PUBLIC PROCUREMENT ASSESSMENT

Review of laws and practice in the EBRD region

EBRD 2011

European Bank
for Reconstruction and Development

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Acronyms

B&H	Bosnia and Herzegovina
EBRD	European Bank for Reconstruction and Development
EBRD PP&R	European Bank for Reconstruction and Development Procurement Policies and Rules
EC	European Commission
ENPI	The European Neighbourhood and Partnership Instrument
EMAS	The Regulation on Eco-management and Audit Scheme
EU	European Union
FYR Macedonia	Former Yugoslav Republic of Macedonia
GDP	Gross Domestic Product
GPA	The World Trade Organization Agreement on Government Procurement
ICT	Information and Communications Technology
IFI	International Financial Institutions
ILO	International Labour Organization
IPA	Instrument for Pre-accession Assistance
ISO	International Organization for Standardization
LTP	Legal Transition Programme http://ebrd.com/pags/sector/legal.shtml
MTF	The Marrakech Task Force on Sustainable Public Procurement
OECD	Organisation for Economic Co-operation and Development
PP	Public Procurement
PRB	Procurement Remedies Body
Q&A	Questions and Answers
SIGMA	Support for Improvement in Governance and Management, http://sigmaweb.org
SME	Small and Medium Enterprise
SPP	Sustainable Public Procurement
SWOT	Strengths, Weaknesses, Opportunities and Threats analysis
UN	United Nations
UNCITRAL	The United Nations Commission on International Trade Law, http://uncitral.org
UNCITRAL Model Law	1994 – UNCITRAL Model Law on Public Procurement
UNDESA	United Nations Department of Economic and Social Affairs
UNEP	United Nations Environment Programme
WB	World Bank
WTO	World Trade Organization

Foreword

It is my pleasure to present to you the report covering the first EBRD Regional Public Procurement Assessment. The assessment was conducted in 2010 with the overall objective of reflecting the status of public procurement reform efforts in the EBRD countries of operations, as well as encouraging, influencing and providing guidance for ongoing reform of the public procurement sector.

In times of fiscal restraint, the upgrade of public procurement legal frameworks is high on governments' agenda as public procurement represents major economic activity for all governments.

The public procurement legal framework, regulating the contractual interactions between the public sector and the private market, determines how governments' purchasing power is exercised and should encourage transparent and efficient competition for public sector contracts. Thus, the quality of public procurement laws has a direct bearing on the quality of goods, works and services provided under public sector contracts and may materially influence the level of public sector spending. Outdated or inefficient public procurement laws can be a drain on limited public funds and will undermine fiscal reform efforts.

The European Bank for Reconstruction and Development (EBRD) is an international financial institution promoting the transition to a market economy in its countries of operations.

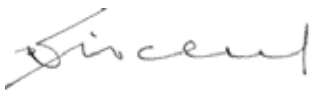
As a major investor in the EBRD region it encourages international best practice in procurement to enable efficient investment and thereby provide opportunities for successful transition. For its part, the EBRD aims to ensure that goods, works and services procured under Bank-financed projects meet international best practice as reflected in Bank's Procurement Polices and Rules which are aligned with the Government Procurement Agreement of the World Trade Organisation.

In addition, part of the EBRD mission is to provide technical assistance to its countries of operations to develop commercial laws and institutions that build market-based economies, create a sound investment climate and promote economic growth. Using relevant analytical tools and current investor experience in the region, the EBRD Legal Transition Programme has assumed an active role in developing expertise and promoting the use of new methods and techniques in legal reform in order to share with the countries in the region international best practice and the requirements of international investors.

Generally, international public procurement best practice calls for removing elements which reduce the efficiency and economy of public procurement. However, we believe that in structuring public procurement policies, a careful balance is required between the often competing considerations of competition, transparency, and efficiency in a manner which is adapted to local market conditions and the legal and business culture found there. Anti-corruption safeguards, of course, remain a critical public procurement regulatory factor, particularly in countries where the local business culture is opaque.

As the EBRD continues to promote the regulatory and economic benefits of public procurement reform, it is hoped that the findings from the EBRD Regional Public Procurement Assessment will contribute new ideas for reform projects, and provide a fresh impetus for governments that are planning to upgrade their legislative framework.

This report is the result of an initiative by the Bank's Legal Transition and Knowledge Management team in the Office of the General Counsel in collaboration with the EBRD's Procurement Department. However, I would especially like to extend my gratitude to the regulators of the EBRD countries of operations that reviewed and improved our assessment content, and contributed to the overall value of this report. The time and commitment offered by officials and individuals reflect the dedication to reform evident in the EBRD countries of operations.



Jan Fisher

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Executive Summary

This EBRD Regional Public Procurement Assessment provides an evaluation of the public procurement legal frameworks and local procurement practice across the EBRD countries of operations, including the application of sustainability policies in public procurement practice.

The aim of the assessment is to encourage continued reform of national public procurement policie as well as continuing development of regulatory and enforcement institutions in the region. In particular, it is hoped that this work will facilitate the investment and development of infrastructure in the public sector in the EBRD countries of operation.

The assessment results indicate that many governments in the EBRD region are increasingly taking steps to reform their public procurement sector and open it to competition and international trade as well as implementing measures to improve procurement efficiency.

The assessment reveals that there is vast diversity in approach to public procurement policies among the countries evaluated.

Several countries have already embraced international best practices and the principles embodied in the Government Procurement Agreement of the World Trade Organisation or in the European Union public procurement legal framework. Those countries are steadily implementing broad-based reform of their public procurement sector (EU Member States in the EBRD region, Balkan Countries, Armenia, Georgia and Turkey).

In Russia, the Eastern European Countries (except for Moldova), the Central Asian Republics, and Mongolia, moderate policy development has been observed. In these countries public procurement legislative reform is underway, but their procurement laws and especially local procurement practices do not currently accord with international standards.

Initial policy development has been observed in Belarus, Moldova and Ukraine (as well as in Turkmenistan and Uzbekistan, where procurement legislation is considered rudimentary). The implementation of a comprehensive new public procurement regulatory framework is needed in these countries.

On average, public procurement legislation in the EBRD region ranges from a very low to a very high level of compliance with international standards; local procurement practice ranges from medium to high compliance. National regulatory authorities frequently lack capacity and ability of enforcement, including remedies procedures; these would need to be further developed across the region. Local public procurement policy-making is often unresponsive to the business culture and market challenges. Sustainability in public procurement policies, with the intention of generating benefits not only for the contracting entities, but also to society and the economy, whilst minimising damage to the environment, is still a concept that has not been fully implemented in many countries in the region.

In several countries in the EBRD region, regulatory and institutional reforms in the field of public procurement generally pre-date actual changes in market operation, such as secure electronic communication. Some countries, however, have advanced in the development of e-Procurement solutions for public contracts and are achieving very impressive results (Albania, Armenia, Estonia, Georgia, Latvia, Lithuania, and Turkey).

In general, as policy and regulatory development is inconsistent and the regulation and practice vary greatly from state to state, public procurement reform needs to continue, with special emphasis on standardisation of public procurement planning, pre-qualification and public contract management.

As a general rule, public procurement regulation and policy should be driven more by independent public procurement authorities and open competition. In the Central Asian Republics and the Eastern European Countries in particular, the public procurement sector is more centralised than in the EU Member States in the EBRD region and in the Balkan Countries.

The public procurement reform agenda should aim to eliminate the gap between (still-present) adopting and implementing integrity safeguards, reduce preferential treatment in its various forms and increase implementation of procurement efficiency instruments in the public sector. It is important also, that procurement in the utilities sector is covered by public procurement laws, as there is very limited competition in these sectors across the EBRD region.

Overall, the assessment shows that, regulatory risk in public procurement is slowly diminishing across the EBRD countries of operation, with the exception of Turkmenistan and Uzbekistan.

Introduction, Background and Objectives

In 2010 the European Bank for Reconstruction and Development (EBRD) conducted its first assessment of the public procurement sector in the EBRD countries of operation. The public procurement legal framework regulates the interaction between public sector purchasers and the market, and thus determines how a government's purchasing power is exercised over private sector commercial enterprises. As public procurement constitutes a major economic activity for all governments, its regulation is an essential supplement to public finance legislation and a sensitive component of a country's commercial laws.

The EBRD assessment aimed to provide a comprehensive picture of the public procurement sector and to evaluate public procurement law and practice in the EBRD countries of operation. The assessment project encompassed 29 countries: Albania, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina (B&H), Bulgaria, Croatia, Estonia, Former Yugoslav Republic (FYR) of Macedonia, Georgia, Hungary, Latvia, Lithuania, Kazakhstan, Kyrgyz Republic, Moldova, Mongolia, Montenegro, Poland, Romania, Russia, Serbia, the Slovak Republic, Slovenia, Tajikistan, Turkey, Turkmenistan, Ukraine, and Uzbekistan.

This report summarises findings from an assessment of public procurement 'law on the books' as well as of a survey of the 'law in practice'. This is first time that the public procurement sectors in all of these countries have been studied concurrently. The report includes a detailed analysis of the efficiency of legal regulation of the public procurement processes and review and remedies procedures in order to identify elements of law and practice that reduce the efficiency of public procurement. The review of public procurement regulatory frameworks covered all 29 countries; the research on local procurement practice has been successfully completed in most of the countries, with the exception of Azerbaijan, Turkmenistan, and Mongolia.

In order to give a representative overview of the public procurement sector, the assessment combined a review of the extensiveness of national public procurement legislation with a survey of the effectiveness of local procurement practice, including a legal analysis of a typical review and remedies case resulting from prohibited behaviour of the contracting authority.* In addition, some research on the application of public procurement sustainability policies has been conducted. The report therefore includes a review of the way in which primary and secondary public procurement regulations are implemented in practice, as compared to international standards. It also provides an overview of the national public procurement rules and institutions of the countries in the EBRD region and discusses national governments' objectives in structuring their procurement policies, as identified in the research.

The assessment was intended to examine legislation and practice in government procurement and public procurement in the utilities sector; however, due to the lack of data on public procurement in the utilities sector, the main findings discussed are in relation to government procurement laws and practice, except where public procurement in the utilities sector is specifically mentioned.

Due to the diversity of the EBRD countries of operation and differences in their public procurement policies, the assessment has been based on a purposely designed benchmark, structured around the EBRD Core Principles for an Efficient Public Procurement Framework (the Core Principles)** and the critical elements of the public procurement process (the procurement process benchmark)***. The Core Principles and all the benchmark indicators were adapted from major international legal instruments, including those which are already in force and some which have the status of 'well-accepted drafts'.**** To enable the evaluation of the public procurement process areas not covered by these instruments, the benchmark was supplemented by indicators assembled from best practice in procurement as used by international financial institutions (the World Bank and EBRD procurement policies).

The overall objective of the assessment is to reflect on the status of public procurement reform efforts in the EBRD countries of operation and to encourage, influence and provide guidance for ongoing reform of the public procurement sector. The assessment aimed to examine whether the public procurement regulatory framework

* The project team has included EBRD staff, international consultants, local contracting authorities, utilities contracting entities, and law firms providing legal advice to contractors and suppliers in the countries concerned. In every country included in the assessment the project team sought to enlist the cooperation of the national public procurement regulatory bodies, which were asked to comment on the legislation review results.

** See Annex 2 to the report.

*** See Annex 1 to the report.

**** 2004–2007 European Union Public Procurement Legislative Package, revised 2010 UNCITRAL Model Law on Procurement of Goods, Construction and Services, revised 2007 WTO Government Procurement Agreement

and local procurement practice are sufficiently extensive to facilitate public procurement reform objectives. The specific objectives of the assessments include:

- providing comprehensive data on the public procurement sector in the EBRD region, public procurement laws, national regulatory and remedies institutions and other operational arrangements in the sector, such as e-procurement platforms or central purchasing bodies;

- providing hard data on how the national public procurement sector works in practice, based on reports from local contracting entities in government procurement and the utilities sector, local procurement professionals, and legal advisers assisting tenderers in competing for and drafting public contracts;

- providing an independent evaluation of the quality of the national public procurement regulatory framework and the quality of local procurement practice in the public sector in the EBRD countries of operation in order to encourage and influence future legal reform efforts;

- assisting the EBRD in measuring legal risk in its countries of operation and in specific investment activities;

- assisting the EBRD in drafting country strategies, and developing and applying accurate measures in order to heighten the transition impact of EBRD financed projects.

To summarise, this report outlines the main findings from the first assessment of the public procurement sector covering all the EBRD countries of operation, based on a specially designed benchmark reflecting critical elements of the public procurement process (the EBRD Core Principles). In order to discuss the efficiency of public procurement regulation and practice, research data analysis has been structured around the Legal Efficiency Approach, a tool developed by the EBRD for evaluating the effectiveness of commercial laws. The assessment results are based on an evaluation of the public procurement legal framework in force on 30 June 2010* and local procurement practice surveyed in Q1 2011.

The report should be read in conjunction with country profiles, published online and available at the EBRD web site: https://ppl.ebrd.com.

* In case of Georgia, Romania and Bulgaria – 30 September 2010.

Chapter 1

Assessment Methodology

1.1 Assessment Model

The assessment model comprised five key stages (see Figure 1.1 below) in accordance with the EBRD approach to evaluating commercial laws, while maintaining a focus on the assessment of the 'law in practice'.

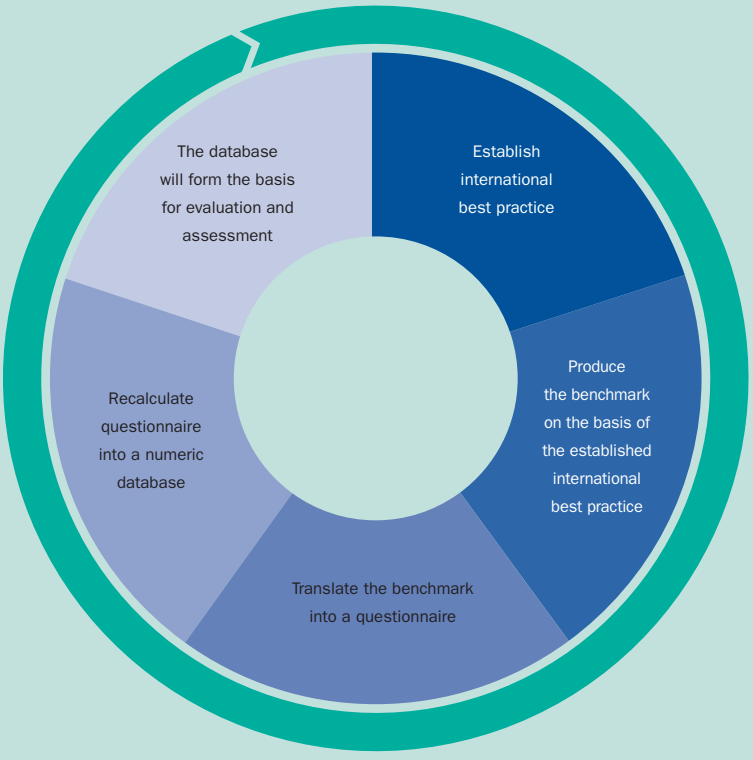
Establishing international best practice

In order to establish international best practice all major international public procurement legal standards were critically reviewed. These included: (2004-2007 European Union Public Procurement Legislative Package, revised UNCITRAL Model Law on Public Procurement (2010 draft),- and the 2007 draft of the revised Agreement on Government Procurement of the World Trade Organisation), as well as International Finance Institutions (IFI) practice (the World Bank and EBRD procurement policies).

As a result of this review, and using as a basis the IFI's practical experience in the region as current best practice, the most innovative procurement standards for modelling the key elements in the public procurement process were identified and structured around the EBRD Core Principles for an Efficient Public Procurement Legal Framework (see Annex 2). The EBRD Core Principles assert that standards of conduct are significant not only for the tendering phase, but also for the pre and post-tendering phases. Once a public procurement has been launched, the fundamental principles of public procurement, common to all international legal instruments, need to be maintained throughout the entire process.

Figure 1.1

Key elements It mentions stages in the first paragraph. of the assessment model



Producing a benchmark on the basis of international best practice

International best practice for modelling the public procurement process has been further restructured into specific indicators, creating a Core Principles benchmark. The Core Principles benchmark is based on the assumption that the primary role of public procurement law is not only to ensure unrestricted international trade, or to save public money, but rather to define the minimum standards to apply to contracting in the public sector.

Translating the benchmark into the questionnaires

The benchmark was further developed to produce detailed questionnaires embracing all phases of the public procurement process, as well as addressing the issues of the institutional framework, institutional capacity, procurement policy trends and the sustainability of public procurement.

Based on the Core Principles benchmark three separate questionnaires were developed:

- ⇒ a questionnaire for the review of national public procurement legislation in the EBRD region (a legislation questionnaire),
- ⇒ a questionnaire to survey local contracting entities' procurement practice in the government and the utilities sectors, (a practice questionnaires, one questionnaire for government contracting entities, another for utilities sector contracting entities)
- ⇒ and a questionnaire to assess national remedies procedures, including a case study (a remedies check list and case studies). The case study was designed to assess how the public procurement review and remedies procedures work in practice in government procurement and in public procurement in the utilities sector.

Recalculating the questionnaires into an online database

A dedicated online database was designed and produced for the assessment. It enabled the collection of hard quantitative and qualitative data from local practitioners whilst eliminating the need to rework the input information and streamlining rating and scoring.

Scoring and evaluation

In the assessment, country groupings in the EBRD region (the EBRD region has been divided into four sub-regions) were based on policies adopted by governments to enable a fair basis for comparison. To simplify comparisons, each research area carried the same maximum scoring potential, as the degree of compliance was assessed. To simplify scoring no additional weighting between indicators and questions raised in each core research area was adopted. In order to avoid subjective judgments, open questions were kept to the minimum. Final ratings determined the degree of compliance.

The Core Principles benchmark

The first part of the assessment analysis was dedicated to evaluating the quality of laws and practice, and the assessment results by country were benchmarked against international best practice, incorporated in the Core Principles benchmark. This analysis resulted in scoring countries based on the quality of their national public procurement legislation (extensiveness) and the quality of their local practice; it also produced an extensiveness/effectiveness ratio for each country, as the relationship between the quality of the 'laws on the books' and the quality of 'law in practice', revealing implementation problems where they exist.

The Legal Efficiency Approach benchmark

The second part of the analysis was focused on the efficiency of public procurement regulation in the EBRD region.

The Legal Efficiency Approach*, an analytical tool developed by the Legal Transition Programme (LTP) for commercial law assessment was employed to assess the extent to which national legislation and its practice recognise the basic legal function purpose of public procurement regulation.

* Dahan and J. Simpson (2008) 'Legal Efficiency of secured transactions reform: bridging the gap between economic analysis and legal reasoning,' in F. Dahan and J. Simpson (eds), Secured Transactions Reform and Access to Credit, pp. 122-140. Edward Elgar Publishing, Cheltenham, UK.

1.2
Benchmarking Public Procurement Legal Frameworks

Public procurement laws organise the procurement process for acquiring goods, works and services by public sector clients, which is integral to resource and public budget management. The procurement process begins with the identification of the public client's needs, followed by the formation of a sourcing strategy, public finance budgeting followed by the tendering, appraisal and selection of suppliers. Once a public contract has been awarded, contract performance must be monitored for the benefit of a potentially large number of end-users. In public procurement regulations these actions are frequently summarised as three key stages Mentioned as phases in figure 1.2. of the public procurement process: pre-tendering, tendering and post-tendering phases These key stages/ main phases are presented in Figure 1.2.

For public clients the complex business process of contracting has to be aligned additionally with public sector values, specifically the transparency of the decision–making process and the accountability of the public sector to the taxpayers, the end-users of public contracts.

Based on the functional approach to public procurement legislation, the basic legal function of public procurement regulation should be ensured by national legislation, regardless of differences in local legal and business tradition. Box 1.1 presents the basic legal function framework for public procurement.

Modelling the content of an individual public procurement national framework will depend on the government procurement policy objectives and contract law culture of individual countries. At the same time, public procurement legislation needs to comply with international standards to ensure that public governance values are respected.

A major difficulty with the modelling of public procurement regulation lies in deciding how relevant most advanced international best practice is for the country's economic and social standing.

It is a test for any government to adequately reflect international best practice in national public procurement legislation while meeting:

a. local market challenges (suppliers and contractors active in the market);

b. the challenge of the national business culture;

c. the extent of development in communication technology in the country.

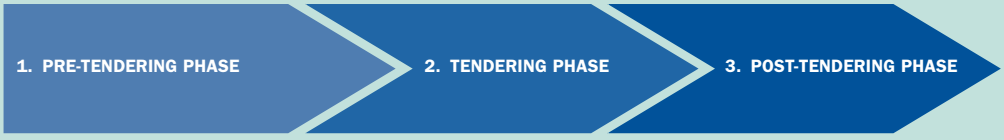
In addition, public procurement regulation has to adjust to the differences between public contracts funded by the government/municipal budget (classical or state/government public procurement) and public contracts in the utilities sector (utilities public procurement).

In the assessment these considerations were deliberately overlooked in favour of establishing a single simplified benchmark, applicable across the politically and economically diverse transition region.

Due to the lack of a commonly recognised public procurement standard and accepting the limitations inherent in a simplified evaluation, the Core Principles see Box 1.2, which embraces current international best practice for modelling the public procurement process, and was developed to serve as a checklist for the assessment.

Figure 1.2

The main phases of the public procurement process



Box 1.1

Functional Approach: Public Procurement Basic Legal Function Framework

Public Procurement legislation should:

- embrace the public sector as a whole
- enable sound financial management in the sector
- deliver 'value for money'
- regulate every phase of the procurement process
- include a transparent notification and remedies procedures
- provide clear and consistent eligibility rules that cannot be modified by the prejudiced decision of a particular contracting entity
- enable the efficient selection of tender type or method based on the specifics of the purchase and contract profile
- respond to economic, social and environmental objectives

The Core Principles benchmark specific indicators are adopted literally, but not exclusively, from the following instruments or organisations:

- 2004-2007 European Union (EU) Public Procurement Legislative Package (the EU Public Procurement Directives: Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts; Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors; Council Directive of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (89/665/EEC); Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors; Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts);
- The United Nations Commission on International Trade Law (UNCITRAL), UNCITRAL Model Law on Procurement of Goods, Construction and Services with Guide to Enactment 1994;
- The World Trade Organisation (WTO) Agreement on Government Procurement (GPA);
- The World Bank (WB) Procurement Policies and Rules;
- The EBRD Procurement Policies and Rules;
- The Public Procurement Sustainability Status Assessment of the Marrakech Task Force (MTF) on Sustainable Public Procurement.

Consequently, the benchmark indicators focus on the quality of the procurement process and, while using principles and requirements that have broad international recognition, remain policy neutral; the assessment does not evaluate the compliance of countries' laws and practice against any of these specific international legal instruments.

As such, the assessment benchmark indicators:

- provide an impartial uniform basis for comparisons across the EBRD region and country groupings (sub-regions);
- can be applied without considering the individual policy choices of the specific countries in the EBRD region;
- can be used to assess legal frameworks in the process of development.

1.3 The EBRD Core Principles Benchmark and Indicators

The Core Principles selected in an international procurement standards review conducted by the EBRD in September 2009, reflect the standards generally regarded as international best practice for developing efficient public procurement regulation. Since power dynamics within the public procurement process are inherently unequal, regulatory and enforcement institutions, uniformity, consistency, and accountability matters were included in the Core Principles.

The original ten Core Principles were translated into eleven key indicators or benchmarks, as described in Box 1.2.

Box 1.2

The Core Principles benchmark key indicators

ACCOUNTABILITY OF PUBLIC SECTOR SPENDING	The public procurement legal framework should promote accountability across all stages of the procurement process, balancing public and business dimensions of the process.	• A clear chain of responsibility between management, budget and procurement officials, • A sound business case and contract profile established before the tendering process is launched, • The technical specifications for a tender should be based on relevant quality characteristics and/or performance requirements and remain unchanged during the entire process, save for reasonable exceptions when negotiated procurement methods are employed, • The opportunity to reject all offers if valid tenders are received in response to the terms of reference should be limited to obvious cases, requiring wholly justified reasons, • The responsibility for paying compensation to tenderers if the tender is cancelled should lie with the contracting entity.
INTEGRITY OF THE PROCUREMENT PROCESS	The public procurement legal framework should promote integrity between the procurement function, transparency in delivering government policy and value for money.	• The behaviour of management and procurement officials is consistent with the public purpose of their organisation, • There are measures to limit the scope for undue influence, • Conflict of interest management is in place for all stages of the procurement process, • There is broad disclosure of public investment and procurement information, provided equally to all interested parties, • Communication between the contracting entity and tenderers should be conducted by the best available means (preferably electronic) to provide a record of the content of the communication, • There are limited opportunities for re-negotiations or amendments to final tenders, proposals and signed public contracts.

ADEQUATE LEVEL OF TRANSPARENCY	For public procurement to be acceptable to all stakeholders it should be seen to be public, transparent, and objective. Any suggestion of an undisclosed resolution must be avoided.	• The law should promote the extensive use of e-Procurement as one of the methods to prevent collusion with tenderers, • There should be effective, official and dependable publicity of procurement opportunities, through a single point of access, • There should be real time recording of the process, preferably through electronic means, accessible to the public free of charge, • Tender documents should be published electronically, and free of charge to the public, • Contract notices and a contract award notice should be published for all public contracts finalised by the contracting entity.
FAIR COMPETITION	The legal framework should promote fair competition and prevent discrimination in public procurement. Tenders and tenderers of equivalent status should be given equal treatment. Domestic preferences should not be allowed.	• The law should promote fair competition, • Prevent discrimination and eliminate domestic preferences, • Tenders and tenderers of equivalent status should be given equal treatment, without regard to nationality, residency or political affiliation, • There should be clear eligibility rules and general understanding of grounds for exclusion, • It should be possible to distinguish between the public procurement eligibility criteria, qualification and technical requirements to be met by tenderers, • Minimum tender deadlines ensure a level playing field, • Where tenderers are eliminated, a sufficient standstill period or an alternative procedure should be in place to provide for immediate protective measures, • A competitive contract established through the tendering process, permitting both tendering and competitive negotiations, wherever appropriate, ensure a fit-for-purpose outcome, • The selection of tender type or procedure should be based on the value of the tender, specifics of the purchase and the contract profile, • It is necessary to stipulate reasonable technical specifications, requirements and suitable award criteria, adequate to the scope and value of the contract prior to embarking on the tendering process, • In the case of an abnormally low tender, it should be possible to ask for clarification and either reject the tender or increase the contract security to mitigate or limit perceived risks.
ECONOMY	The law should enable public procurement to be accomplished in a reasonable time frame.	• Formal requirements essential for transparency should be kept simple, • Participation costs should be kept low, • There should be reasonable enforcement costs, • It should be possible to submit an inquiry or tender electronically in a confidential manner, • Aggregation of lots should be possible, • Whole life cycle costing should be used, where appropriate,

EFFICIENCY	The legal framework should ensure value for money is achieved.	• There should be an accurate and unbiased assessment of the contracting entity's needs, • Sound procurement planning is essential, • Appropriate budget procedures are needed, • Methods of tender evaluation should consider both the quality and cost of purchase, • Contract terms and conditions should be fair and balanced and reflect the best available business practice, • Accurate contract management is required.
VALUE OF PROPORTIONALITY	The formality and extent of the public procurement procedure should reflect the scope and size of the contract. The contracting entity should align the value and scope of the contract with the choice of contract type and formal tendering procedure.	• The formality of the procedure should reflect the scope and size of the public contract, • The value and scope of the contract should be aligned with the choice of the contract type and procurement method, • There should be cascaded (monetary and other) thresholds to instruct contracting entities how to produce an effective procurement strategy for a public contract, • The contracting entity should allow proposals, offers or quotations to be formulated in a language customarily used in international trade except where, due to the low value of the goods, works or services to be procured, only domestic tenderers are likely to be interested.
UNIFORMITY	The legal framework should be comprehensive and limit derogations to reasonable exemptions. The regulation should be unitary, comprehensive and cover all public contracts. It should be clear that contracting entities of a different status may have different procurement requirements.	• The law should be unitary, comprehensive and cover all public contracts, • Clarity is needed in determining the requirements of contracting entities of a different status, • Exemptions from regulation to contracts outside the public procurement domain should be limited for evident and justified reasons.
STABILITY	To make the process efficient, stakeholders must learn their roles, rights and obligations, within a stable legislative framework.	• Frequent changes of the law disrupt procurement capacity building.
FLEXIBILITY	The framework should be capable of flexibility so as to accommodate the changing market.	• Appropriate development of secondary and tertiary legislation is necessary.
ENFORCEABILITY	Public procurement law should be easy to enforce. Regulatory mechanisms should be able to assess the compliance of the contracting entities and employ corrective measures when necessary.	• Review and remedies mechanisms should be able to assess the compliance of the contracting entities and employ corrective measures when necessary, • Dedicated national regulatory agencies should be professional, independent and provide audit and monitoring of the sector to drive up public procurement (PP) sector capability.

1.4
The Legal Efficiency Approach Benchmark and Indicators

Legal Efficiency Concept

In creating the efficiency benchmark indicators the assessment makes due reference in its findings and conclusions to the Legal Efficiency Concept (LEC), which was originally developed for a separate EBRD commercial law assessment.

The concept primarily focuses on the extent to which the law and the way it is used, provides the (economic) benefits that it was intended to achieve.

Thus legal efficiency is analysed by looking at the degree to which the particular legal framework enables the stakeholders to achieve not only the basic functions of the regulation in question, as explained in Box 1.1 but also to maximise its economic benefit. Box 1.5 presents the five LEC indicators.

The first notion refers to the idea of the basic functions of public procurement regulation. It has to be stressed that in this area, the functional approach means that public procure-

Box 1.4

Legal Efficiency Concept indicators

SIMPLICITY	This indicator is achieved when a reasonable balance has been struck between the user-friendly approach and the sophistication required by the local legal and business culture.
SPEED	This indicator recognises the cost involved in delay. For most aspects, the less time it takes, the more efficient the process. In the public procurement process there are exceptions: a reasonable deadline to ensure a level playing field, a standstill period of an appropriate length etc... However, most elements of the process should be conducted without unnecessary delay, and within the original tender validity period.
COST	The indicator recognises that there are costs on both sides: a public client conducting the public procurement process and a private contractor participating (during the tender as well as remedies procedure). Delay in a contracting entity decision, unnecessary complexity in the technical specification and uncertainty as to the evaluation process all add to the transaction costs. There is a direct relationship with the other aspects of legal efficiency. Some costs are, at least to some extent, within the control of the parties. The cost of legal advice on a complicated transaction may be outweighed by the benefits. However, the cost of legal advice incurred because of defects in the legal framework always reduces efficiency, as do fixed costs (for example a participation cost, notary or court fees).
CERTAINTY	This indicator refers to predictability as a critical element of any sound legal system. Even an element of uncertainty in the legal position can have far-reaching consequences. Transparency can often strengthen certainty: for instance in remedies, easy access to information on former decisions by the public procurement remedies body, if consistent, allows potential complainants to evaluate the merit of their complaint.
'FIT-TO-CONTEXT'	The efficiency of the public procurement procedure depends on whether the institutions are well adapted to the economic, social and legal context.

ment laws should embrace the public sector as a whole and enable financial management in the sector. Moreover, the function of public procurement regulation is defined through the delivery of 'value for money'. This regulation of every phase of the procurement process is very important because it provides clear and consistent eligibility rules that cannot be modified by the prejudiced decision of a particular contracting entity, enabling the efficient selection of the tender type or method based on the specifics of the purchase and contract profile. Finally, it should respond to economic, social and environmental objectives. The above catalogue is not closed as it is based on the assumption that basic functions include those elements of the public procurement legal framework that are fundamental to obtaining economic benefit through the appropriate use of the law.

The second notion of the LEC that needs an in-depth analysis is the economic benefit. The economic benefit has been broken down into five categories: simplicity, cost, speed, certainty, and 'fit-to-context'.

In conclusion, the LEC leads to the assumption that the contracting entity, while creating the process of purchasing, must reach the appropriate balance between fulfilling the contract's economic purpose and its integrity requirements, respond to purchase characteristics and the local market situation, and achieve particular policy objectives of the of public procurement laws (economic, social and environmental).

The concept of Legal Efficiency in public procurement legislation and practice is analysed from two perspectives: Procurement Process Efficiency, and Remedies Efficiency.

Procurement process efficiency

In the report the LEC was employed in order to evaluate the quality of local procurement practice in terms of the five economy indicators mentioned above. The report examines how local contracting entities conduct their public procurements as regards three key phase of the procurement process:

- The pre-procurement phase (procurement planning and preparation phase)
- The tendering phase (conducting procurement procedures)
- The post-procurement phase (management of public contracts). Public procurement remedies efficiency.

Public procurement remedies efficiency

The second area of interest is the effectiveness of enforcement procedures in the EBRD countries of operations, the efficiency of review and remedies procedures (Remedies Efficiency) in particular. The LEC has been adopted in order to address public procurement review and remedies procedures.

An effective public procurement remedies system should exhibit certain basic features, both in terms of the structure of the remedies bodies and the procedure they follow. The basic function indicators in the Remedies Efficiency Concept (REC) include inter alia: the right of the tenderer to seek review, the right of the tenderer to seek remedial action as opposed to monetary compensation, a dedicated remedies system, an independent body, authorised to sanction remedial action, access to judicial review, and the right of the tenderer to seek compensation in cases where the remedies procedures are not feasible and there is no access to alternative dispute resolution*. These function indicators provide a stable framework within which governments may design remedies procedures to balance policy issues such as protection of public finance and the right of the tenderer to seek effective remedy.

In terms of Remedies Efficiency, the five indicators of the LEC regarding economic benefit also have to be analyzed from the perspective of the basic functions of the remedies procedure. This refers to the Certainty indicator in particular, as the key components of this indicator are:

- consistency or predictability;
- impartiality;
- resistance to corruption.

* Basic features of the pubic procurement remedies function, as adopted by the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services.

1.5
Assessment Scoring and Rating

The Core Principles Rating and Evaluation Categories

Each of eleven key Core Principles benchmark indicators has been converted into a minimum of ten specific indicators (survey questions in the relevant questionnaire), and based on the responses to the questionnaire, an average score, or compliance rate, has been calculated for each key indicator for every country included in the assessment.

This scoring has been completed based on the assumption that all key and specific indicators have an equal influence on the effectiveness of the procurement process.

The overall rating provides scores from 'very high compliance' (above 90 per cent of the benchmark), 'high compliance' (76 – 90 per cent compliance rate), 'medium compliance' (between 60 and 75 per cent compliance rate), 'low compliance' (between 50 – 59 per cent compliance rate), to 'very low compliance' (below 50 per cent of the benchmark). Figure 1.4, presents categories and definitions for the assessment ratings for the legislation, law on the books, and practice, law in practice review areas.

In the assessment, the public procurement laws and practice of every country in the EBRD region was assessed against each of the key Core Principle benchmark indicators.

Total average scoring and rating was completed across the EBRD region and between country groupings (sub-regions), making it possible to

Figure 1.3

The assessment rating

LEGISLATION (Law on the books)	
above 90%	**Very High Compliance** The existing legal framework substantially provides for recommended features.
76% – 90%	**High Compliance** The existing legal framework provides for some features which are not recommended.
60% – 75%	**Medium Compliance** The legal framework provides for features which may not be compliant with international standards.
50% – 59%	**Low Compliance** The legal framework provides for features which are not compliant with international standards.
below 50%	**Very Low Compliance** The legal framework does not provide for any recommended features.

PRACTICE (Law in practice)	
above 90%	**Very High Compliance** The reported local procurement practice is fully aligned with international best practice.
76% – 90%	**High Compliance** The reported local procurement practice includes some practices which are not recommended.
60% – 75%	**Medium Compliance** The reported local practice includes some practices not compliant with international standards.
50% – 59%	**Low Compliance** The reported local practice is not compliant with international standards.
below 50%	**Very Low Compliance** The reported local practice does not include any practices recommended by international standards.

Notes: The scores range from 'very high compliance to 'very low compliance'. 'Medium compliance' means that (1) laws provide for the basic features as recommended by international standards, and still include regulatory features which may not be compliant with international standards, (2) practice embraces basic good practice, as recommended by international standards. Still some practices may not be compliant with international good practice.

compare the quality of public procurement laws and the practice of individual countries using the data from the assessment.

In order to enable comparison of the results, more general evaluation categories and some law to practice ratios were adopted.

Evaluation categories

The 11 key benchmark indicators have been further divided into three more general evaluation categories to provide an overall picture of the public procurement sector in the EBRD sub-regions. These include:

1. integrity safeguards;
2. efficiency instruments;
3. institutional and enforcement measures.

Box 1.3 presents the three key evaluation categories and their benchmark indicators.

The **integrity safeguards** category includes the benchmark integrity indicators, providing for public procurement anti-corruption precautions and procedures, as well as mandatory transparency mechanisms and accountability requirements. Historically, anti-corruption safeguards have always been a major factor in public procurement policies and should still be deemed of greatest importance as a regulatory element for countries where corruption is perceived to be a serious problem.

Under the heading **efficiency instruments,** all benchmark indicators related to the economy and efficiency of procurement were listed; including all the procurement practices and procedures that ensure the final outcome meets the requirements, and is economical and efficient. The incorporation of adequate efficiency instruments in procurement regulation ensures that value for money is achieved. Procurement efficiency is a major factor shaping public procurement policies in countries which are less affected by corruption in the public sector.

The **institutional and enforcement measures** category comprises the assessment benchmark indicators related to creating an accountable institutional framework (independent regulatory authority and remedies body) and procedures (public procurement audit and review and remedies system), as well as the enforcement capacities of the local public procurement regime.

Evaluation ratios

Regulatory gap

The regulatory gap is a ratio reflecting the extensiveness of the national public procurement legal framework compared with the assessment benchmark. The better the comprehensiveness of national public procurement regulation in a given country, the smaller the regulatory gap. Thus, the regulatory gap is calculated as the difference between the maximum value of the specific benchmark indicator and the marks in the assessment for the quality of national public procurement legislation, including the institutional framework.

Box 1.3

The assessment benchmark key evaluation categories

INTEGRITY SAFEGUARDS	Accountability Integrity Transparency
EFFICIENCY INSTRUMENTS	Competition Economy of the process Efficiency of the contract Proportionality
INSTITUTIONAL AND ENFORCEMENT MEASURES	Enforceability Uniformity Stability Flexibility

The regulatory gap indicates how much room for improvement exists in the country's legislation ('law on the books'), as identified in the assessment.

Performance Gap

The performance gap is a ratio reflecting the effectiveness of local procurement practice, as compared with the assessment benchmark rather than national public procurement legislation. The better the quality of local procurement practice in a given country, the smaller the implementation gap. Thus the performance gap differs from an implementation gap, which illustrates a difference between the quality of national legislation and the level of its implementation in practice.

As adopted in the assessment, the performance gap indicates how much room for improvement exists in the organisation of the contracting entity, and the need for procurement capacity building from the point of view of international procurement best practice, rather than from the perspective of the national legal framework.

The performance gap ratio also provides information on the relationship between the national legal framework and the procurement capacities of the specific contracting entities. If in the key or specific benchmark indicator, the recorded performance gap is smaller than the regulatory gap identified this indicates that the contracting entity assessed has improved the quality of its procurement process by implementing internal procurement rules or policies, supplementing the national legal framework. If such a relationship between the regulatory and performance gaps is observed, this indicates that the national public procurement legislative framework is not comprehensive enough in terms of international standards, but that local procurement practice is well driven by the market and thus compliant with international best practice. The opposite ratio, where the performance gap is bigger than the regulatory gap, indicates that in the case of this specific feature of the procurement process an implementation gap has been observed and the local market influence is not strong enough to influence procurement practice positively. In such cases the national legislative framework should be improved in order to improve the quality of local procurement practice.

The assessment covered the 29 EBRD countries of operation: Albania, Armenia, Azerbaijan, Belarus, B&H, Bulgaria, Croatia, Estonia, FYR Macedonia, Georgia, Hungary, Moldova, Kazakhstan, Kyrgyz Republic, Latvia, Lithuania, Mongolia, Montenegro, Poland, Romania, Russia, Serbia, Slovak Republic, Slovenia, Tajikistan, Turkey, Turkmenistan, Ukraine, and Uzbekistan. Map 1.1 illustrates the assessment terrritorial scope and geographical location of the ERBD countries of operation.

In order to reflect the public procurement regulatory model that the individual countries pursue, the EBRD countries of operation were divided into four country groupings or sub-regions. Map 1.2 presents the assessment country groupings or sub-regions. These include: the Balkan countries and Turkey, the Central Asian Republics the Caucasus and Mongolia, the Eastern European Countries including Georgia and Russia, and EU member states in the EDRD region. Map 2.1 presents and geographically illustrates the four assessment country groupings or sub-regions.

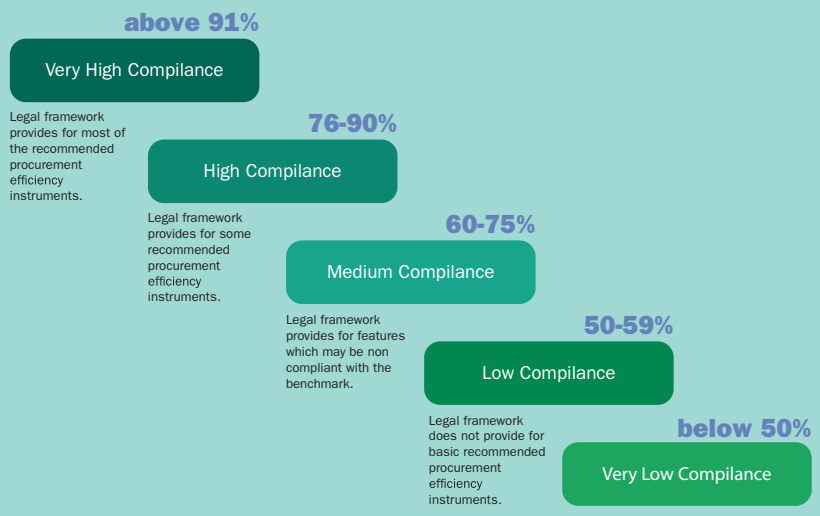
The Legal Efficiency Scoring and Rating

Box 1.4 below presents a scoring and rating formula for the Legal Efficiency indicators.

The Legal Efficiency Approach has been adapted to the public procurement basic regulatory function and translated into the benchmark. The elements of public procurement practice - conducting public procurement process and remedies procedures were subsequently reviewed against the Legal Efficiency Concept benchmark (LEC benchmark) and scored for compliance.

