exercise, with the announced revised EU directives. Further, integrity issues, prohibited practices such as corruption, and conflicts of interest definitions require urgent attention, as they are not presently at the standards required by the EBRD's PP&R system.

From the EBRD's perspective, the EBRD's PP&R should be used for procurement under EBRD financing in Croatia in order to mitigate the identified risks and to maintain the efficiency of project implementation. The EBRD's PP&R have been specially designed, based on international best practices, to guide, monitor and overview procurement processes from the perspective of a third party reviewer with fiduciary responsibility for the use of funds from EBRD operations. The EBRD's PP&R system is composed of the policies, rules, methods, standardised procurement documents, the review and no objection system, the complaint process, and the capacity risk assessment of the client and the operation. The EBRD is equipped to efficiently apply this system. Therefore, while it can be recognised that Croatia has made important progress in public procurement regulation, evidence of successful implementation, as analysed above, is still pending. The EBRD's Procurement Department believes this situation demands the on-going use of the EBRD's PP&Rs for EBRD transactions in Croatia.



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Future challenges

The Act has undoubtedly improved the legal framework of the public procurement regime in Croatia. In addition, the government has made efforts to help those required to comply with the public procurement regulations by setting up an informative web site (www.javnanabava.hr), which contains information such as a general description of the public procurement system, the relevant legal framework, applicable guidelines, educational seminars, annual public procurement reports, information brochures, and contact details for a call centre.

However, even after the enactment of the Act, participants in the public procurement process still face both a somewhat overly formalistic approach, and inconsistency in the interpretation and application of tender rules.

These shortcomings came to the fore during two tenders that were recently organised by the Ministry of Finance for the selection of consultants for two key strategic projects for the country: (1) the privatisation and capitalisation of Hrvatska poštanska banka d.d., a state-

owned bank (whose market share amounted to approximately 4.04 per cent in 2011);[41] and (2) the privatisation and capitalisation of Croatia osiguranje d.d., a major state-owned Croatian insurance company with a market share of approximately 35.7 per cent.[42] Both tenders attracted bids involving internationally recognised advisory firms, including Deloitte, KMPG, BNP Paribas and others.

Hrvatska poštanska banka d.d.

The tender for the selection of consultants for the privatisation and capitalisation of Hrvatska poštanska banka d.d. was first launched in July 2012, but was subsequently cancelled because both bids that were submitted (one by a consortium led by KPMG and the other by a Swedish consultancy firm, Lagerkvist & Partners) were disqualified for formal reasons. The bid submitted by KPMG and its partners was disqualified under the Act (no detailed explanation of the disqualification reasons was published), while the bid of Lagerkvist & Partners was dismissed due to irregularities in its delivery.[43] Both bidders were dissatisfied with the outcome of the tender; Lagerkvist & Partners stated in a press release that no clear explanation was offered for the disqualification of its bid, that the tender rules were unclear and that the tender documents were available only in the Croatian language.[44]

The tender was repeated in September 2012, and only two bids were submitted. The joint bid submitted by an Austrian-Croatian consortium (Confida-Revizija d.o.o., Confida Klagenfurt Steuerberatungsgesellschaft m.b.H., Schoenherr Rechtsanwälte GmbH and CD Invest Consult GmbH) was selected as the most favourable bid in November 2012. The other bid, which was submitted by Lagerkvist & Partners, together with a Croatian firm BDO Croatia d.o.o., was disqualified because of the failure to submit certain documents in the required form, among other reasons. The latter consortium filed a formal complaint against this decision, but it was dismissed by the Commission on the grounds that the claimant did not establish sufficient grounds for bringing the claim.[45]

Croatia osiguranje d.d.