Box 1.4

The Legal Efficiency Concept Scoring and Compliance Rating



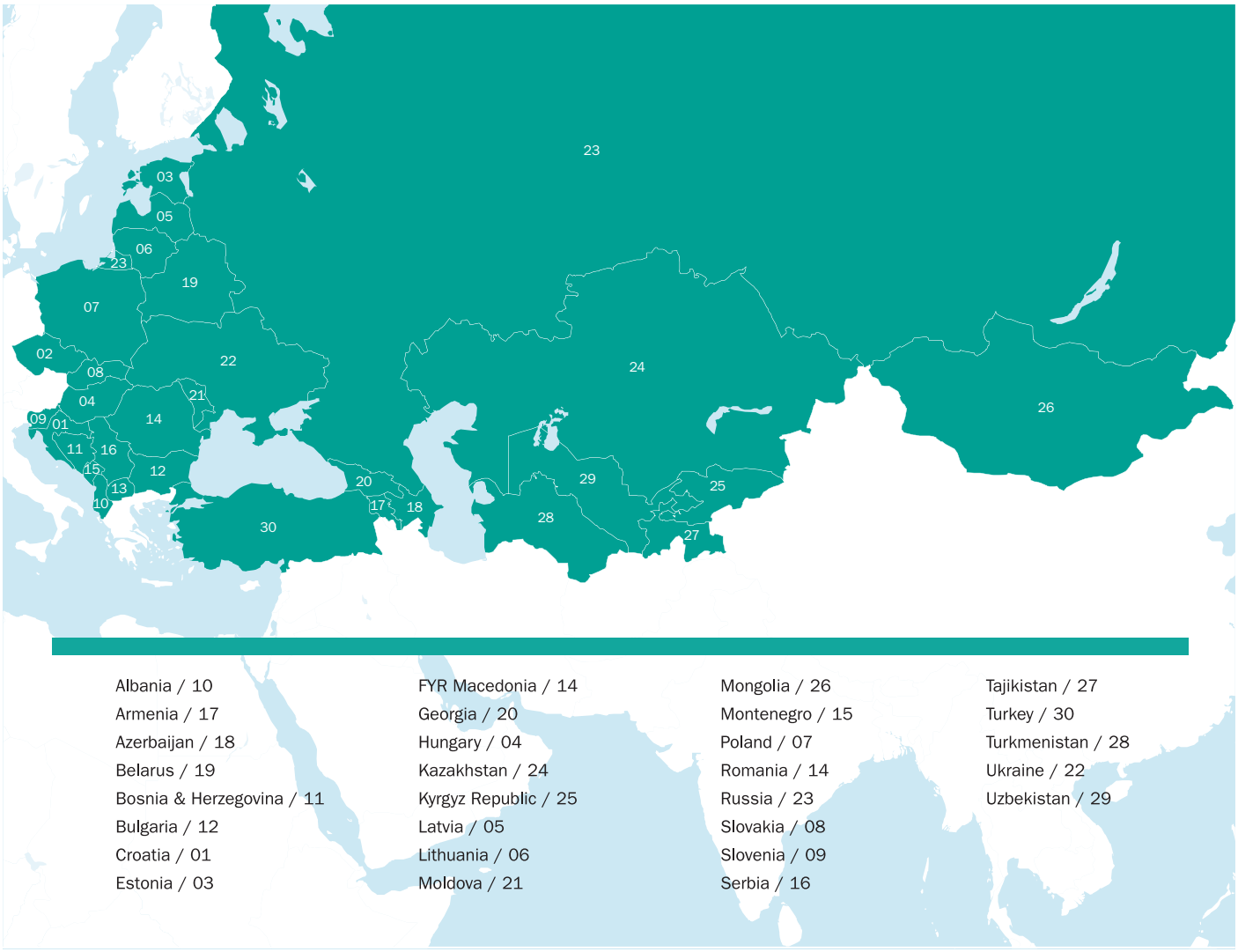
Medium or Satisfactory Compliance means that public procurement laws provide for basic procurement efficiency instruments.

1.6
Country and Sub-region Groupings

The assessment covered the 29 EBRD countries of operation: Albania, Armenia, Azerbaijan, Belarus, B&H, Bulgaria, Croatia, Estonia, FYR Macedonia, Georgia, Hungary, Moldova, Kazakhstan, Kyrgyz Republic, Latvia, Lithuania, Mongolia, Montenegro, Poland, Romania, Russia, Serbia, Slovak Republic, Slovenia, Tajikistan, Turkey, Turkmenistan, Ukraine, and Uzbekistan. Map 1.1 illustrates the assessment terrritorial scope and geographical location of the ERBD countries of operation.

Map 1.1

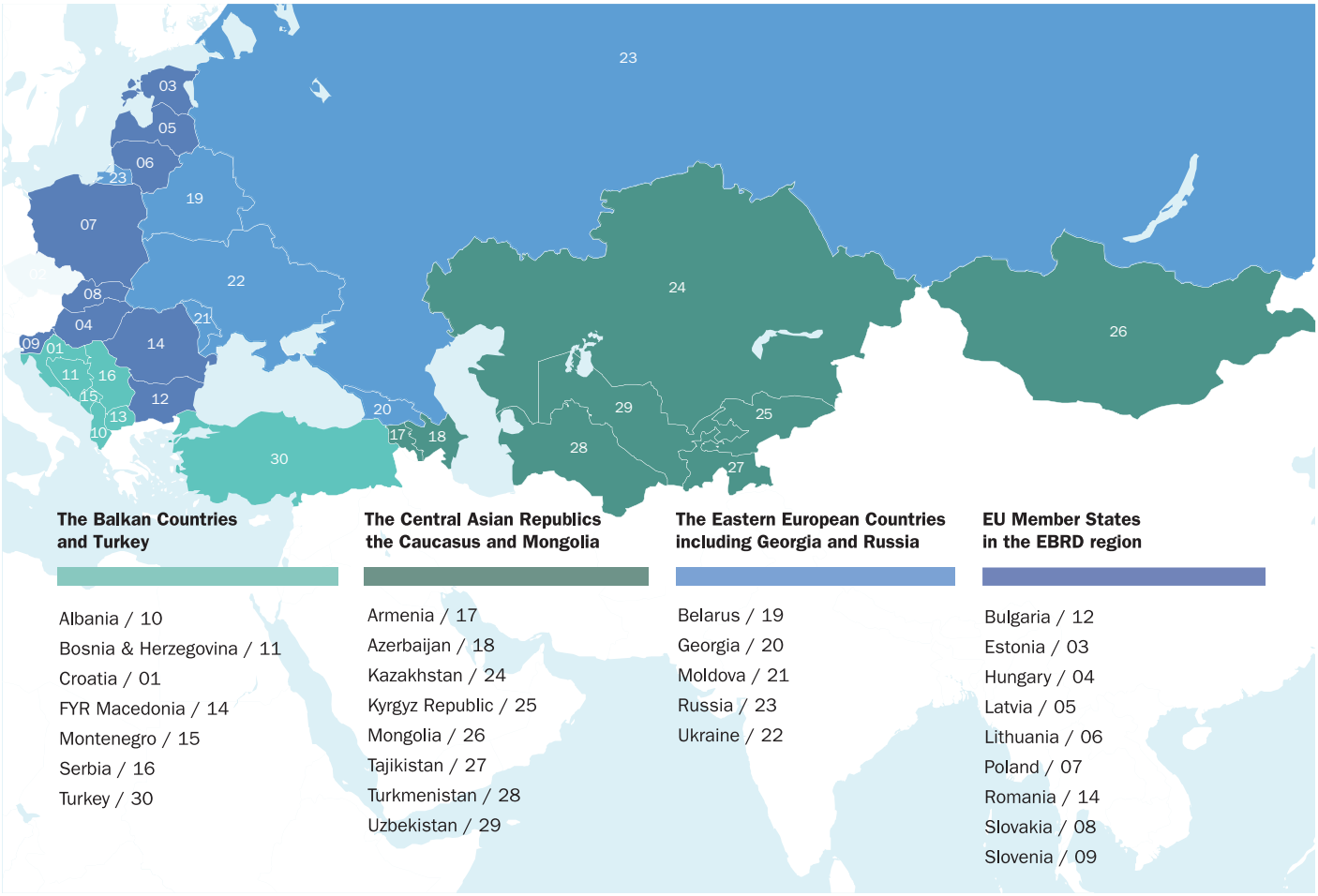
The assessment territorial scope



In order to reflect the public procurement regulatory model that the individual countries pursue, the EBRD countries of operation were divided into four country groupings or sub-regions. Map 1.2 presents the assessment country groupings or sub-regions. These include: the Balkan countries and Turkey, the Central Asian Republics the Caucasus and Mongolia, the Eastern European Countries including Georgia and Russia, and EU member states in the EDRD region. Map 2.1 presents and geographically illustrates the four assessment country groupings or sub-regions.

Map 1.2

The assessment country groupings or sub-regions



EU Member States in the EBRD region – the sub-region includes: Bulgaria, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia. Countries assigned to this group after successfully completing the EU accession process are obliged to follow the EU *acquis*, specifically the EU Public Procurement Directives*,

The Balkan Countries and Turkey – this sub-region includes six countries situated on the Balkan Peninsula: Albania, B&H, Croatia, FYR Macedonia, Montenegro and Serbia, as well as Turkey. Countries assigned to this group are pursuing membership in the EU and have already oriented their public procurement legal framework towards compliance with the EU Public Procurement Directives,

The Eastern European Countries, including Georgia and Russia – this sub-region includes: Belarus, Georgia, Moldova, Russia and Ukraine. Countries in this group are in the process of negotiating their accession to the WTO, therefore the GPA** provides common objectives for their public procurement regulation,

The Central Asian Republics, the Caucasus and Mongolia – this sub-region covers: Armenia, Azerbaijan, Kazakhstan, Kyrgyz Republic, Mongolia, Tajikistan, Turkmenistan and Uzbekistan. These countries originally implemented public procurement legislation based on the 1994 UNCITRAL Model Law on Public Procurement***.

* http://ec.europa.eu/internal_market/publicprocurement/legislation_en.htm

** www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm

*** www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/1994Model.html

1.7 Data Gathering

Data sources and data availability

The assessment information and quantitative and qualitative data were collected using different methods. The research focused on three core areas:

- national public procurement legal frameworks
- local procurement practice
- sustainability of public procurements.

The research included data available electronically, in addition to interviews and case studies provided by local practitioners contracting entities and local legal advisers supporting tenderers competing for public contracts. The research team aimed to review legislation on government procurement and public procurement in the utilities sector in the EBRD countries of operation. The team sought to obtain feedback from interviews with a minimum of two local contracting entities, one a public or municipal authority (government procurement), and one in the utilities sector (power & energy or transport sectors).

While in general the research was completed successfully, in some countries interviewing contracting entities in the utilities sector was unachievable. Thus the plan to include a comprehensive analysis and comparison between government procurement practice and the utilities public procurement practice in the assessment had to be abandoned. Instead, the research focused on government procurement.

Furthermore, in some countries the contracting entities approached for interview were not keen to participate in the research research initiativesand, and, despite effort from the research team and the EBRD resident office staff, no response to the assessment questionnaire was received in the allocated timeframe. This was the case in Azerbaijan, Kazakhstan, Mongolia, and Turkmenistan. As the information on local procurement practice could not be found from any other sources, there is no assessment of the quality of local procurement practice in these countries in the report. This lack of data made it impossible for the report to be as comprehensive and complete an assessment of local procurement practice in the EBRD region as had been intended.

Research in the 'law on the books' area

A review of the 'law on the books' including the national public procurement legislation of the 29 countries of the EBRD operation was conducted by the EBRD Legal Transition Programme between January and July 2010. This desk-based analysis covered primary public procurement legislation; secondary legislation was reviewed where it was available in English or Russian.

A special legislative review questionnaire was designed, including 120 questions correlated with specific Core Principle benchmark indicators. Each of 11 key benchmark indicators was covered by one section of the questionnaire, embracing 10 closed questions which were designed to assess the legislation compliance/against the benchmark. The questionnaire also included ten additional questions regarding basic features of the public procurement institutional framework. The questionnaires can be accessed at https://ppl.ebrd.com

Research n the 'law in practice' area

The research on local procurement practice included: a survey of local procurement practice based on the core principles benchmark, a case study on review and remedies practice, and a review of sustainability of local procurement practice.

Survey of local procurement practice, based on the Core Principles benchmark indicators

This component included a review of hands-on experience with national public procurement legislation and practice, with respect to the

* See e.g. in Mortgages in transition economies, European Bank for Reconstruction and Development, London, 2007. Available at www.ebrd.com/downloads/research/guides/mit.pdf

concept of Maximising Economic Benefit.* In order to compare the legislation with the way laws are/applied, this practice was assessed using an online survey completed by contracting entities in each country of operation. The contracting entities were selected from the EBRD's clients. Moreover, to encourage participation all the questionnaires were prepared and offered to the contracting entities in two languages, English and Russian.

A questionnaire for the survey of local practice was based on the Core Principles benchmark. The 150 questions were allocated to the three phases of the procurement process. These include: pre-tendering, tendering, and post-tendering.

- **The pre-tendering phase** – questions focused on: the assessment of needs, the contract profile, the budget available, qualification and award criteria, tender procedureand finally management of the process (ie. planning, time, cost of the process).

- **The tendering phase** – covered a wide range of public procurement instruments and mechanisms. The questions aimed to review issues such as: tender notices, opening sessions, forms of communication, documentation, especially standard documentation, language currency used in the procurement process, grounds for exclusion and evaluation of offers including abnormally low price; annulment of the procedure, and, availability of remedies.

- **The post-tendering phase** – questions concentrated on two significant issues: admissibility of amendments introduced to a concluded contract (enlargement of scope, extension of time), and performance of an agreement.

The questionnaires for the survey of local practice can be accessed at https://ppl.ebrd.com.

Case study on local public procurement review and remedies practice

The second dimension of the research into the scope of public procurement practice focused mainly on remedies procedures. In order to carry out the research, the EBRD's LTT designed two specific cases studies and asked external experts from selected law offices in each of the EBRD's countries of operations to solve the legal problems presented in both case studies.

The main objective of this component was to evaluate the adequacy of law enforcement instruments in the countries of operation. Each case study included two hypothetical scenarios regarding the contracting entity from the government sector, and the contracting authority from the utilities sector. The scenarios focused on the review and remedies procedure, covering illegitimate behaviour by the contracting entity, dispute resolution and general verification of compliance with national public procurement law. The findings from the case studies as answered by local legal advisers were included in the assessment on-line database. The answered case studies can be accessed at https://ppl.ebrd.com.

Sustainability of local public procurement practice

The MTF developed an analytical tool dedicated to assessing sustainability of public procurement practice.*

The MTF project was initiated by the Swiss Government and the United Nations Development Programme (UNDP) and was conducted by an international team comprising national governments, the EU, United Nations Environment Programme (UNEP), United Nations Department for Economic and Social Affairs (UNDESA) and, the International Labour Organization (ILO).

The main objective of the MTF is to support the development and the implementation of national policies on sustainable public procurement, defining a process whereby organisations meet their needs for goods, services and works, in a way that achieves value for money while generating benefits to society and the economy, whilst minimising damage to the environment. The ultimate goal of the MTF is to assist developing countries in addressing environmental, economic and social issues through their procurement function.

In the research the MTF Sustainability Status Assessment has been included in the survey of local procurement practice as a separate questionnaire. This questionnaire was answered in addition to the procurement process questionnaire by the local contracting entities

* http://esa.un.org/marrakech-process/tfsuspubproc.shtml

from the EBRD countries of operations. The questionnaire for the review of sustainability of the local procurement practice can be accessed at https://ppl.ebrd.com.

Tools – online database

The tool used for processing data in the assessment played an essential role throughout the research. In order to collect, process and analyse data, the LTP designed a special online database. The database, including all assessment questionnaires and a reporting section, and was made available on the EBRD website. The contracting entities, local legal advisers and other respondents selected from the EBRD's clients were provided with unique logins and access codes which enabled the online interviews to take place. The assessment website was designed to facilitate the research and employed a user-friendly interface, access to glossaries in English and Russian, a user's manual, as well as a dedicated help desk to support respondents in the case of any problem. After finalising the interview, the completed questionnaires were saved, evaluated automatically where possible, and processed by the research team.

1.8
Explanation of the Assessment and Results

The analysis conducted as part of the assessment is based on international best practice drawing, in particular, from best practice described in EU Public Procurement Directives, along with the guidelines introduced by the UN Commission on International Trade Law, the WTO Agreement on Government Procurement and the MTF. Due to the fact that the assessment covers the EBRD countries of operation which are at different stages of economic and political development, the challenge was to reflect best practice under the specific conditions experienced by the participants in the assessment.

This section provides an overview of the structure of the country profiles and graphs presented in the assessment report.

Country profile

The assessment report offers a country profile for each EBRD country of operations. The country profile follows the structure of the assessment model and is intended to summarise the status of the public procurement sector in the countries of operation both in terms of the scope of the status of public procurement laws and practice. Each country profile offers an insight into the national regulatory regime, as well as an evaluation of practice, and highlights factors that have served regulatory development. Furthermore, the country profiles are meant to provide a proactive, forward looking portrait of the individual countries, summarising the current position of the country with its strengths, weaknesses, opportunities and regulatory risks analysed. The country profiles are available online and can be accessed at https://ppl.ebrd.com.

Spider graphs

A spider graph presents the main results of the assessment in accordance with the benchmark indicators. Each graph provides a summary of the assessment at a glance. For this research project spider graphs were produced to present the results of the assessment of the public procurement legislation, and practice.

Figure 1.5, as an example, presents the quality of the public procurement legal framework in Russia.

The extreme outer rim of the spider graph represents full compliance with international best practice, with each spoke on the graph representing one of the 11 Core Principles key indicators. For each Core Principle key indicators the diagram presents the scores as a percentage of the maximum achievable. The scores begin at 0 at the centre of the graph and reach 100 on the outside of the graph. Consequently, looking at the graph as a whole, the wider the web, the better the score in the assessment.

Pie charts

Pie charts are also used to present the assessment results illustrating either the regulatory gap in the scope of the quality of public procurement legal framework, or the performance gap with

Figure 1.5

The quality of public procurement legal framework – Russia

Notes: The figure shows the score for extensiveness of national public procurement laws of the country. The scores have been calculated on the basis of the legislation questionnaire, developed from the EBRD Core Principles for an Efficient Public Procurement Framework. Total scores are presented as a percentage, with 100 per cent representing the optimal score for each Core Principles benchmark indicator.

Source: EBRD Public Procurement Assessment 2010

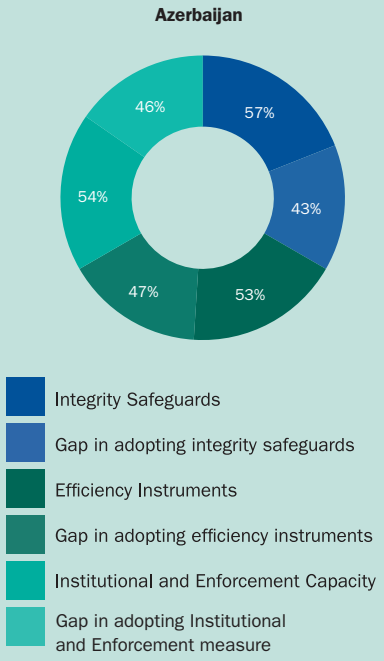
regard to quality of public procurement practice. The report includes two types of pie charts:

- The first type illustrates how the integrity safeguards, efficiency instruments, and enforcement measures are incorporated in the national public procurement policies. The pie chart presents scores for the quality of public procurement legislation in these assessed categories, and the regulatory gap identified from the results of the assessment. A regulatory gap, the difference between the marks for observed quality of public procurement legislation and the assessment benchmark.
- The second type of pie chart illustrates how the integrity safeguards, efficiency instruments, and enforcement measures are implemented in practice. The pie chart presents scores for the quality of public procurement practice in these assessed categories, and the performance gap identified from the results of the assessment. A performance gap, the difference between the marks for observed quality of public procurement practice and the assessment benchmark.

The pie charts illustrate the percentage of the maximum possible score achieved by the country and the size of the public procurement regulatory gap, or performance gap.

Figure 1.6

Public procurement policies: integrity safeguards, efficiency instruments and institutional and enforcement measures in legislation – Azerbaijan

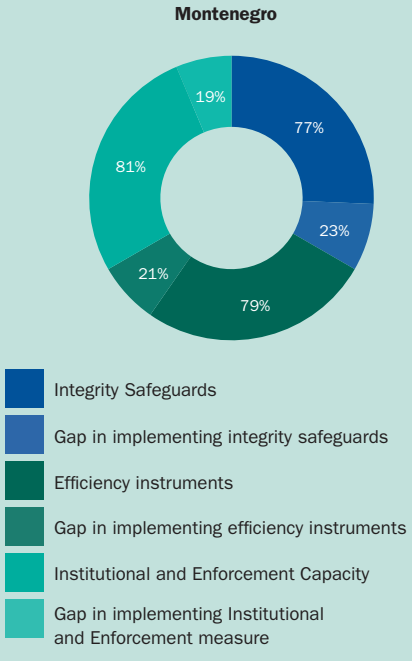


Notes: The figure shows the scores for integrity safeguards, the efficiency instruments and institutional and enforcement measures incorporated in the national legislation. The scores have been calculated on the basis of the legislation questionnaire, developed from the EBRD Core Principles for an Efficient Public Procurement Framework. Total scores are presented as a percentage, with 100 per cent (one third of the pie chart) representing the maximum score for each evaluation category. A regulatory gap, a difference between assessment results and the benchmark is marked in light blue, in green and light green, respectively.

Source: EBRD Public Procurement Assessment 2010

Figure 1.7

Public procurement policies: integrity safeguards, efficiency instruments and institutional and enforcement measures in practice – Montenegro



The figure shows the scores for integrity safeguards, the efficiency instruments and institutional and enforcement measures as implemented in local procurement practice. The scores have been calculated on the basis of the practice questionnaires, developed from the EBRD Core Principles for an Efficient Public Procurement Framework and answered by local contracting entities. Total scores are presented as a percentage, with 100 per cent (one third of the pie chart) representing the maximum score for each evaluation category. A performance gap, a difference between results of the survey of local practice and the benchmark is marked in lightblue, in green and light green, respectively.

Source: EBRD Public Procurement Assessment 2010

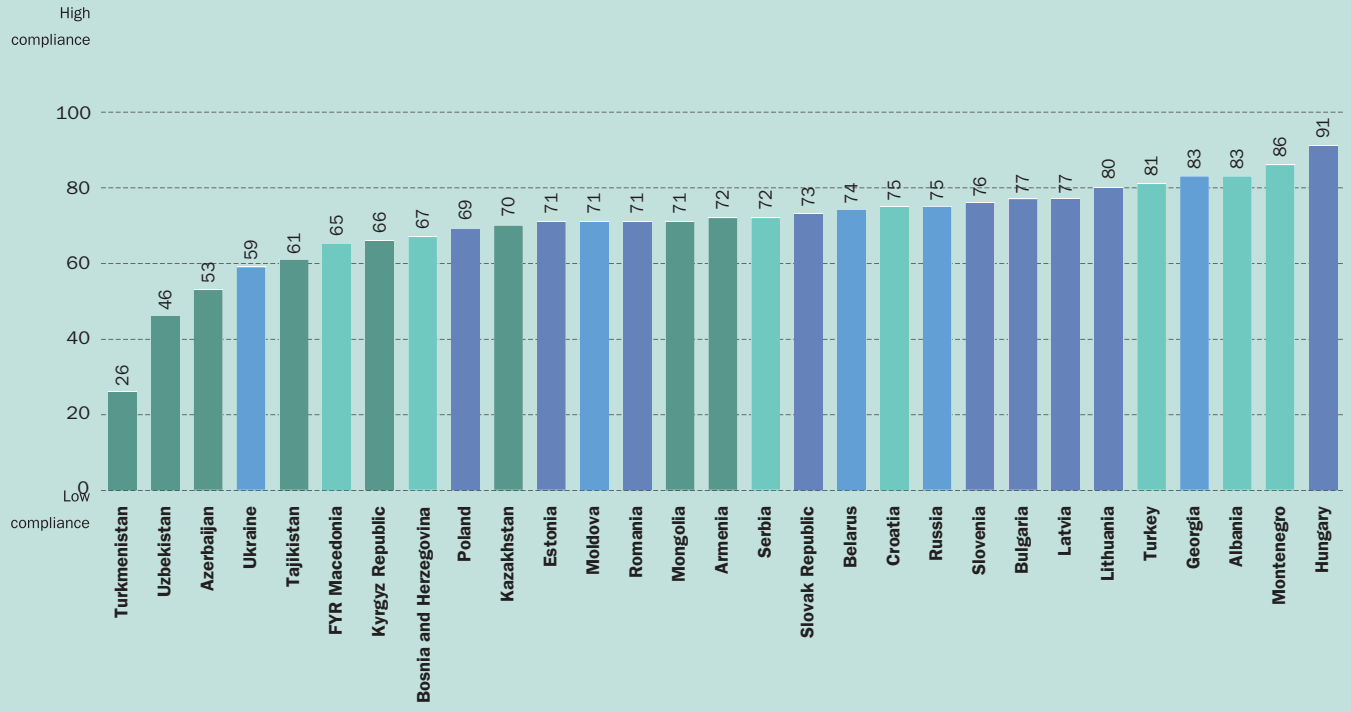
Bar graphs

The bar graphs, or histograms, show the total score assigned to each country. Furthermore, the bar graph allows the reader to make an immediate comparison between countries of a given group of countries or sub-regions.

In the report bar graphs are used to illustrate the score for quality - extensiveness and effectiveness – of national public procurement laws and practice, which is calculated on the basis of the completed assessment questionnaires. Finally, the bar graphs show the scores for public procurement remedies legislation for each country in the ERBD region, which were calculated on the basis of a checklist and two a case studie answered by local legal advisers. The bar chart in Figure 1.8 presents an example of the results from the assessment of the quality of procurement laws in the EBRD countries of operations.

Figure 1.8

The quality of public procurement laws in EBRD countries of operations



Notes: The figure shows the score for quality (extensiveness) of national public procurement laws in the EBRD countries of operations. The scores have been calculated on the basis of the legislation questionnaire, developed from the EBRD Core Principles for an Efficient Public Procurement Framework. Total scores are presented as a percentage, with 100 per cent (one third of the pie chart) representing the maximum total score for Core Principles benchmark.

Source: EBRD Public Procurement Assessment 2010

Chapter 2

The Quality of Public Procurement Laws and Practice in the EBRD region

2.1 Introduction

As part of the assessment, a review of 'law on the books' was conducted which aimed to assess the quality of public procurement legal frameworks in the EBRD region (extensiveness of the regulation). To provide an insight into 'law in practice' a survey of local procurement practice, based on interviews with local procurement professionals, contracting entities and legal advisers, examined the application of public procurement laws in practice (effectiveness of the regulation).

The results are presented in this chapter. There are three main sections. The first two sections present the results of the legislative review and the contracting entities' procurement practice, and an appraisal of the institutional frameworks across the EBRD region. Section three presents an analysis of the quality of laws and practice for each of the country groupings (the sub-regions of the Balkan Countries and Turkey, the Central Asian Republics, the Caucasus and Mongolia, the Eastern European countries, including Georgia and Russia, and the EU Member States in the EBRD region), including general trends revealed by the assessment.

Rating of the public procurement laws

For each country in the EBRD region, a 'spider' graph (see figure 2.1) presents the quality of the public procurement laws. Put differently, the extensiveness of the national regulatory framework. It presents a snapshot of the eleven key Core Principles benchmark indicators: accountability, integrity, transparency, competition, efficiency, economy, proportionality, uniformity, stability, flexibility, and enforceability. The total score was calculated for each country on the basis of a legislation and institution questionnaire.

The scores range from 'very high compliance' (above 90 percent of the benchmark), 'high compliance' (76 to 90 percent), 'medium compliance' (between 60 and 75 percent), 'low compliance' (between 50 to 59 percent), to 'very low compliance' (below 50 percent).

In each diagram in figure 2.1, the wider the coloured 'web' the better the national public procurement regulatory framework.

The results of the legislative review show that in the assessment of the public procurement legal framework three countries in the ERBD region scored high for compliance (Latvia, Montenegro, Turkey), with one country (Hungary) scoring very high for compliance.

The majority of the countries (twenty) were rated at a medium level of compliance (60 to 75 percent). Two countries were found to be at a low level of compliance, but still above 50 percent (Tajikistan and Ukraine), while another three countries were found to register a score below 50 percent against the benchmark, i.e. very low compliance (Turkmenistan, Uzbekistan, and Azerbaijan).

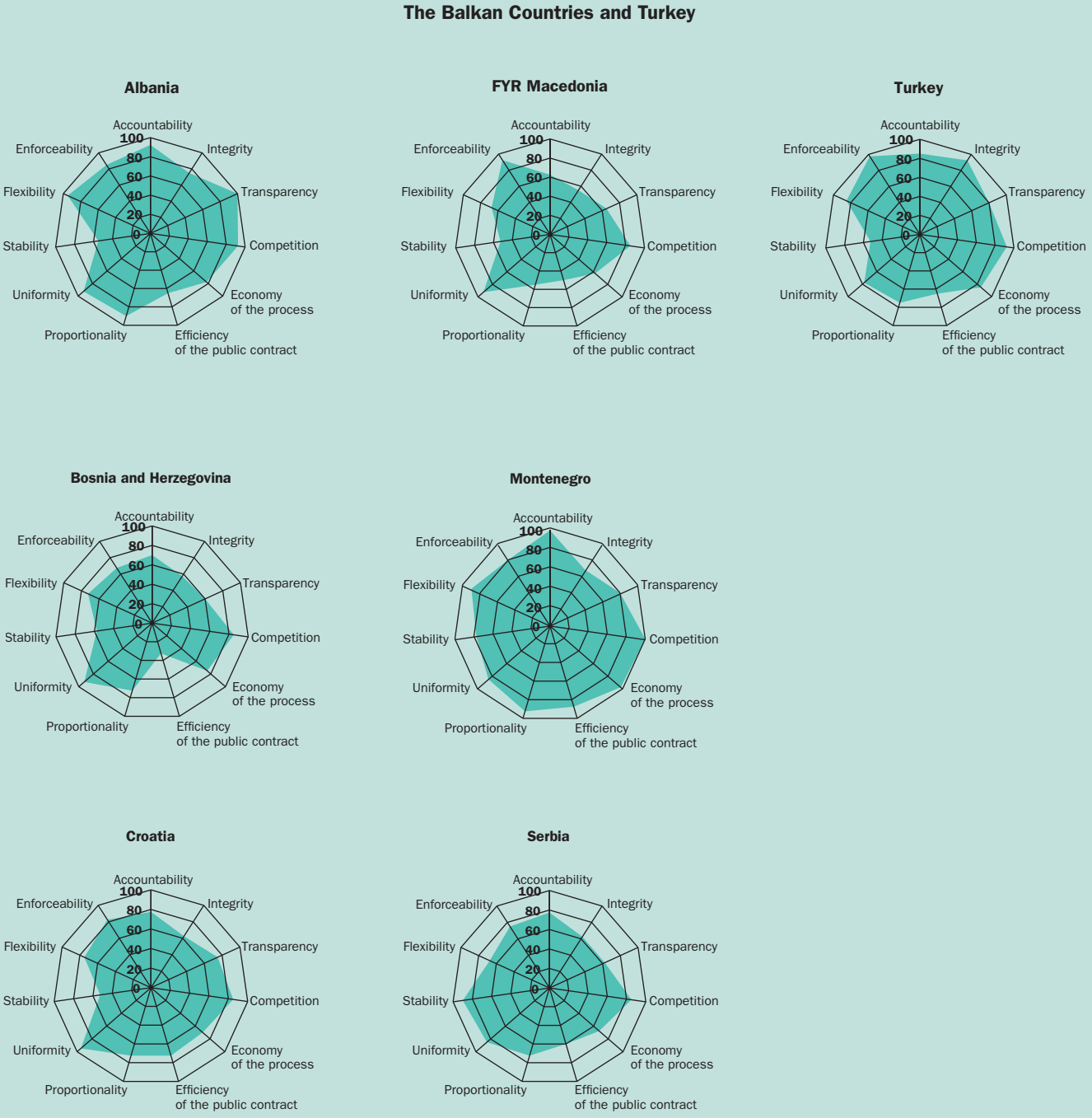
Rating of the public procurement practice

For countries in the EBRD region, where surveys of local procurement practice have been successfully completed, 'spider' diagrams were created to demonstrate the quality of local procurement practice (effectiveness). Figure 2.2 presents the quality of public procurement practice in the ERBD countries of operation. As in the legislative review, each 'spider' diagram includes the eleven key Core Principal benchmark indicators (accountability, integrity, transparency, competition, efficiency, economy, proportionality, uniformity, stability, flexibility, and enforceability). The marks for the quality of practice were calculated for each country on the basis of a local procurement practice survey, comprising a procurement process questionnaire, an institutional framework questionnaire and a case study on review and remedies practice.

Again, the scores range from 'very high compliance' (above 90 percent of the benchmark), 'high compliance' (76 to 90 percent), 'medium compliance' (between 60 and 75 percent), 'low compliance' (between 50 and 59 percent), to 'very low compliance' (below 50 percent). In each diagram, the wider the coloured 'web' the better the local procurement practice.

Figure 2.1

The quality of public procurement laws (extensiveness) in the EBRD countries of operations in detail



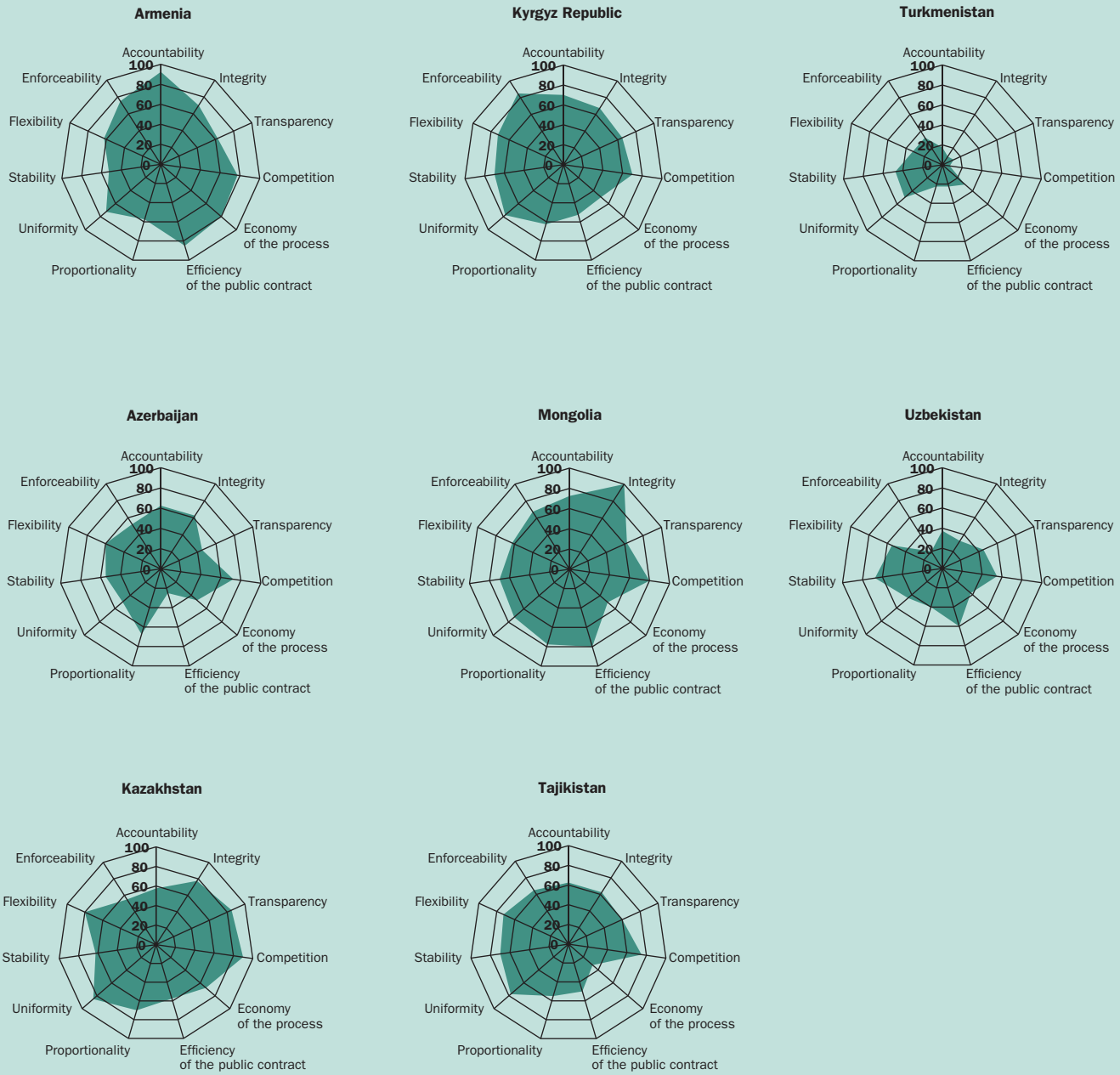
Notes: The figure shows the score for quality (extensiveness) of national public procurement laws for each country in the EBRD region. The scores have been calculated on the basis of the legislation questionnaire, developed from the EBRD Core Principles for an Efficient Public Procurement Framework. Total scores are presented as a percentage, with 100 per cent representing the optimal score for each Core Principles benchmark indicator.