The tender for the selection of consultants for the privatisation and capitalisation of Croatia osiguranje d.d. was published in September 2012. Four consortiums – led by KPMG, Deloitte, BNP Paribas S.A, and Ernst & Young, respectively – submitted their bids. The joint bid made by KPMG Croatia d.o.o., KPMG Advisory ltd., KPMG Advisory S.p.A. and the Zagreb subsidiary of Wolf Theiss Rechtsanwälte GmbH was selected as the most favourable bid in November 2012. Two other bids – submitted by the consortiums led by Deloitte and BNP Paribas, respectively – were disqualified for formal reasons; these consortiums were found to have failed to submit certain confirmations and statements in the required form. Both consortiums whose bids were disqualified filed formal complaints with the Commission, noting in their complaints an excessively formalistic approach taken in the evaluation process, as well as a lack of clear and transparent criteria for the determination of whether the relevant documents complied with the requirements of the tender rules. The complainants also asserted inconsistency in treatment, in that documents submitted by them were rejected as invalid, while documents submitted in the same form by other bidders were accepted as formally valid.[46] The Commission dismissed both complaints, in its decisions from 19 January 2013.[47]

In respect of both tenders, the complainants asserted that the formal requirements for various confirmations, statements and similar documents were onerous to comply with. For instance, the Ministry of Finance required certain documents to be provided in the form of a solemnised document (that is, in the form of a document, the contents of which have been confirmed by a notary public). For a number of foreign bidders, this formal requirement was virtually impossible to comply with, as such documentary forms do not exist in their jurisdictions, while others struggled to obtain the required documents (for example, in Austria solemnisation is only possible in certain cases prescribed by law). This resulted in the disqualification of half of the submitted bids in each of the two tenders.

Some of the foreign bidders also found the requirement that all tender documents be submitted in the Croatian language or accompanied by a certified translation into Croatian highly impractical. They argued that this was an overly formalistic requirement, considering the fact that the required consultancy services were procured in an international context

and would most likely be rendered in English. Lastly, in respect of both tenders, the bidders were not clearly informed if, and if so, how, to include value added tax (VAT) in the offered prices. Consequently, some of the bidders included VAT in their bids, while others did not. This resulted in differently priced bids, which were not fully comparable.

The overall impression, gained from the views of the procurement process expressed by the bidders that participated in the two tenders discussed above, was that achieving compliance with the formal requirements was the most difficult part of the process. These examples suggest that Croatia still needs to invest considerable efforts towards overcoming the formalistic approach of contracting authorities towards public purchasing, and to place more emphasis on obtaining value for money, as recommended by the Progress Report from 2011, which was primarily funded by the EU.[48]

Conclusion

The adoption of the new public procurement law finalised the alignment of Croatia's public procurement regime with the requirements of the EU *acquis communautaire*. The new law introduced a number of progressive measures, primarily in terms of transparency of the process and publication of information. Moreover, the web sites of the Office and the Commission contain very useful information, and provide assistance to those that need to comply with the public procurement regulations. Also, significant strides have been made towards improving the quality of procurement procedures through the organisation of seminars and the publication of educational materials and various reports. Notably, the Commission is able to process complaints within reasonable time frames.

Nevertheless, as voiced above, further work is required in the areas of enhancing capacities of institutions involved in public procurement and moving towards a more pragmatic, and less formalistic, approach by the contracting authorities.