Source: EBRD Public Procurement Assessment 2010

Figure 2.1

The quality of public procurement laws (extensiveness) in the EBRD countries of operations in detail

The Central Asian Republics, the Caucasus and Mongolia



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Source: EBRD Public Procurement Assessment 2010

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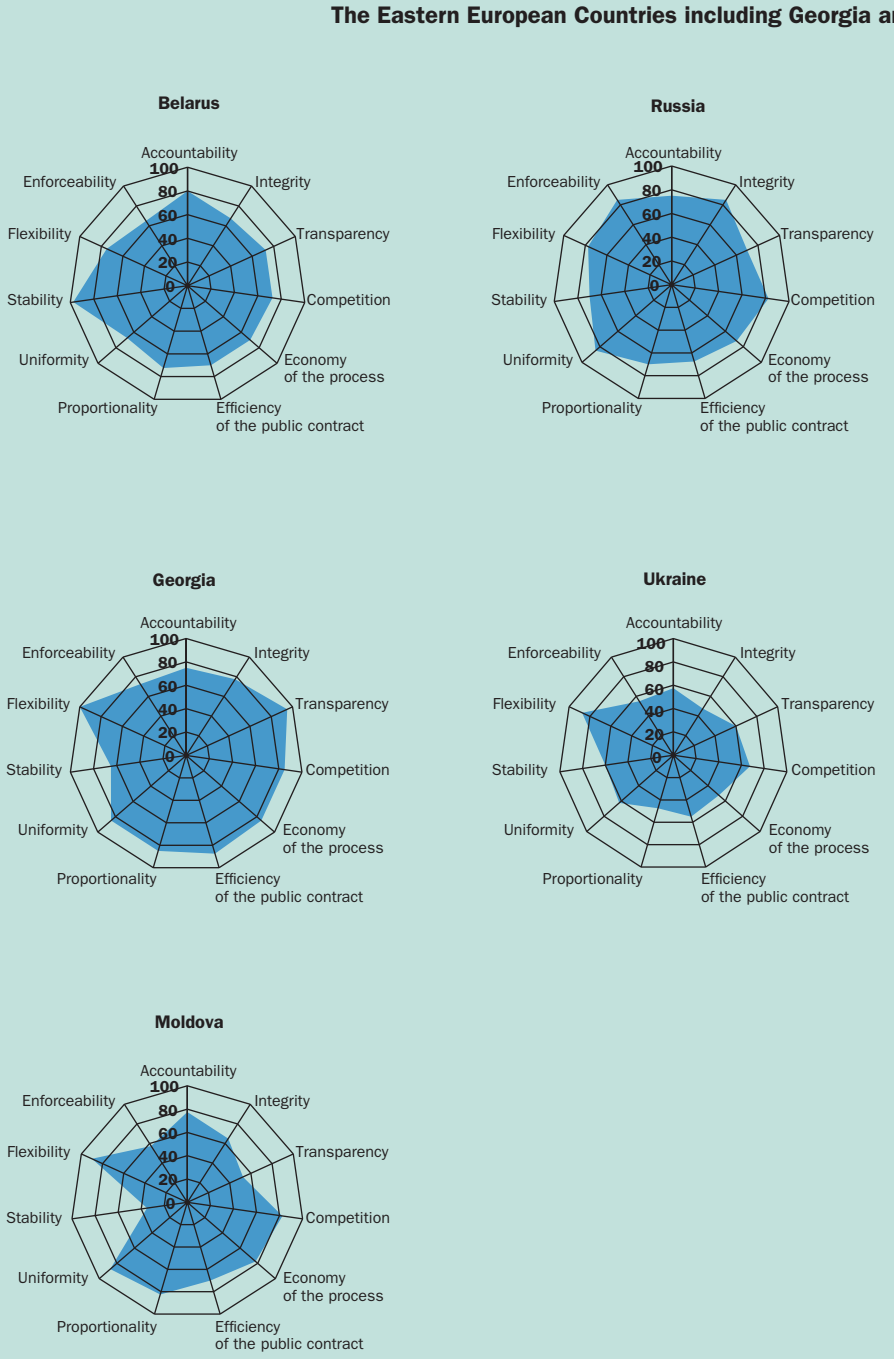

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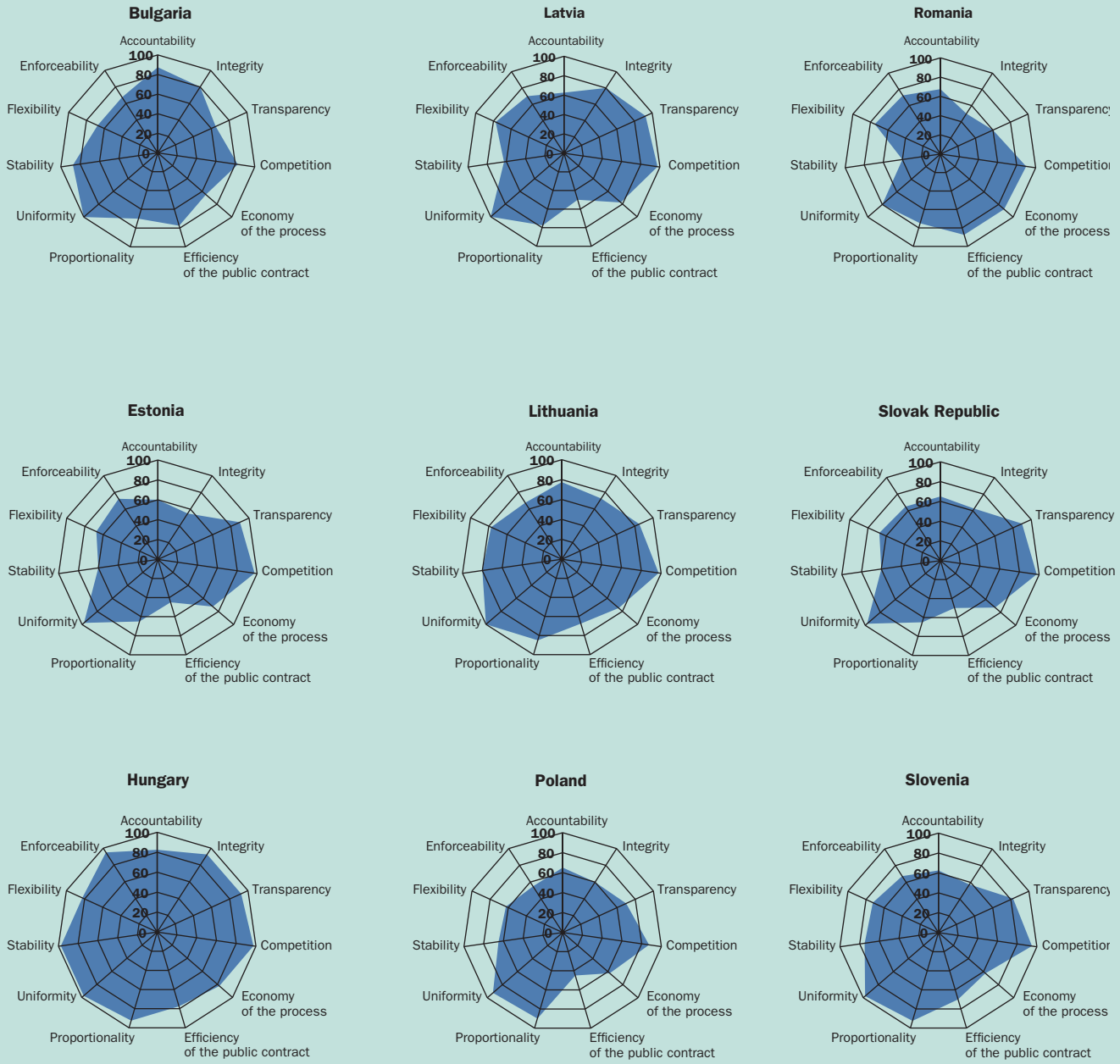
Source: EBRD Public Procurement Assessment 2010

Figure 2.1

The quality of public procurement laws (extensiveness) in the EBRD countries of operations

The EU Member States in the EBRD region



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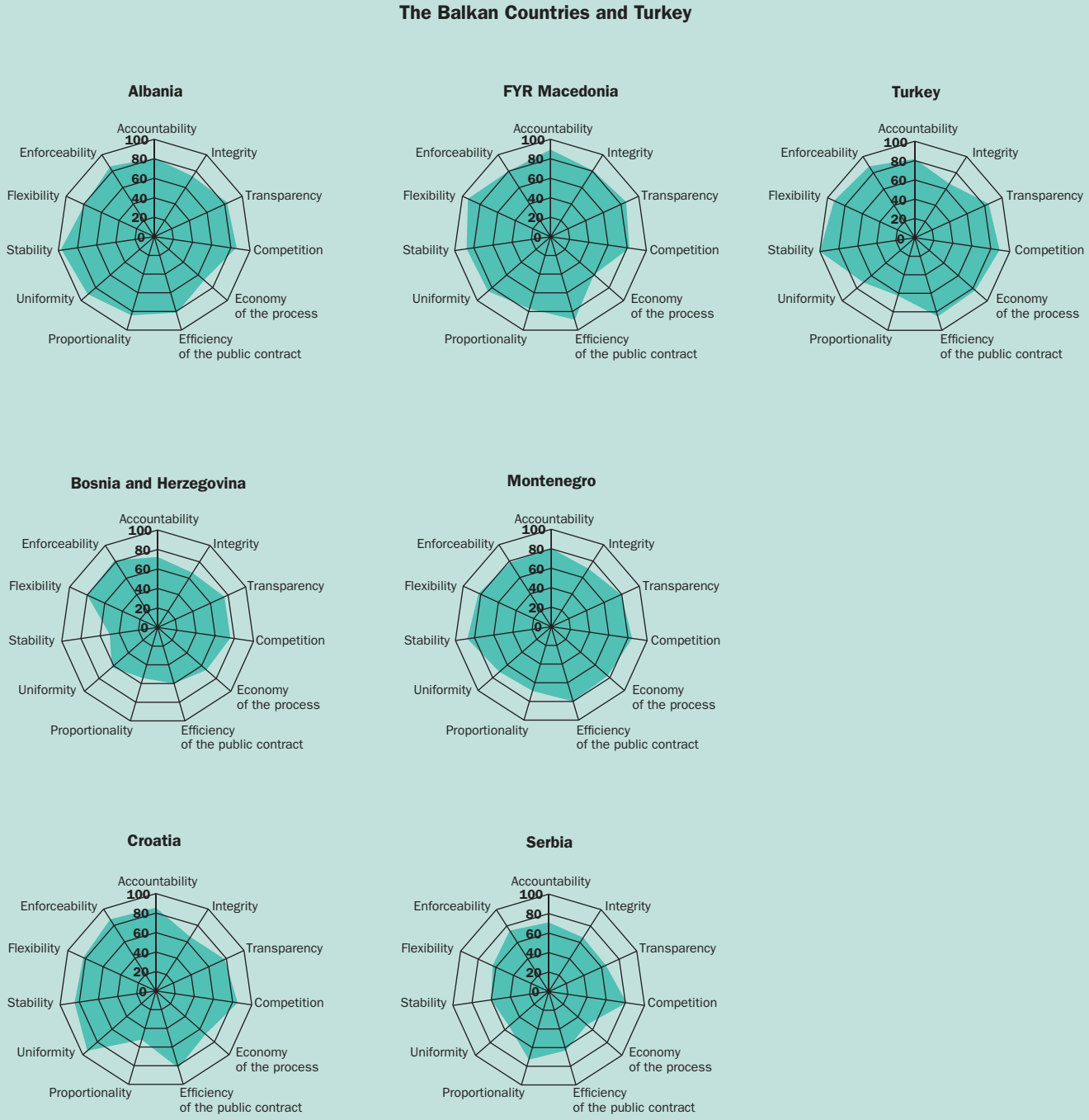
Source: EBRD Public Procurement Assessment 2010

Figure 2.2

The quality of public procurement practice (effectiveness) in the EBRD countries of operations in detail



Notes: The figure shows the score for quality (effectiveness) of local public procurement practice in each country in the EBRD region. The scores have been calculated on the basis of the practice questionnaires, developed from the EBRD Core Principles for an Efficient Public Procurement Framework and answered by local contracting entities. Total scores are presented as a percentage, with 100 per cent representing the optimal score for each Core Principles benchmark indicator.

Source: EBRD Public Procurement Assessment 2010

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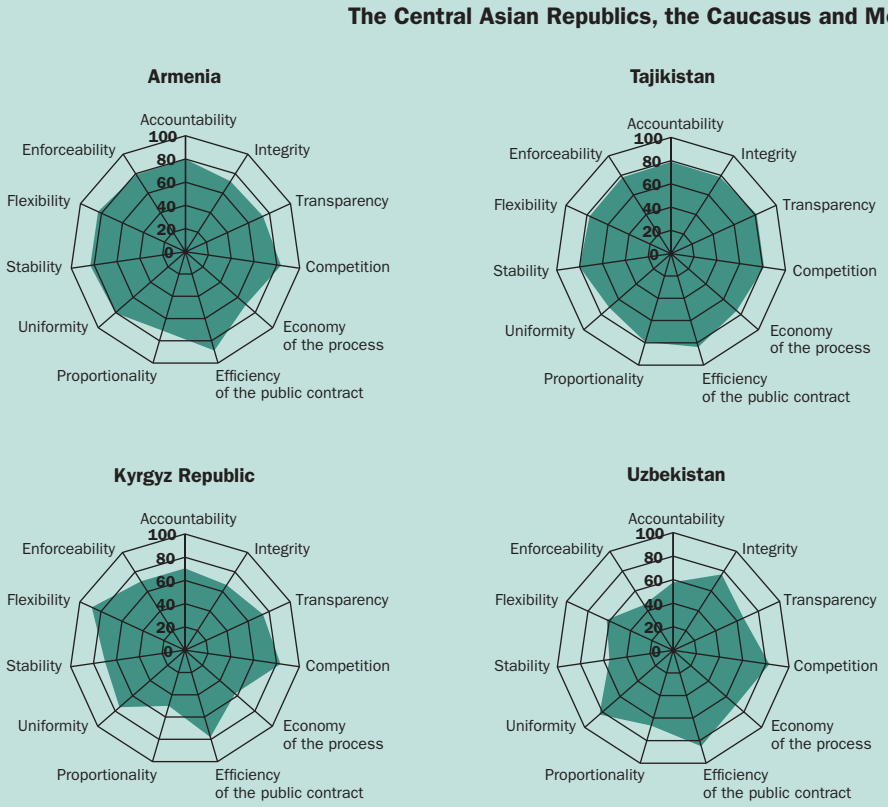

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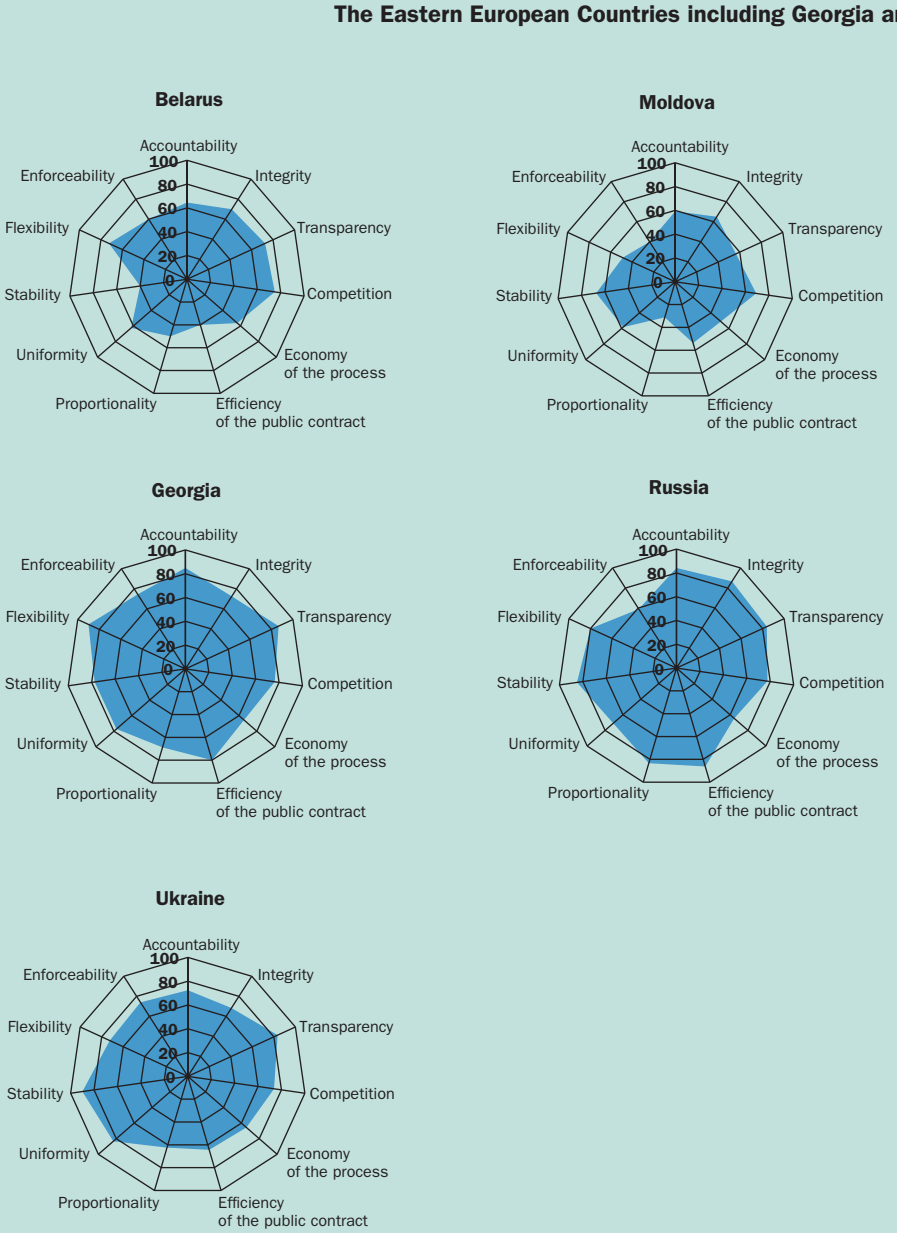
No data available for Azerbaijan, Kazakhstan, Mongolia and Turkmenistan

Source: EBRD Public Procurement Assessment 2010

Figure 2.2

The quality of public procurement practice (effectiveness) in the EBRD countries of operations in detail



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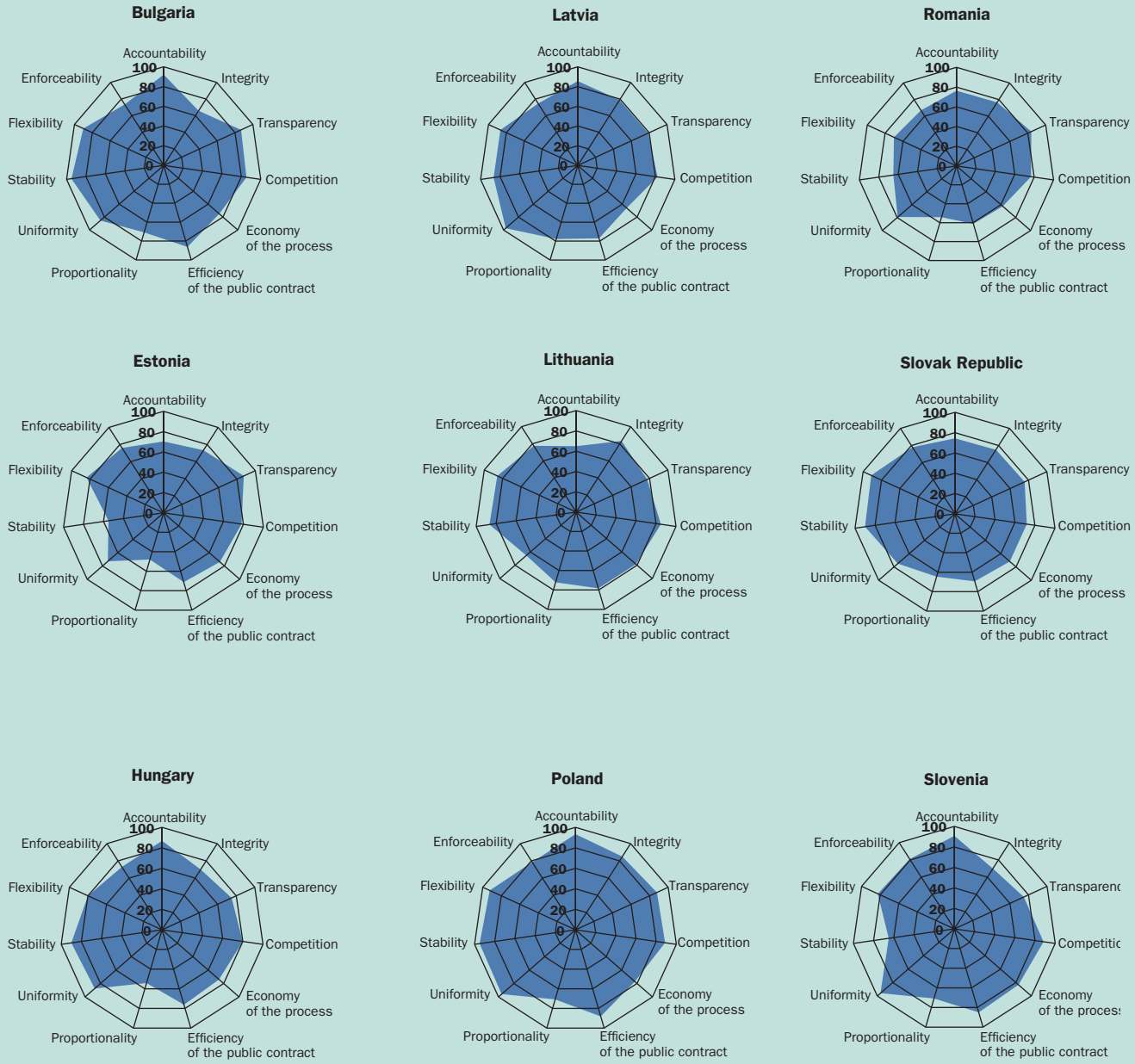
Source: EBRD Public Procurement Assessment 2010

Figure 2.2

The quality of public procurement practice (effectiveness) in the EBRD countries of operations

The EU Member States in the EBRD region



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Source: EBRD Public Procurement Assessment 2010

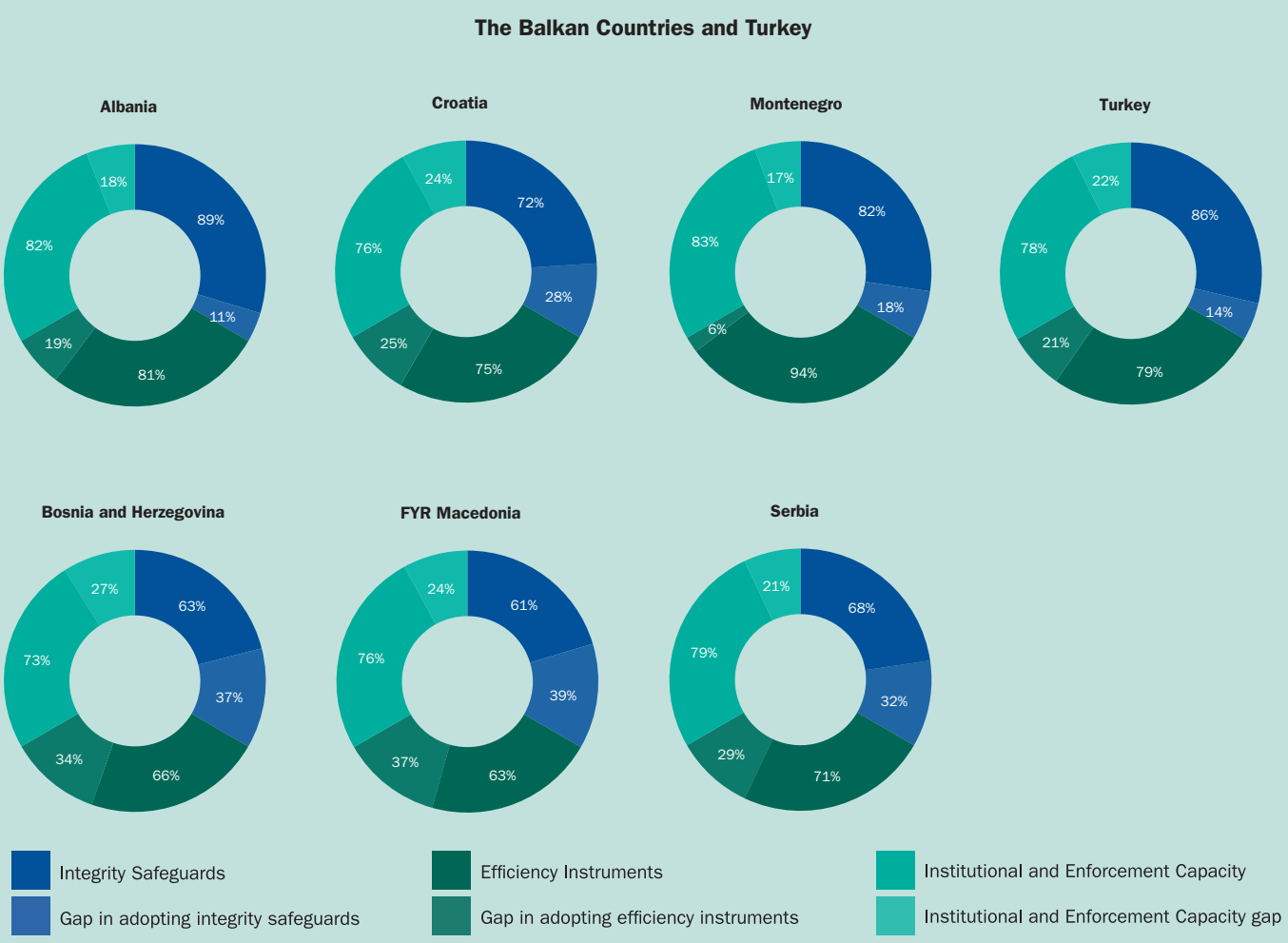
Based on the data collected by the survey of local procurement practice, the procurement practice of local contracting entities was evaluated against the assessment benchmark. None of the countries in the EBRD region scored very high compliance in the practical application of public procurement laws. The majority of the countries surveyed scored high for compliance against the assessment benchmark (Albania, Armenia, Bulgaria, Croatia, FYR Macedonia, Georgia, Hungary, Latvia, Lithuania, Montenegro, Poland, Russia, Slovenia, Tajikistan, and Turkey).

A number of countries in the EBRD region (Belarus, B&H, the Kyrgyz Republic, Romania, Serbia, Ukraine, and Uzbekistan) were rated at a medium compliance level (60 to 75 percent). While Moldova's practice was found to be at a low level of compliance, slightly above 50 percent compliance rate.

No feedback from this survey was received from four countries in the EBRD region (Azerbaijan, Kazakhstan, Mongolia, and Turkmenistan).

Figure 2.3

Public procurement policies in the EBRD countries of operations integrity safeguards, efficiency instruments and institutional and enforcement measures in legislation



Notes: The figure shows the scores for integrity safeguards, the efficiency instruments and institutional and enforcement measures incorporated in the national legislation in the Balkan Countries and Turkey. The scores have been calculated on the basis of the legislation questionnaire, developed from the EBRD Core Principles for an Efficient Public Procurement Framework. Total scores are presented as a percentage, with 100 per cent (one third of the pie chart) representing the maximum score for each evaluation category. A regulatory gap, a difference between assessment results and the benchmark is marked in light blue, in green and light green, respectively.

Source: EBRD Public Procurement Assessment 2010

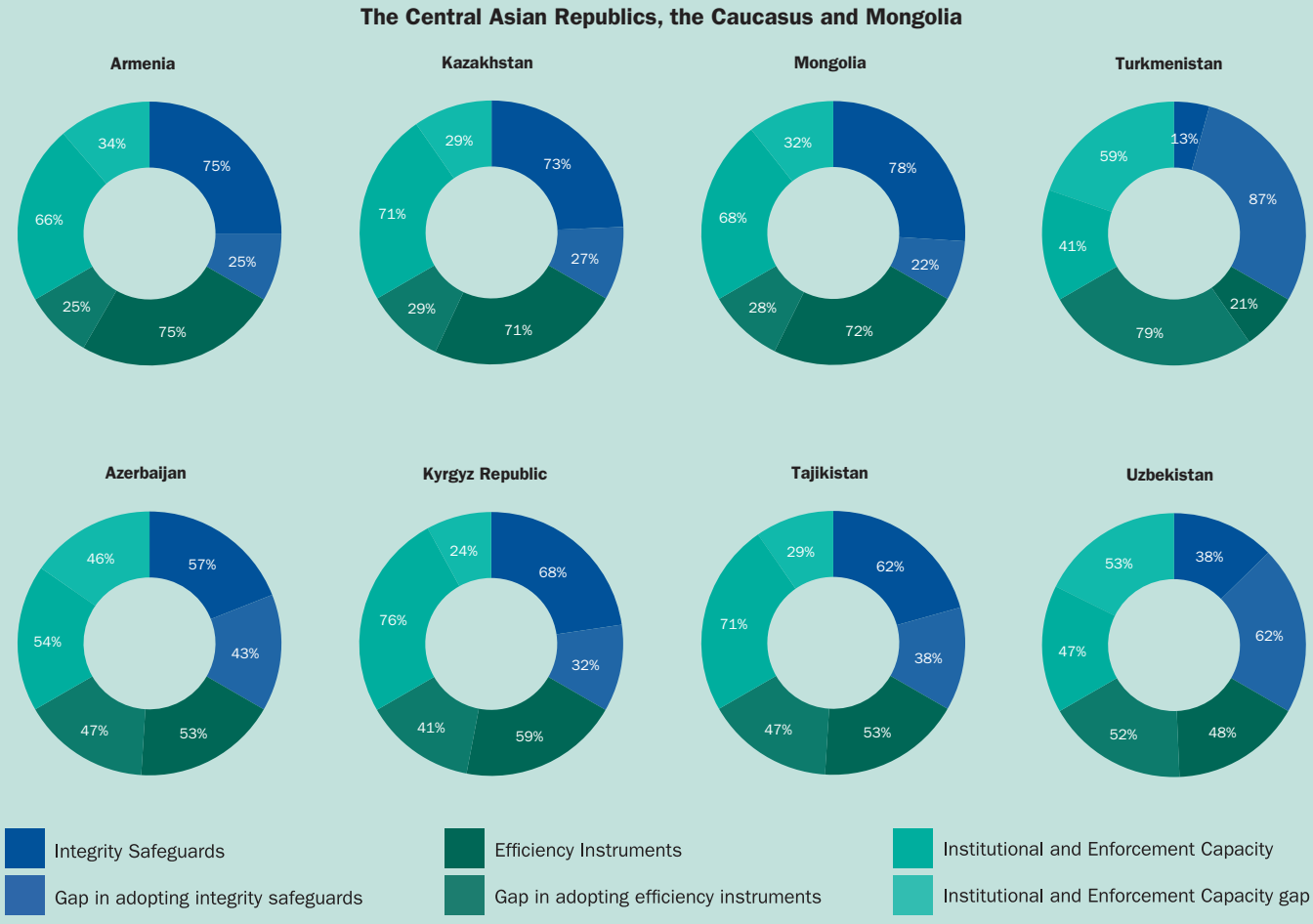
Public procurement regulatory institutions and policy making

In an attempt to assess the strength of national regulatory institutions and identify and review national policy makers' decisions on high level policy considerations, the key benchmark indicators were grouped in to three general evaluation categories: (1) integrity safeguards, (2) efficiency instruments, and (3) institutional and enforcement measures.

For each country a 'pie chart' shows the marks for the integrity safeguards (as a sum of the scores on the accountability, integrity and transparency indicators), for the efficiency instruments in the national regulatory framework (as a sum of the scores on the competition, economy, efficiency, and proportionality indicators), and for the quality of the institutional and enforcement measures (a total score on the enforceability, uniformity, flexibility and stability indicators). Figure 2.3 presents the data for the EBRD countries of operation regarding integrity safeguards, efficiency instruments, and institutional enforcement measures in legislation. Figure 2.4 presents the data for the EBRD countries of operation regarding integrity safeguards, efficiency

Figure 2.3

Public procurement policies in the EBRD countries of operations integrity safeguards, efficiency instruments and institutional and enforcement measures in legislation



Notes: The figure shows the scores for integrity safeguards, the efficiency instruments and institutional and enforcement measures incorporated in the national legislation in the Central Asian Republics, the Caucasus and Mongolia. The scores have been calculated on the basis of the legislation questionnaire, developed from the EBRD Core Principles for an Efficient Public Procurement Framework. Total scores are presented as a percentage, with 100 per cent (one third of the pie chart) representing the maximum score for each evaluation category. A regulatory gap, a difference between assessment results and the benchmark is marked in light blue, in green and light green, respectively.

Source: EBRD Public Procurement Assessment 2010

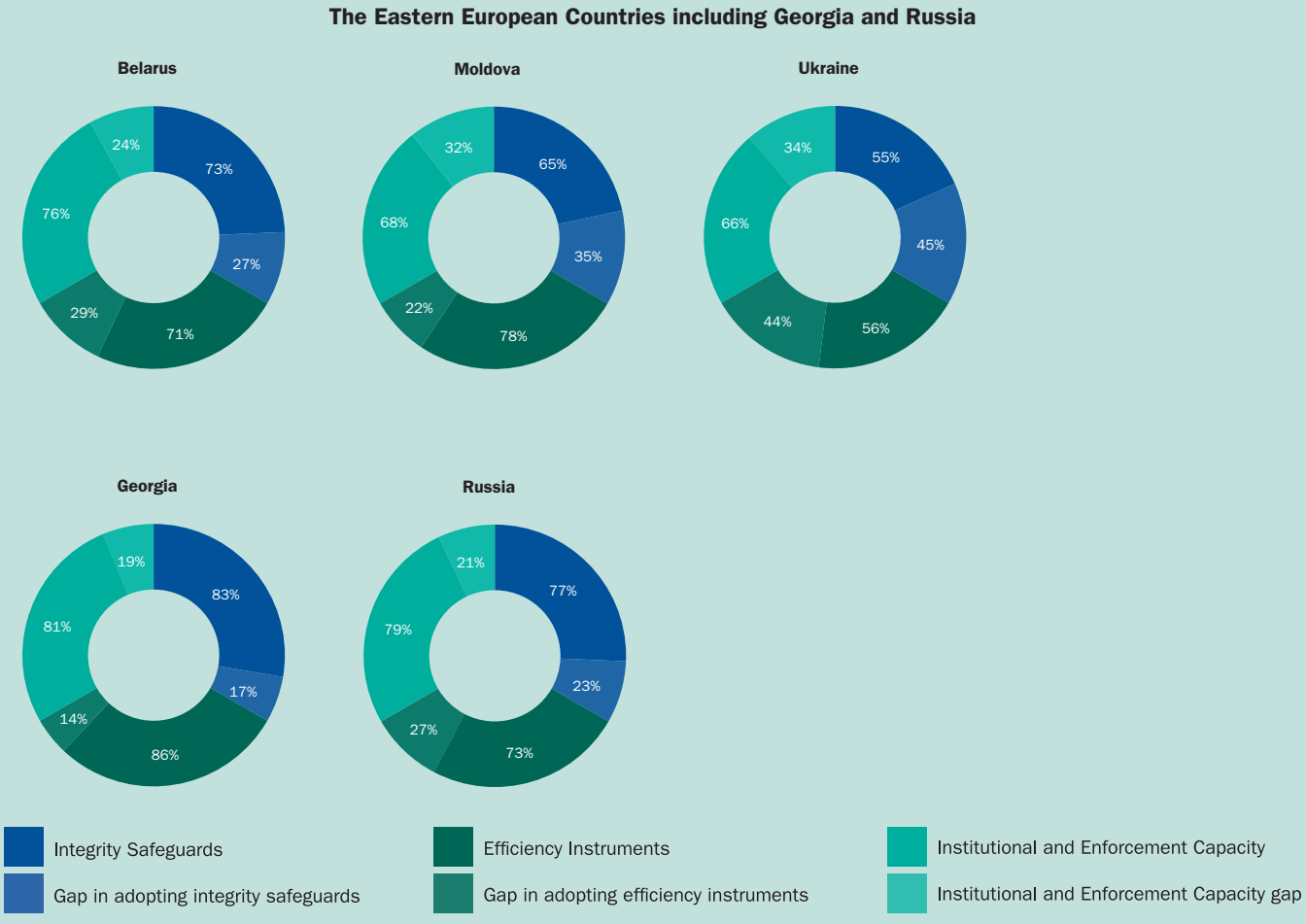
instruments, and institutional enforcement measures in practice.

Each indicator in the diagram presents the scores as fractions of the maximum achievable rating in every feature. The lighter sections in the diagram translate into a public procurement frameworks' regulatory gap.

The assessment results show that few of the countries in the region achieved an optimal level of development and meet their local legal and business culture challenges. This is the case for both legislation and practice. In addition, the assessment revealed that in the legal frameworks of several countries the regulatory gap between what has been achieved and what remains to be achieved in anti-corruption safeguards is greater than that in adopting efficiency measures. This may be a signal that there is still room for improvement in key public procurement policy areas, especially for countries associated with low ethical standards in business and a high level of corruption.

Figure 2.3

Public procurement policies in the EBRD countries of operations integrity safeguards, efficiency instruments and institutional and enforcement measures in legislation



Notes: The figure shows the scores for integrity safeguards, the efficiency instruments and institutional and enforcement measures incorporated in the national legislation in the Eastern European countries including Georgia and Russia. The scores have been calculated on the basis of the legislation questionnaire, developed from the EBRD Core Principles for an Efficient Public Procurement Framework. Total scores are presented as a percentage, with 100 per cent (one third of the pie chart) representing the maximum score for each evaluation category. A regulatory gap, a difference between assessment results and the benchmark is marked in light blue, in green and light green, respectively.

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Source: EBRD Public Procurement Assessment 2010

Figure 2.4

Public procurement policies in the EBRD countries of operations integrity safeguards, efficiency instruments and institutional and enforcement measures in practice

Notes: The figure shows the scores for integrity safeguards, the efficiency instruments and institutional and enforcement measures as implemented in local procurement practice in the Balkan Countries and Turkey. The scores have been calculated on the basis of the practice questionnaires, developed from the EBRD Core Principles for an Efficient Public Procurement Framework and answered by local contracting entities. Total scores are presented as a percentage, with 100 per cent (one third of the pie chart) representing the maximum score for each evaluation category. A performance gap, a difference between results of the survey of local practice and the benchmark is marked in light blue, in green and light green, respectively.

Source: EBRD Public Procurement Assessment 2010

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Public procurement policies in the EBRD countries of operations integrity safeguards, efficiency instruments and institutional and enforcement measures in practice

Notes: The figure shows the scores for integrity safeguards, the efficiency instruments and institutional and enforcement measures as implemented in local procurement practice in the Central Asian Republics, the Caucasus and Mongolia. The scores have been calculated on the basis of the practice questionnaires, developed from the EBRD Core Principles for an Efficient Public Procurement Framework and answered by local contracting entities. Total scores are presented as a percentage, with 100 per cent (one third of the pie chart) representing the maximum score for each evaluation category. A performance gap, a difference between results of the survey of local practice and the benchmark is marked in light blue, in green and light green, respectively.

No data available for Azerbaijan, Kazakhstan, Mongolia and Turkmenistan

Source: EBRD Public Procurement Assessment 2010

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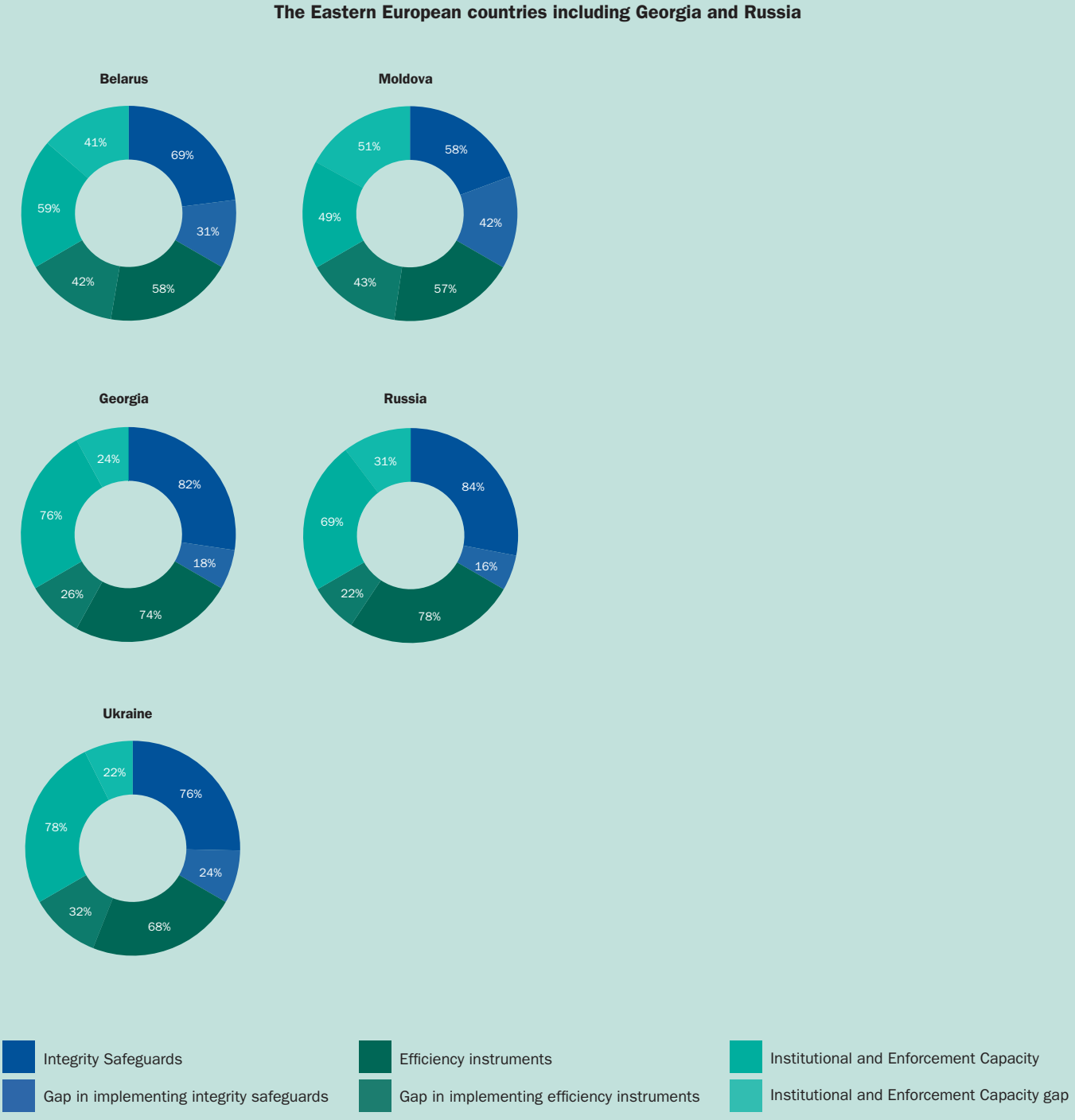

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Source: EBRD Public Procurement Assessment 2010

2.2
The Balkan Countries and Turkey

This section of the report discusses the assessment results for public procurement laws and practice review in 7 of the EBRD countries of operation in southern Europe (Albania, B&H, Croatia, FYR Macedonia, Montenegro and Serbia) as well as Turkey. In the assessment, public procurement legal frameworks of all countries in the sub-region were reviewed and, in principle, a survey of local procurement practice was conducted successfully. Local contracting entities in the Balkan Countries and Turkey were cooperative, with the very first online questionnaire received from Albania. In total, 12 local contracting entities participated in the research and provided feedback on their public procurement practice: 9 contracting entities from government procurement, and 3 contracting entities from the utilities sector. Limited participation from the utilities sector is due to the fact that in 3 countries the utilities sector is still not effectively covered by public procurement regulation (Montenegro, Serbia, and Turkey). In addition, local legal advisers from all countries in the sub-region contributed to the research by answering a case study on the quality of local public procurement review and remedies procedures.

Background

The countries of the Western Balkans and Turkey orient themselves towards EU public procurement principles and legislation. From amongst the seven countries, four (Croatia, the FYR Macedonia, Turkey and recently, Montenegro) are official candidates and have already begun accession negotiations with the EU. While three (Albania, B&H and Serbia) are considered potential candidate countries.

The countries continue to receive support to align their legal systems with the European acquis from the Instrument for Pre-accession Assistance (IPA), coordinated by the Directorate-General Enlargement and delivered with the participation of the other Directorate-Generals. This concerns, inter alia, public procurement. EU support is delivered through various specific instruments, including twinning activities or policy advisory activities through the SIGMA programme, managed jointly by OECD and the EU.

Consequently, public procurement law in the Balkan countries and Turkey increasingly follow the EU Public Procurement Directives and practice on-the-ground, and are catching up with EU Member States in the EBRD region.

The national public procurement legal framework and regulatory institutions

In the Balkan Countries and Turkey public procurement laws cover national and local government procurement (which together comprise 'state' or 'government' procurement) and public law institutions. The utilities sector procurement (public services monopoly) is outside the scope of public procurement laws in Montenegro, Serbia, and Turkey. In all the countries public procurement laws provide for a decentralised procurement system. An option to establish a Central Purchasing Body has been incorporated in the laws of Albania, Croatia, and FYR Macedonia. The assessment of 'law on the books' in this group of countries confirmed that their public procurement laws introduced a very uniform, comprehensive regulation as a result of their efforts to harmonise legislation with the acquis. The exceptions are Serbia and Turkey where there is still room for improvement, mainly in implementing regulations for the utilities sector and a clear differentiation between public procurement and concessions. However, a survey of local practice revealed that a gap in the uniformity indicators increases in the case of Bosnia and Herzegovina to 37 percent and in Serbia to 46 percent because local contracting entities have failed to develop internal procurement policies and rules. The assessment confirmed that public procurement laws in this sub-region are far from stable: in five out of seven countries gaps of more than 40 percent were recorded in the stability indicators.

In all the countries in the sub-region standard tender documents and contract terms and conditions are widely implemented. The secondary public procurement legislation commonly includes guidelines on how to draft the tendering documents, accompanied by standard forms for

contact notices and procurement records. Higher than average marks for flexibility indicators in Montenegro, Albania and Turkey are due to their legislation adopting standard tender documents, and terms and conditions for all types of procurement. The assessment of local practice confirms the high level of tender document standardisation.

The Balkan Countries and Turkey scored high in the enforceability indicators, with no significant regulatory gaps in this area, with the exception of Serbia. The high marks are due to the establishment of dedicated regulatory authorities and independent review bodies. Complaints related to public procurement are dealt with by the remedies bodies, except in Serbia, and a judicial review is available in every country. In principle, the remedies bodies are independent and dedicated, except in Turkey. However, the remedies procedures may lack certain recommended features. For example: hearings, and expert witnesses. The survey of local practice confirmed that in the majority of countries remedies procedures are perceived to be simple, speedy and 'fit to context', if not entirely predictable and impartial (B&H, FYR Macedonia, and Turkey).