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[1] See Statistical Report on Public Procurement in the Republic of Croatia for 2011, available at: http://www.javnanabava.hr/userdocsimages/userfiles/file/Statistička%20izvješća/Godišnja/Statisticko_izvjesce_JN-2011.pdf, accessed on 10 May 2013.
[2] See *Zakon o nabavi roba, usluga i ustupanju radova*, Official Gazette No. 142/97.
[3] See *Zakon o javnoj nabavi*, Official Gazette No. 117/01.
[4] *Ibid.*, Article 69.
[5] *Ibid*., Article 71.
[6] See *Uredba o popisu obveznika primjene Zakona o javnoj nabavi*, Official Gazette Nos. 14/08, 83/09 and 19/12.
[7] See *Uredba o nadzoru nad provedbom Zakona o javnoj nabavi*, Official Gazette No. 10/12.
[8] *Zakon o javnoj nabavi*, Official Gazette No. 90/11 (the Act).
[9] *Ibid*., Article 20(1).
[1010] See Public Procurement Act, Official Gazette No. 110/07 (the 2007 Act), Article 13(5).
[11] The Act, *supra* note 8, Article 20(3).
[12] *Ibid*., Article 20(4).
[13] *Ibid*., Article 20(5).
[14] *Ibid*., Article 20(6).
[15] *Ibid*., Article 20(7).
[16] *Ibid*., Article 20(8).
[17] *Ibid*., Article 182(1)(4).
[18] *Ibid*., Article 182(2).
[19] *Ibid*., Article 21(1).
[20] *Ibid*., Article 21(2).
[21] *Ibid*., Article 21(3).
[22] *Ibid*., Article 21(4).
[23] *Ibid*., Article 21(5).
[24] *Ibid*., Article 21(6).
[25] *Ibid*., Article 21(7).
[26] *Ibid*., Article 182(1)(5).
[27] *Ibid*., Article 182(2).
[28] The 2007 Act, *supra* note 10, Article 58(4).
[29] The Act, *supra* note 8, Article 82(3).
[30] *Ibid*., Article 83(4).
[31] *See Zakon o ustrojstvu i djelokrugu ministarstava i drugih središnjih tijela državne uprave*, Official Gazette, Nos. 150/11 and 22/12, Article 26.
[32] See *Strateški plan razdjela Državnog ureda za središnju javnu nabavu za razdoblje 2013-15*, available at: http://www.sredisnjanabava.hr/UserDocsImages/Strateski%20plan/Strateski_plan_2013-2015.pdf.
[33] *Zakon o Državnoj komisiji za kontrolu postupaka javne nabave*, Official Gazette No. 18/13 (the Commission Act), Article 3(1).
[34] *Ibid*., Article 7(1).
[35] *Ibid*., Articles 8(1) and (3).
[36] The Act, *supra* note 8, Articles 146-153.
[37] *Ibid*., Article 173.
[38] The Commission Act, *supra* note 33, Article 18(1).
[39] *Ibid*., Article 18(4).
[40] *Ibid*., Article 18(5).
[41] See the bank's Information Memorandum, available at: http://www.mfin.hr/adminmax/docs/HPB%20INFORM%20MEMO%20%202012%20hrv%20kon%20ver.pdf, at www.hpb.hr, accessed on 20 May 2013.
[42] See the company's Information Memorandum, available at: http://www.mfin.hr/adminmax/docs/Informacijski%20memorandum%20CO_final1_hrv.pdf, at www.osiguranje.hr, accessed on 20 May 2013.
[43] See The Ministry of Finance statements, available at: http://www.mfin.hr/hr/novosti/pristigla-jedna-ponuda-za-usluge-savjetnika-za-privatizaciju-hrvatske-posta (21 August 2012) and http://www.mfin.hr/hr/novosti/ponistenje-postupka-javne-nabave-za-usluge-savjetnika-za-privatizaciju-hrva (30 August 2012), accessed on 20 May 2013.
[44] *See* the newspaper article titled: "*Poništen natječaj za savjetnika u privatizaciji HPB-a"* [English translation: "*Cancelled tender for consultants in HPB's privatisation"*], Večernji list of 30 August 2012, *available at*: http://www.vecernji.hr/vijesti/ponisten-natjecaj-savjetnika-privatizaciji-hpb-a-clanak-447553, accessed on 20 May 2013.
[45] *See* Decision of the Commission classification no. UP/II-034-02/12-01/1513, register no. 354-01/12-4, available at: http://pdf.dkom.hr/10743.pdf, accessed on 20 May 2013.

[46] See Decision of the Commission classification no. UP/II-034-02/12-01/10881, register no. 354-01/13-12, *available at*: http://pdf.dkom.hr/10876.pdf, at p. 5, accessed on 15 May 2013.
[47] *Ibid*.
[48] See Support for Improvement in Governance and Management: A joint initiative of the Organisation for Economic Co-operation and Development and the EU, principally financed by the EU, page 21, available at: http://www.oecd.org/site/sigma/publicationsdocuments/48970754.pdf, accessed on 20 May 2013.

SEMED: searching for the best reform concept

SEMED: searching for the best reform concept

Joao de Almeida
Jean-Claude Mabushi

The EBRD assessment of the public procurement sector in Egypt, Jordan, Morocco and Tunisia (SEMED), completed in 2012 confirmed that several policy areas need substantial improvement and that governments in the SEMED countries are actively working to reform their national public procurement systems. Since these countries are keen to create a modern and comprehensive legal framework for public procurement and to get good value for money in public spending, different reform scenarios are under discussion. This article aims to highlight 'problem areas' in local procurement practice identified in the EBRD research and consider using the 2011 UNCITRAL Model Law on Public Procurement to find suitable regulatory solutions for SEMED countries.

Public procurement reform challenges in the SEMED region

In accordance with its mandate, the European Bank for Reconstruction and Development fosters the transition to market economies in its countries of operations. At the EBRD Office of the General Counsel, the Legal Transition Program (LTP) aims to contribute to the improvement of the investment climate in the Bank's countries of operations by helping create an investor-friendly, transparent and predictable business environment.

In order to encourage reforms of public procurement regulation, in 2010 the LTP, in collaboration with the Bank's Procurement Department, conducted its first sector assessment in the then 29 countries of operations. Based on the results of the assessment, the LTP has developed a series of public procurement reform initiatives in the Commonwealth of Independent States (CIS) countries to assist them to upgrade their public procurement regulation. The majority of policy dialogue in the CIS countries has been linked under the EBRD's UNCITRAL Initiative on Enhancing Public Procurement Regulation in the CIS and Mongolia.

In the wake of the Arab spring, the EBRD's mandate was extended to include four countries in the southern and eastern Mediterranean (SEMED) region – Egypt, Jordan, Morocco and Tunisia. From 2011-12 the LTP conducted an evaluation of commercial laws in the SEMED countries, with an assessment of the public procurement sector (the Assessment) forming part of this initiative. The Assessment reviewed public procurement "laws on the books" as well as the local procurement practice, and revealed that the public procurement legal framework in SEMED countries is generally in medium compliance with international standards. The quality of local procurement practice was also recorded as below the average compared to the other transition countries in the EBRD region. A review of the Assessment results, conducted with SEMED governments in 2013, verified the accuracy of the Assessment findings and enabled a discussion about reform recommendations. The most relevant reform issues in the SEMED region relate to transparency safeguards, fair competition instruments for local and international bidders and review, and remedies mechanisms to protect private sector suppliers and contractors.

This article aims to discuss how the 2011 UNCITRAL Model Law may assist in driving and strengthening reform of public procurement in SEMED countries.

Opportunities for using the Model Law as a reform tool in SEMED countries

As an international standard covering the principles, rules and procedures that are essential for a sound public procurement system, the 2011 UNCITRAL Model Law offers a set of valuable legislative instruments to align national regulation of public procurement sector with current international best practice.

The results of the Assessment revealed specific reform needs in the SEMED region, which should be targeted by government reform projects (a summary of research findings is presented, country by country, in Figure 1 below).

The key findings from the Assessment were recently discussed with SEMED governments in order to facilitate well-designed and results-driven national reform programmes. Inevitably, in the context of regulatory gaps revealed by the Assessment, different policy standards and objectives were discussed, including reasons for international procurement standards as well as specific UNCITRAL Model Law recommendations. In this context, the objectives[1] of the UNCITRAL Model Law are highly relevant for the SEMED countries, since enactment of national legislation based on the 2011 Model Law could facilitate significant improvements in national legal frameworks, regardless of their specific legal traditions or their current political objectives.

The question remains as to whether SEMED governments will find regulatory standards that were recommended by the 2011 UNCITRAL Model Law useful for their reform work. To answer this key question, we interviewed SEMED national regulatory authorities. The opinions of Jordanian, Moroccan and Tunisian officials, on the prospects of utilising the UNCITRAL Model Law in designing their public procurement reform projects are presented below.

In addition to specific reform needs, the Assessment identified some common problems across the SEMED region which, if neglected, have the potential to hinder any reform efforts. In the following four sections of this article we have attempted to address issues that were identified by the Assessment and that recurred in the discussions with SEMED governments. Next, we have tried to identify whether the 2011 UNCITRAL Model Law could offer guidance about how to set priorities in the public procurement reform agenda in order to better address these common problems.