The key policy features in the Balkan Countries and Turkey is that public procurement policies are aligned with local market requirements. Integrity safeguards and efficiency instruments were implemented to an almost identical level of compliance. However, in Serbia, Turkey and B&H national laws allow preferential treatment of domestic bids. Broader and easier access to procurement opportunities should also be provided; only in Turkey and Albania is a full tender dossier available online, free of charge. In Montenegro, the assessment of local practice revealed that not all key policy features provided for in public procurement law were implemented in practice. In the 'law on the books' assessment the efficiency instruments adopted by national laws were scored 6 percent below the optimal level (an insignificant regulatory gap), whereas in the 'law in practice' assessment a performance gap of 20 percent has been recorded. The assessment revealed that across the Balkan Countries and Turkey sub-region there is room for improvement in the implementation of the efficiency instruments, especially in the pre-tendering and post-tendering phases.

The quality of public procurement laws: Regulatory Gaps

The Balkan Countries and Turkey sub-region follow the EU Public Procurement Directives and EU Public Procurement case law. This is due to the fact that, in principle, all these countries are pursuing membership of the EU and have already taken steps to make their legal systems more compliant with the acquis, including the EU Public Procurement Directives.

The Balkan Countries and Turkey were ranked second in the sub-regions, although the disparity in rating between this sub-region and the EU Member States in the EBRD region and Eastern European countries, including Georgia and Russia, is negligible. The average score of the Balkan Countries and Turkey is a 75 percent compliance rate, in comparison to the EU Member States in the EBRD region, which have an average score of 76 percent compliance, and the Eastern European countries, including Georgia and Russia, which have an average score of 73 percent compliance rate. The results between these sub-regions vary only a few percentage points, but the Balkan Countries and Turkey are well ahead in ranking in comparison to the Central Asian Republic, the Caucasus and Mongolia sub-region, which scored on average 58 percent compliance rate.

The Balkan Countries and Turkey sub-region owes its high ranking primarily to good marks in three key indicators: competition (89.3 percent), uniformity (87.5 percent), and enforceability (82.9 percent). Such a result is not surprising when account is taken of the progress these countries have made towards harmonisation of their national public procurement laws with the EU Public Procurement Directives. One of the main objectives of EU acquis in public procurement is to establish fair competition in the market with no barriers for entrepreneurs from other EU Member States. The legal frameworks in the Balkan Countries and Turkey are, in principle, comprehensive and limit derogations to the exceptions provided for in the EU Public Procurement Directives. The high marks for the enforceability indicators testify to the existence of dedicated national regulatory authorities and independent remedies bodies with access to judicial review.

The lowest marks were scored in the efficiency of the contract (61.8 percent) and the stability (62.5 percent) indicators. The low marks for efficiency indicators are directly linked with focusing on harmonisation with the EU Public Procurement Directives and limitations coming from EU policy. Public procurement planning and public contract administration is not covered by

EU Public Procurement Directives, as EU policy focuses on competition in a single market, and other areas such as public contract management, project definition, achievable completion schedules and accurate cost estimates have been left to national legislators. The assessment revealed that only in Montenegro has the national legislature provided for comprehensive regulation of the pre-tendering and post- tendering phases of public procurement. Montenegro scored very high compliance in efficiency indicators, thus proving that it is possible for a national public procurement legal framework to introduce an efficient legal mechanism to ensure proper public procurement planning, assessment of needs, and accurate selection of tender type and method.

The Balkan Countries with highly compliant legal frameworks, i.e. Albania, Croatia and Montenegro, as well as Turkey, have developed new public procurement legislation and modern procurement solutions in the last few years, aiming to align their legal frameworks with EU Public Procurement Directives. However, this massive redevelopment of their legal frameworks has resulted in lower average scores for the stability indicators.

In the Balkan Countries and Turkey the variation between the highest and lowest marks in the areas assessed is 25 percentage points. The assessment results indicate that the Balkan Countries and Turkey have developed their national legal frameworks and transformed elements of their public procurement systems as required by the EU Public Procurement Directives. On the other hand, areas which are not directly regulated by the EU Public Procurement Directives have not been developed in general and achieved significantly worse results.

In the assessment of 'law on the books' the Balkan Countries and Turkey reached at least a medium level of compliance, with Montenegro (86 percent), Albania (83 percent), and Turkey (81 percent) scoring a high level of compliance. Montenegro scored well above the average in the sub-region, achieving very high compliance in the accountability, competition, and economy of the process indicators.

In contrast, FYR Macedonia (65 percent) and Bosnia and Herzegovina (66 percent) with medium compliance scored lowest amongst the countries in the sub-region. The reason FYR Macedonia achieved a low rating is primarily for poor compliance in the efficiency of the public contract, stability, and integrity indicators. Even high marks for the enforceability and uniformity indicators, which were better than average in the sub-region, could not improve its position in the ranking. B&H also scored lower than the average in all indicators, due mainly to its very low rating, below 40 percent, in the efficiency of the public contract. Low marks reveal that, in practice, there is insufficient regulation of the pre-tendering and post-tendering phases of public procurement in this country.

The quality of local procurement practice: Performance Gaps

The quality of local procurement practice in the Balkan Countries and Turkey was assessed as highly compliant with the benchmark, with a total average score of 79 percent. No areas of low compliance were identified. Most of the countries scored a high level of compliance, with Turkey as a regional leader (85 percent compliance rate), followed by FYR Macedonia (83 percent) and Albania (82 percent). The countries rated lower in the 'law on the books' assessment also scored lower in the practice evaluation and achieved a medium level of compliance (B&H (72 percent), Serbia (69 percent)).

The marks for quality of local procurement practice in the sub-region match the results of the EU Member States in the EBRD region, whereas the Eastern European countries, including Georgia and Russia, as well as the Central Asian Republics, the Caucasus and Mongolia, scored 6 to 10 percentage points lower.

In the key indicators, local practice in the Balkan Countries and Turkey was evaluated as medium to highly compliant, with the basic features of public procurement functions well developed. Marks for the integrity, economy of the process and proportionality indicators are lower and fluctuate between 67 and 70 percent (medium compliance level). The sub-region scored best in the competition indicators (84 percent). Nevertheless, the scores for quality of local practice are a few percentage points lower than the relevant scores in the 'law on the books' assessment (89 percent). Thus the results confirm that national procurement laws provide for fair competition mechanisms, but practice does not fully adhere to the standards set up by legislation.

The institutional framework in the sub-region scored 80 percent compliance rate. All local practitioners reported that their respective regulatory institutions are strong with guidelines on how to draft tender documents, standard procurement forms, procurement reports and contract notice templates provided. However, in practice, only Bulgaria and Latvia have introduced a mandatory test to ensure that the scope and subject of public procurement is economically justified.

The assessment results prove that local contracting entities in both the government and utilities sector conduct their public procurement in a manner compliant with the Core Principles benchmark. Local procurement practice does significantly better in areas where e-Procurement solutions have been implemented (Albania, Turkey, FYR Macedonia), and national legislation provides for standardised procurement documents as well as strong enforcement (Montenegro, Albania and Turkey).

Lessons learned: how practice differs from laws

General implementation problems

Albania and Montenegro which have recently adopted new legislation and scored very high marks for the quality of their laws in the 'law on the books' assessment, scored lower in the evaluation of the quality of their local practice. In both countries procurement practice still needs time to adjust to the new standards imposed by new high quality regulation.

Difficulty in ensuring fair competition and uniformity of local practice

The average score for each country reveals lower marks for competition and uniformity indicators than the very high marks scored in the 'law of the books' assessment. In three out of the seven countries contracts are frequently amended which distorts the results of a public tender.

Consistency and uniformity of local practice is hard to achieve. B&H provides is a good example: laws scored very high compliance in the uniformity indicators (93 percent), and the performance of local contracting entities scored medium compliance (60 percent). The discrepancy of 30 percentage points between law and practice indicates a lack of adherence to the law when conducting procurement procedures, thereby undermining the reliability of the public procurement system. Survey results revealed that internal procurement processes and decision making is not sufficiently regulated, nor are there, in place, internal monitoring and auditing arrangements. In addition, enforcement capacities should be improved. Scores for the quality of enforcement practice are 15 percentage points lower than scores for its regulatory framework.

Incomplete regulation of the pre-tendering and post-tendering phases of public procurement

As EU policies do not require obligatory regulation of procurement planning, procurement needs and risks assessment or contract management, the Balkan Countries and Turkey which re-oriented their laws towards compliance with acquis, seldom regulated these areas. The exception is Montenegro where during the EU harmonisation process pre-tendering and post-tendering phases of procurement were regulated. Accordingly, in a survey of local practice, contracting entities reported that they have adopted internal procurement policies to cover these areas. As a result, marks in the local practice survey for the economy and efficiency indicators improved, as compared to scores for the quality of legislation, and decreased for the uniformity indicators (no uniform local practice), in every country with the exception of Montenegro.

A survey of local practice revealed that, in general, in order to achieve good value for money, local contracting entities frequently adopt internal procurement rules, including policies on procurement planning and monitoring contract performance, thus generally improving their procurement capacity. The greatest discrepancy in favour of the quality of local practice is observed in FYR Macedonia and amounts to 18 percentage points. In FYR Macedonia, in seven out of eleven indicators, marks for practice were higher than the scores for quality of legislation in the 'law on the books' assessment.

2.3
The Central Asian Republics, the Caucasus and Mongolia

This section of the report discusses the assessment results for the public procurement laws and practice assessment in 8 EBRD countries of operation in the Caucasus and Central Asia: Azerbaijan, Armenia, Kazakhstan, the Kyrgyz Republic, Mongolia, Tajikistan, Turkmenistan, and Uzbekistan.

In the assessment, the public procurement legal frameworks of all the countries in the sub-region were reviewed and a survey of local procurement practice was undertaken. Unfortunately, no feedback, within the allocated timeframe, on local practice has been obtained from Azerbaijan, Kazakhstan, Mongolia, or Turkmenistan. Local contracting entities from these countries remained unresponsive to an invitation to participate in the research. In addition, only in this sub-region was a paper version of the questionnaire requested on top of the online interviewing tools (Azerbaijan, Turkmenistan, and Uzbekistan). However responses, where received, were all provided online.

In total, 7 local contracting entities participated in the research and provided feedback on their public procurement practice: 3 contracting entities from government procurement, and 4 contracting entities from the utilities sector. In addition, local legal advisers from all the countries in the sub-region contributed by answering a case study on the quality of local public procurement review and remedies procedures.

Background

The Central Asian Republics, the Caucasus and Mongolia sub-region includes countries that, in principle, follow the procurement standards of the 1994 UNCITRAL Model Law. UNCITRAL, the United Nation's foremost legal body in the field of international trade law, was created with the aim of introducing a range of core principles and good practices into the public procurement regimes of developing and transition countries, and to increase competition in these markets. The Central Asian Republics, the Caucasus and Mongolia region includes: Armenia, Azerbaijan, Kazakhstan, the Kyrgyz Republic, Mongolia, Tajikistan, Turkmenistan, and Uzbekistan.

The 1994 UNCITRAL Model Law resembles the WTO GPA and EU Public Procurement Directives in many aspects. For example: they all emphasise the publication of tender notices, the accurate disclosure of eligibility and award criteria, they include requirements for informing tenderers of the outcome of the procurement, still they recommend different procurement methods. In addition, the 1994 UNCITRAL Model Law allows exemptions from competition under specific circumstances.

The national public procurement legal framework and regulatory institutions

Public procurement regulations in the Central Asian Republics, the Caucasus and Mongolia have been influenced by the 1994 UNCITRAL Model Law. In the Central Asian Republics, the Caucasus and Mongolia, public procurement laws cover government procurement and, with the exception of Turkmenistan, local government procurement. Procurement in the utilities sector (public services monopoly) is generally not within the scope of the public procurement framework, whereas public law institutions' purchases are covered in Armenia, Kazakhstan, the Kyrgyz Republic, and Mongolia. In all the countries, with the exception of Uzbekistan, the law provides for a decentralised procurement system. Concessions are regulated separately only in Kazakhstan and Tajikistan.

In total, the Central Asian Republics, the Caucasus and Mongolia scored the lowest in the assessment. The difference is substantial as the sub-region achieved a medium level of compliance. With an average of 58 percent compliance. Whereas other sub-regions scored more than 74 percent compliance rate. The relatively low score for the whole sub-region is the result of Turkmenistan's 26 percent compliance rate.

However, key public procurement policy features are in place, although, however, they mainly operate at low or very low compliance levels. Only Armenia, Kazakhstan (two countries which revised their laws recently) and Mongolia achieve a medium level of compliance in incorporating anti-corruption safeguards, and procurement efficiency instruments in their legislation.

In general, countries in this sub-region perform better in adopting and implementing anti-corruption policies than in achieving efficiency of public procurement (except for Armenia, which is doing very well in terms of ensuring economy and efficiency of public procurement). In Turkmenistan and Uzbekistan more needs to be done in terms of implementing anti-corruption policies. The main problems are with the lack of transparency in public procurement, with no regulation ensuring broad access to procurement opportunities implemented. There is a need for a code of ethics, conflict of interest regulation, and specialised professional training in procurement. In a survey of local practice, contracting entities from the region reported that they aim to increase transparency and efficiency of their practice above the levels required by national legislation. In Kazakhstan, Tajikistan, and Uzbekistan the performance gaps were reported to be smaller than the regulatory gaps identified in the assessment of laws. In Armenia the assessment score is accurate only for anti-corruption policies, the score for practical implementation of the efficiency instruments are at the same level as the scores for legislation.

In general, in this sub-region, the legal frameworks are not comprehensive and do not cover all public contracts. Legislation does not ensure uniformity of local practice (regulatory gaps of between 20 and 50 percent were identified across the region), with the exception of Kazakhstan where the procurement function is primarily centralised, thus uniform. However, there are efforts to ensure stability and flexibility of local practice by incorporating standard tender documents. Standard contract notices and procurement record templates have been implemented in the majority of countries, except for Uzbekistan and Turkmenistan. Standard tender documents for all types of procurement are in use in Kazakhstan, Kyrgyzstan and Tajikistan but standard terms and conditions for contracts are used only in Kazakhstan. The assessment of practice reveals that local contracting entities have adopted standard internal forms and templates for procurement procedures. Local contracting entities reported that the use of standard international contract forms for all types of procurement is allowed, except in the Kyrgyz Republic. In half of the countries (Armenia, Kazakhstan, the Kyrgyz Republic, Tajikistan) secondary legislation includes guidelines on how to draft tender documents.

Moreover, sufficient enforcement capacities are not ensured by law. In the 'law on the books' assessment substantial regulatory gaps were identified in Azerbaijan, Uzbekistan and Turkmenistan. In these countries remedies procedures are not available because independent review bodies have not been appointed. It is the case that in five out of the seven countries, an alternative mechanism has been established, either within the general administration or by enabling a complaint to the commercial court. These courts do not apply remedies but they can award compensation. Where a remedies system has been established, the main problems in practice are certainty and cost.

The quality of public procurement laws: Regulatory Gaps

In the assessment the Central Asian Republics, the Caucasus and Mongolia scored low to medium compliance, below 70 percent, in all the key benchmark indicators.

The countries scored medium compliance in the basic competition and uniformity indicators (67 to 68 percent). If compared to other countries in the EBRD region these results appear to be low. The EU Member States in the EBRD region achieved very high compliance, (above 90 per cent) and the other sub-regions a high compliance rate (above 76 per cent).

Relatively good marks for the competition indicators are due to the adoption of the UNCITRAL Model Law standards in this region. Open tender is the default procurement method and laws require tender documents to be prepared and provided to the tenderers in good time before tender submission deadlines. However, in five countries out of eight in this sub-region preferential treatment of domestic bids is the rule. The procurement function in the countries is centralised, resulting in good marks for uniformity indicators.

In the economy and efficiency indicators, the sub-region scored below 50 percent on average, with very modest marks of approximately 40 percent compliance in Turkmenistan, Tajikistan and Uzbekistan. The main problems were recorded in the planning phase, where there is no test to verify whether a good business case and realistic budget can match the scope and subject of public procurement, and very simple methods are used to estimate the value of public contracts.

The best result in the sub-region was achieved by Armenia which scored a consistent medium level of compliance with an average of 72 percent. The Central Asian Republics, the Caucasus and Mongolia, are very diverse in the level of their policy development. There is a difference of 46 percentage points between Armenia and Turkmenistan, which scored the lowest in the sub-region and among all the EBRD countries of operation.

In general, low marks for the key indicators: integrity, transparency, and competition draw attention to a failure to achieve the main objectives of the public procurement policies. On a more positive note, the level of policy development in Armenia, Mongolia, and Kazakhstan, which scored about 60 percent compliance rate in these key indicators, demonstrates that significant progress can be achieved with focused reform. In the case of Armenia reform was stimulated by the WTO negotiation process, successfully completed in 2010.

The quality of local procurement practice: Performance Gaps

The assessment of practice in the Central Asian Republics, the Caucasus and Mongolia was challenging, as local contracting entities from four out of eight countries declined the invitation to participate in the research. With limited response, the assessment results cannot be considered representative of the region.

Based on the feedback received, local practice in Armenia, the Kyrgyz Republic, Tajikistan, and Uzbekistan was examined. The quality of local practice scored satisfactory in key benchmark indicators, with good procurement practice implemented by local contracting entities.

Nevertheless, the results for the economy of the process and proportionality are below 70 percent compliance rate. A better result, of 84 percent compliance rate, was achieved in the efficiency indicators. Local contracting entities reported that accurate planning methods have been implemented, such as a mandatory test to ensure that the scope and subject of procurement is economically justified and procurement plans are prepared in sufficient detail, taking into account the project definition, completion schedules, and cost estimates. Contract administration is mandatory for most respondents. The efforts made in practice have had a positive effect on the efficiency indicators. The internal regulations adopted by local contracting entities and the hard work of public procurement staff are focused on achieving 'value for money'. As a result, good marks were given for local practice in the pre-tendering and post-tendering phases of public procurement, as public contracts were reported to be well aligned with the contracting entities' needs and completed within the original contract price and on schedule.

Lessons learned: how practice differs from laws

General implementation problems

Armenia, which recently revised its public procurement legislation and scored high marks for the quality of its laws in the 'law on the books' assessment, scored lower in the evaluation of the quality of local practice, with several implementation problems reported. In Kazakhstan, where the law has also been changed, no feedback on the quality of local practice was received.

Lack of transparency and limited access to information on procurement opportunities

In this sub-region especially, barriers to international trade were identified. Domestic preferences are commonly allowed and modern procurement techniques and electronic communication are generally not available. This has resulted in a closed and uncompetitive public contracts market, and murky procurement decision-making.

Incomplete regulation of the pre-tendering and post-tendering phases of public procurement

In all the countries where a survey of local practice has been completed, the practice of local contracting entities scored better than the marks given for the 'law on the books'. If it is possible to trust the testimony of local contracting entities in this region, they take commendable care of all aspects of procurement in practice, while their laws are fragmented, with significant regulatory gaps in key policy areas, such as adopting anti-corruption safeguards, ensuring accurate planning and contract management and sufficient enforcement.

Insufficient enforcement and lack of remedies procedures

In this sub-region especially, if compared to other countries in the EBRD region, public procurement regulatory authorities lack capacity. In addition, in most of the countries in the region, independent remedies bodies have never been established and remedies in public procurement are not available.

2.4
The Eastern European Countries, including Georgia and Russia

This section of the report discusses the assessment results for public procurement laws and the practice review in 5 EBRD countries of operation: Belarus, Moldova, and Ukraine, as well as Georgia and Russia. In the assessment, the public procurement legal frameworks of all the countries in the sub-region were reviewed and a survey of local procurement practice successfully completed.

Local contracting entities in the sub-region were, in principle, cooperative and were keen to answer the online questionnaires, especially in Georgia and Ukraine. In total, 8 local contracting entities participated in the research and provided feedback on their public procurement practice: 3 contracting entities from government procurement, and 5 contracting entities from the utilities sector. In addition, local legal advisers from all countries in the sub-region contributed to the research by answering a case study on the quality of local public procurement review and remedies procedures.

Background

The Eastern European Countries, including Georgia and Russia sub-region, comprises five countries that are negotiating their access to the WTO and consider the WTO's Agreement on Government Procurement, 1994 version signed in Marrakesh (GPA) as the point of reference for their public procurement regimes.

The WTO GPA establishes procurement principles, terms and tools also reflected in the EU Public Procurement Directives (The EU is a party to the GPA). Amongst the key principles it enshrines are a commitment to avoiding discrimination between tenderers from countries who are signatories to the agreement and transparency (involving the publication of primary and secondary laws, administrative rulings and procedures).

The GPA sets out a number of requirements for conducting public procurement procedures, which can be open, 'selective' and 'limited', and include negotiations. Contracting entities shall publish tender notices (or 'contract notices') in their official procurement gazette, observe minimum deadlines for the preparation, submission and receipt of tenders, provide all necessary information in the tender documentation for a responsive tender, and respect fairness, equity and transparency in their internal rules for submission, receipt and opening of tenders. It is also prescribed that only tenders that comply with the 'essential requirements' of the tender documentation, and have been submitted by eligible tenderers can be considered in the evaluation. Contracting entities have the opportunity to clarify the circumstances in the case of abnormally low tenders. When closing the evaluation, contracting entities or entities have to provide information on the award decision and on why a specific tender was rejected and the winner selected.

The WTO GPA does not cover all public procurement sector, only certain contracting entities, certain types of procurement, and purchases above certain thresholds. Specifically, public procurement in the utilities sector is not regulated by the GPA. Furthermore, some other public contracts may be exempted on the grounds of various policy considerations such as national security or public health.

The national public procurement legal framework and regulatory institutions

In the Eastern European countries, including Georgia and Russia, the public procurement regulatory framework covers national and local government procurement (government procurement). Only in Georgia, procurement in the utilities sector (public services monopoly) is covered by public procurement laws. Whereas public law institutions are included in Georgia and Moldova. In all the countries, the law provides for a decentralised procurement system. There is legislation on Central Purchasing Bodies in Be-

larus, Moldova, and Ukraine. Concessions are regulated separately in all the countries, except Ukraine.

In the Eastern European countries, including Georgia and Russia, the basic policy features of public procurement are in place. However, only Georgia scored a high compliance rate, as most integrity safeguards and procurement efficiency instruments recommended by international best practice were adopted in Georgia in 2010. In the other countries there is a medium level of compliance with the benchmark, or even low compliance in the case of Ukraine, with a significant regulatory gap in these countries.

To achieve what remains to be done, in terms of adopting anti-corruption safeguards, may be a significant challenge for some national governments. Only in Moldova do procurement laws require government officials to follow a code of ethics and declare a conflict of interest. However, in a survey of local practice, the Moldovan respondents did not identify that as an obligation for their public procurement staff. Moreover, the laws in all the countries in the region do not require adequate formal training programmes for procurement staff and, in practice, their training needs are not met.

With the exception of Georgia, scores for the anti-corruption policies incorporated in the legislation are modest; with the results for procurement efficiency indicators lower. In addition, in a survey of local practice, the results were lower than the marks for the laws. Yet again, the performance gap for procurement efficiency is greater than the performance gap in transparency, integrity, and accountability indicators in all the countries in the region. In this sub-region specifically, the level of incorporation of procurement efficiency instruments in public procurement laws and practice is low and reveals a weakness in procurement planning and project-oriented public management.

The main problems were recorded in the planning phase, where there is no test to verify whether a good business case and realistic budget can match the scope and subject of public procurement and very simple methods are used to estimate the value of public contracts.

Laws do not provide for uniform and comprehensive regulation. On average a regulatory gap of between 12 (Moldova) and 38 (Ukraine) percentage points has been recorded, with local practice scoring less well, mainly due to an unsatisfactory level of public contract management.

The practice of local contracting entities is also irregular and unstable. This is not because of changes in the legislation (infrequent in this sub-region), but because of improper mechanisms ensuring the stability of internal procurement processes (Moldova scored 35 percent, Russia 70 percent and Ukraine 60 percent compliance against the benchmark).

On a more positive note, in the majority of countries in the sub-region, except for Russia, templates for contact notices and procurement records, standard tender documents for all types of procurement, and standard terms and conditions for contracts are available.

In principle, secondary legislation in the region provides guidelines on how to draft the tendering documents. However, in practice, contracting entities do not have appropriate standards for tender securities and the use of standard international contract forms is not popular.

As to the institutional framework and enforcement, several shortcomings were identified in the 'law on the books' assessment and confirmed in the survey of local practice. Due to the insufficient capacity of the regulatory authorities and the lack of independent remedies bodies, marks for the enforcement indicators in this sub-region were modest and the lowest of all the EBRD countries of operation.

In four out of five countries there is no opportunity to appeal to an independent remedies body; judicial review is provided for but the courts do not decide on remedies (only compensation). Only in Georgia is the remedies body fully independent. In other countries the review mechanisms lack certain recommended features or, as in the case of Moldova, no remedies body has been appointed. Where a remedies system has been established, the main problems, in practice, are certainty and predictability of the review decisions and cost.

The quality of public procurement laws: Regulatory Gaps

In the assessment the Eastern European countries, including Georgia and Russia, scored me-

dium compliance (average 73 percent) in all the key benchmark indicators, which places the sub-region in the third position in the EBRD region.

The difference between the Eastern European countries, including Georgia and Russia, and the other more highly ranked sub-regions is not considerable. On average there is a variation of only 5 percentage points.

The Eastern European countries, including Georgia and Russia, achieved a high level of compliance in the competition and uniformity of policy indicators (78 percent compliance). A high mark in the competition indicators is the result of introducing the open tender as the default procurement method and clear regulation of technical requirements and award criteria to fit the value of the contract. On the other hand, three of the five countries in the sub-region have not adopted procedures for dealing with abnormally low tenders. Public procurement law in Belarus allows preferential treatment of domestic bids.

The countries also received good scores for the flexibility indicator (86 percent compliance), as their legislation provides for standard contract notices and procurement report templates, tender securities forms as well as standard terms of reference and contract terms and conditions for typical public contracts. Guidance on how to draft tender documents is also provided.

The best result in the region was achieved by Georgia (83 percent) which indicates high compliance with international standards. Three other countries' national frameworks were evaluated as medium compliant with scores below 75 percent: Russia almost 75 percent, Belarus 74 percent, and Moldova 71 percent. Ukraine's result of 59 percent shows low compliance. More specific scrutiny of the laws reveals bigger differences in some of the indicators.

The results of Georgia are better than the average in all the Core Principles benchmark, especially in the transparency, flexibility and efficiency of the public contract indicators.

The most balanced development of a national framework was in Russia with scores of between 70 and 80 percent in all indicators.

The most significant differences between the scores in each indicator were observed in Moldova. Moreover Moldova scored lowest in the stability indicators (less than 40 percent).

The quality of local procurement practice: Performance Gaps

With a total score of 68 percent, the quality of local procurement practice in the Central and Eastern European countries and Russia sub-region was assessed as medium compliant.

The sub-region attained the lowest score in comparison to other sub regions. The difference between the evaluation of the Eastern European countries, including Georgia and Russia, and the EU Member States in the EBRD region and the Balkan Countries and Turkey equals 10 percentage points.

The sub-region achieved high compliance rate (above 75 percent) only in reference to the transparency indicators. At the other end of the scale, the proportionality was the only indicator on which the countries achieved low compliance. In all the other Core principle benchmark indicators the results fluctuate between 61 and 74 percent, or medium compliance.

Consequently, the quality of local procurement practice in the sub-region is considered to be satisfactory in most of the basic features of public procurement. However, three out of four procurement efficiency indicators – the economy of the process, efficiency of the public contract, and the proportionality indicators – scored below 70 percent. Scoring below 70 per cent were the enforceability indicators.

The least best result was for the proportionality indicators, primarily arising from a very low evaluation of practice in Moldova and Belarus, with a score of 31 and 49 percent respectively. Such a poor result is a consequence of a lack of the appropriate regulations requiring the formality and the extent of the procedure to reflect the scope and value of the purchase. In neither Moldova or Belarus is there a mandatory test to ensure that the scope and subject of procurement is economically justified.

The poor result for the enforceability indicators in this sub-region is unexpected and indicates not only difficulties in effective enforcement of existing laws, but also illustrates a lack of institutional capacities which would enable national governments to introduce lawful actions.

In Russia and Moldova there is no independent remedies system. In all the countries of the sub-region, the remedies procedures was considered more or less complicated (none of the interviewed local practitioners declared that the procedures were straightforward), and consequently, the remedies bodies are perceived to be unpredictable (except in Belarus). The remedies were evaluated as ineffective in Moldova, Russia and Belarus.

The best result of the whole sub-region was observed in the transparency (76 percent). In most of the countries, the tender documentation furnishes all the information necessary to submit a responsive tender and determine the obligations of both parties to the future contract. On the other hand, the tender documentation is not available free of charge. However, it is published on the contracting entities' websites (except in Russia and Belarus) in most cases.

In the survey of local practice, two countries in the sub-region, Russia and Georgia, achieved high compliance, 77 and 78 percent respectively.

Georgia obtained better results in comparison to the average of the region in all the Core Principle benchmark indicators. In the case of Russia, differences between the scores for specific indicators are even greater. The results for the competition, uniformity, and enforceability indicators are close to the average of the whole sub-region; whereas local contracting entities in Russia scored better than average in the efficiency of the public contract, proportionality and integrity indicators.

Two other countries were assessed as medium compliant: Ukraine (73 percent) and Belarus (63 percent). However, the difference between the results is significant as it accounts for 10 percentage points. The main problems for Belarus were in the procurement efficiency indicators.

The lowest marks were for Moldova at 56 percent. Moldova's overall assessment of low compliance is due to very low ratings in the proportionality and enforceability indicators (both indicators below 40 percent).

Analysis of the local practice leads to the conclusion that Georgia has a well developed public procurement framework. Russia and Ukraine, in specific areas, have a public procurement system embracing most of the basic international public procurement standards. In contrast, Belarus and Moldova, with their low marks in the assessment, should improve their public procurement regulation in all areas.

Lessons learned: how practice differs from laws

General implementation problems, except for Georgia

The sub-region scored the same medium compliance rate in both the assessment of laws and the assessment of local practice. However, local practice scored lower than laws, with a 5 percentage point difference between marks for laws (73 per cent) and for practice (68 per cent). In addition, a 10 percentage point difference has been identified between the results for Eastern European countries, including Georgia and Russia than for other sub-regions in the local practice survey. In all benchmark indicators, except for the competition indicators, local procurement practice was assessed as lower than that of the legal framework in the sub-region. The most substantial difference (17 percent) was for the proportionality, followed by 15 percent for the flexibility (the highest result in legal framework), and finally, for the economy indicators. In the sub-region, negotiated procedures are not always available for specific or complex contracts. Neither are there instruments available to ensure the procedure used is adjusted to the scope and specifics of the public contract in question. The contracting entities reported that there was no necessity to explain their choice of procurement method and less than half of those asked admitted that there is no mandatory test to ensure that the scope and subject of procurement is economically justified. The contracting entities prepare the tender documents in their official language only, even when the scope and value of the purchase indicates a potential international interest. More than half of local respondents are not allowed to use international standard contract terms and conditions.

Low procurement capacities of the local contracting entities, except for Georgia

In all the countries where a survey of local practice has been completed, the practice of local contracting entities scored lower than the marks given for the 'law on the books'. Local contracting entities in this region are not capable of supplementing national laws with internal procurement rules, and provide for an efficient public procurement process. Based on the survey results, local contracting entities in the sub-region are better at increasing competition and adopting transparency safeguards, than ensuring accurate planning and contract management of public contracts. The main gaps in practice occurred in the procurement planning phase. National laws do not provide for public contract valuation methods and contracting entities did not commonly provide for that in their internal procurement rules. The value of the contract is estimated using the simplest of methods. Procurement staff are not regularly provided with market surveys to update their knowledge of the prevailing prices for goods. Although the law in most countries of the sub-region includes provisions concerning tender securities, only in a few countries have the contracting entities applied the rules to demand a tender security for long-term contracts, or contracts with high risk and/or high value.

Insufficient enforcement and lack of remedies procedures

Except for Russia and Georgia, public procurement regulatory authorities in the region lack capacity. In addition, except for Georgia, remedies bodies are not independent. If the local respondents are to be trusted, the outcome of the remedies procedures is uncertain, except for Belarus. In Belarus, according to local legal advisers, the review procedures are never impartial but always predictably biased against the complaining supplier.

Successful implementation due to central e-Procurement platform

Georgia, which revised its public procurement legislation in 2010 and scored high marks for the quality of its laws, also scored high in the evaluation of the quality of local practice. No significant implementation problems were reported. Due to the introduction of a comprehensive eProcurement system, Georgia achieved good marks for both laws and practice.

Lack of transparency and limited access to information on procurement opportunities

In some countries in the sub-region barriers to international trade were identified, with domestic preferences allowed. In this sub-region only in Georgia are modern procurement techniques and electronic communication generally available.

2.5
The European Union Member States in the EBRD Region

This section of the report discusses the assessment results for 9 European Union Member States in the EBRD region: Bulgaria, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, the Slovak Republic, and Slovenia. Since 2006 the Czech Republic is no longer an EBRD country of operations. For this reason public procurement regulation in the Czech Republic has not been covered by the EBRD 2010 assessment and is not included in this report. In the assessment, public procurement legal frameworks were reviewed and a survey of local procurement practice successfully conducted in all the countries in the sub-region. Local contracting entities in the EU Member States in the EBRD region were keen to participate in the research and share their experience in conducting public procurement. All contracting entities approached by the research team agreed to participate and all online questionnaires were answered fully and accurately. In total 18 local contracting entities participated in the research and provided feedback on their public procurement practice: 14 contracting entities from the government procurement, and 4 contracting entities from the utilities sector. In addition, local legal advisers from all countries in the sub-region answered a case study on the quality of local public procurement review and remedies procedures.

Background

The regulation of public procurement in the EU Member States in the EBRD region is shaped by Directive 2004/17/EC for entities operating in the water, energy, transport and postal services sectors (the 'utilities directive') and Directive 2004/18/EC for public authorities and bodies (the 'classical directive'), both adopted in 2004 (the EU Public Procurement Directives).

Box 2.1

The provisions of EU Public Procurement Directives, relevant to the Legal Efficiency Concept

The EU Public Procurement Directives set out provisions for purchases covered in a range of topics relevant to the Legal Efficiency Concept:

- **publicity and transparency:** obligations to publish information notices (including contract notices, contract award notices and non-mandatory prior information notices); to disclose the name of the economic operator chosen, and explain the relative advantages of the selected tender, as well as the reasons for rejecting the tenders of unsuccessful candidates.
- **integrity and confidentiality:** prescribing the secure storage of tenders before opening; allowing the opening of tenders only after the deadline for submission has expired.
- **objectivity**: obligation to define the technical requirements clearly in the tender specifications; ensuring that these requirements do not create unjustified obstacles to competition, and do not refer to a specific make or process, trade mark or patent, for example; encouraging the use of national or European standards; the need for a tender to comply with the specifications as laid down in order to be valid;
- **combating fraud and corruption:** defining conditions to check the suitability of tenderers, including mandatory ones such as exclusion if the tenderer has been found guilty of participating in a criminal organisation or of corruption in the past, fraud or money laundering, and non-mandatory ones such as possible exclusion in case of bankruptcy or suspended business activities, conviction of any offence, grave professional misconduct, non-payment of social security contributions or taxes, having made false declarations to the contracting entity.
- **e-Procurement:** putting paper-based and electronic communication on an equal legal footing, and encouraging electronic means of communication as an efficient and secure way of interaction; specifying requirements for electronic auctions and introduction of the dynamic purchasing system.

The EU Public Procurement Directives outline conditions and mandatory time limits for the four main procedures: the open procedure, the restricted procedure, the negotiated procedure, and, the newly introduced, competitive dialogue. The directives also outline conditions and mandatory timeframes for the special areas of public works concessions and design contests.

The EU Public Procurement Directives, with some exceptions, such as consideration of public security or health, are mandatory only above certain value thresholds.* However, they exert considerable influence on procurement regimes even below these thresholds in most EU Member States. The efficiency of public procurement legislation in this first group of EBRD countries depends, therefore, partly on the EU Public Procurement Directives, even though the guidance given by the EU Public Procurement Directives is not equally present in all procurements for public contracts.

The national public procurement legal framework and regulatory institutions

In all countries in the EU Member States in the EBRD region, the coverage of the public procurement regulatory framework includes national and local government procurement (government procurement), utilities sector procurement (public services monopoly), and public law institutions' procurement. In all countries the law provides for a decentralised procurement system, but it does not exclude, at the same time, the opportunity to establish a Central Purchasing Body. As a result of the harmonisation with the EU Public Procurement Directives national laws in the sub-region are uniform.

In the EU Member States in the EBRD region procurement policy is balanced in almost all countries, with the exception of Romania, where most of the recommended procurement efficiency instruments were adopted, and a few anti-corruption safeguards. Apparently, the procurement policymakers in this country show more concern for the 'value for money' aspect of public spending than anti-corruption measures. This should be considered alarming when taken into account with the results of research conducted by Transparency International. The Transparency International Corruption Perception Index in 2009 ranked Romania lowest among the EU Member States in the EBRD region. On the other hand, that assessment of local procurement practice demonstrates the reverse ratio. At the level of contracting entities, the performance in the integrity measures is better than the implementation of procurement efficiency instruments.

In other countries the appropriate balance between integrity and efficiency measures was achieved at a medium level of compliance, except for Hungary, Lithuania and Latvia, where the results revealed high compliance in both evaluation categories.

The primary and secondary procurement laws in the sub-region were evaluated as stable with the exception of Poland and Romania, where the laws have been changed frequently within the last five years. The results achieved in the uniformity and flexibility indicators show a significant gap in legal frameworks across the region. In the majority of countries little emphasis is put on the standard tender documents, terms of reference, or standard terms and conditions for contracts (only in Romania are the standard documents envisaged by law). On the other hand, the assessment of local practice shows that this gap is reduced to certain extend by the contracting entities commonly adopting internal procurement guidelines and standard forms.

The quality of public procurement laws: Regulatory Gaps

The quality of the legal frameworks in the EU Member States in the EBRD region was scored highest among the EBRD sub-regions; however, the total average result of 76 percent compliance rate is as good as the Balkan Countries and Turkey, and similar to the Eastern European countries, including Georgia and Russia (73 percent).

What is noteworthy is that the EU Member States in the EBRD region owes its position to the very high scores of three key benchmark indicators: transparency (81 percent), competition (93 per cent) and uniformity (96 per cent). Such a result is not surprising when taking into consideration the mandatory harmonisation of national laws with EU Public Procurement Directives.

The laws cover most of the public contracts in the region and limit derogations to strictly defined exceptions. One of the most essential objectives of EU Public Procurement Directives is to establish fair competition in public procurement with no barriers to entrepreneurs from any EU Member State. In addition, with the EU being a party to the WTO GPA, the EU Public Procure-

* The corresponding EU regulation has introduced a complex system of thresholds, but as a general rule, the thresholds in the case of works is 4,845,000 Euros, in the case of supply and service contracts 125,000 Euros for 'traditional' public contracting entities, and 387,000 Euros for utilities.

ment Directives entail a compliance with the GPA requirements.

The EU Member States in the EBRD region have reached a medium level of compliance or better. Hungary is the only country in the whole EBRD region, wich reached very high compliance with a score of 91 per cent. Other countries with highly compliant frameworks are Lithuania (80 per cent), Latvia (77 per cent), Bulgaria (77 per cent, after adopting amendments in 2010), and Slovenia (76 per cent).

The EU Member States in the EBRD region scored lowest in the efficiency (63 per cent) and the integrity indicators (67 per cent). The low marks for efficiency indicators are directly linked with focusing on harmonisation with the EU Public Procurement Directives and limitations coming from EU policy. Public procurement planning and public contract administration is not covered by EU Public Procurement Directives, as EU policy focuses on competition in a single market, and other areas such as public contract management, project definition, achievable completion schedules, and accurate cost estimates have been left to national legislators. The assessment revealed that only in Hungary, and to the certain extent in Slovenia, has the national legislature provided for the regulation of the pre-tendering and post-tendering phases of public procurement. In Estonia, Poland, Latvia and the Slovak Republic the laws scored a maximum 50 per cent compliance in the efficiency indicators. The national laws are on the whole aimed at regulation of the tendering phase, while both the preparation of the procurement process and public contract management regulation is rudimentary.

The assessment revealed low performance of the EU Member States in the EBRD region in the enforceability indicators. Except for Hungary, with a 95 per cent compliance rate, the countries across the sub - region scored no more than 70 per cent compliance. The assessment results revealed that across the EU Member States in the EBRD region there is no common policy regarding a structure and key duties of the national regulatory authorities, and no single formula for independent remedies bodies. As the assessment was conducted while the harmonisation of national laws with, the EU Remedies Directive was still in progress, this could explain why access to remedies could be difficult. With basic features of the remedies systems already in place, the remedies procedure in five countries out of nine was evaluated as lacking administrative tribunal features and expensive.

The quality of local procurement practice: Performance Gaps

The quality of legal practice in the EU Member States in the EBRD region was assessed as highly compliant with a total average result of 79 percent compliance rate. The Balkan Countries and Turkey attained the same result, whereas the Eastern European countries, including Georgia and Russia, as well as the Central Asian Republics, the Caucasus and Mongolia scored lower. The disparity between the scores is between 6 and 10 percentage points.

In the survey of local procurement practice, the EU Member States in the EBRD region received high marks, except for the proportionality and economy of the process indicators. It needs to be noted that the results in the economy of the process indicators was very close to high compliance, at as more than 73 percent. In the proportionality indicators the score was at 66 per cent compliance. In view of these results, at the procurement capacity of local contracting entities was assessed as well developed. Based on the results of the survey of local practice, local contracting entities undertake all phases of public procurement activities with the effort required and aim to achieve good value for money. It is noteworthy that in all key benchmark indicators local procurement practice the EU Member States in the EBRD region score high and score very consistently.

In the survey of local practice, Poland scored best with an 87 per cent compliance rate, close to very high compliance, followed by Bulgaria (82 per cent) and Slovenia (81 per cent). The only country which a medium level of compliance was Romania. However, the score achieved (73 per cent) was only 2 percentage points lower than the minimum rate for high compliance.
The case of Poland clearly illustrates the importance of the procurement capacities of the contracting entities and local market influence for the quality of the public procurement practice. The assessment reveals that in a market - driven economy, local contracting entities could conduct sound procurement processes, even if there are no binding laws prescribing to undertake the pre-tendering and post-tendering activities or public contract management. In the market economy, awareness of the objectives and functions of the public procurement and sound financial management facilitate sound procurement practices, and these can fill gaps in the legislation at national level.

Lessons learned: how practice differs from laws

Efficiency driven procurement practice, if not laws

The assessment of local procurement practice in the EU Member States in the EBRD region shows that even when the laws do not incorporate mandatory efficiency instruments, local contracting entities conduct public procurement procedures in compliance with the Core Principles benchmark. In the survey of local procurement practice, all countries, apart from Romania, scored better in the procurement efficiency indicators than their results in the 'law on the books' assessments. Since at the EU level, the law does not require regulating procurement planning, nor does it regulate management of concluded public contracts, most of national laws remain silent on the pre-tendering and post-tendering phases of the procurement process. Nonetheless, in practice, contracting entities have introduced appropriate mechanisms in this area, based on internal procurement rules and policies. Consequently, the objective of conducting a procedure in order to gain the best 'value for money' and efficiently manage public contracts is in principle achieved.

Additional internal integrity safeguards

The assessment of practice revealed that in practice performance in the integrity safeguards is 9 percentage points better (9 per cent percentage) than scores marks for the integrity safeguards as adopted in national laws. Almost all countries in the sub-region, except for Hungary and Bulgaria, improved their results due to additional integrity safeguards incorporated in the internal procurement policies and rules. Primarily, internal procurement rules ensure that the activities undertaken by procurement officers are consistent with the underlying public objective. To this end, all contracting entities interviewed, adopted codes of ethics for their procurement staff and carefully managed cases of conflict of interest. In principle, disclosure of procurement opportunities and procurement decisions is comprehensive, and provided equally to all stakeholders in the process.

Implementation problems, specifically in ensuring fair competition and uniformity of local procurement practice

If we compare the results of the assessment of laws and practice in the EU Member States in the EBRD region, we will come to a conclusion that only those countries whose legal framework scored above 85 per cent compliance rate, except for Romania, may experience implementation problems. In the case of Romania, similar medium average scores were recorded for both quality of laws (73 percent) and practice (71 percent). The assessment revealed that in the 'law on the books' assessment the national laws scored 60 per cent compliance in the integrity and transparency indicators (medium compliance), but results for practice were even lower, indicating a lack of mechanisms which could enable implementing the law in practice. In the 'law on the books' assessment marks for the economy of process and efficiency of the public contract indicators were very high (around 90 per cent). In a survey of local practice both indicators scored only 60 per cent compliance rate.

In two key benchmark indicators, competition and uniformity, local procurement practice in each country in the sub-region scored lower than in the 'law on the books' assessment. In practice, a small fraction of the public contracts is awarded to international suppliers. In addition, the results of a public tender are frequently distorted by revisions to the contract. In addition aprior review or approval is not always required for amending a public contract. Moreover, the contracting entities in five out of nine countries have admitted that public contracts are not generally completed within the originally approved contract price, if on schedule.

As regards uniformity of local practice, the prequalification may differ substantially between the contracting entities, not to mention between countries in the sub-region. In half of the countries local contracting entities have introduced internal standard documents and contracts, which improve their marks for the consistency and uniformity of the procurement processes but does not do much to improve the overall scores for the uniformity of the national practice.

Internal procurement policies and rules regulate pre-tendering phase

In practice, local contracting entities reported that preparation for a public procurement procedure is as important and well-regulated internally as is the conducting of the procurement procedure itself.

Chapter 3

Efficiency of the Public Procurement Process in the EBRD Countries of Operations

3.1 Introduction

Public procurement regulation has an exceptional role to play in making progress towards a sound, transparent and accountable public sector in transition economies as it includes all the main sectors of national economies and virtually all government activity. Public procurement also has a profound impact on the development of the commercial sector and private businesses. In 2009 in the nine EU Member States in the EBRD region the total value of goods, works and services covered by public contracts was between 17 and 24 per cent of GDP. The corresponding share in the other EBRD countries of operation differs. However, using even the most conservative estimates, would put the combined value of public contracts in the four EBRD sub-regions at around $ 500 billion dollars (at a combined GDP of $ 3,394 billion in 2009, according to WB data).

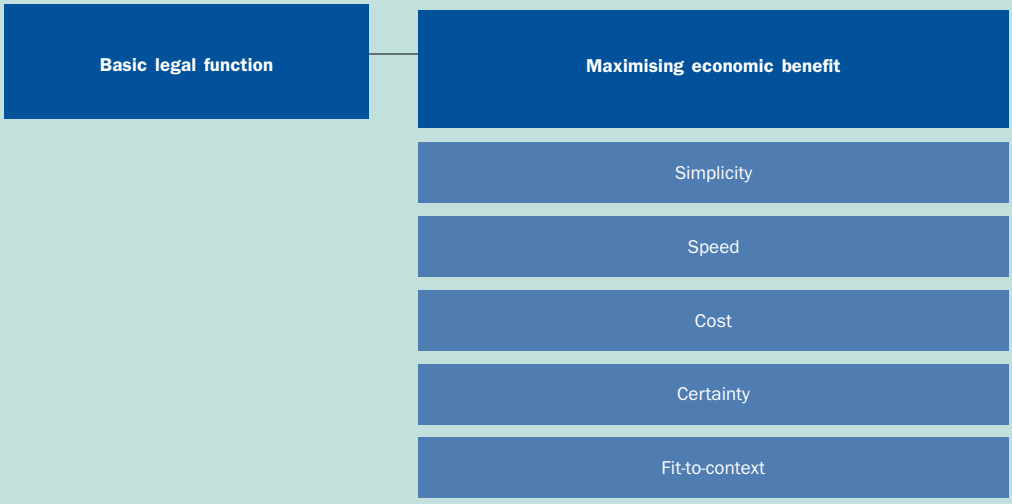
Considering its enormous impact on public spending, the quality of public services and the fate of private business, the efficiency of the public procurement sector is of paramount importance. Transition countries, working towards the development of their economies, have a particular stake in ensuring that their procurement systems are transparent and efficient, yielding the highest possible benefits in the long run.

Most of the EBRD countries of operation have some elements of a legal public procurement framework in place, which definines the institutional framework and the rights and obligations of the public procurement process stakeholders. Both the quality of the legislation in place and local procurement practice may or may not be compliant with good practice, depending on many internal and external factors. In order to enhance the economic outcome of the public procurement process, governments need to understand the role of key efficiency factors and to identify gaps in law and practice, as compared to their peers.

This chapter discusses how the concept of legal efficiency, originally developed to assess the quality of commercial laws, has been applied to review public procurement regulations in order to evaluate the efficiency of local public procurement practice in the EBRD sub-regions.

Figure 3.1

The Legal Efficiency Concept



3.2
The Legal Efficiency Concept and its Application in Public Procurement Regulation

The LEC, as discussed in Chapter 1 of the report, emerged from the interplay of legal theory and institutional economics, building upon the work of Nobel laureate economists Ronald Coase and Gary Becker, and pioneered by legal theorist Richard Posner. Developed further by the EBRD to assess commercial law, it provides a measure of the economic benefit of the law accruing to economic actors under a given law governing a given legal situation. This approach goes beyond the traditional goals of transparency, predictability and effectiveness of regulation. It not only requires that a specific legal situation is clearly and comprehensively regulated, but also that the overall benefits of regulation, in economic terms, outweigh the cost of the regulation itself as much as possible. In other words, the regulation in question should lead to an outcome that makes sense from an economic point of view. A legislative framework cannot be seen as efficient if it imposes more costs than necessary on the stakeholders. In commercial law, for example, enforcing contracts in all circumstances is not preferable to considering payment of compensation, if the performance of the original contract would contradict economic rationale.

In the public procurement context, legal efficiency is the degree to which the regulatory framework enables public procurement to

- achieve its basic function, and
- operate in a way that maximises economic benefit.

Public procurement regulation must therefore comply with two interdependent objectives.

Firstly, it must achieve its basic legal function of establishing the legal context and structures for public client transactions, i.e. government contracts. To begin with the most important legal function is the allocation of government contracts and public procurement in the spheres of administrative regulation or civil law. Subsequently, the public procurement legal framework should provide for a clear definition of rights and obligations, comprehensive institutions, and purchasing procedures suitable for a wide range of public contracts, from small value goods purchases to complex infrastructure projects. The public procurement legal framework should allow the public client to purchase the goods, works and services they need for their operations in a transparent and accountable manner, whilst ensuring the best possible value-for-money. In public procurement regulation, the legal efficiency approach must further allow for an appropriate balance between sometimes conflicting policy objectives and public expectations, such as competition policies, international trade targets, long-term economic development, local social goals and protection of the environment.

Secondly, this regulatory framework must also ensure that the way it regulates the public contract market creates the 'maximum economic benefit' for the parties involved, considering both gains and costs associated with complying with the rules. This second criterion is broken down into five key indicators, viz.: simplicity, speed, cost, certainty and 'fit-to-context'. The LEC model application to the public procurement remedies regulation is explained in Box 3.1.

Whereas the concept of legal efficiency indicators is relatively straightforward, the selection of regulatory tools and procurement practices maximising legal efficiency in public procurement, and the measurement of progress is a more complex task.

The main challenge for transition countries is identifying and applying the right tools, depending on the business culture and the progress of their market development. Procurement tools and techniques can hardly ever be directly transplanted from developed economies to transition countries. On the other hand, in the transition country, introducing new standards and business concepts may, in some cases, be easier if there is a blank page in the local legal tradition.

The main message of the legal efficiency concept is that, under different legal traditions and

Box 3.1

Legal Efficiency Concept indicators

SIMPLICITY	Regulation needs to be easy to comprehend and apply in practice. On the other hand, it also needs to cover, in sufficient detail, the legal situation addressed, taking into consideration the overall sophistication of the legal and business landscape, and stakeholder expectations. Rules, specific requirements, criteria and built-in controls tend to proliferate and become more complex over time following the evolution of the marketplace, where actors start to adapt to the given legal context and find their ways, including loopholes, through it. Such a proliferation, however, is likely to lead to confusion amongst stakeholders, who will find it increasingly difficult to understand which paragraphs need to be invoked or how they should be interpreted. Lack of simplicity in legislation is a weak area for many transition countries; either because the bureaucracy requires detailed practical guides disguised as regulations, or because complex and ambiguous legal texts are open to many interpretations. This may be due to a general lack of empowerment and risk averseness.
SPEED	Timely access to documents or clarifications can help considerably in mitigating uncertainties in public procurement. Notable delays in the evaluation of tenders or in contracting are likely to drive up business costs and consequently, prices. Tenderers will need to factor in a higher probability of increasing input prices and idle capacities. Therefore, the less time procedures take, the better they are from an efficiency viewpoint. However, shorter deadlines are not always preferable in public procurement: there are valid arguments for slowing the pace in certain phases. Contracting entities are well-advised to leave tenderers sufficient time to prepare for and draw up their tenders when scheduling the publication of prior information and tender notices. Similarly, a sufficiently long timeframe for eventual appeals should be maintained in the standstill period. Legislators and contracting entities need to strike a balance between swiftness and other, contradictory objectives.
COST	Tenderers, contracting entities, remedies bodies, courts and other parties in a public procurement procedure always incur certain costs including: direct financial costs (e.g. fees for requesting certificates, the services of notaries, legal advice, courts, correspondence), costs for manpower, or indirect costs arising from uncertainty. Public procurement legislation is able to influence these costs considerably, and so can the contracting entities' internal requirements. Rules that facilitate less costly procedures are preferred, as long as they are feasible and balanced against the accuracy and impartiality of procedures. Reduced costs help maximise the economic benefits for all actors in the marketplace, and can also encourage potential new entrants, especially small and medium sized enterprises (SME).
CERTAINTY	Certainty is one of the most important characteristics of an efficient public procurement system. Certainty is the assurance that procedures will be performed, criteria applied and rights and obligations observed exactly as laid down in the legislation, irrespective of the place, time, or subject of the purchase or the tenderers involved. Correspondingly, this aspect is seen as an amalgamation of three components: a. consistency or predictability b. impartiality c. resistance to corruption. Uncertainty is normally considered detrimental to doing business as it raises costs and prices. High standards of transparency, accountability, and safeguards for effective controls can help to strengthen the degree of certainty regarding a public procurement procedure and its outcomes.
FIT-TO-CONTEXT	The final aspect measures how well public procurement legislation and practice is adapted to the economic, social and legal context in the country concerned. Specifically, the practice of public procurement should: a. achieve economic, social and environmental policy objectives of the law (e.g. enhancing access for SMEs, or taking into account the full life-cycle costs of the product purchased) b. reach an appropriate balance between fulfilling the economic purpose of the public contract and the integrity requirements of the public client c. respond to economic need with flexibility, being able to adapt to, and take advantage of, the changing market context and innovation d. be compatible with the existing business and legal practice in the local market.

various types of contract regulation, public procurement procedures need to be simple, fast and inexpensive. They should also be associated with a sufficient degree of certainty and they should fit the local context. The role of local legislators and public procurement practitioners is to select the most appropriate set of procurement tools and good practices and, while applying them in the local market context, aim to achieve an appropriate balance between the core principles of procurement and the LEC indicators explained in Box 3.1 above.

3.3
Benchmarking Legal Efficiency in Public Procurement

The specific legal and institutional context in the EBRD countries of operation may differ significantly, thus solutions maximising the economic benefit from public procurement regulation in one country may not be adopted easily in another. However, it is still possible to outline a set of procurement tools and practices that are generally considered to contribute to achieving efficiency in public procurement.

For the purpose of the assessment, examples of good practice in procurement were collected from international public procurement legal instruments, internationally recognised procurement standards and recommendations, to enable comparison, were simplified and allocated to the relevant legal efficiency indicator. Based on this categorisation, a checklist of good practice was drawn up under each main legal efficiency indicator and this checklist constituted the assessment benchmark against which public procurement legislation and practice in the EBRD countries of operation were measured.

Information on local procurement practice has been provided by contracting entities in the government procurement and utilities sector of the EBRD countries of operations. During the assessment, local contracting entities in the government and utilities sectors were interviewed about their procurement policies and practices.

Feedback from the local contracting entities participating in the research provided a basis for the evaluation of local procurement practice against the benchmark. Despite several attempts, no feedback was received from contracting entities in Azerbaijan, Kazakhstan, Mongolia, or Turkmenistan.

As public procurement legislation regulates a three-stage process, examples of good practice in the checklist were reviewed and analysed separately for the pre-tendering, the tendering and post-tendering phases of public procurement.

In addition, a set of overarching topics were analysed under the heading of 'institutional framework' (see Figure 3.2 below).

The following four sections outline examples of good practice and procurement tools that should be considered in order to maximise economic benefit from regulation in transition countries. These examples of good practice and procurement tools formed the backbone of the checklist in the assessment benchmarking exercise.

In addition, the assessment looked specifically at the extent to which these practices and tools are applied or implemented in practice; the main findings are listed in specific country groupings or sub-regions.

Figure 3.2

The main phases of the public procurement process

Institutional Framework

This overarching category contains the regulatory framework, the institutions in place, the definition and organisation of critical procedures, and basic standard documents and templates. Box 3.2 presents and explains the best practice and their individual indicators for the five legal efficiency indicators.

Box 3.2

Best practice in five legal efficiency indicators

SIMPLICITY	
• Single comprehensive regulation of all types of public contract • Unified procurement procedures for all public contracts • Unified standards of communication • Standard terms and conditions for public contracts • Standard tender documents	The use of standard forms for contract and contract award notices, tender securities or procurement reports helps both contracting entities and tenderers by simplifying the process. As the format and content of standardised notices and tender documents are well known, the risk of mistakes and misinterpretations is greatly reduced. These also save considerable cost and time for all actors.
SPEED	
• Reasonable deadlines for prequalification and tender submission • Appropriate division of responsibility and staffing in the contracting entity • Streamlined procurement decision-making process	It is, of course, not possible, nor recommended, to shorten the prescribed time periods for prequalification or tender submission in order to save time. Tenderers should have sufficient time available to organise consortia or subcontractors, to prepare their tender, and to collect the required certificates and other supporting documents. Minimum time limits, as recommended in the EU Public Procurement Directives, should be set out in the national legislative framework, but individual contracting entities may benefit from further guidance on calculating the optimal time limits, considering the context and circumstances of the procurement. To ensure that procurement procedures do not take more time than they ought, contracting entities need to design the processes carefully. It is essential that the public procurement function is adequately staffed, that officials have guidance avail-able and are thoroughly trained to apply the procedure, without delay. The workload of public procurement staff can be greatly reduced and throughput times consequently streamlined by the use of appropriate Information and Communication Technology (ICT) tools and the application of e-Procurement solutions.

COST	
• Participation costs should be aligned with the value of the contract. • Complexity of the procurement process shall be proportional to the value of the contract	The costs accruing to contracting entities and tenderers are kept at a reasonable level through legislative and organisational means by simplifying the procedures to an optimal extent (thus reducing the time input needed), by prescribing standardised notices and documents, and by applying e-Procurement solutions.

CERTAINTY	
• Stability of regulation • Disclosure of procurement legislation • Disclosure of internal procurement policies and procurement decisions • Respectability and low turnover of procurement officers	Good practice requires public procurement law to be clear and unambiguous, creating a relatively stable legal environment which ensures adherence to the rules and sufficient competition in public procurement. Legal certainty needs to be reinforced by as much transparency as possible. Contracting entities are best advised to disclose their internal procurement rules (describing the allocation of tasks and responsibilities, as well as the main procedures) and procurement decisions, e.g. in the form of individual contract award notices. Efficient public procurement structures need to have well-regulated processes and adequate instructions and training for staff so that they are able to apply them in an appropriate and consistent way. In order to strengthen the organisation's resistance to corruption, public procurement officers should enjoy adequate pay levels. These officials should be respected and have a sound and stable position within the organisation. This is achieved through hiring qualified staff, anchoring them firmly in the organisational structure and providing clear management support in case of disputes. Preparing codes of ethics, emphasising their role and the importance of complying with the codes are equally helpful.

'FIT-TO-CONTEXT'	
• Clear allocation of responsibilities in the description of organisational structures and processes • Monitoring changes in the procedure • Monitoring amendments and revisions to the public contracts • Clear internal rules on public contract cancellation and justification in order to ensure sound financial management • Adequate auditing arrangements	Public procurement policy, internal rules and processes need to reflect the socio-economic context in which the organisation operates. Introducing strict tender security requirements or sophisticated e-Procurement solutions does not make sense if tenderers are not generally able to cope with them. Elaborate internal controls and external audit mechanisms are not useful if the controlling units or bodies are weak. Governments and contracting entities should take all the relevant contextual factors into account when proposing legislation, setting up rules and defining processes.

Efficiency of public procurement: institutional frameworks – general trends in the EBRD sub-regions

In the assessment, the quality of the institutional frameworks measured against legal efficiency indicators was surveyed across the EBRD region. Analysis of the responses to the survey on the public procurement institutional framework shows significant deficiencies, concerning speed and cost aspects of the institutional framework, in the Eastern European countries, including Georgia and Russia. Figure 3.3 presents the scores of the efficiency of the institutional frameworks in the EBRD sub-regions.

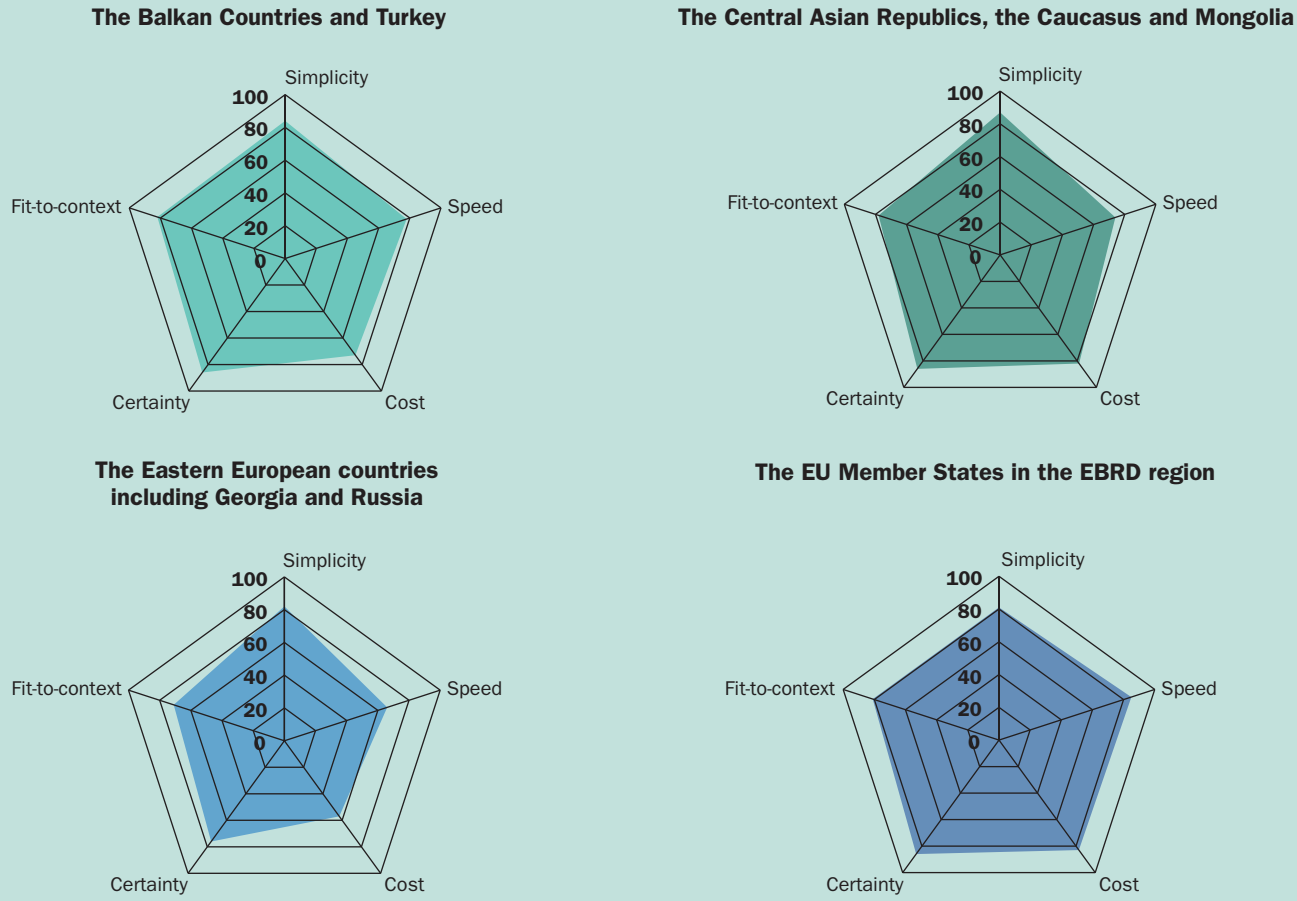
Cost is a concern in the Balkans and to a lesser extent amongst EU Member States in the EBRD region, whilst the Central Asian Republics have room for improvement with regard to the speed of their institutions.

Marks for simplicity, certainty and 'fit-to-context' indicators seem to be at acceptable levels across all the EBRD countries of operation.

In terms of the adequacy of institutional frameworks, the Central Asian Republics, Caucasus and Mongolia, and the EU Member States in the EBRD region perform best, at 85 and 84 per cent respectively. The average score for the Balkan countries and Turkey is 77 per cent, with the Eastern European countries, including Georgia and Russia, performing the least well, with 71 per cent. Figure 3.4 presents the assessment results for the institutional framework in the ERBD countries of operation and the average of the ERBD sub-regions.

Figure 3.3

Efficiency of the institutional frameworks in the EBRD sub-regions

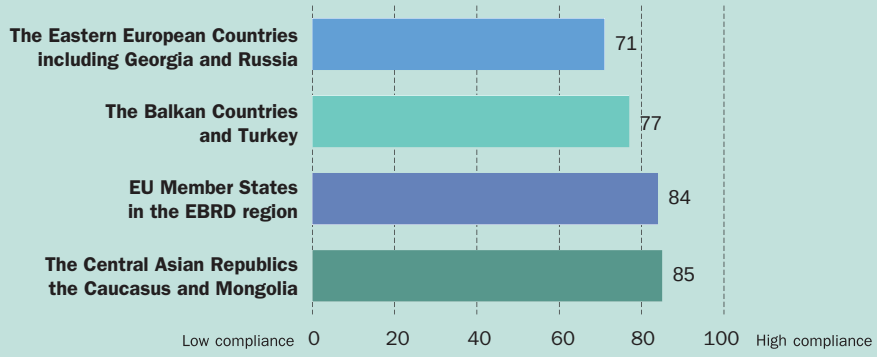


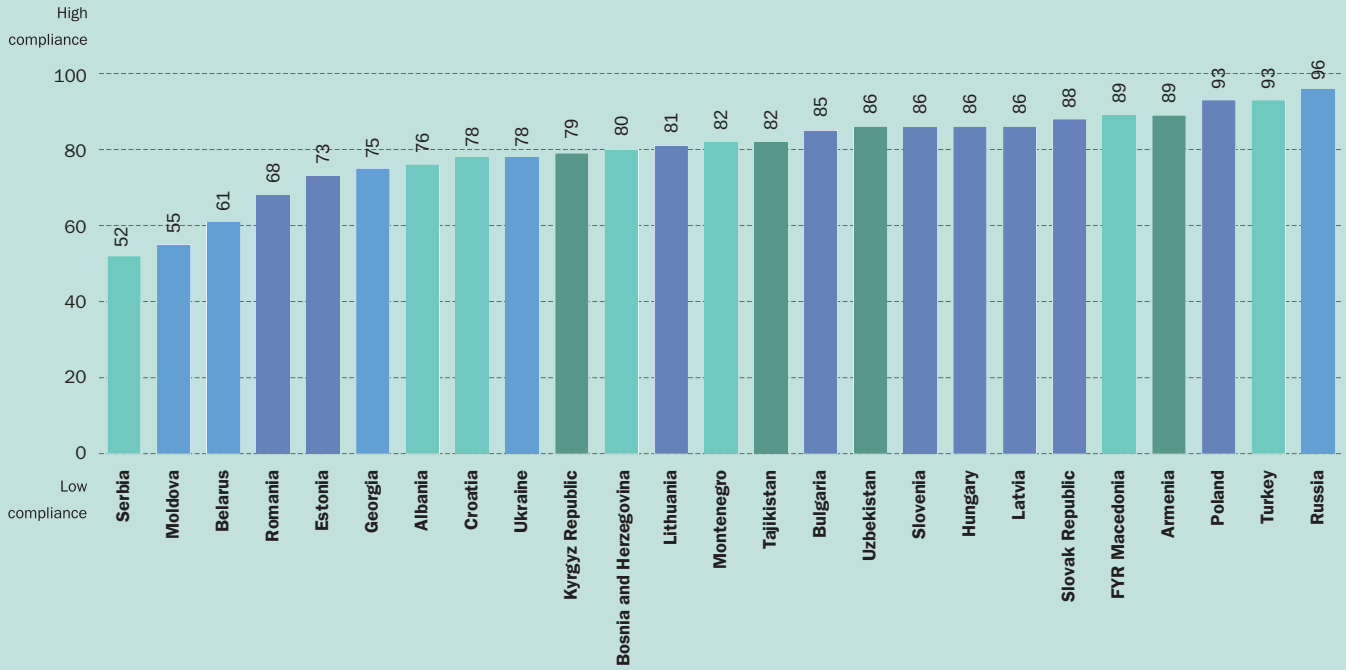
Notes: The figure shows the quality of the institutional frameworks in five LEC indicators for the EBRD sub-regions. The figure shows the score for efficiency of national public procurement institutions as a mean average. The scores have been calculated on the basis of the practice questionnaires, developed from the LEC benchmark and answered by local contracting entities, and local legal advisors. Total scores are presented as a percentage, with 100 per cent representing the optimal score for each LEC benchmark indicator.

Source: EBRD Public Procurement Assessment 2010

Figure 3.4

Assessment results – the institutional framework in the EBRD countries of operations and the average of the EBRD sub-regions





Notes: The figure includes two charts. The top chart shows the average score for efficiency of institutional frameworks in the EBRD sub-regions. The second chart shows the scores for efficiency of institutional framework in the evaluated countries as a mean average. The scores for both the EBRD sub-regions and the countries have been calculated on the basis of the practice questionnaires, developed from the LEC benchmark and answered by local contracting entities, and local legal advisors. Total scores are presented as a percentage, with 100 per cent representing the optimal score for each LEC benchmark indicator.

Source: EBRD Public Procurement Assessment 2010

Some common trends across the Bank's countries of operation are observable from the responses of the practitioners who participated in the survey. Basic guidance and templates supporting the work of officials, such as procurement manuals, internal guidelines for tendering documents, as well as standard forms, seem to be available throughout the EBRD region. Local practitioners also report that there are no problems with the fundamental organisation of the public procurement function. For example, the internal procurement roles and responsibilities are duly allocated, and internal monitoring and auditing is undertaken by the procuring bodies concerned, although its depth may not be entirely satisfactory.

However, there is potential for significant improvement across the region in the provision of training for public procurement officials. The current situation is unsatisfactory in terms of availability of training materials and on-the-job courses in most EBRD countries. A general lack of adequate training is preventing officials from performing their work efficiently.

There is further potential for significant improvement across the region in the provision of procurement risk assessments. These are normally conducted for all public tenders in developed countries. Such risk assessments enable the organisations to understand and prepare for hazards to finances, health and safety, or an adverse public perception of the procuring body, by estimating the likelihood of such hazards and their potential impact.

The greatest need for improvement in the EBRD region concerns first and foremost the adequate remuneration of public procurement staff. Poor remuneration may negatively impact staff retention and integrity. Similarly, codes of ethics are non-existent or only very weakly observed in most of the procuring entities in the countries surveyed.

The Pre-tendering phase

The pre-tendering phase comprises a range of preparatory activities, such as defining the need for the procurement exercise, budgeting for it accordingly, setting up the contract profile, selecting the procedure, setting the award criteria and, based upon all of these, preparing the tender documentation. Box 3.3 presents best practice in the five legal efficiency indicators for the pre-tendering phase.

Box 3.3

The Pre-tendering phase: Best practice in five legal efficiency indicators

SIMPLICITY	
• Aligning budget and procurement programming and planning • Implementing standard planning models • Aligning business and procurement management	Contracting entities are well advised to take great care aligning their procurement programming procedures smoothly with their operations and investment planning arrangements. For example, there should be simple procedures in place for line units consulting the public procurement function, if necessary, for their annual budget planning process. This helps avoid inaccurate estimations or unregulated and inefficient interactions between the units. Clear, comprehensive descriptions should be available during the procurement planning process to help stakeholders understand it. The descriptions should also cover the coordination of technical and financial planning activities. The best solution is to use standard planning models for major types of procurement. Software applications, with built-in controls and efficient workflow management functions, can contribute significantly to simplifying these otherwise complex tasks.

SPEED	
• Specific procurement planning deadlines • Shorter deadlines for procurements with prior notice publication • Implementing e-catalogues • Implementing framework agreements • Mandatory online communication	A reasonable pace in procurement planning is important in order to prevent budget estimates, delivery terms, even technology choices from becoming outdated. This can be achieved through defining a clear timeframe for preparing contract profiles, information notices, and later, tender documentation. The requirements should be different for regular operational purchases, complex investment projects, and urgent purchases. In general, they should take into account the contract value and scope. Providing deadlines for staff to work towards, even if they are not always met, helps maintain a reasonable pace. Publishing contract notices and tender documentation online, on a central procurement website or the site of the contracting entity, is also considered good practice. The information reaches tenderers faster this way, allowing more time for preparation of the tender.
COST	
• Making use of ICT tools in procurement planning • Proportional tender securities • Developing online procurement resources, available free of charge	Efficient procedures, the use of standard documents and ICT tools play arguably the biggest role in reducing manpower costs through reducing the need for time-consuming input. Contracting entities should have a well-considered and justifiable policy on the application of tender securities. These can reduce potential losses from not being able to conclude the contract with the winner, but, at the same time, may put too much of a financial burden on the economic actors (especially if the tender security of unsuccessful tenderers is retained by the procurer). Therefore maintaining the right balance between avoiding risks and encouraging participation is important. Where possible, tender documents should be available online and free of charge for tenderers.
CERTAINTY	
• Specific and firm needs assessment • Regular business and procurement decision making process • Clear policies on the selection of the procurement procedures • Clear eligibility criteria • Fully formulated and published prequalification requirements and contract award criteria • Availability of complete tender documents well in advance of the tender deadlines	To maximise certainty in public procurement, contracting entities need to preserve the consistency and relative stability of the financial and investment planning procedures. These need to be laid down firmly and not amended at will. Consistency in making and authorising planning decisions is also important. As an anti-corruption safeguard, planning ought to be separated from supply management. Procedures should take account of the potential for conflicts of interest from elsewhere, too. The selection of the procurement procedure (if not open procedure) must be justified. Open tender should be the default procedure by law, from which deviations should be allowed only in well-defined cases. In order to protect the rights and obligations of both parties, the eligibility and award criteria must be published in the tender documentation. It is, of course, important that these criteria are strictly applied. No tenderer should be exempted or treated differently from others, irrespective of the attractiveness of this offer. The criteria should be sufficiently detailed and objective, and their relative weights reasonable. Whenever possible, they should be expressed in monetary terms.

'FIT-TO-CONTEXT'	
• Real and justified needs • Availability of market data, where applicable • Regular interdependence between financial and procurement management • Realistic procurement targets • Sound business case and contract profile	To take due regard of the economic context, contracting entities should give valid economic justifications for their planned purchases, and planning procedures should be, as far as possible, regulated and standardised. In order to validate the planning process as well as improve the accuracy of budgeting, one-off or more regular (for recurring purchases) market surveys should be conducted to learn about prices and performance characteristics/ updates of known products, and products newly introduced to the market, as well as new delivery or financing schemes. It is also essential, for the purposes of sound financial management, to integrate procurement planning with the organisation's budgeting process. Major projects should be identified specifically in long-term budget estimates. In addition, mandatory financial authorisation should normally be required to start the procurement process, and for contracts for which payments will be due beyond the current financial year. Good practice involves sufficiently detailed procurement planning to be able to produce a realistic project definition, achievable completion schedules, and accurate cost estimates; appropriate coordination of technical, financial and procurement planning as well as the obligation to complete the procurement plan before a public procurement process is started. The contract profile (before specifying the terms of reference) ought to respond to economic need with an optimal degree of flexibility, being able to adapt to, and to take advantage of, the changing market context. Contract terms have to be consistent with existing legal and business practices in the local marketplace. Contracting entities should not request delivery terms which are unusual in the country, or certifications that are rarely issued. The prequalification and award criteria may be designed to achieve particular economic, social and environmental policy objectives. This decision has to be taken by the contracting entity after carefully balancing the sometimes contradictory objectives against each other, such as reducing immediate costs to the treasury, minimising the long-term costs over the full life-cycle of the product; increasing the employment of vulnerable groups or strengthening sub-regional development.

Efficiency of public procurement: the pre-tendering phase – general trends in the EBRD region

The assessment results show that, most countries in the EBRD region have reached similar levels of efficiency. In fact, the differences in terms of pre-tendering phase regulation. In fact, the differences between the individual performances of the sub-regions is smaller than those for the efficiency of the institutional framework. Once again the Eastern European countries, including Georgia and Russia, are lagging behind the other sub-regions mostly in terms of speed and cost of the procedures. Additionally, in this sub-region inadequate controls and financial management reduced the marks for 'fit-to-context' indicators. Figure 3.5 presents the results for the efficiency of the pre-tendering phase in the ERBD sub-regions.

In the pre-tendering phase the Balkan countries and Turkey achieved a good score, and lead the ranking of EBRD countries with 82 per cent compliance rate. The Central Asian Republics, Caucasus and Mongolia, and the EU Member States in the EBRD region follow with 80 per cent and 79 per cent, respectively. At the end of the list, with 70 per cent compliance rate, are the Eastern European countries, including Georgia and Russia.

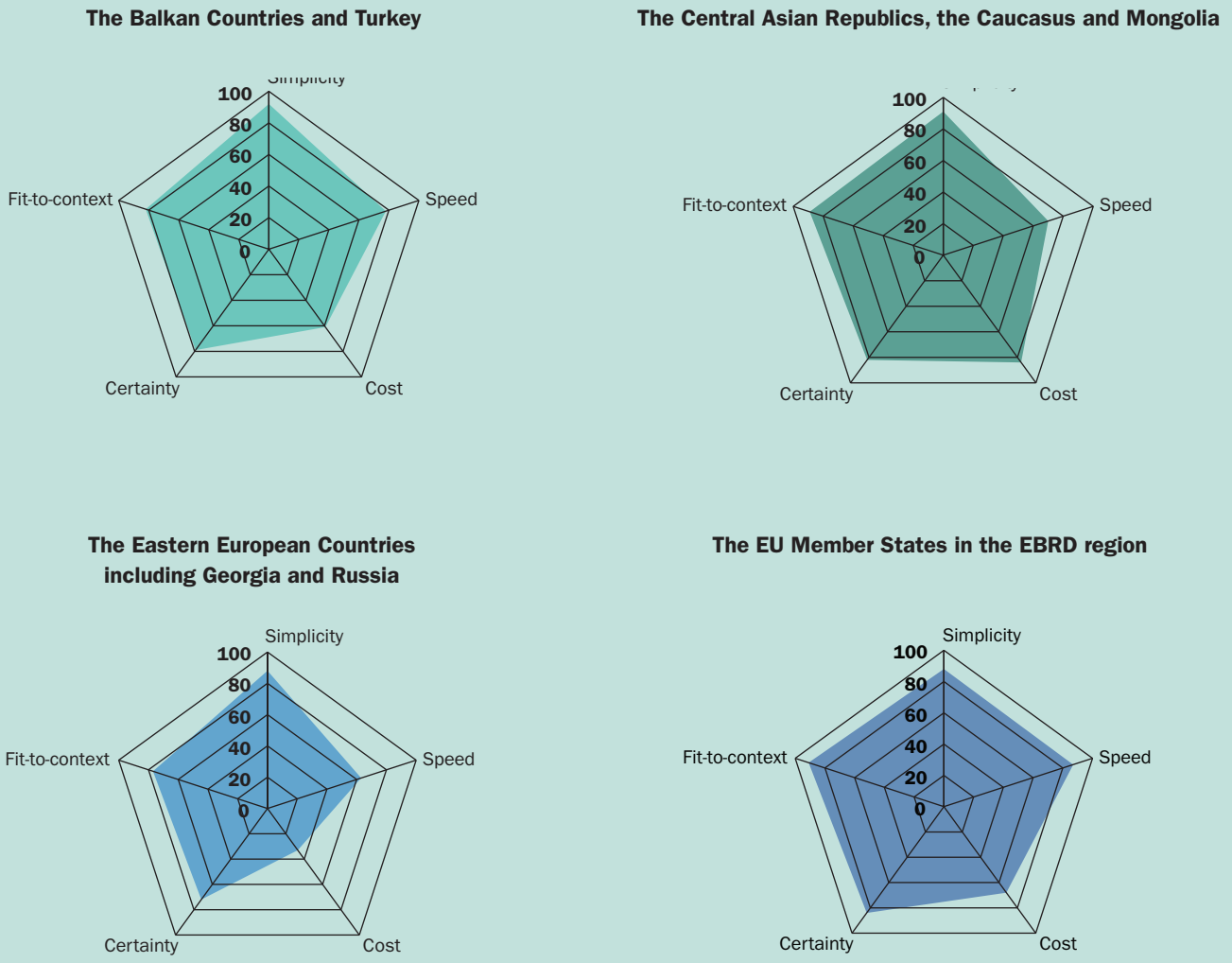
The general strengths across the region comprise the wide application of prequalification pro-

cedures. This can save time and costs for both contracting entity and tenderer, and the compilation of more or less comprehensive tender documentation, enabling prospective tenderers to understand the client's requirements, as well as eligibility and selection criteria.

In most of the countries, however, weaknesses have been identified in the preparatory phases of tendering. This includes a lack of needs assessments, especially the economic justification of the planned purchase and prior market surveys to find information on available technologies and prices. Gaps were also reported by local practitioners concerning cooperation between the line units, public procurement and the treasury function. Weak coordination between purchasing and overall financial planning may cause delays in

Figure 3.5

Efficiency of the pre-tendering phase in the EBRD sub-regions

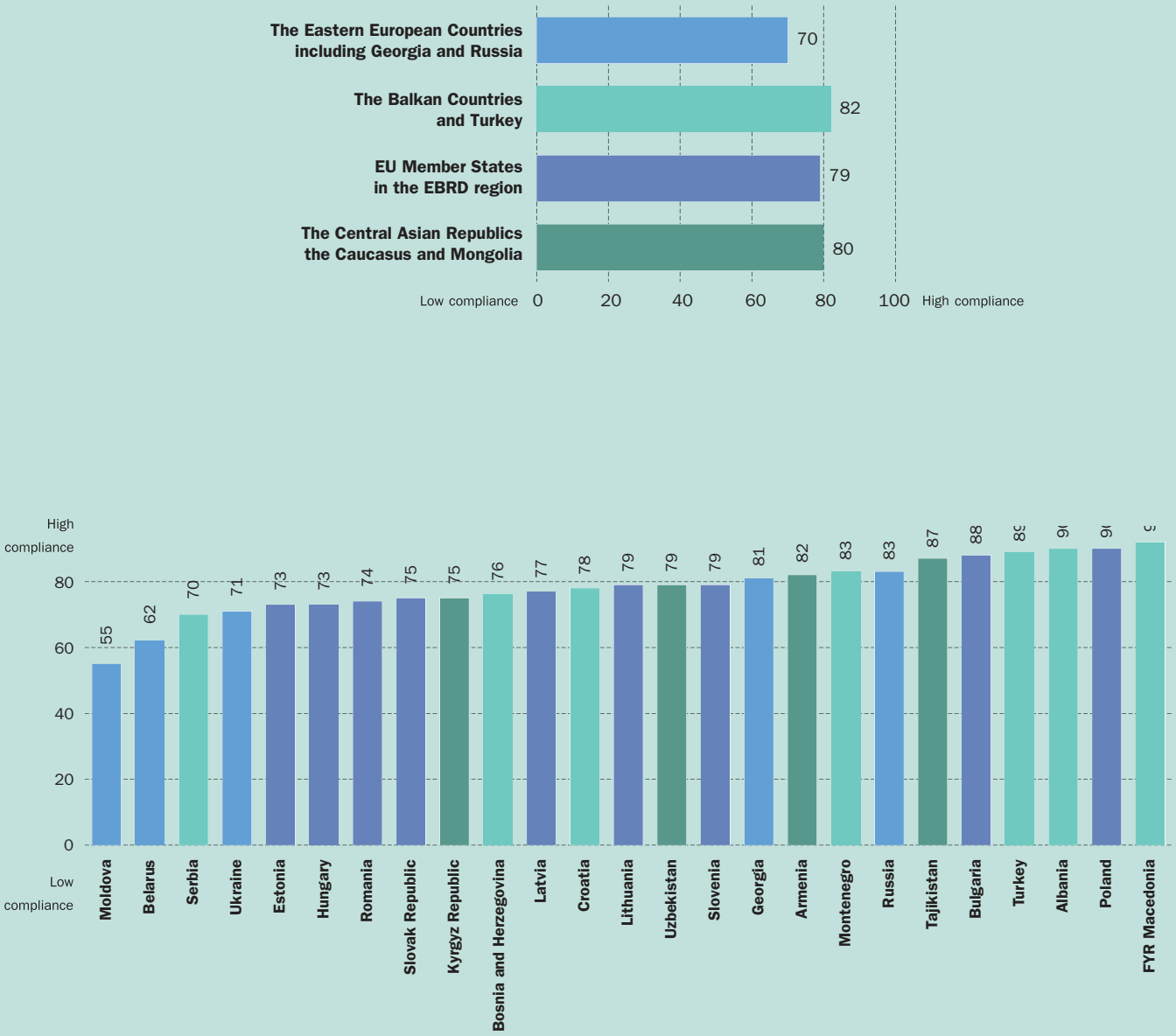


Notes: The figure shows the efficiency of the pre-tendering phase in five LEC indicators for the EBRD sub-regions, as a mean average. The scores have been calculated on the basis of the practice questionnaires, developed from the LEC benchmark and answered by local contracting entities, and local legal advisors. Total scores are presented as a percentage, with 100 per cent representing the optimal score for each LEC benchmark indicator.