Need for better legislation: more modern, uniform and comprehensive

The results of the SEMED public procurement sector assessment suggest that the public procurement legal framework in SEMED countries is fragmented, and not always as comprehensive as it could be. For this reason, both contracting authorities and economic operators might find the rules difficult to understand and apply.

In order to address these concerns, the broad scope of the Model Law might help national legislators to design far more comprehensive legislation that should regulate every phase of the procurement process (pre-tendering, tendering and post-tendering phases), embrace the public sector as a whole, and cover all types of public contracts. Exemptions from the application of the public procurement law are treated as the exception, and are therefore as limited as possible.

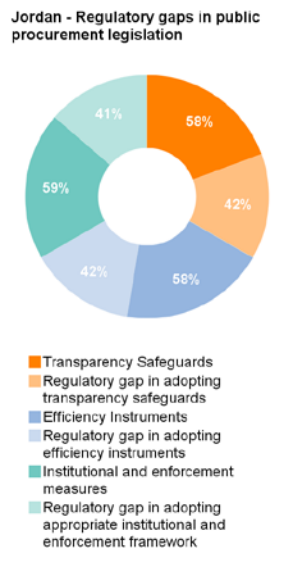
Need for better governance: weak regulatory agencies and monitoring units will not make good public contracts

A weak institutional framework – which is sometimes combined with a limited scope of the public procurement law (which may have the effect of creating uncertainty about which rules to apply to local government entities, state-owned companies, utilities, concessions and public-private partnerships) – might mean that important areas of public contracts are excluded from the beneficial results that are expected to be produced by the reforms.

Significant efforts will have to be made by national legislators and policy-makers to strengthen the public procurement institutional framework and promote an effective segregation of functions, based on the concept of independence and independent bodies.

Jordan

The EBRD SEMED Assessment identified substantial regulatory gaps in public procurement laws in Jordan. The UNCITRAL Model Law standards may be beneficial in breaching the gaps and creating modern, comprehensive legal framework.



Note: Chart above presents the scores for the quality of the public procurement institutional and enforcement framework. The scores have been calculated on the basis of a legislation questionnaire, based on the EBRD Core Principles benchmark for an Efficient Public Procurement Framework, and answered by the appropriate regulatory authority. The scores are presented as a percentage, with 100 per cent (one quarter of the pie chart) representing the optimal score for each of the four institutional and enforcement measures. The regulatory gap – the difference between the assessment results and the benchmark – is marked in light blue, light orange and light green respectively.

Source: 2012 EBRD SEMED Public Procurement Assessment

"I find the UNCITRAL Model Law very useful in the context of the reform in Jordan and I would like to highlight the following main positive aspects:

First, the Model Law provides a very clear structure upon which the national legislator can build their own system in such a way that the main features characterising modern public procurement systems are not neglected. The draft legislation that is currently pending approval in Jordan is largely inspired by the Model Law.

Second, the set of procedures envisaged by our draft legislation has been largely taken from the Model Law toolbox, with the exception of competitive dialogue, which we do not envisage adopting given the transparency-related risks.

Third, the Model Law is among the main important sources of information used to draft national regulations regarding the framework procedures and agreements.

Lastly, the challenge proceedings that we are now in the stage of redesigning will certainly take into account the guiding principles and the main features promoted by the Model Law.

These are, among others, good reasons to consider the Model Law such an important and useful reform tool, which needs to be promoted before key policy-makers and legislators at the national level."

Moh'd Khaled Al-Hazaimeh
Director-General
Government Tenders Directorate
Ministry of Public Works and Housing
Jordan

Other reform efforts, and even some interim positive results (for example, those generally linked to the creation of challenge proceedings, the implementation of some of the electronic procurement [eProcurement] tools, and the generalisation of the publication of contract notices through the internet) could be jeopardised by a weak institutional framework that does not provide for a clear separation of functions and responsibilities, which is a mandatory feature of every modern and transparent public procurement system.

Proportionality and flexibility are important values for modern procurement methods: combining old bureaucracy and eProcurement tools can hamper reform

In principle, the current legal frameworks in all SEMED countries could be improved in order to allow for different solutions, as well as different procurement methods and procedures, to be adopted according to the nature, scope and value of the public contracts concerned. In addition to the bureaucracy inherited from the previous regimes, some more rigid approaches are still being justified by public procurement authorities as a way of preventing corruption. A better alignment between procedural complexity and the value of the public contract is needed if these countries are to enhance the cost-effectiveness of their public procurement systems.

The Assessment revealed that SEMED governments are enthusiastic about eProcurement tools, although there is still significant room for building a clear understanding about how to implement eProcurement in order to benefit both the public and private sectors.

It has been proven by several governments that adopting eProcurement will not only enhance transparency and cost-effectiveness, but that it will also contribute to hastening progress in other critical areas of reform. Experience of successful reformers shows that comprehensive regulatory reforms incorporating eProcurement tools have significant potential to generate benefits related to transparency, and to the cost-efficiency of public contracts. Further, eProcurement “changeover” programmes, if well-managed and efficiently implemented, are able to produce quick economic results that are easy to showcase, and that can be useful in supporting further reform efforts.

Taking the Model Law as a starting point for designing regulatory frameworks for eProcurement-oriented policies should follow a balanced approach, and should allow for adaptation to country-specific circumstances. In order to ensure a sustainable changeover towards eProcurement solutions, a clear understanding about the required specific legal instruments dealing with eProcurement is needed.

eProcurement tools are neutral in terms of policy decisions, and the Model Law provides the necessary guidelines in respect of how to incorporate new tools without compromising basic standards of transparency and accountability. Particular attention should be paid to the distribution of legal content between the primary law – which is designed with the main aim of setting the principles and main rules – and the secondary legislation, aimed at regulating the eProcurement systems in detail.

Rights of the private sector to complaint against public official decisions: review and remedies for public procurement

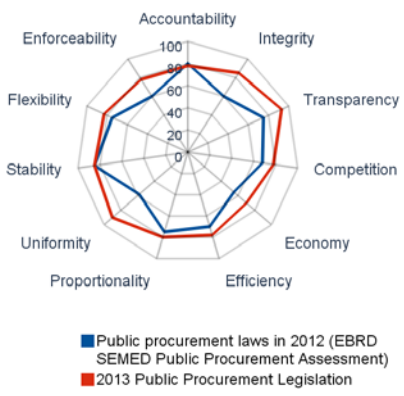
Challenge proceedings should also attract particular attention, as the current situation in SEMED countries has substantial room for improvement, since there is no clear understanding about the public procurement review and remedies mechanisms, nor how to implement them.

The Model Law provides clear guidance on these key matters, striking a balance between public and private interests, and putting forward the main principles to be adopted, and the requirements to be fulfilled.

Morocco

As presented in the chart below, the EBRD SEMED Assessment mapped substantial progress in development of the public procurement laws in Morocco in 2013. Further work on implementing the eProcurement procedures, if based on the UNCITRAL Model Law recommendations, should enable creating modern and efficient public procurement system.

Reform progress in Morocco: New 2013 Public Procurement Legislation



Note: Chart above presents the scores for the quality of the national legal framework in key Core Principles benchmark indicators. The scores have been calculated on the basis of legislation questionnaire, answered by national regulatory authority first in 2012 and afterwards in 2013, following an adoption of the new legislation in Morocco. Total scores are presented as a percentage, with 100 per cent representing the highest performance.

Source: 2012 EBRD SEMED Public Procurement Assessment

"Morocco was a member of the working group on public procurement in charge of updating the 1994 Model Law, and considers it a reference point for the reform of public procurement legislative frameworks. Indeed, the 2011 Model Law provides countries with best practices and new procurement methods. This is particularly the case for our country since the regulation of electronic reverse auctions in the new Moroccan public procurement law, adopted in 2013, has been developed based on the Model Law provisions."