Source: EBRD Public Procurement Assessment 2010

Figure 3.6

Assessment results – the pre-tendering phase in the EBRD countries of operations and the average of the EBRD sub-regions



Notes: The figure includes two charts. The top chart shows the average score for efficiency of pre-tendering phase of public procurement in the EBRD sub-regions. The second chart shows the scores for efficiency of pre-tendering phase of public procurement in the evaluated countries as a mean average. The scores for both the EBRD sub-regions and the countries have been calculated on the basis of the practice questionnaires, developed from the LEC benchmark and answered by local contracting entities, and local legal advisors. Total scores are presented as a percentage, with 100 per cent representing the optimal score for each LEC benchmark indicator.

Source: EBRD Public Procurement Assessment 2010

procurement or even the cancellation of certain tenders.

To improve standards of transparency, contracting entities in the EBRD region should put more emphasis on providing a justification for the specific procurement method selection and it is advisable to make the tender documentation available free-of-charge, wherever possible, to reduce the financial burden on tenderers and to increase competition, especially from SMEs. Figure 3.6 presents the assessment results for the quality of the pre-tendering phase in the ERBD countries of operation and the average of the ERBD sub-regions.

The Tendering phase

The tendering phase, in many ways the 'main' phase of public procurement, is always, under any legislative regime, the most regulated stage in the process. Most aspects covered under the 'Institutional Framework' heading, as well as those under the pre-tendering and post-tendering headings, phases are only guided by general provisions and by a set of organisation-specific internal rules and guidelines. This is in contrast to the tendering phase which is shaped decisively by dedicated public procurement legislation, international agreements or good practice. Consequently, it is not surprising that there are smaller differences in legal efficiency between countries and sub-regions in the tendering phase.

Box 3.4 presents procurement best practice in the five legal efficiency indicators for the main public procurement phase - tendering - from notification of activities to the closing of the tender evaluation.

Box 3.4

Best practice in five legal efficiency indicators

SIMPLICITY	
• Implementing 'one-stop-shop' schemes • Implementing remote work of the evaluation panels • Implementing comprehensive e-Procurement solutions	In order to ensure simple access to tender information, entities should publicise contract notices using a single point of access approach, in a national official tender gazette or website. The contract notices should remain readily accessible to the wider public at least until expiration of the tender submission deadline. The work of the evaluation committee can be considerably supported by method descriptions, training and guidance, templates and software. e-Procurement is a tool that can simplify the communication between the tenderer and procurer, as well as the procedure of submitting tenders, and is therefore recommended where the local context is ready for it. It allows tenderers to receive instant feedback on the receipt of their question or tender.
SPEED	
• Reasonable tender deadlines • Specific clarification deadlines • Specific internal deadlines for evaluation	As a major recommendation, sufficient time should be allowed to prepare tenders. In order to speed up the interaction between procurer and tenderer, the use of electronic communication channels should be emphasised, if appropriate in the local context. Requests for clarification should be allowed and answered promptly and in writing (and sent to all known tenderers as a matter of course).
COST	
• Contract notices available electronically and free of charge • Tender documents available electronically and free of charge • Electronic submission of prequalification documents • Contract award notices and procurement reports available to the public electronically and free of charge	Allowing electronic submission can help reduce the costs involved with printing and mailing. Accepting electronic certifications and supporting documents, as well as storing those submitted or retrieving documents directly from the relevant entities (e.g. tax certificates), reduces the administrative burden on tenderers. It is recommended that the contract notices and tender documentation should be available free of charge to all interested tenderers. Similarly, notice of the outcomes of the tender should be published and freely accessible to the public.

CERTAINTY	
• Clear rules regarding the tender opening session • Adequate confidentiality measures • Consistent application of selection criteria to all tenders received • Sufficient legal and business expertise among the members of the evaluation committee • A written real time procurement record accessible electronically to all parties	Good practice, in terms of transparency, includes the public opening of tenders promptly after the expiry of the submission deadline, whilst leaving sufficient time to receive tenders which were sent by post (in the case of paper-based public procurement). Tenders arriving or posted after the submission deadline have to be rejected. All tenderers should be welcome at the tender opening session. At that session, the name of the tenderer and tender price should be read aloud or posted online when electronic tendering is used (except when a financial proposal is a separate document, to be opened only after the technical proposal and administrative parts of the tender have been evaluated). This procedure is required to ensure impartiality and prevent corruption. Suitable arrangements need to be made to preserve the integrity of data and the confidentiality of tenders and proposals between submission and tender opening. Signed sheets and envelopes in a paper-based procurement, or encryption techniques and secure storage in electronic procurement are both vital. As above, the tender must also be strictly assessed against the mandatory criteria set out clearly in the tender documentation. The tender should have all the prescribed content so that the contracting entities can decide upon the possibilities given for later completion (taking into consideration the local market context and traditions (the modalities have to be decided before launching the tender and clearly communicated). It is good practice to ask for clarification in the case of abnormally low tenders, and contracting entities should be entitled to reject abnormally low tenders if the tenderer is not able to provide a satisfactory explanation. The contracting entities have to ensure that, taken as a whole, members of the evaluation committees have all the appropriate expertise to evaluate the tenders fairly. This normally includes, to varying degrees, overall procedural, financial and subject-related technical knowledge. Depending on the complexity (and size) of the tender, external experts may need to be involved. A written record should be kept of the procurement proceedings, which, with the exception of confidential information, should be made available to tenderers or the wider public upon request. In general, proper measures to protect sensitive commercial data and other confidential information should be in place. Key information on the outcomes of the procedure should be published and remain freely accessible on the internet after a tender has been accepted or after procurement proceedings have been terminated without resulting in a contract award.
'FIT-TO-CONTEXT'	
• Advance information on public procurement opportunities • Contract notices published electronically in the languages of international trade • Complete tender documents available in the languages of international trade	The publication of advance procurement notices (e.g. 'prior information notices') helps SMEs, especially those with limited capacities to prepare for tenders. Prior information is perceived as a useful tool to boost the successful participation of SMEs. It is good practice to consider publishing tender documents, instead of or apart from the national language, in the language customarily used in international trade in the region, to facilitate cross-border access by tenderers. (Note that for EU Member States in the EBRD region, rules exist on the mandatory publication of notices for tenders above given thresholds on the EU's central public procurement website. However, there is no prescription regarding the language of the tender documents).

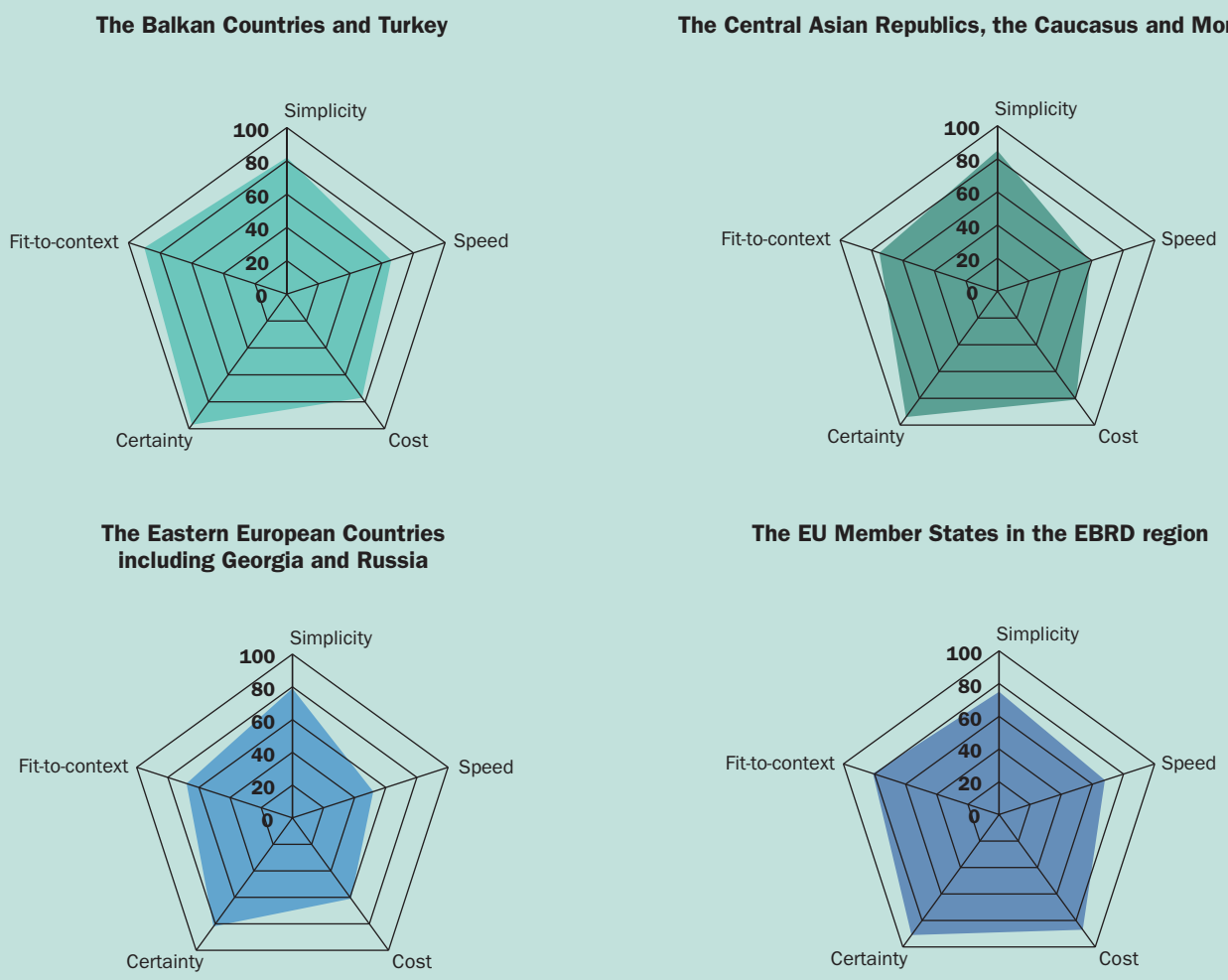
Efficiency of public procurement: the tendering phase – general trends in the EBRD region

The tendering phase is the most comprehensively regulated phase in public procurement. The assessment results confirmed that the tendering phase is, in principle, well regulated in the EBRD region as a whole and differences in efficiency in regulating the tendering phase between the sub-regions are smaller than those for other phases. Figure 3.7 presents the assessment results for the quality of the tendering phase in the five legal efficiency indicators.

Significantly, the Eastern European countries, including Georgia and Russia, do not fall behind in terms of the speed of the procedures. This is a better result than the regulation of other procurement phases in that sub-region but there is room for improvement in the cost aspects and 'fit- to-context' indicators. The assessment results for the Central Asian Republics reveal very similar results, being relatively good in terms of simplicity and speed indicators, but lagging behind other countries in the EBRD region in terms of performance on cost and 'fit-to-context' indicators. Figure 3.8 presents the assessment results for the quality of the tendering phase in the ERBD countries of operations and the average of the ERBD sub-regions.

Figure 3.7

Efficiency of the tendering phase in the EBRD sub-regions

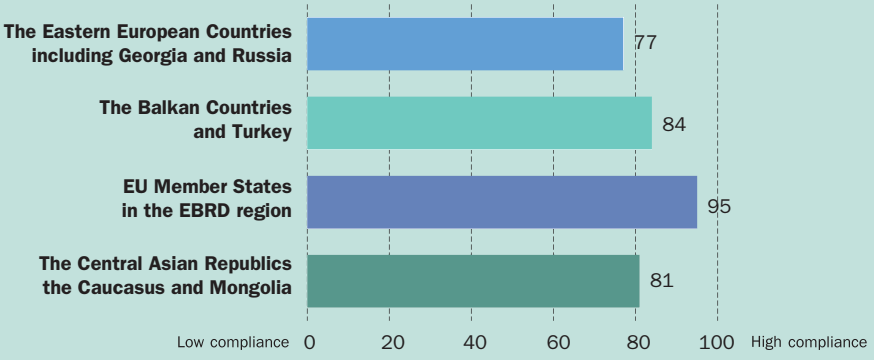


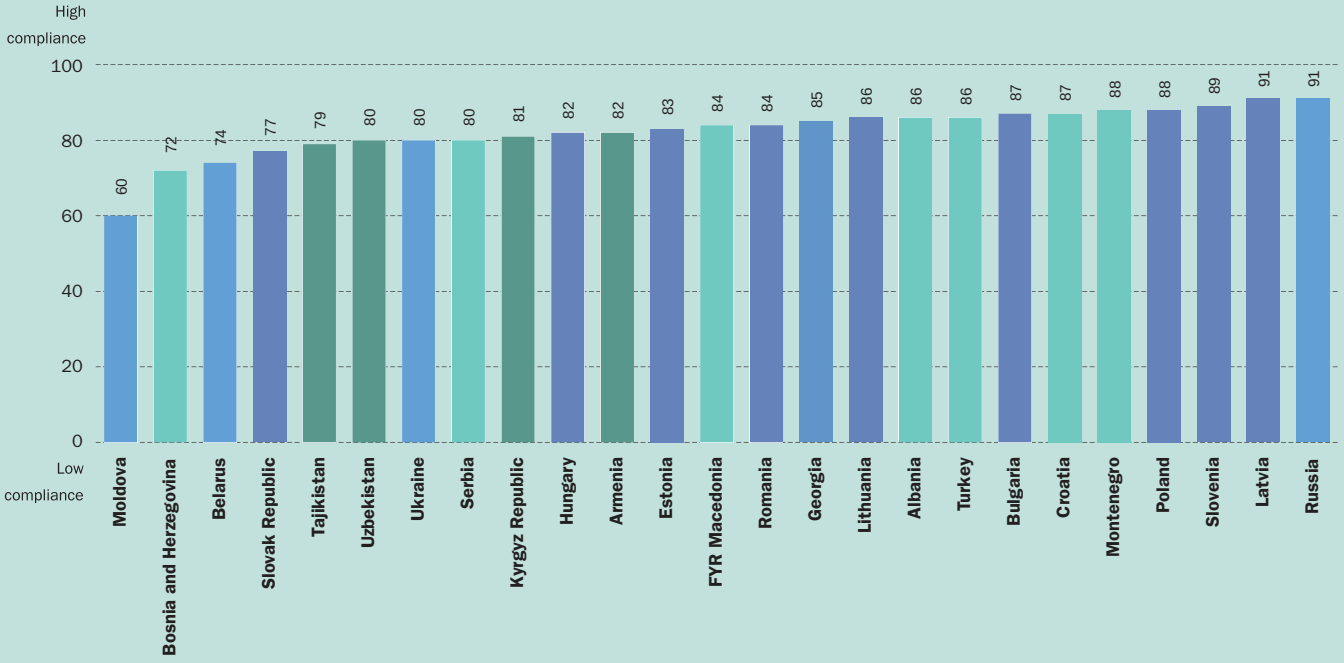
Notes: The figure shows the efficiency of the tendering phase in five LEC indicators for the EBRD sub-regions, as a mean average. The scores have been calculated on the basis of the practice questionnaires, developed from the LEC benchmark and answered by local contracting entities, and local legal advisors. Total scores are presented as a percentage, with 100 per cent representing the optimal score for each LEC benchmark indicator.

Source: EBRD Public Procurement Assessment 2010

Figure 3.8

Assessment results – the tendering phase in the EBRD countries of operations and the average of the EBRD sub-regions





Notes: The figure includes two charts. The top chart shows the average score for efficiency of tendering phase of public procurement in the EBRD sub-regions. The second chart shows the scores for efficiency of tendering phase of public procurement in the evaluated countries as a mean average. The scores for both the EBRD sub-regions and the countries have been calculated on the basis of the practice questionnaires, developed from the LEC benchmark and answered by local contracting entities, and local legal advisors. Total scores are presented as a percentage, with 100 per cent representing the optimal score for each LEC benchmark indicator.

Source: EBRD Public Procurement Assessment 2010

In the tendering phase, differences between the performance of the EBRD region, and the countries within are relatively benign. The sub-regional average level of legal efficiency compliance is medium to high and ranges between 77 and 85 per cent, with EU Member States in the EBRD sub-region and the Balkan countries and Turkey leading the ranking.

Almost all the countries assessed exhibit relatively good results for clearly communicating the eligibility criteria for the tenderer and the tender. Legislation and the practice of contracting entities usually provide sufficient time to prepare and submit tenders as well as the opportunity to interact in some form with the contracting entity (e.g. online and e-mail communication, Q&As). This opportunity can be useful in clarifying requirements or any other points in the tender documentation.

The failure to use the languages of international trade in addition to the country's official language is a general weakness across the EBRD regions. Publishing documentation or accepting tenders in a language that is commonly used in trade transactions has the potential to strengthen competition by allowing access from a wider range of tenderers.

Significant improvement could be made by increasing the transparency and efficiency of the evaluation process. Practitioners in the ERBD countries of operation report that pre-defined eligibility and selection criteria are not always strictly observed and the results of tender evaluations are not communicated well to tenderers.

The Post-tendering phase

Depending on national public procurement policy, the post-tendering phase of the public procurement process may be directly regulated through dedicated public procurement laws or shaped by general public finance laws as well as the internal rules and guidelines of the contracting entities.

Box 3.5 presents best practice in the five legal efficiency indicators for the post-tendering phase of the procurement process.

Box 3.5

Best practice in five legal efficiency indicators

SIMPLICITY	
• Standard ICT business solutions employed for the monitoring and auditing of the public procurement process • Standard monitoring tools for public contracts	To maximise the simplicity of procedures, process descriptions, templates and adequate guidance is required for contract management, control and audit. These supporting tools are more effective and efficient if they are integrated into ICT solutions, e.g. built into the line units' workflow management software or, at least, forming part of a separate system for public procurement.
SPEED	
• Delivering public contracts according to the original schedule • Managing the time and cost of public contracts • Dedicated procurement staff or contract administrators	Receiving goods or services on time is often a slightly less important objective for the contracting entity than staying within budget. Correspondingly, delays are not a rarity in the EBRD region. Ensuring contract performance on time should be a clear and well-communicated goal of the contracting entity, in order to encourage compliance with the terms by the suppliers. Contracting entities should also have adequately trained staff ready and available to verify performance and authorise payment as swiftly as possible.
COST	
• Managing the time and cost of public contracts • Managing overall contract performance	If contract management in the organisation is adequate, contracts will generally be completed within the originally approved contract price. However, this also depends on the traditions and the market power of the supplier. Contracting entities should, in all cases, keep track of progress, adherence to technical specifications or performance criteria, and approve modifications to the contract terms only after sufficient justification has been received. Imposing penalties for late delivery or for lack of conformity with the specifications in the contract, and enforcing these in practice, helps to recover some of the losses.

CERTAINTY	
• Mandatory contract administration • Monitoring payments and deliveries	Good practice in this area covers mandatory contract administration activities for public contracts and record keeping and fairness as well as appropriate procedures to monitor delivery of goods and services to verify inter alia quantity, quality and respect for deadlines. Payments to the supplier, and possibly to subcontractors, should also be monitored. Any modifications or waivers of the terms and conditions of a contract should be subject to a review and approval procedure.
'FIT-TO-CONTEXT'	
• Mandatory regular audits of public contract administration	To ensure accountability and aid institutional learning, procurement evaluations/audits should be conducted regularly, and periodic reports on the overall functioning of public procurement authorities prepared.

Efficiency of public procurement: the post-tendering phase - general trends in the EBRD region

In the assessment feedback on post-tendering practice is perhaps the most dramatic. The results revealed that in this phase the direct regulatory impact of public procurement legislation is limited across the countries in the EBRD region. A survey of local procurement practice proves that, due to a lack of comprehensive regulation, the overall efficiency of the post-tendering phase depends mainly on the level of general governance standards in public administration. Figure 3.9 presents the assessment results for the efficiency of the post-tendering phase in the ERBD sub-regions.

As the public governance level in the EU Member States in the EBRD region is satisfactory, these countries perform well in terms of efficiency of the post tendering phase. The survey revealed that this is also the case for the Central Asian Republics, perhaps due to their centralised administration, including procurement administration.

Again, the efficiency gaps are largest in the Eastern European countries, including Georgia and Russia. This group of countries lacks efficiency especially in terms of certainty and speed indicators.

In the post-tendering phase, the Central Asian Republics, the Caucasus and Mongolia, due to their centralised procurement function showed the best performance with a legal efficiency score of 90 per cent. EU Member States in the EBRD region and the Balkan countries and Turkey follow with 85 and 83 percent respectively.

The Eastern European countries, including Georgia and Russia, lag behind and on average reach an efficiency score of 73 per cent. Figure 3.10 presents the assessment results for the post-tendering phase in the ERBD countries of operations and the average of the ERBD sub-regions.

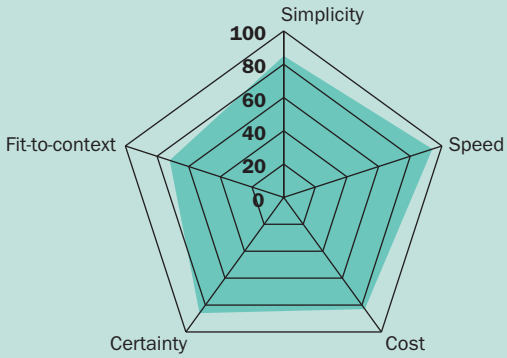
The general trends in the EBRD regions in terms of contract administration are positive. The administration of public procurement contracts, as well as internal monitoring is perceived as satisfactory. This, however, cannot prevent a medium compliance rate and occasional problems with the completion of public contracts on schedule and within budget. Clearly additional contractual safeguards, beyond monitoring delivery, and their enforcement may help, together with ongoing improvements in the general business practices in the countries concerned.

Ensuring the integrity of the procedure would require further strengthening of the review and approval procedures for amendments and extension of public contracts. Currently, a lack of monitoring and clear contract revision procedures in many countries leaves room for corruption.

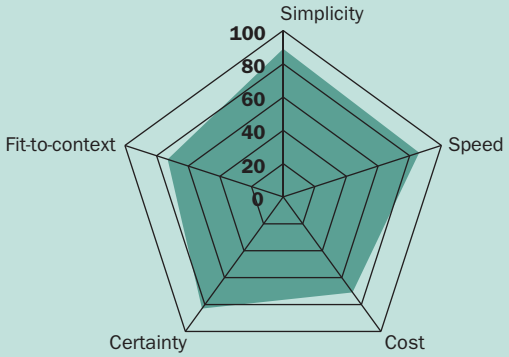
Figure 3.9

Efficiency of the post-tendering phase in the EBRD sub-regions

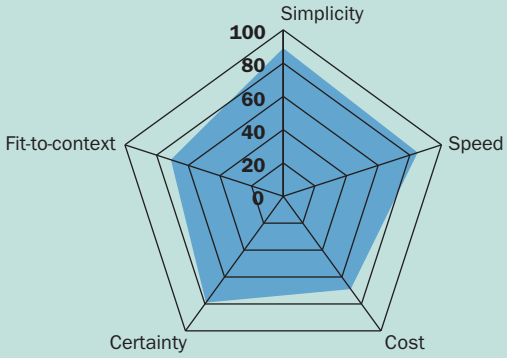
The Balkan Countries and Turkey



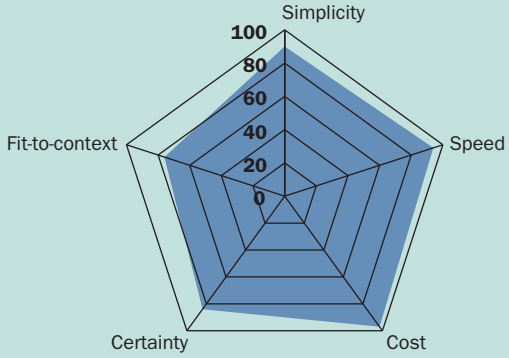
The Central Asian Republics, the Caucasus and Mongolia



The Eastern European Countries including Georgia and Russia



The EU Member States in the EBRD region

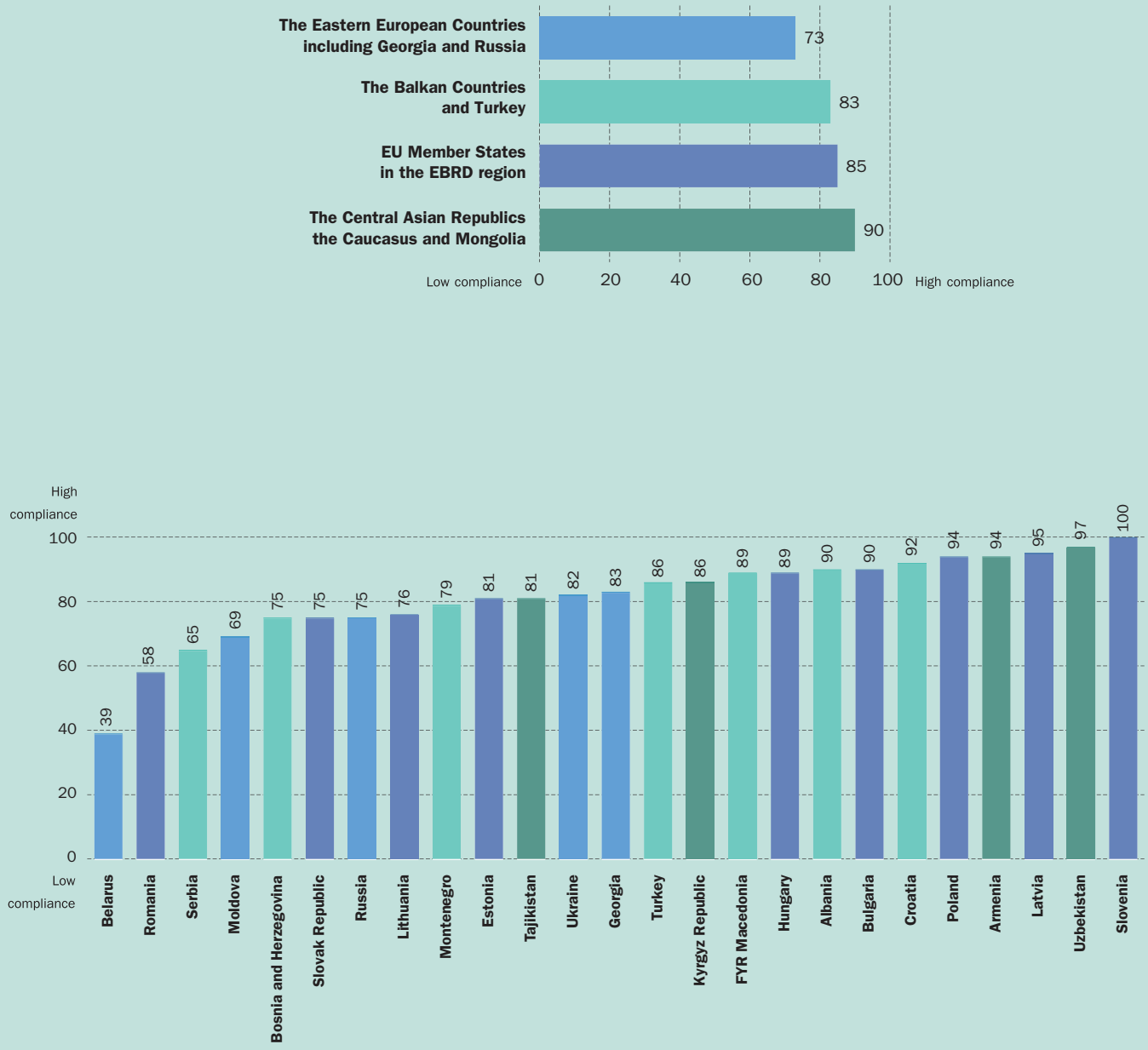


Notes: The figure shows the efficiency of the post -tendering phase in five LEC indicators for the EBRD sub-regions, as a mean average. The scores have been calculated on the basis of the practice questionnaires, developed from the LEC benchmark and answered by local contracting entities, and local legal advisors. Total scores are presented as a percentage, with 100 per cent representing the optimal score for each LEC benchmark indicator.

Source: EBRD Public Procurement Assessment 2010

Figure 3.10

Assessment results – the post-tendering phase in the EBRD countries of operations and the average of the EBRD sub-regions



Notes: The figure includes two charts. The top chart shows the average score for efficiency of post-tendering phase of public procurement in the EBRD sub-regions. The second chart shows the scores for efficiency of post-tendering phase of public procurement in the evaluated countries as a mean average. The scores for both the EBRD sub-regions and the countries have been calculated on the basis of the practice questionnaires, developed from the LEC benchmark and answered by local contracting entities, and local legal advisors. Total scores are presented as a percentage, with 100 per cent representing the optimal score for each LEC benchmark indicator.

Source: EBRD Public Procurement Assessment 2010

3.4
The Balkan Countries and Turkey

Institutional Framework

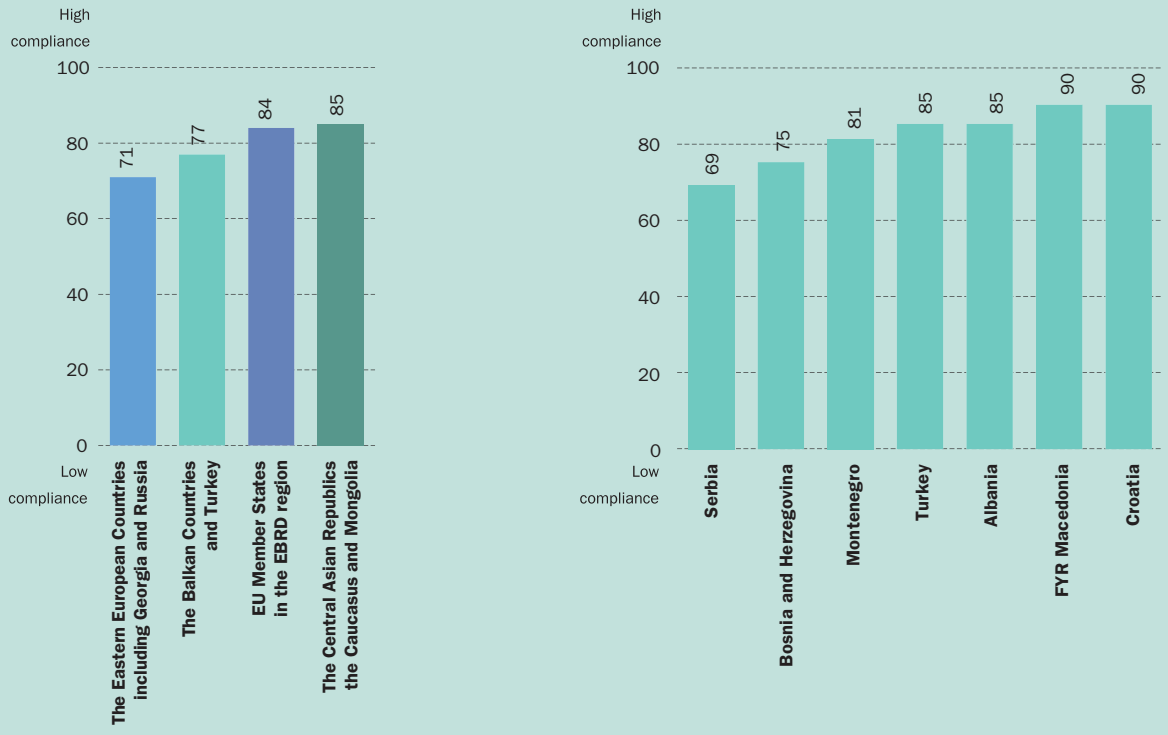
The average score (77 per cent) of the Balkan countries and Turkey puts the sub-region in third place out of the four EBRD sub-regions. This is better than the Eastern European Countries, including Georgia and Russia, but weaker than the EU Member States in the EBRD region and the Central Asian Republics, the Caucasus and Mongolia.

Figure 3.11 presents the assessment results for the Balkan Countries and Turkey and the average of the ERBD sub-regions for the institutional framework.

Overall, according to the stakeholders responding to the questionnaire, countries in this region are ahead of the other sub-regions in having clear and comprehensive legal framework and an adequate legal environment for public procurement, includ-

Figure 3.11

The institutional framework – country scores in the Balkan Countries and Turkey and the average of the EBRD sub-regions



Notes: The figure includes two charts. The first chart shows the average score for quality of institutional frameworks in the EBRD sub-regions. The second chart shows the scores for efficiency of national public procurement institutions in the Balkan Countries and Turkey as a mean average. The scores for both the EBRD sub-regions and the Balkan Countries and Turkey have been calculated on the basis of the practice questionnaires, developed from the LEC benchmark and answered by local contracting entities, and local legal advisors. Total scores are presented as a percentage, with 100 per cent representing the optimal score for each LEC benchmark indicator.

Source: EBRD Public Procurement Assessment 2010

ing an adequate inventory of standard forms, including those for contract notices and procurement reports. In addition, the Balkan countries and Turkey are on a par with the best performers concerning the clear allocation of procurement roles within the organisations responsible for procurement and the availability of guidelines on the drafting of tendering documents.

Areas where the sub-region seems to fall behind most revolve around guidance and control. These areas include: a lack of or inadequate codes of ethics, manuals and training for procurement staff, risk assessment, as well as monitoring and auditing arrangements.

Efficiency of public procurement process - average total score

The country ranked first with 93 per cent is Turkey. It is the only country in the sub-region that did not undergo a major transformation or a transition to a market economy, whilst many of its neighbours have only recently acquired statehood. Turkey shows strength in all the basic regulatory and organisational aspects of public procurement, inter alia, the definition of roles, the allocation of public procurement functions, staffing, guidance and training, and standard forms. Only two areas are described as weak. Firstly, the pay levels for procurement officers are not considered adequate when assessed against those of comparable technical specialists. Second, contracting entities generally do not seem to have adopted codes of ethics for the procurement function.

Turkey is closely followed by the FYR Macedonia achieving a 89 per cent in the scoring. Amongst the major strengths of Macedonian contracting entities are, in slight contrast with the Turkish case, appropriate pay levels and the appropriate level of respect for the position of procurement officials within the organisation. They also include adequate risk assessments and monitoring and control arrangements, distinguishing Macedonia from the rest of the region.

Next in the hierarchy, Montenegro, Bosnia and Herzegovina, Croatia and Albania (with scores between 76 and 82 per cent) are relatively strong in providing standard forms and templates and in the more basic regulatory aspects of public procurement. However, these countries but lag behind in several areas that aim to improve the organisations' resistance to corruption: adequate pay levels, respect for staff, or the adoption of codes of ethics.

The survey of local practice has put Serbia in last place, reaching only low compliance with 52 per cent of the total score, surprisingly far behind all the other countries in the region, even though Serbia is amongst the few countries to have a well-established public administration. Serbia faces gaps in most regulatory and organisational aspects of public procurement, especially those concerning the availability of staff in general, and the extent to which they are rewarded, respected and trained. Contracting entities lack codes of ethics, appropriate internal rules on how to lead the process and make decisions, guidelines and standard forms.

The Pre-tendering phase

Looking specifically at legal efficiency in the pre-tendering phase, the Balkan Countries and Turkey lead the league table with an overall compliance rate of 82 per cent, although it is closely followed by the Central Asian Republics, Caucasus and Mongolia, and the EU Member States in the EBRD region. Figure 3.12 presents the assessment results for the quality of the pre-tendering phase in the Balkan countries and Turkey and the average of the ERBD sub-regions.

The region, in general, exhibits a well-balanced profile with no apparent weaknesses in the pre-tendering phase. The two major strengths of the region are the appropriate transparency in the selection of the procurement procedure and a relatively transparent, and objective prequalification procedures.

Furthermore, the Balkan Countries and Turkey are, on average, sufficiently efficient in the assessment of contracting entity's needs, aligning with budgeting processes, elaborating the contract profile, setting award criteria, defining the need for tender securities, enabling easy online access to tender documents, usually free of charge, and having standard forms available.

Areas where the region seems to fall behind most revolve around guidance for procurement officers and monitoring features: a lack of or inadequate codes of ethics, manuals and training for procurement staff, procurement risk assessment, as well as monitoring and auditing arrangements.

The country ranked first with 92 per cent compliance rate for pre-tendering phase is FYR Macedonia. FYR Macedonia is closely followed by the Turkey and Albania, achieving a respectable 90 per cent and 89 per cent respectively. Next in the ranking, Montenegro, Croatia, Bosnia and Herzegovina, and Serbia (with scores between 70 and 83 per cent), are relatively strong in providing standard forms and templates and in the basic regulatory aspects of public procurement legislation, but lag behind

in procurement planning and aligning procurement process with investment decisions. The survey of local procurement practice has put Serbia in last place, reaching medium compliance with 70 per cent of the optimal score. Serbian contracting entities were reported to lack procurement planning procedures, financial authorization procedures as well as standard tools for procurement risks assessment.

In addition, publication of the advance procurement notices and procurement plans were reported as non-mandatory for most contracting entities.

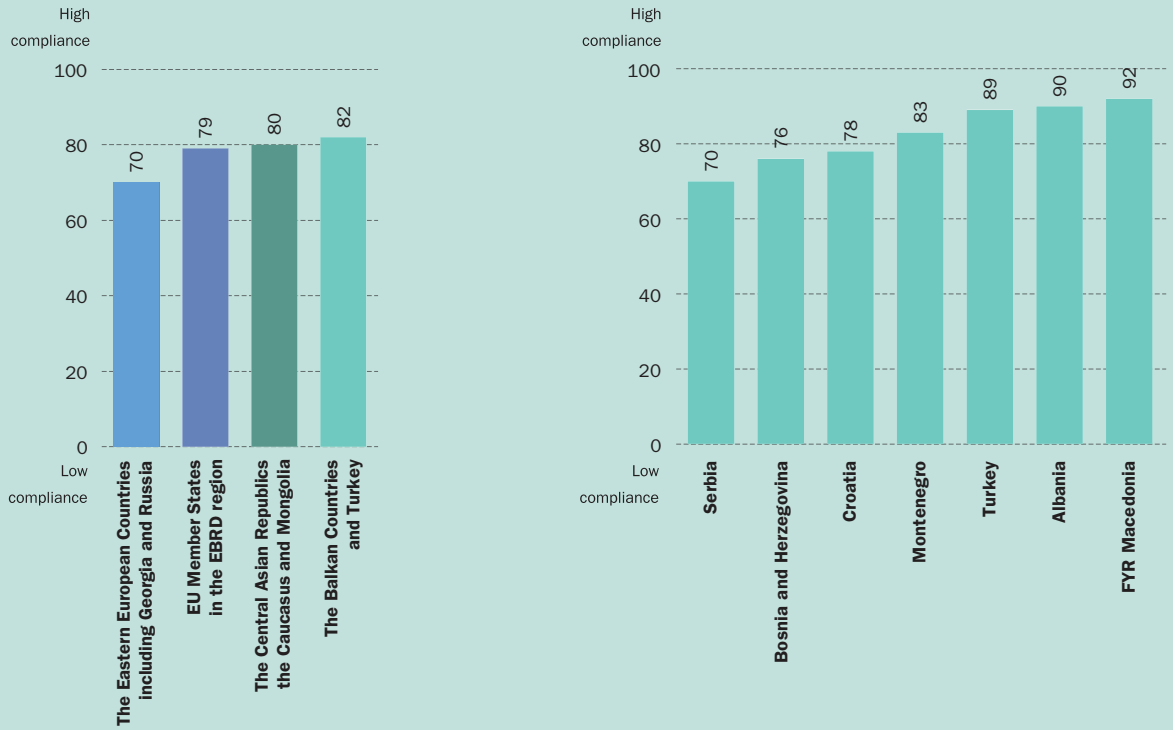
The Tendering phase

Resembling results in the EU Member States in the EBRD region, the strengths of EBRD countries in the South Eastern Europe lie in the management of the tender preparation phase, in the objectivity of eligibility criteria, and in the efficient conduct of the evaluation process. Figure 3.13 presents the assessment results for the quality of the tendering phase in the Balkan Countries and Turkey and the average of the ERBD sub-regions.

Tenderers generally have sufficient time to draw up their proposals, and usually have the opportunity to communicate with the contract-

Figure 3.12

The pre-tendering phase – country scores in the Balkan Countries and Turkey and the average of the EBRD sub-regions



Notes: The figure includes two charts. The first chart shows the average score for efficiency of the pre- tendering phase in the EBRD sub-regions. The second chart shows the scores for efficiency of the pre- tendering phase in the Balkan Countries and Turkey as a mean average. The scores for both the EBRD sub-regions and the Balkan Countries and Turkey have been calculated on the basis of the practice questionnaires, developed from the LEC benchmark and answered by local contracting entities, and local legal advisors. Total scores are presented as a percentage, with 100 per cent representing the optimal score for each LEC benchmark indicator.