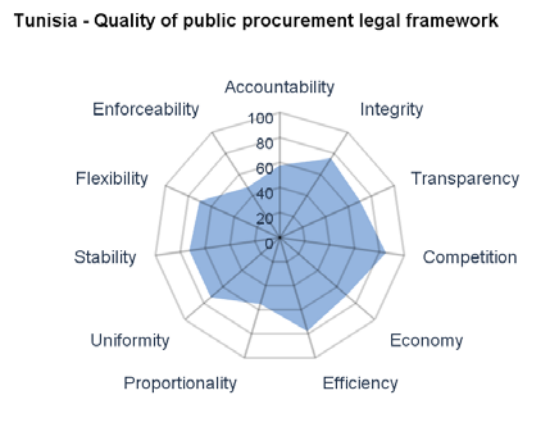
Abdelmjid Boutaqbout
Head of Legislative Drafting
Department for Regulatory and Legislative Work
General Treasury of the Kingdom of Morocco

In some cases the proposed way forward requires broad agreement and a common understanding among the key public stakeholders, such as the national government, the parliament and policy-makers. This is an area where we can expect countries to face some difficulties in their progress, especially in those cases where the institutions trying to reach a common understating have a very different level of expertise regarding the public procurement law, and different levels of experience with its practical application.

Also, in this perspective, since the Model Law provides a neutral approach, it can be used by national policy-makers as a solid and convincing argument in favour of the envisaged reforms.

Tunisia

Tunisia is intensively reforming national public procurement system. Still, the EBRD SEMED Assessment revealed (see chart below) that more efforts should be dedicated to increasing efficiency and accountability of procurement procedures. Within this specific area policy recommendations of the UNCITRAL Model Law can be easily applied and provide a basis for developing new legislation addressing these reform needs.



Note: Chart above presents the scores for the quality of the national legal framework in key Core Principles benchmark indicators. The scores have been calculated on the basis of legislation questionnaire, answered by local legal advisers in 2012. Total scores are presented as a percentage, with 100 per cent representing the highest performance.

Source: 2012 EBRD SEMED Public Procurement Assessment

"The Model Law represents an excellent reference in the field of public procurement, among others, such as various donor guidelines and the European Union (EU) directives on public procurement. The public procurement reform engaged in within Tunisia aims at harmonising our national legislation with international standards and adopting the best practices."

Khaled El Arbi
Programme Manager
Office of the Head of the Government
Government Presidency
Tunisia

Designing reform based on the UNCITRAL Model Law in the SEMED countries

As a consequence of its ability to accommodate different political decisions and legal environments, we believe that the Model Law has significant potential to be used as a template for modernising national legislation in the SEMED region, where political objectives differ but where all governments have identified a common need for procurement to deliver better "value for money".

The dialogue thus far undertaken between the EBRD and national public procurement authorities of the SEMED countries has confirmed these countries' interest in taking advantage of the Model Law as a guiding reform tool. The same dialogue has demonstrated the need to build a clear understanding about how to incorporate the Model Law principles and provisions into the national legislations of the SEMED countries. Additional efforts in respect of capacity building are seen as critical success factors within the framework of an effective enactment of the Model Law.

At a practical level, we believe that the critical issues for implementing reforms using the Model Law should be identified and addressed in the national reform agenda. Following a priority-based approach, the scope and objectives of the reform project should be tailored to local circumstances.

However, the Assessment results suggest that the national reform agenda should consider the following issues in all SEMED countries: (i) unifying the public procurement law and making it more comprehensive; (ii) strengthening governance-related aspects of the institutional framework; and (iii) enabling independent review and remedies procedures, providing a fundamental guarantee of a fair system of public contracts.

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[1] (i) maximising economy and efficiency in procurement; (ii) fostering and encouraging participating in procurement proceedings by suppliers and contractors, regardless of nationality, thereby promoting international trade; (iii) promoting competition among suppliers and contractors for the supply of the goods, construction or services to be procured; (iv) providing for the fair and equitable treatment of all suppliers and contractors; (v) promoting integrity, fairness and public confidence in the procurement process; and (vi) achieving transparency in the procedures relating to procurement.

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