Source: EBRD Public Procurement Assessment 2010

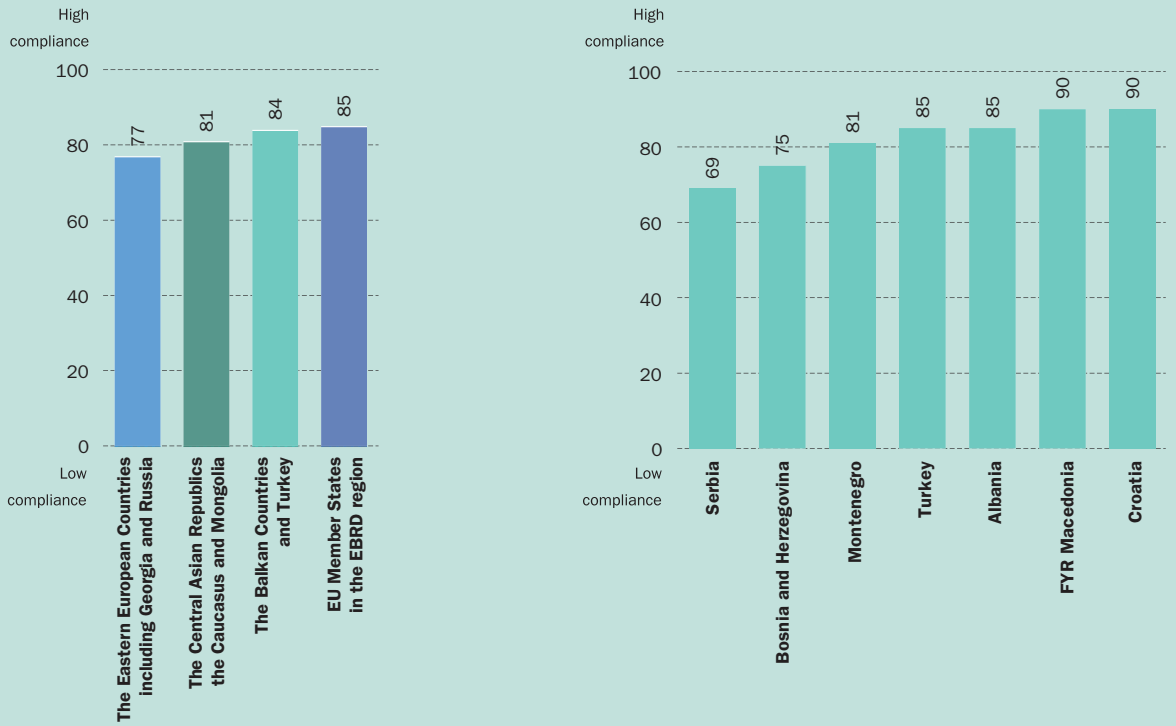
ing entity, clarifying the requirements. Communication with the contracting entity is often online or electronic, thus facilitating swift and easy interaction. The regulatory framework ensures that eligibility criteria are clearly publicised in the tender documents and are applied sufficiently strictly, objectively and fairly at the evaluation of tenders. The legal framework allows the contracting entity to clarify the details of abnormally low tenders and eventually reject them. Contracting entities are normally well prepared to carry out the tender evaluation, with evaluation committees set up and staffed with appropriately experienced internal or external members, and written records kept of the evaluation procedure. As in the EU Member States in the EBRD region, it is unusual to publish tenders in any language other than the official language of the country. This may have an adverse impact on competition and as such on achieving 'value for money', particularly for small states in the Western Balkans.

On a country-by-country basis, the survey of local practice shows little difference between the top five countries in the region, i.e. Montenegro, Croatia, Albania, Turkey and the FYR Macedonia. These EBRD countries rank almost equally well, scoring between 81 and 90 percent. Croatia, for example, ranked first, excels in communication between contracting entity and tenderers in the tender preparation phase, in the evaluation of tenders, and in enabling access to the records of the tender evaluation. Similar praise applies to the other countries in this group.

According to the survey results, B&H lags behind slightly, with 75 per cent legal efficiency. In contrast with its neighbours Montenegro above, there is some room for improvement in communication with tenderers throughout the process and prior to submitting the offers, as well as strengthening evaluation committees by ensuring that members have the necessary qualifications and experience.

Figure 3.13

The tendering phase – country scores in the Balkan Countries and Turkey and the average of the EBRD sub-regions



Notes: The figure includes two charts. The first chart shows the average score for efficiency of the tendering phase in the EBRD sub-regions. The second chart shows the scores for efficiency of the tendering phase in the Balkan Countries and Turkey as a mean average. The scores for both the EBRD sub-regions and the Balkan Countries and Turkey have been calculated on the basis of the practice questionnaires, developed from the LEC benchmark and answered by local contracting entities, and local legal advisors. Total scores are presented as a percentage, with 100 per cent representing the optimal score for each LEC benchmark indicator.

Source: EBRD Public Procurement Assessment 2010

Serbia is the only country not achieving a good level of compliance with tendering phase legal efficiency criteria, scoring only 69 per cent compliance. The most significant gap concerns the lack of easy access to information. It has not yet ensured that contract notices are published electronically on a central website, and remain accessible, free of charge, until the expiry of the submission deadline.

The Post-tendering phase

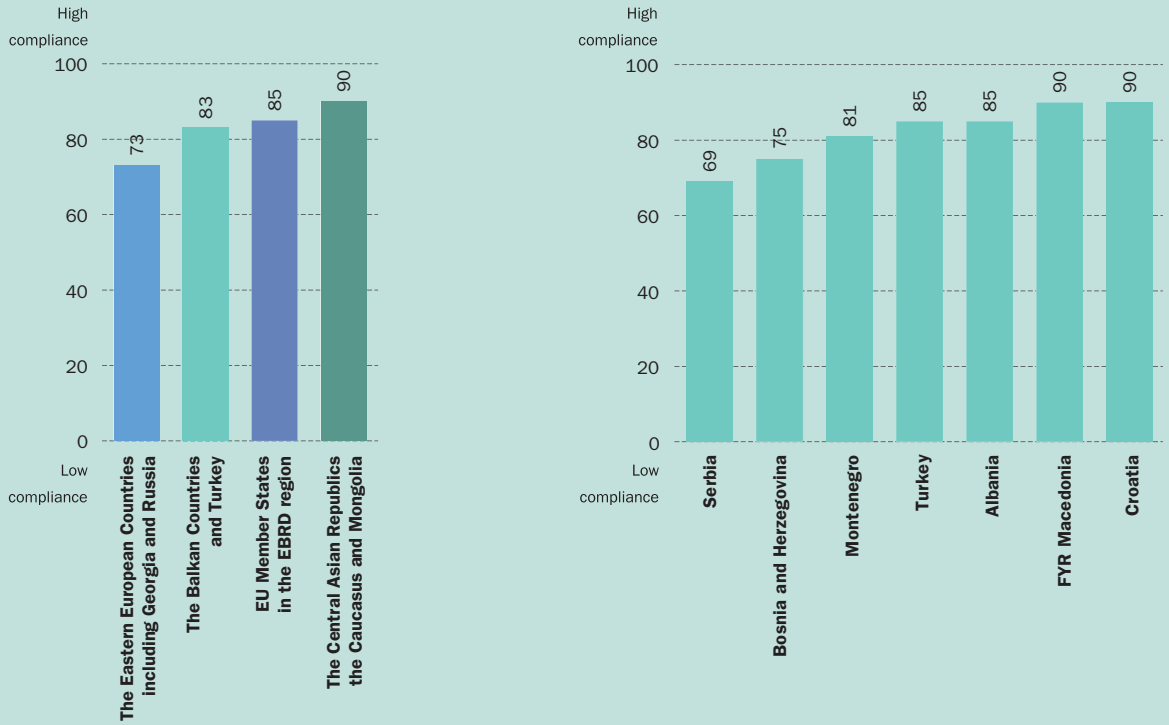
The Balkan countries and Turkey achieved 83 per cent in the post-tendering phase assessment. This is close to the EU Member States in the EBRD region average regarding legal efficiency, and is third among the four EBRD sub-regions assessed. Figure 3.12 presents the assessment results for the quality of the post-tendering phase in the Balkan Countries and Turkey and the average of the ERBD sub-regions.

The sub-region performs well in contract administration as well as in the audit of the procurement function. However, practitioners answering the survey perceived frequent problems with suppliers not delivering on time and within budget. Contracting entities seem to lack adequate means or incentives to control and enforce delivery deadlines as set down in the public contract.

At the country level, Croatia and the FYR Macedonia achieved the best results for legal efficiency in the post-tendering phase, with 90 per cent compliance rate. In the case of Croatia, in the survey of local procurement practice, contract management processes were rated highest amongst countries in this region.

Figure 3.12

The post-tendering phase – country scores in the Balkan Countries and Turkey and the average of the EBRD sub-regions



Notes: The figure includes two charts. The first chart shows the average score for efficiency of the post - tendering phase in the EBRD sub-regions. The second chart shows the scores for efficiency of the post - tendering phase in the Balkan Countries and Turkey as a mean average. The scores for both the EBRD sub-regions and the Balkan Countries and Turkey have been calculated on the basis of the practice questionnaires, developed from the LEC benchmark and answered by local contracting entities, and local legal advisors. Total scores are presented as a percentage, with 100 per cent representing the optimal score for each LEC benchmark indicator.

Source: EBRD Public Procurement Assessment 2010

In particular, the mandatory contract administration and the obligation to obtain authorisation when amending the public contract can be highlighted as good practice. Macedonian contracting entities performed particularly well in relation to the adequacy of control, audit and evaluation measures.

Albania, Turkey and Montenegro were the next group in the ranking of the Balkan countries, with Turkey scoring between 81 and 85 per cent compliance rate. The strength of the three countries lies, inter alia, in maintaining adequate records for contract administration, and monitoring contractor payments adequately. However, unlike in Croatia, modifications or waivers of the terms and conditions in contracts are not necessarily subject to monitoring or prior review and approval.

Achieving the lowest scores in the Balkan countries and Turkey sub-region are B&H and Serbia with 75 and 69 per cent compliance respectively. The main gaps identified in Bosnia concern the lack of appropriate procedures to monitor the delivery of the contract, as well as the lack of prior authorisation for modifications to the public contract. This is a practice the Bosnian public procurement system shares with most of the other Balkan Countries and Turkey. In Serbia, contract performance seems to be a persistent problem. Local practitioners considered the failure of suppliers to deliver on time and within budget a frequent weakness in their country. In addition, there were problems with regard to evaluations and audits of public procurement activities. These are apparently not undertaken at all by Serbian contracting entities.

3.5
Central Asian Republics, the Caucasus and Mongolia

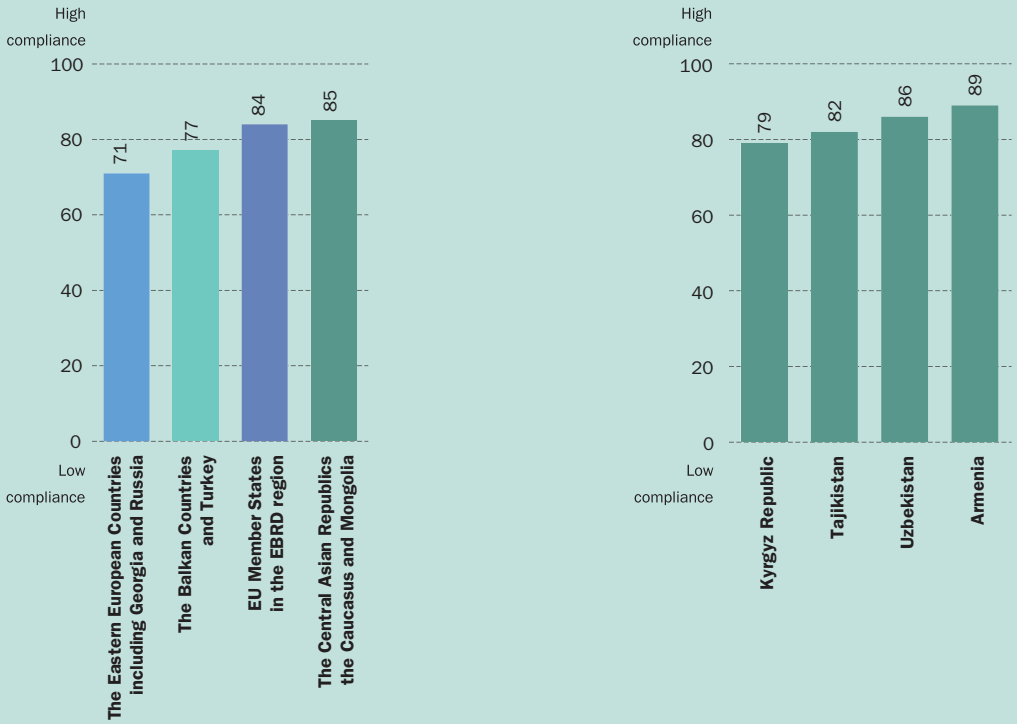
Institutional Framework

Based on the assessment results, in terms of legal efficiency of the institutional framework the Central Asian Republics, the Caucasus and Mongolia region is the leading sub-region, with an average score of 85 per cent. This result, however, may be partly attributable to divergent perceptions held by local practitioners in the surveyed countries in relation to what level of compliance is expected or acceptable. Public procurement officers in EU Member States in the EBRD region or in the Balkan countries and Turkey may have been more demanding in their assessment, whereas their counterparts in the Central Asian Republics, the Caucasus and Mongolia could have been more optimistic in view of the considerable improvements over recent years in the overall regulation of public procurement sector. Figure 3.15 presents the assessment results for the quality of the institutional frameworks in the Central Asian Republics, the Cacuasus and Mongolia and the average of the ERBD sub-regions.

It is also important to note that no feedback on local procurement practice has been obtained from several countries in this region (Azerbai-

Figure 3.15

The institutional framework – country scores in the Central Asian Republics, the Caucasus and Mongolia and the average of the EBRD sub-regions



Notes: The figure includes two charts. The first chart shows the average score for quality of institutional frameworks in the EBRD sub-regions. The second chart shows the scores for efficiency of national public procurement institutions in the Central Asian Republics, the Caucasus and Mongolia as a mean average. The scores for both the EBRD sub-regions and the Balkan Countries and Turkey have been calculated on the basis of the practice questionnaires, developed from the LEC benchmark and answered by local contracting entities, and local legal advisors. Total scores are presented as a percentage, with 100 per cent representing the optimal score for each LEC benchmark indicator.

Source: EBRD Public Procurement Assessment 2010

jan, Kazakhstan, Mongolia and Turkmenistan). These countries are not included in calculations of the average score, which could distort marks on the institutional efficiency of the sub-region.

The sub-region's strengths include adequate disclosure of procurement rules enhancing transparency, clear allocation of roles in the procurement process, appropriate monitoring arrangements, and the availability of standard forms, yielding efficiency gains for both contracting entity and tenderer. One remaining weakness is the insufficient availability of internal guidelines that could support procurement staff when drafting tender documents.

All the countries demonstrate good compliance in the assessment. Best amongst the countries in the sub-region, according to the survey of local practice, with 89 per cent compliance is Armenia. It received top marks for most aspects of regulation and organisation of the public procurement function: the allocation of defined internal roles for specific units and persons, appropriate staffing, procedural guidance to support the drafting of tender documents, the adoption of codes of ethics, and the respect accorded public procurement staff within the organisation. Armenia also has adequate standard forms for contract notices and tender securities available, procurement risk assessment arrangements as well as monitoring and auditing arrangements.

Uzbekistan and Tajikistan follow Armenia's lead, with 86 and 82 per cent compliance, respectively. The two Central Asian countries demonstrate similar performance across specific aspects pertaining to the institutional framework for public procurement, with some weaknesses in introducing procurement risk assessments, or monitoring changes to the contract after closing the procurement process.

The Kyrgyz Republic is fourth in the ranking, but its compliance score of 79 per cent is still good. No significant gaps were identified in availability of standard procurement documents. However, identified weaknesses are concentrated in areas which are designed to strengthen the organisation's resistance to corruption. In particular, pay levels do not necessarily match comparable technical specialist positions in the public or private sector, and codes of ethics are largely nonexistent or not enforced with sufficient rigour. Shortcomings are also present in regulation of internal procurement processes, the availability of training for procurement staff, and in disclosure of procurement decisions.

The Pre-tendering phase

The good overall performance of the countries in this sub-region (80 per cent) puts them in second place, only 2 percentage points behind the Balkan countries and Turkey, which showed the best performance among the countries in the EBRD region. Figure 3.15 presents the assessment results for the pre-tendering phase in the Central Asian Republics, the Cacuasus and Mongolia and the average of the ERBD sub-regions.

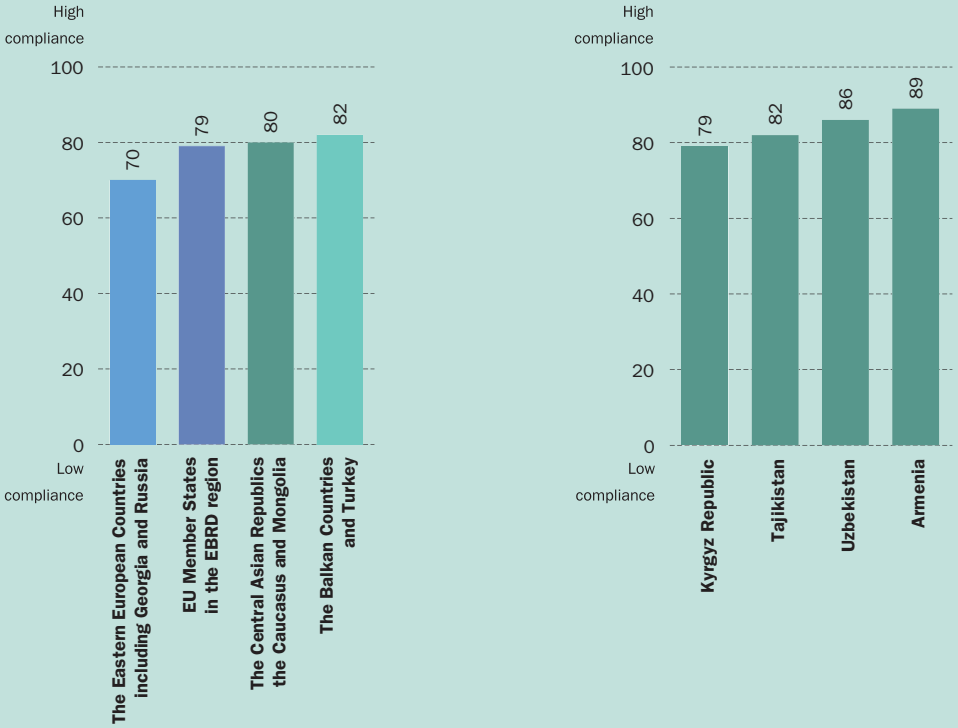
The areas in which the Central Asian Republics, the Caucasus and Mongolia, function most efficiently when compared to the other sub-regions include: adequate prequalification arrangements, objective and transparent award criteria, the strict application of tender securities, and tender documentation including standard forms for contract notices and contracts. Contracting entities in this region promote standard documents as far as possible, although they do not usually offer the tender documents free of charge. Areas of concern include no correlation between procurement and budgeting procedures, notably the lack of mandatory financial authorisation to launch the process. Furthermore, there is no obligation to explain why a procurement method has been chosen, which reduces transparency and may conceal the favouring of certain economic operators.

At the country level, Tajikistan is ranked first with a compliance score of 87 per cent. The practitioners surveyed recognised that contracting entities in Tajikistan perform well in procurement planning, integrating it with the budgeting function, setting objective award criteria, carefully selecting the procedure and explaining their choice, as well as dealing with tender securities. On the other hand, tender documents are not necessarily comprehensive, i.e. they do not contain all the information necessary to submit a tender. Tender documents often fail to fully describe the obligations of the contracting entity and tenderer, so that additional communication is necessary. In addition, the tender documents are not usually free of charge.

Armenia and Uzbekistan follow Tajikistan, scoring 82 and 79 per cent, respectively. Both countries perform well at defining award criteria objectively and transparently, and at relying on tender securities in order to discourage dishonest behaviour and mitigate the risk to public funds.

Figure 3.16

The pre-tendering phase – country scores in the in the Central Asian Republics, the Caucasus and Mongolia and the average of the EBRD sub-regions



Notes: The figure includes two charts. The first chart shows the average score for efficiency of the pre- tendering phase in the EBRD sub-regions. The second chart shows the scores for efficiency of the pre- tendering phase in the Central Asian Republics, the Caucasus and Mongolia as a mean average. The scores for both the EBRD sub-regions and the Balkan Countries and Turkey have been calculated on the basis of the practice questionnaires, developed from the LEC benchmark and answered by local contracting entities, and local legal advisors. Total scores are presented as a percentage, with 100 per cent representing the optimal score for each LEC benchmark indicator.

Source: EBRD Public Procurement Assessment 2010

Furthermore, Armenia shows strengths in the way it uses prequalification procedures, and in the assessment of the contracting entity's needs.

Armenian contracting entities seem to be appropriately bound by laws requiring economic justification for the purchase and manage to align procurement decisions well with the organisation's general investment-related decision-making process. The assessment results also confirmed that the procurement plans are standardised and supported by software applications.

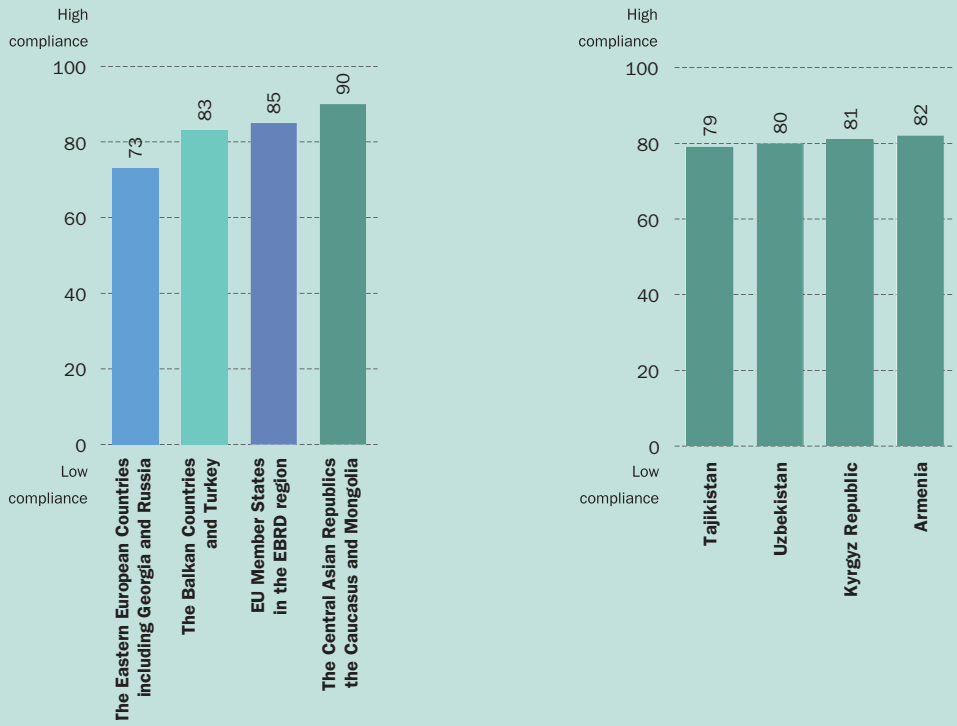
Last in the Central Asian Republics, the Caucasus and Mongolia sub-region in terms of legal efficiency is the Kyrgyz Republic with a score of 75 per cent, only slightly lower than Uzbekistan. The main gaps identified in the survey of local practice in the Kyrgyz Republic are in the selection of procurement methods. First, it is reported that the open tender is not clearly established as the default procedure. Second, there is a lack of clarity over the conditions under which negotiated procedures can be used for more complex contracts. In addition, the lack of arrangements and procedures for planning the public procurement of recurrent contracts and market surveys were identified as areas for improvement by survey respondents.

The Tendering phase

The unifying feature of countries in this group is that they all follow UNCITRAL model law on public procurement. Although this is far less detailed than the EU Public Procurement Directives, variance between the four countries for which survey results are available is very small. They are all at practically the same level of legal efficiency, with similar strengths and weaknesses. The sub-region's average efficiency

Figure 3.17

The tendering phase – country scores in the in the Central Asian Republics, the Caucasus and Mongolia and the average of the EBRD sub-regions



Notes: The figure includes two charts. The first chart shows the average score for efficiency of the tendering phase in the EBRD sub-regions. The second chart shows the scores for efficiency of the tendering phase in the Central Asian Republics, the Caucasus and Mongolia as a mean average. The scores for both the EBRD sub-regions and the Balkan Countries and Turkey have been calculated on the basis of the practice questionnaires, developed from the LEC benchmark and answered by local contracting entities, and local legal advisors. Total scores are presented as a percentage, with 100 per cent representing the optimal score for each LEC benchmark indicator.

Source: EBRD Public Procurement Assessment 2010

score (81 per cent) is sufficient to put it at third place, just behind the EU Member States in the EBRD sub-region and EU-oriented Balkan countries and Turkey. Figure 3.15 presents the assessment results for the tendering phase in the Central Asian Republics, the Cacuasus and Mongolia and the average of the ERBD sub-regions.

Based on survey of local procurement practice, the key strengths of the Central Asian Republics, the Caucasus and Mongolia lie in their relatively quick and effective communication during the tender preparation phase and in their clear approach to eligibility criteria. The scores obtained by Armenia, the Kyrgyz Republic, Uzbekistan and Tajikistan for legal efficiency in the tendering phase are similar. Country-by-country analysis does not show any significant difference between them either, although certain specific weaknesses can be identified. Kyrgyz contracting entities could improve notification of procurement opportunities by electronic means. Armenia and Tajikistan should further strengthen the transparency of procurement procedures by making the record of the process accessible to tenderers, and publish all contract award notices electronically. In Uzbekistan, there were more problems than elsewhere with notification of procurement opportunities, the obligation to keep records of the procurement proceedings and disclose these to interested parties.

The Post-tendering phase

The Central Asian Republics, the Caucasus and Mongolia achieved very good marks, with a compliance score of 91 per cent. However, lack of data for several countries and the possibility of

divergent perceptions held by local practitioners in the surveyed countries in relation to what level of compliance is expected or acceptable must be considered. Figure 3.18 presents the assessment results for the post-tendering phase in the Central Asian Republics, the Cacuasus and Mongolia and the average of the ERBD sub-regions.

The region's overall performance significantly exceeds the other three sub-regions in two areas: contract administration, and monitoring and audit. Careful monitoring of delivery and payments, regular audits and reports on the procurement function seem to be in place. The region fares well but does not stand out for contract performance.

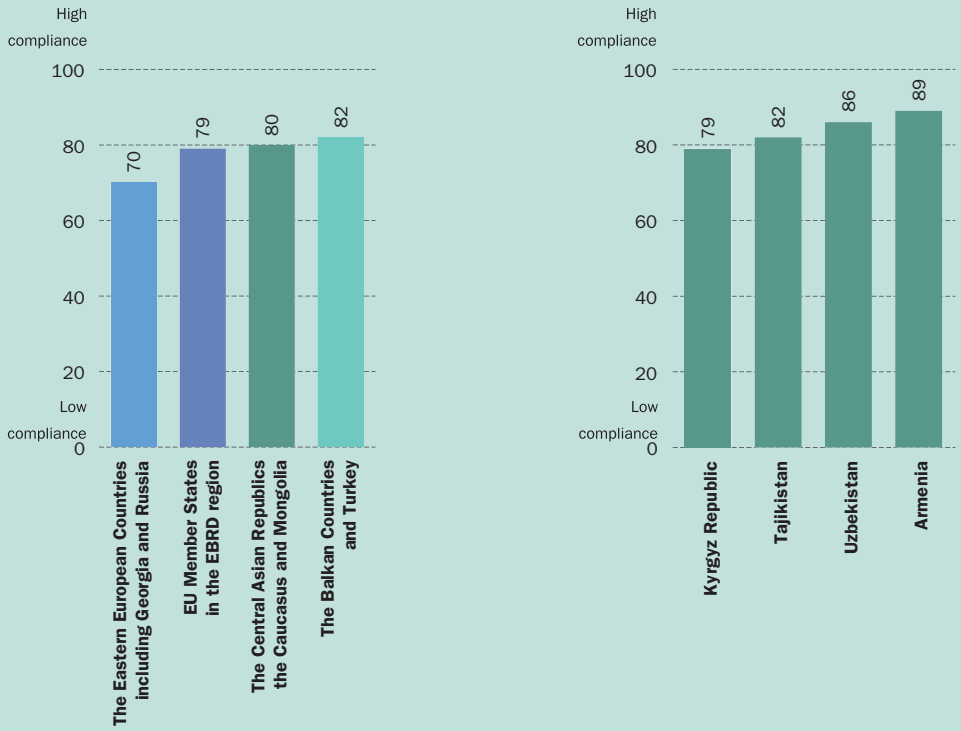
Differences in the country scores are relatively unimportant when compared to other regions. According to the assessment results, Uzbekistan leads the region with 98 percent legal efficiency. However, in Uzbekistan practice there are problems with delivery of contracts within the originally approved budget.

Armenia follows with 95 percent. The main weakness identified is that contracting entities here are not necessarily evaluated or regularly audited. The Kyrgyz Republic achieved a score of 88 percent compliance rate. Unlike Armenia, it excels in contract delivery and evaluations and audit, but lags behind in contract administration. For example, the monitoring of contract delivery is seen as one of the areas where further improvement is needed.

Finally, Tajikistan achieved a score of 83 percent. According to the survey of local practice in Tajikistan there are some weaknesses in public contract performance meaning, in practice, that contracts are not often delivered on time and within original budget. Local contracting entities also fail to keep adequate records in relation to contract administration.

Figure 3.18

The post-tendering phase – country scores in the in the Central Asian Republics, the Caucasus and Mongolia and the average of the EBRD sub-regions



Notes: The figure includes two charts. The first chart shows the average score for efficiency of the post-tendering phase in the EBRD sub-regions. The second chart shows the scores for efficiency of the post- tendering phase in the Central Asian Republics, the Caucasus and Mongolia as a mean average. The scores for both the EBRD sub-regions and the Balkan Countries and Turkey have been calculated on the basis of the practice questionnaires, developed from the LEC benchmark and answered by local contracting entities, and local legal advisors. Total scores are presented as a percentage, with 100 per cent representing the optimal score for each LEC benchmark indicator.

Source: EBRD Public Procurement Assessment 2010

3.6 The Eastern European Countries, including Georgia and Russia

Institutional Framework

The performance of the Eastern European countries, including Georgia and Russia (71 per cent compliance rate) on institutional framework efficiency indicators is satisfactory overall (medium compliance rate), but falls behind three other EBRD sub-regions. Figure 3.19 presents the institutional framework assessment results in the Eastern European Countries including Georgia and Russia and the average of the ERBD sub-regions.

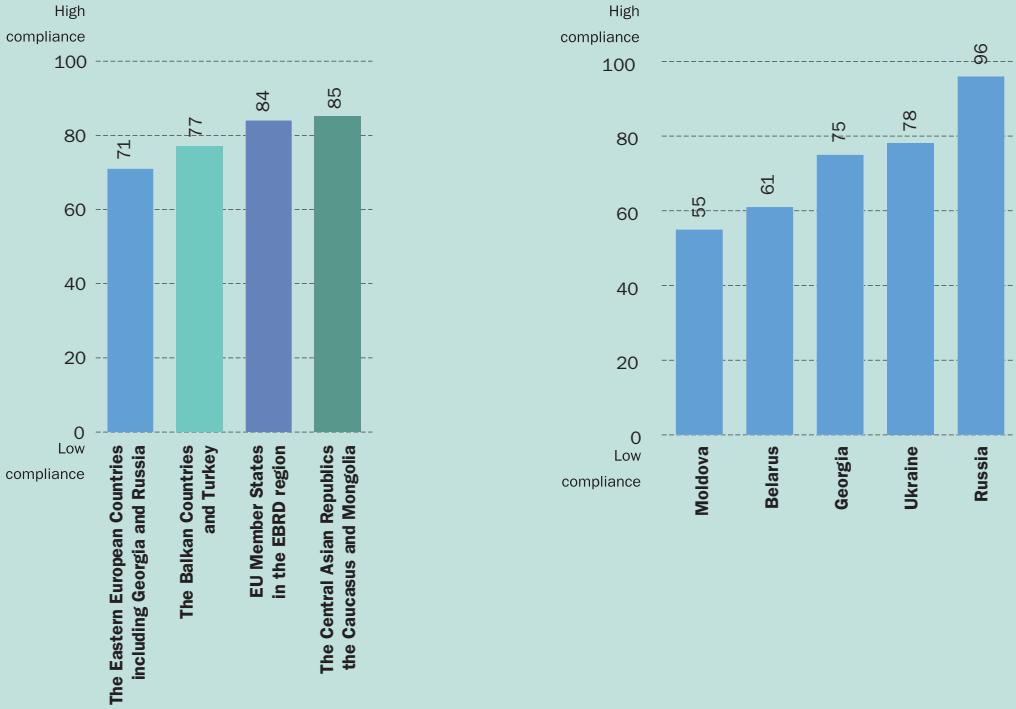
In terms of providing guidelines and training staff, this region performs fairly well.

The major weaknesses lie in the legal framework which is not seen as clear and comprehensive, or contributing to achieving public procurement goals effectively. There is also a range of gaps such as the general lack of standard tender forms, codes of ethics or adequate regulation of internal procurement procedures.

Differences within the Eastern European countries, including the Georgia and Russia sub-region are deep. As regards institutional framework, Russia has achieved (96 per cent) the highest score amongst all countries in this region. Interestingly, the only area which was not assessed favourably is the clarity and

Figure 3.19

The institutional framework – country scores in the Eastern European Countries including Georgia and Russia and the average of the EBRD sub-regions



Notes: The figure includes two charts. The first chart shows the average score for quality of institutional frameworks in the EBRD sub-regions. The second chart shows the scores for efficiency of national public procurement institutions in the Eastern European Countries, including Georgia and Russia as a mean average. The scores for both the EBRD sub-regions and the Balkan Countries and Turkey have been calculated on the basis of the practice questionnaires, developed from the LEC benchmark and answered by local contracting entities, and local legal advisors. Total scores are presented as a percentage, with 100 per cent representing the optimal score for each LEC benchmark indicator.

Source: EBRD Public Procurement Assessment 2010

comprehensiveness of the legal framework. In all other regulatory issues Russia's performance is good.

Georgia and Ukraine scored lower, with compliance rates between 75 to 78 per cent. Gaps in those countries are found mostly in the way the procurement function is delivered within the contracting entity's organisation. This concerns weaknesses in regulating the internal procurement procedures appropriately, providing guidance, clear instructions, and organising regular training for procurement staff.

The two countries lagging behind in this region are Belarus, which achieved a score of 61 per cent, and Moldova, with only 55 per cent compliance rate. In the survey of local practice in Belarus gaps were identified in internal regulation of the procurement process, the lack of mandatory assessment of procurement risks, and inadequate monitoring of changes in the public contract after closing the procurement procedure.

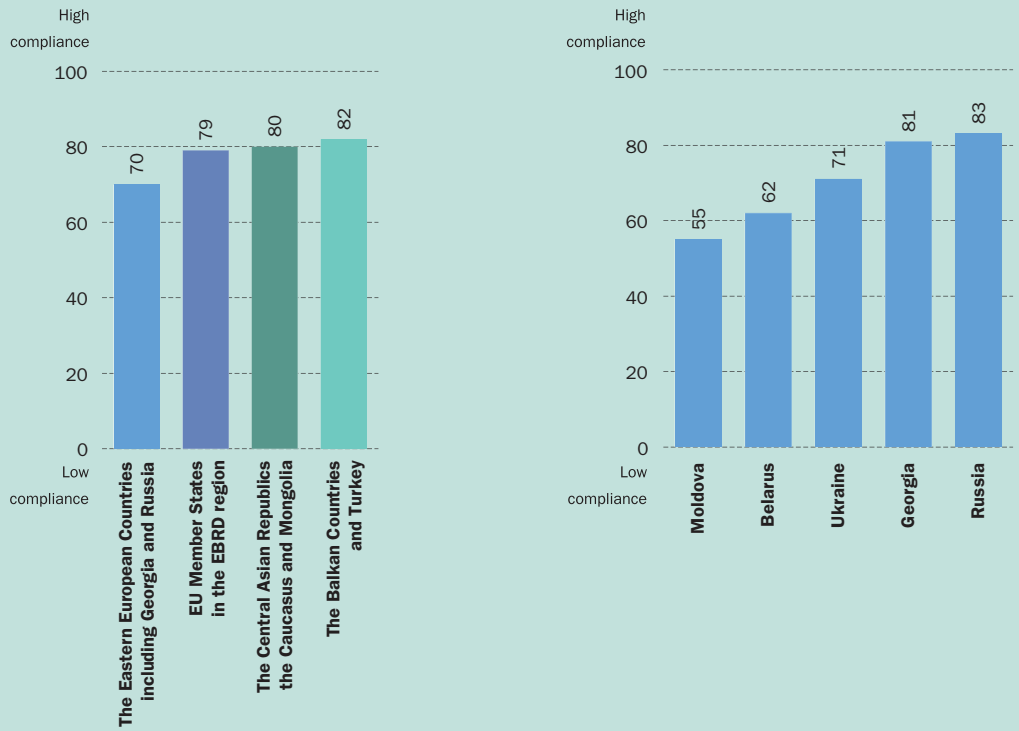
Moldova, the country with the lowest score for organisation of the procurement function, and is particularly feeble in providing notification of procurement opportunities, standard tender documents and procurement reports, and insufficient training for procurement staff. In addition, it is reported that the disclosure of internal procurement rules and decisions is not necessarily mandatory for Moldovan contracting entities. Moldova also does not manage conflict of interest cases and lack codes of ethics for their procurement staff.

The Pre-tendering phase

In terms of legal efficiency, the Eastern European countries, including Georgia and Russia, are ranked fourth in the pre-tendering phase, clearly behind the other sub-regions assessed. Figure 3.20 presents the assessment results for the pre-tendering phase in the Eastern European Countries including Georgia and Russia and the average of the ERBD sub-regions.

Figure 3.20

The pre-tendering phase – country scores in the in the Eastern European Countries including Georgia and Russia and the average of the EBRD sub-regions



Notes: The figure includes two charts. The first chart shows the average score for efficiency of the pre-tendering phase in the EBRD sub-regions. The second chart shows the scores for efficiency of the pre-tendering phase in the Eastern European Countries, including Georgia and Russia, as a mean average. The scores for both the EBRD sub-regions and the Balkan Countries and Turkey have been calculated on the basis of the practice questionnaires, developed from the LEC benchmark and answered by local contracting entities, and local legal advisors. Total scores are presented as a percentage, with 100 per cent representing the optimal score for each LEC benchmark indicator.

Source: EBRD Public Procurement Assessment 2010

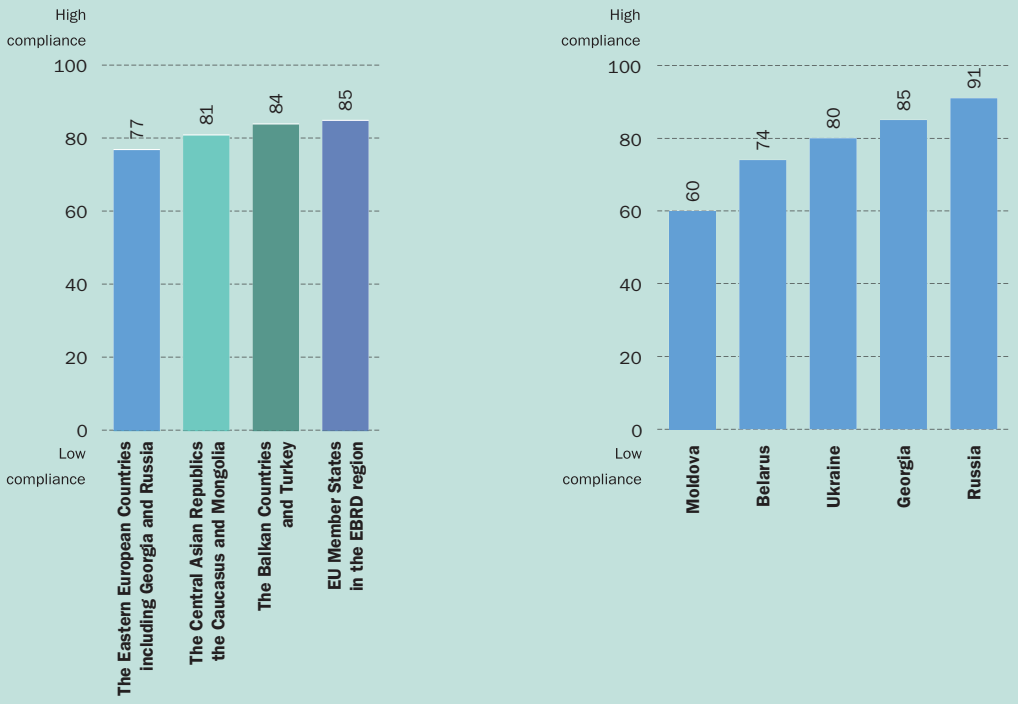
The major areas where the average performance of the sub-region falls significantly behind other countries are: the assessment of procurement needs, alignment of the planning process with the organisation's budgeting procedure, technical and financial planning methods needed to establish the contract profile, prequalification arrangements, and the application of tender securities. On the other hand, the Eastern European countries, including Georgia and Russia, in general, do not exhibit obvious gaps in relation to setting up reasonable award criteria, selecting and justifying the procedure, or the use of standard tender forms.

Just as in the assessment of the Institutional Framework, Russia, with a score of 83 per cent, is ranked highest, closely followed by Georgia (81 per cent compliance rate). Russia's strengths lie in three areas: the budgeting process, the definition of award criteria, and the application of requirements for tender securities. More specifically, Russian contracting entities do well in integrating their procurement planning processes with budgeting, and identifying major projects in long-term budget estimates. Financial authorisation to start the procurement process and for contracts with payments extending into subsequent financial years is mandatory. Contracting entities are entitled to request tender securities. Award criteria are appropriately detailed and reasonably objective.

In Georgia contracting entities are similarly good in aligning procurement planning processes with budgeting and in setting out award criteria. Procurement stakeholders are also sufficiently supported with standard forms, and demonstrated their proficiency in establishing the contract profile and the application of technical and financial planning methods.

Figure 3.21

The tendering phase – country scores in the in the Eastern European Countries including Georgia and Russia and the average of the EBRD sub-regions



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Source: EBRD Public Procurement Assessment 2010

Ukraine achieved a medium compliance score of 71 per cent. Based on the survey results in Ukraine relative weaknesses were identified in aligning procurement planning with budgeting process, establishing the contract profile, application and organisation of prequalification procedures, and in the limited use of tender securities.

At the bottom of the ranking, Belarus and Moldova scored 62 and 55 per cent respectively. Problems with the assessment and economic justification of needs, conducting market surveys, as well as in the technical and financial planning of purchases are apparent in both countries. In addition, contracting entities in Belarus do not find it easy to align procurement planning with budgeting, whereas the Moldovan contracting entities fall behind their peers in setting reasonable and objective tender award criteria.

The Tendering phase

Despite being the most regulated phase in the public procurement process, the survey results for the tendering phase highlight the stark differences between individual countries in this region. This may be partly due to the lack of an influential common instrument such as the 1994 UNCITRAL Model Law or EU Public Procurement Directives, which could harmonise approaches and disseminate good practice. Figure 3.2 presents the assessment results for the tendering phase in the Eastern European Countries including Georgia and Russia and the average of the ERBD sub-regions.

The overall performance of the sub-region is good. However, a score of 77 per cent still puts the Eastern European countries, including Georgia and Russia in last place amongst the four EBRD sub-regions.

The Eastern European countries, including Georgia and Russia, on average, do not perform worse than any other sub-region when it comes to having adequate notification arrangements in place. Publication of contract notices in an official national gazette and/or a central procurement website is mandatory and the contract notices are generally available free of charge to the public until expiry of the submission deadline. Standard tender documents and templates are commonly used in practice. The main weaknesses were identified as originating in the organisation and implementation of the tender evaluation process. In most of these countries, practitioners reported a lack of adequate measures ensuring that sensitive information from economic operators, once submitted as part of their tender, is kept confidential. It was also highlighted that evaluation procedures can be delayed and were not often completed within the original tender validity period, which, of course, may result in legal uncertainty and additional costs for participants.

In the assessment very explicit differences emerged between individual countries within the sub-region. The legal efficiency of public procurement regulation and practice in tendering phase is highest in Russia (91 per cent), due to efficiency in the procurement notification process. Russian contracting entities can take advantage of a central procurement website, standard forms, and are generally obliged to publish advance procurement notices, if applicable. The contract notices are available to economic operators free of charge until the expiry of the submission deadline. Russia is also one of very few countries where efforts are reportedly made, in certain cases, to publish tender documents in foreign languages in order to elicit interest from tenderers based abroad.

Georgia and Ukraine follow in second and third place, with a performance of 85 and 80 per cent, respectively. Georgia performs relatively well regarding notification of procurement opportunities, verifying eligibility of the tenderer, and the organisation of the tender evaluation process.

According to the assessment results, Belarus lags behind with a score of 74 per cent. This has its origin mainly in weaknesses in the organisation of the tender evaluation procedure. Public procurement practitioners reported that tender evaluation frequently slips outside the original tender validity period, and that tenderers may not easily request and obtain the procurement records and decisions. Measures used to protect confidential business information are often unsatisfactory.

Moldova reached only 60 per cent compliance rate in the assessment, corresponding to a low compliance level. The major gaps were identified in the procurement notification arrangements, the submission of tenders and their evaluation.

The Post-tendering phase

In the post-tendering phase, the Eastern European countries, including Georgia and Russia, achieve only moderate levels of legal efficiency. With a compliance score of only 74 per cent. These countries have the lowest score among the EBRD sub-regions. Figure 3.22 presents the assessment results for the post-tendering phase in the Eastern European Countries including Georgia and Russia and the average of the ERBD sub-regions.

The region's main weakness in comparison to the other countries is that its regulation focuses on audit, but does not provide for contract administration tools which could be applied to improve local procurement practice. Based on the survey of local procurement practice it is apparent that contracting entities in most countries, bar a few exceptions, do not usually have monitoring systems for public contracts in place, and procurement audits are not regularly undertaken. In addition it is not customary for contracting entities to prepare regular reports on their procurement activities.

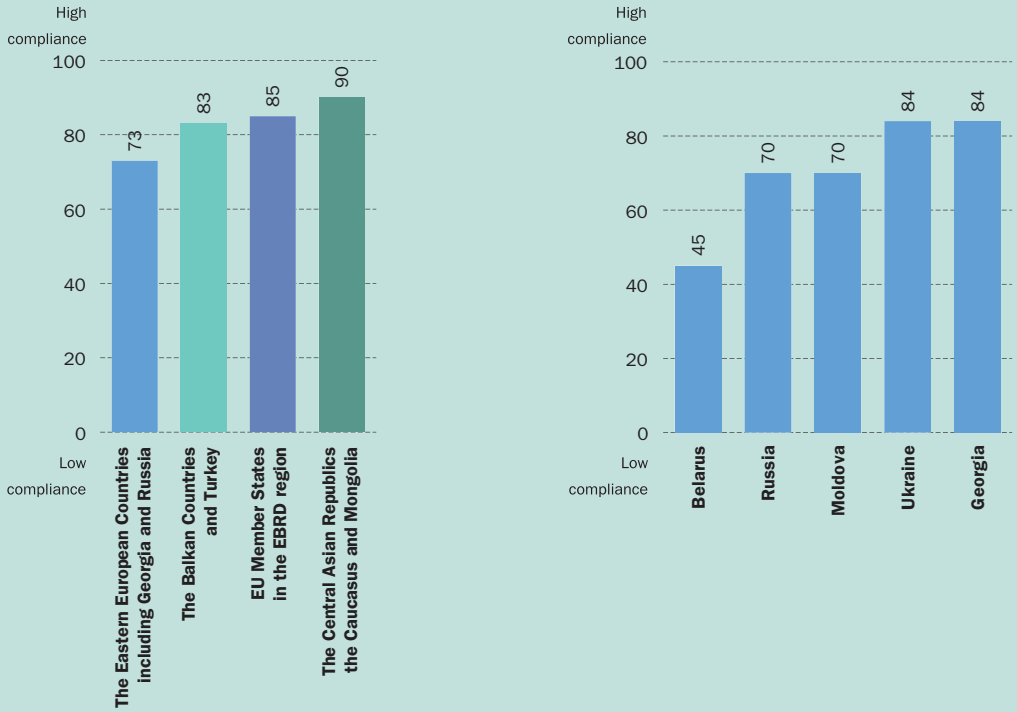
The best performers in the Eastern European Countries, including Georgia and Russia, were Georgia and Ukraine, both reaching 84 per cent compliance rate. This was due to higher marks for contract performance and procurement evaluation and audit indicators.

Russia and Moldova follow with a medium compliance rate, with an average score of 70 per cent in each case. Russia, which is a top performer in terms of regulation of the procurement institutional framework, pre-tendering and tendering phases, does less well in the post-tendering phase. It performs relatively well in contract administration, but often struggles with delivering contracts on time and within budget, and clearly lacks robust evaluation arrangements and regular audits in public procurement. On the other hand, the largest gaps in Moldova's performance are related to the contract management tasks of contracting entities and to general fairness in dealing with suppliers.

Last in the ranking by a large margin is Belarus. According to local practitioners there are considerable gaps in the development and application of procedures to monitor the delivery of goods or services procured, as well as supplier payments. Procurement evaluations and audits are not carried out, or not carried out adequately. Furthermore, the survey of local practice revealed that public contracts are often not completed on schedule.

Figure 3.22

The post-tendering phase – country scores in the in the Eastern European Countries including Georgia and Russia and the average of the EBRD sub-regions



Notes: The figure includes two charts. The first chart shows the average score for efficiency of the post-tendering phase in the EBRD sub-regions. The second chart shows the scores for efficiency of the post -tendering phase in the Eastern European Countries, including Georgia and Russia, as a mean average. The scores for both the EBRD sub-regions and the Balkan Countries and Turkey have been calculated on the basis of the practice questionnaires, developed from the LEC benchmark and answered by local contracting entities, and local legal advisors. Total scores are presented as a percentage, with 100 per cent representing the optimal score for each LEC benchmark indicator.

Source: EBRD Public Procurement Assessment 2010

3.7
The EU Member States in the EBRD Region

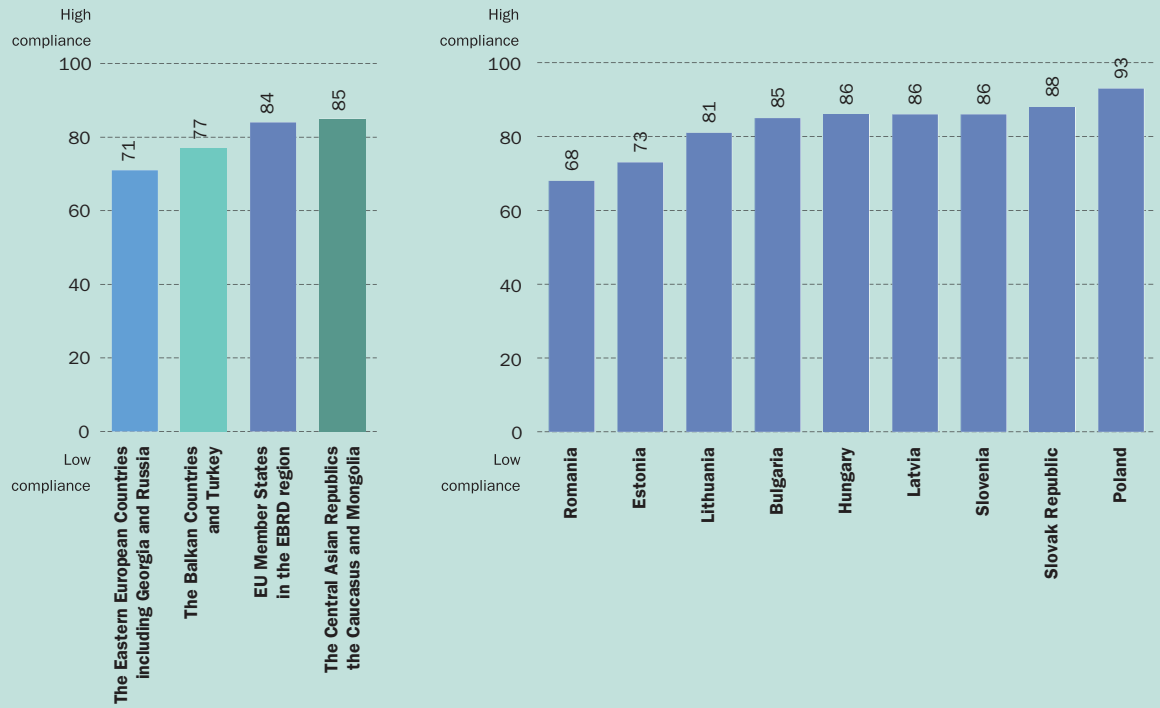
Institutional Framework

The overall performance of EU Member States in the EBRD region on institutional framework indicators is significantly above the average of the Balkan countries and Turkey and the Eastern European countries, including Georgia and Russia, and is comparable to the Central Asian Republics, the Caucasus and Mongolia. Figure 3.23 presents the institutional framework assessment results for the EU Member States in the EBRD Region.

Where the EU Member States in the EBRD region seem to operate most efficiently in comparison with other sub-regions is the overall structure of the public procurement function. Contracting entities in the EU Member States in the EBRD region have their internal procurement processes and decision-making sufficiently regulated, with and specific procurement roles within the organisation assigned and staffed. They usually have adequate procurement manuals and clear instructions for the procurement staff, as well as internal procurement guidelines on how to draft tender documents. Internal monitoring and auditing arrangements are normally in place. Areas of concern include procurement officers' pay levels, procurement risk assessments, a lack of

Figure 3.23

The institutional framework – country scores in the EU Member States in the EBRD region and the average of the EBRD sub-regions



Notes: The figure includes two charts. The first chart shows the average score for quality of institutional frameworks in the EBRD sub-regions. The second chart shows the scores for efficiency of national public procurement institutions in the EU Member States in the EBRD region as a mean average. The scores for both the EBRD sub-regions and the Balkan Countries and Turkey have been calculated on the basis of the practice questionnaires, developed from the LEC benchmark and answered by local contracting entities, and local legal advisors. Total scores are presented as a percentage, with 100 per cent representing the optimal score for each LEC benchmark indicator.

Source: EBRD Public Procurement Assessment 2010

codes of ethics, and internal rules on contract cancellation in many countries in the sub-region.

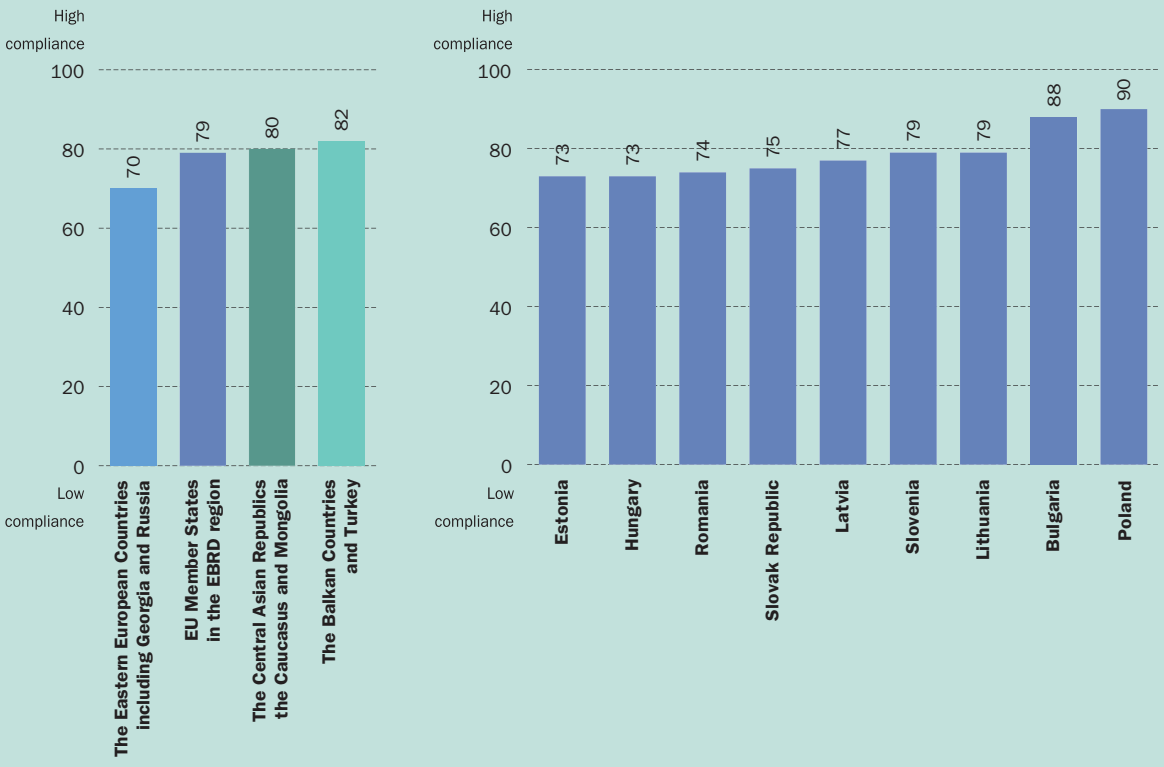
At the country level, Poland's procurement practice scored best, with 93 per cent compliance rate. Local contracting entities reported having a clear, comprehensive and effective legal framework. They are particularly successful in implementing internal procurement policies and rules, allocation of internal procurement roles, adopting internal manuals and instruction on the procurement process. In Poland, in contrast to many other EBRD countries, procurement officers are reportedly held in high regard generally and procurement capacity building is provided for regularly.

The Slovak Republic, Slovenia, Latvia and Hungary, together with Bulgaria, occupy the middle ranks with very similar scores between 85 and 88 per cent respectively. All countries perform equally well at regulating the procurement process, allocating roles, and at assigning and staffing functions. Lithuania is slightly behind these countries. Last in line are Estonia, which is otherwise known to have a smoothly run public administration, and Romania, a relatively recent EU member.

The main gaps explaining Estonia's relatively low marks include limited availability of standard tender forms and certain aspects of the organisational setup, more specifically, the clear allocation of functions and staffing, and risk assessment. It was also reported that procurement monitoring and auditing arrangements are not always up to standard.

Figure 3.24

The pre-tendering phase – country scores in the in the EU Member States in the EBRD region and the average of the EBRD sub-regions



Notes: The figure includes two charts. The first chart shows the average score for efficiency of the pre- tendering phase in the EBRD sub-regions. The second chart shows the scores for efficiency of the pre-tendering phase in the EU Member States in the EBRD region, as a mean average. The scores for both the EBRD sub-regions and the Balkan Countries and Turkey have been calculated on the basis of the practice questionnaires, developed from the LEC benchmark and answered by local contracting entities, and local legal advisors. Total scores are presented as a percentage, with 100 per cent representing the optimal score for each LEC benchmark indicator.

Source: EBRD Public Procurement Assessment 2010

In Romania similar gaps were identified, and in addition, weaknesses in relation to the monitoring of procurement processes and public contracts were also identified.

The Pre-tendering phase

EU Member States in the EBRD region perform slightly worse on legal efficiency indicators in the pre-tendering phase of public procurement than they do in the overall performance of their institutional frameworks. Figure 3.24 presents the assessment results for the pre-tendering phase in the EU Member States in the ERBD region and the average of the ERBD sub-group.

The average compliance rate is 79 per cent, more or less equal to that of the Balkan countries and Turkey, and the Central Asian Republics, the Caucasus and Mongolia.

Contracting entities in most EU Member States in the EBRD region perform well at integrating their public procurement planning with the budgeting process. In addition, obtaining financial authorisation before starting the procurement procedure is the norm in this sub-region. Local contracting entities are reported to act transparently and objectively when preparing tender documents, including the contract award criteria. Tender securities are normally requested for high value contracts in order to mitigate risk. The value of the tender security and the modalities of its use are considered reasonable.

The EU Member States in the EBRD region did not perform well in comparison with other EBRD countries in two specific areas. Firstly, the assessment of contracting entity needs, which includes weaknesses concerning the need to justify planned purchases and regulation of the planning procedure.

Secondly prequalification. Not all EU Member States in the EBRD region use this opportunity regularly, in spite of its potential for considerably increasing the efficiency of the purchasing process. Practitioners from several countries have also reported that data and other information supplied by the tenderers during the prequalification procedure are not always adequately verified.

In the survey of legal efficiency in the pre-tendering phase, Poland was again ranked first with a compliance rate of 90 per cent, closely followed by Bulgaria with 88 per cent. Amongst EBRD countries of operation Polish contracting entities lead in carrying out needs assessments, in aligning procurement and budgetary processes, in detailing procurement planning, as well as selecting and justifying the procurement methods. Gaps remain in the area of prequalification arrangements, as well as standardisation of the tender package.

The latter is explained by an apparent lack of standard tender documents and contract forms, consequently requiring unnecessary additional effort from both the contracting entity and tenderer. Contracting entities are obliged to draft new tender documents and contracts repeatedly, often working with considerable uncertainty as to whether the terms and conditions imposed will comply with the requirements of sound financial management and current market expectations. Tenderers, on the other hand, need to review and interpret tender documents and contract terms and conditions each time they intend to submit a proposal.

In Bulgaria, local contracting entities do not yet fully align the procurement planning with public finance budgeting. The lack of standard tender documents and contract forms is also reported as a problem. In addition, tender documents are not generally available free of charge, reducing the efficiency of the procurement process.

The remaining EU Member States in the EBRD region: Lithuania, Slovenia, Latvia, the Slovak Republic, and Romania are clustered at a medium level of compliance, ranging from between 74 and 79 per cent, with Hungary and Estonia trailing the group at 73 per cent compliance rate.

The specific barriers to achieving greater efficiency in Hungary revolve around the limited use of prequalification arrangements. These include activities such as placing a greater emphasis on financial information from tenderers, verification of the proposal and limited operation of certification schemes to speed up the process and reduce the administrative burden. The Hungarian public procurement system also demonstrated weakness by not providing for standard tender documents and contract forms to avoid duplication of effort and to mitigate legal risks arising from inconsistently drafted tender documents and contract terms and conditions.

Estonia lags behind mostly in the appropriateness of the methodological background for technical and financial planning and the use of contract award criteria.

The transparency of procurement may be adversely influenced by certain gaps in the rules on, and the practice of, the modalities of selecting the procurement method and justifying this choice. The value of the tender security and the modalities of its use are considered reasonable.

The Tendering phase

The tendering phase is shaped decisively by public procurement legislation, which in turn, is heavily influenced by EU Public Procurement Directives, international agreements or good practice.

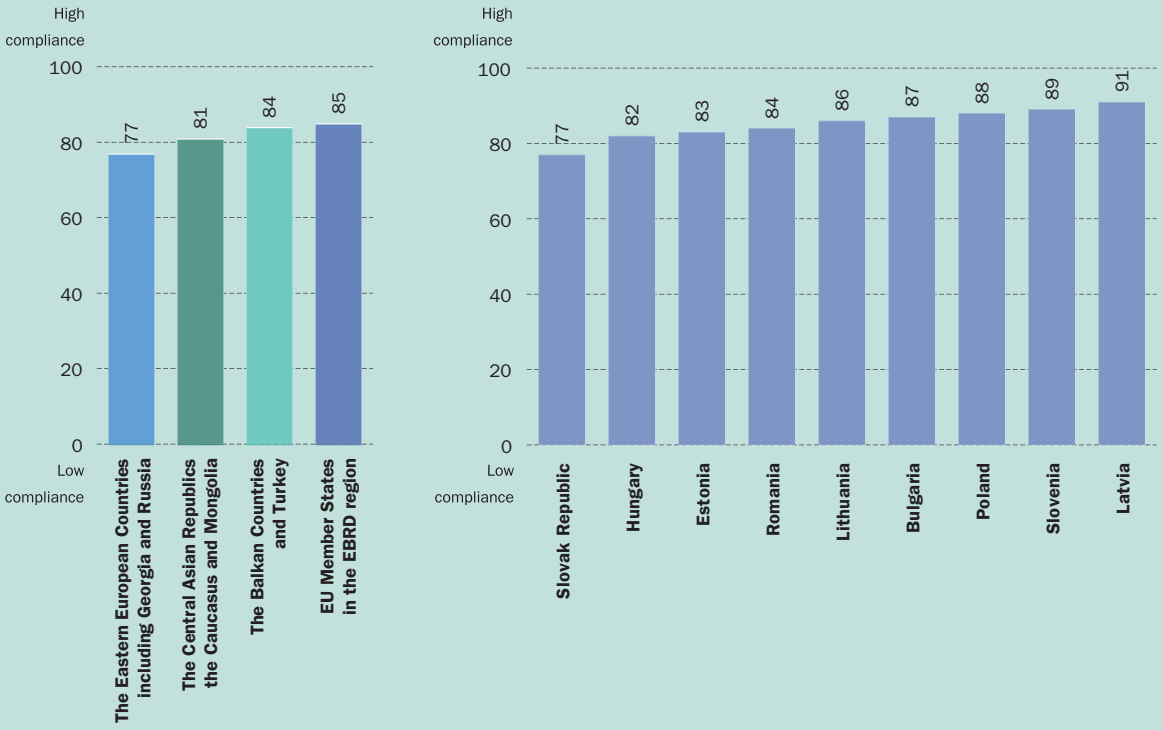
The results of the survey of local procurement practice revealed that the EU Member States in the EBRD region scored best, with an average 85 per cent compliance rate, in all key indicators. This result surpassed the Eastern European Countries, including Georgia and Russia, but reaching similar level of compliance as the Eastern European countries, including Georgia and Russia, and the Central Asian Republics, the Caucasus and Mongolia. Figure 3.25 presents the assessment results for the tendering phase in the Eastern European Countries including Georgia and Russia and the average of the ERBD sub-regions.

The EU Member States in the EBRD sub-region's relative strengths can be seen in the efficient management of tender preparation and procurement related communication, in the fair and objective application of the eligibility criteria, as well as in the regulation and organisation of the tender evaluation process.

European contracting entities allow sufficient time for the preparation of tenders. Frequent use is made of electronic communication in the tender preparation phase to facilitate easy, inexpensive and timely interaction with tenderers. The contracting entities usually allow the posting of requests for clarification and answer these as

Figure 3.25

The tendering phase – country scores in the in the EU Member States in the EBRD region and the average of the EBRD sub-regions



Notes: The figure includes two charts. The first chart shows the average score for efficiency of the tendering phase in the EBRD sub-regions. The second chart shows the scores for efficiency of the tendering phase in the EU Member States in the EBRD region, as a mean average. The scores for both the EBRD sub-regions and the Balkan Countries and Turkey have been calculated on the basis of the practice questionnaires, developed from the LEC benchmark and answered by local contracting entities, and local legal advisors. Total scores are presented as a percentage, with 100 per cent representing the optimal score for each LEC benchmark indicator.

Source: EBRD Public Procurement Assessment 2010

quickly as possible. The legislative framework also provides for a high degree of objectivity and fairness in assessing tenders against the eligibility criteria, prescribed clearly in the call for tenders. Another key strength concerns the tender evaluation process. This includes, inter alia, adequately staffed evaluation committees, and a comprehensively written procurement records.

Contracting entities from EU Member States in the EBRD region meet most standards for submission of tenders and tender evaluation. However, tenders, even for large contracts, are not usually published in languages other than the official language of the country, which may create a barrier to competition, especially in smaller countries.

With a strong and comprehensive regulatory base, all the EU Member States in the EBRD region reach high scores for compliance with the legal efficiency criteria and exhibit very similar patterns of strengths and weaknesses. The best performer in this group was Latvia, receiving a 91 per cent score, due to its open and transparent approach towards access to the records of the tender evaluation. This is an area where Latvia outperforms most other EU Member States in the EBRD region. The records are generally available upon request, accessible free of charge, and notification of the outcome of the procedure is published electronically.

Slovenia and Poland follow with similar scores (88 to 89 per cent compliance rate), and a set of shared strengths covering activities in tender preparation and submission, as well as verifying the eligibility of the tenderer. In addition, Slovenia is well advanced in notifying procurement opportunities. In particular, it is mandatory to publish advance procurement notices (PINs) in a wide range of cases, and contract notices are easily available electronically, through a single point of access.

Bulgaria, Lithuania and Romania, Estonia and Hungary are next in the ranking. The differences between these countries are small, not only in their average compliance scores but also in patterns of quality of regulation and practice. All five countries ensure effective communication in the tendering phase. They are also considered to have reliable, objective and fair arrangements in place to check the eligibility of the tenderers.

The only EU Member State in the EBRD region that seems to lag behind in terms of legal efficiency in the tendering phase is the Slovak Republic. Its medium compliance score of 77 per cent indicates a relatively satisfactory performance. However, in the assessment of local practice gaps were identified. There are limited possibilities for electronic communication with contracting entities, and insufficient time is frequently allocated for the revision of tenders when a modification of the tender documents takes place.

The Post-tendering phase

Most of stages of the post tendering phase i.e. contract management, contract performance and certification of delivery, payment, audit and evaluation are not harmonised by the EU Public Procurement Directives. Consequently, the lack of harmonisation translates into substantially larger differences across EU Member States in the EBRD region than in the tendering phase. The overall performance of the EU Member States in the EBRD region is relatively good, with a score of 85 per cent and a high compliance rate it comes second in the survey. Figure 3.25 presents the assessment results for the post-tendering phase in the Eastern European Countries including Georgia and Russia and the average of the ERBD sub-regions.

Contracting entities in the EU Member States in the EBRD region are generally fair and equitable compared to those in other EBRD sub-regions. They are also better at keeping procurement records. A clear strength of the EU Member States in the EBRD region is the use of procurement evaluations/audits. Contracting entities routinely undergo audits in the EU Member States in the EBRD region whereas many countries in other sub-regions do not use these tools.

The EU Member States in the EBRD region score less well in ongoing monitoring of their public contracts. Practitioners reported that modifications or waivers of the terms and conditions of a contract are not necessarily subject to a review and approval procedure in most of the countries. This can be seen as a violation of the principle of transparency, and might lead to corruption arising from, for example, suppliers who seek to amend terms that are difficult with which to comply.

In short, the EU Member States in the EBRD region rankings for the post-tendering phase are similar to those for the preceding phases, but the degree to which they differ from each other is considerably higher.

Legal efficiency in the post-tendering phase is highest in Slovenia and Latvia, with scores of 98 and 96 per cent compliance rate respectively. Slovenia's performance stands out in

contract administration in particular. Whilst most EU Member States in the EBRD region lack mandatory review and approval procedures to modify or waive terms and conditions of the public contract, this is generally obligatory in Slovenia. The same applies to Latvia, which was also reported as remarkably diligent in performing audits and publishing periodic procurement reports.

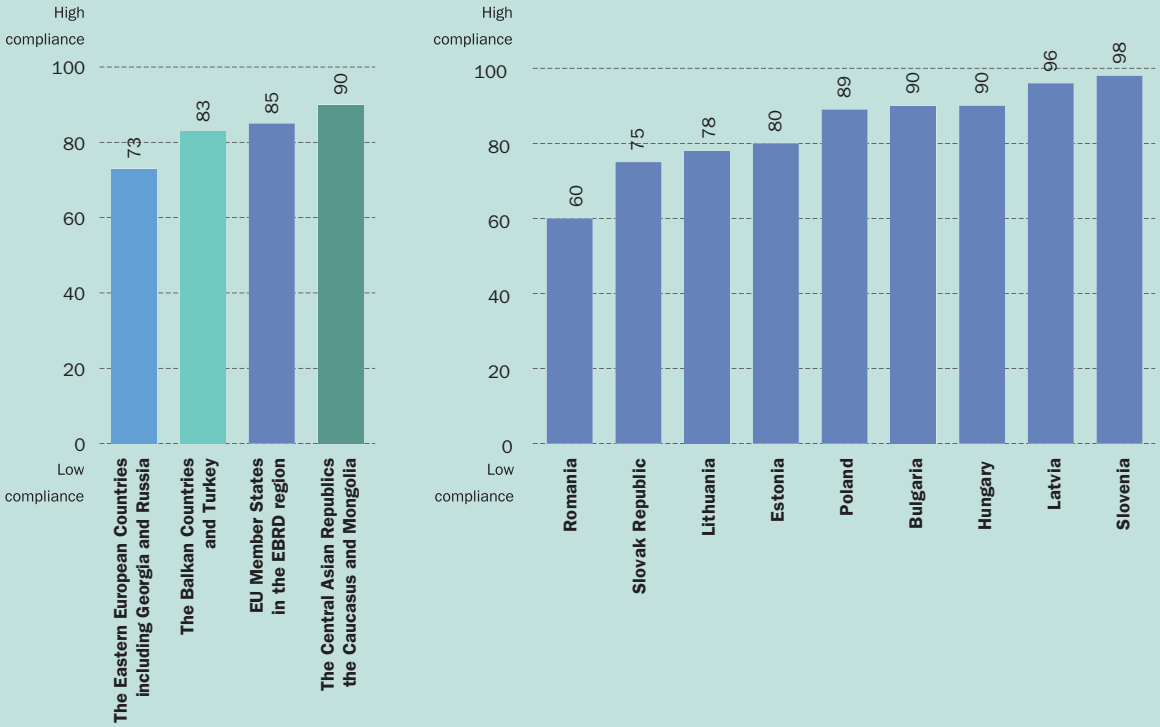
Hungary, Bulgaria and Poland follow in second to fourth place in the ranking, with a high level of performance (89 to 90 per cent). Hungary, like Latvia, excels in conducting regular audits and compiling procurement reports. One of Bulgaria's specific strengths was reported to be public contract performance. Public contracts are normally completed within the originally approved contract price. Poland performs relatively well in contract administration, including appropriate procurement record keeping.

According to the assessment results, Estonia, Lithuania and the Slovak Republic lag behind slightly with a 75 to 80 per cent compliance rate. This is explained by gaps in contract administration regulation resulting in a lack of appropriate procedures to monitor the delivery of goods and services to verify quantity and quality, as well as a failure to respect given milestones and ultimate deadlines. Consequently, in these countries, there is a perception of problems in ensuring that public contracts are delivered on schedule and within budget.

Romania achieved a score of 60 per cent, which corresponds to a low to medium compliance level. The major gaps in Romania are similar to the weaknesses of Estonia, Lithuania and the Slovak Republic. Weaknesses are found primarily in the monitoring of contract performance, and accordingly, in frequent cases of late delivery or exceeding the budget. This is in addition to gaps in public contract financial management, notably the adequate monitoring of payments.

Figure 3.26

The post-tendering phase – country scores in the in the EU Member States in the EBRD region and the average of the EBRD sub-regions



Notes: The figure includes two charts. The first chart shows the average score for efficiency of the post - tendering phase in the EBRD sub-regions. The second chart shows the scores for efficiency of the post -tendering phase in the EU Member States in the EBRD region, as a mean average. The scores for both the EBRD sub-regions and the Balkan Countries and Turkey have been calculated on the basis of the practice questionnaires, developed from the LEC benchmark and answered by local contracting entities, and local legal advisors. Total scores are presented as a percentage, with 100 per cent representing the optimal score for each LEC benchmark indicator.

Source: EBRD Public Procurement Assessment 2010

3.8 Conclusions

The overall recommendation is to apply the good practices in public procurement, as presented in the first section of this chapter.

National legislators and local stakeholders in the transition countries should align their regulatory framework more closely with the procurement good practices, which are themselves derived from major international procurement standards, such as the EU Public Procurement Directives, WTO GPA, UNCITRAL Model Law, as well as from lessons learnt by international financial institutions.

A set of tables on the following pages present the priority areas for public procurement legal reform, which in some countries at least, are recommended.

The areas of concern are grouped under the procurement phases, and indicate with asterisks where the survey amongst local public procurement practitioners identified substantial gaps in local procurement practice (* = moderate performance gaps; ** = major performance gaps).

As countries within each EBRD sub-region differ significantly from each other in terms of their performance in legal efficiency indicators, there are no recommendations addressed to the EBRD region in general. While based on general international standards, specific public procurement policy messages directed at the region would not be able to capture this diversity and lead to unhelpful generalisations.

For this reason priority areas for reform were indicated for each country in the EBRD region individually and are intended as a check-list for the national legislators and stakeholders.

PUBLIC PROCUREMENT INSTITUTIONAL FRAMEWORK: PRIORITY AREAS FOR REFORMS

	The EU Member States in the EBRD region									The Balkan Countries and Turkey							The Eastern and European countries including Georgia and Russia					The Central Asian Republics, Caucasus and Mongolia			
	BG	EE	HU	LT	LV	PL	RO	SI	SK	AL	BA	HR	MK	ME	RS	TR	BY	GE	MD	RU	UA	AM	KG	TJ	UZ
LEGAL INSTITUTIONAL FRAMEWORK																									
Clear, comprehensive legal framework		*		*																**	*		*		
Staff generally held in high regard				*						**		*			*		**				*		*		
Adequate pay levels	**			*		*	*					**		*	**	*	*		**		**	*	*	**	
Code of ethics	**	*							*			*	*	*	**	**	**	*	**		*		**		
Mandatory disclosure of internal regulations and decisions		*								**									*			*			
PROCEDURES AND TEMPLATES																									
Regulated procurement process and decision making											*				**		**	*	*			*	*		
Assigning key procurement functions and adequate staffing		*					*								**				*		*		**		
Mandatory assessment of procurement risks		*			*		**				*	*			**		**	*	*				*	*	
Procurement manuals for staff															*			*	*						
Regular trainings								**	*	*		*	*		**			*	**			*	*		
Continuous monitoring of changes in procedure							**			*		*													**
Continuous monitoring of changes in contract	*						*			**					*		**		*						**
Internal monitoring and auditing arrangements		*									*				*			*							
Internal standard forms for procurement reports		*	*												*				*			*			
Internal standard forms for tender securities		*	*		*		*				*	*			**		**	*	**		**				
Internal rules on contract cancellation		*	*		**				**	*	*				**		**	**	**		**	*			

Notes: The table presents the priority areas for reform in the regulatory framework of the the public procurement process, where corrective action is recommended. The structure of the table starts with public procurement institutional framework and follows phases of the public procurement process. The EBRD countries of operations are grouped in sub-regions. Performance gaps, as identified in the assessment are indicated with asterisks, where: ***= stands for moderate performance gaps and some room for improvement,** ****= stands for major performance gap**

Source: EBRD Public Procurement Assessment 2010

	The EU Member States in the EBRD region									The Balkan Countries and Turkey							The Eastern and European countries including Georgia and Russia					The Central Asian Republics, Caucasus and Mongolia			
	BG	EE	HU	LT	LV	PL	RO	SI	SK	AL	BA	HR	MK	ME	RS	TR	BY	GE	MD	RU	UA	AM	KG	TJ	UZ
NEEDS ASSESSMENT																									
Mandatory economical justification for purchases		*	*	**			*	*	**		**	**			**	*	**		**		*				
Alignment of procurement planning with general investment decision-making		*	*												*				**		**		*		
Use of standard form or software for procurement plans		*			*		*	*			**	*					**								
Sufficiently detailed procurement plans (incl. time and cost estimates)		*					*				*					*	*		*				*		
Procedures for planning procurement of recurrent contracts (incl. inventory control, spare parts management)		*						**									*		*		*		*		**
Regular market surveys		*		**	**		*	*			**	*	*		*		*	*		**	*	**	**		**
Budget allocation											*				**		**	*	*			*	*		
Identification of major projects in long-term budget estimates		*					*										**		*		*				
Mandatory financial authorisation to start the procurement process	*				*						*	*		*							*		*		**
Budgetary authorisation for contract payments due beyond the current financial year	*	*						**			**						**				*		*		
Establishing contract profile								**	*	*		*	*		**			*	**			*	*		
Coordination of technical, financial and procurement planning		**					*				**								**		**	*			
Mandatory completion of procurement plans before starting the procedure		**						*												**					
Specific methodologies to plan procurement for large projects		*		**	*			*		*		**			**		**	*	**		**	*	*		**

Notes: The table presents the priority areas for reform in the regulatory framework of the the public procurement process, where corrective action is recommended. The structure of the table starts with public procurement institutional framework and follows phases of the public procurement process. The EBRD countries of operations are grouped in sub-regions. Performance gaps, as identified in the assessment are indicated with asterisks, where: ***= stands for moderate performance gaps and some room for improvement,** ****= stands for major performance gap**

Source: EBRD Public Procurement Assessment 2010

PUBLIC PROCUREMENT TENDERING PHASE: PRIORITY AREAS FOR REFORMS

	The EU Member States in the EBRD region									The Balkan Countries and Turkey							The Eastern and European countries including Georgia and Russia					The Central Asian Republics, Caucasus and Mongolia			
	BG	EE	HU	LT	LV	PL	RO	SI	SK	AL	BA	HR	MK	ME	RS	TR	BY	GE	MD	RU	UA	AM	KG	TJ	UZ
PREQUALIFICATION																									
Standardised and transparent prequalification process			*																*		*				
Verification of prequalification information			**					**													*				
Requesting financial information in prequalification to assess tenderers capacity			**		*																*		**		
Using only qualification criteria disclosed in the tender documents		*		*			*									*				**			*		
Operation of a registration scheme to speed up the prequalification process	*	*	**	**		**	*	*	**	*	*	*	*	**	*		**	**	**	**	**	**		*	**
SETTING AWARD CRITERIA																									
Sufficiently detailed award criteria with reasonable weights		**									**				*				**						
SELECTING THE PROCEDURE																									
Setting open tender as default procedure in legislation		*																*					**		
Availability of negotiated procedures for specific or complex contracts																			**			*	*		
Mandatory justification for the choice of the procedure (if not open tender)	*	*	*					*	**			*				**		*	**	**			**		**
TENDER SECURITIES																									
Possibility to request tender security from specific tenderers			*		*				**	*			**		*	**	**	*	*		**				
PREPARING TENDER DOCUMENTATION																									
Availability of tender documents free of charge	**		*								**	*	**	**	*	*		**	*	**	*	**	**	*	**

Notes: The table presents the priority areas for reform in the regulatory framework of the the public procurement process, where corrective action is recommended. The structure of the table starts with public procurement institutional framework and follows phases of the public procurement process. The EBRD countries of operations are grouped in sub-regions. Performance gaps, as identified in the assessment are indicated with asterisks, where: ***= stands for moderate performance gaps and some room for improvement,** ****= stands for major performance gap**

Source: EBRD Public Procurement Assessment 2010

	The EU Member States in the EBRD region									The Balkan Countries and Turkey							The Eastern and European countries including Georgia and Russia					The Central Asian Republics, Caucasus and Mongolia			
	BG	EE	HU	LT	LV	PL	RO	SI	SK	AL	BA	HR	MK	ME	RS	TR	BY	GE	MD	RU	UA	AM	KG	TJ	UZ
Publishing tender documents on procurer's or a central website			*									*		*				*		**		*	*		**
Mandatory use of standard tender documents for goods (supplies), works and services			*	*	*			*	**			*			**		**		**			*			
Mandatory use of standard contract forms	*	*	**	**	**	**		**	**			**		*	**		**		*	**		*	*		
NOTIFICATION																									
Mandatory publication of advance procurement notices (PINs)						*						*		*	*	*			*				*		
Electronic publication of tender notices, available free of charge											**		**				*		**		*	*	*		
Single point of access for tender notices				*		*		*		*	**				*							*			
Drafting notices/tender documents in languages customarily used in trade in the region, if relevant	**	**	**	**	**	**	**	**		*	**	**	**	**	**	**	**	**	**		**	**	**	**	**
TENDER PREPARATION																									
Availability of swift electronic communication	*							*										*				*			*
Allocate sufficient time to revise tenders in case of a modification of terms	*							*			**										*				
SUBMISSION AND TENDER OPENING																									
Prompt opening of tenders after expiry of submission deadline		**						*		**						*									
Allowing tenderers to be present at the tender opening session										*									**						
Reading out/posting the names of the tenderer and the price (if financial offer not separate)			*					*			**			**	*				**		*	**	*	*	**

Notes: The table presents the priority areas for reform in the regulatory framework of the the public procurement process, where corrective action is recommended. The structure of the table starts with public procurement institutional framework and follows phases of the public procurement process. The EBRD countries of operations are grouped in sub-regions. Performance gaps, as identified in the assessment are indicated with asterisks, where: ***= stands for moderate performance gaps and some room for improvement,** ****= stands for major performance gap**

Source: EBRD Public Procurement Assessment 2010

PUBLIC PROCUREMENT POST-TENDERING PHASE: PRIORITY AREAS FOR REFORMS

	The EU Member States in the EBRD region									The Balkan Countries and Turkey							The Eastern and European countries including Georgia and Russia					The Central Asian Republics, Caucasus and Mongolia			
	BG	EE	HU	LT	LV	PL	RO	SI	SK	AL	BA	HR	MK	ME	RS	TR	BY	GE	MD	RU	UA	AM	KG	TJ	UZ
Rejecting tenders received after the stipulated deadline	**	*	*	**	**	**	**	**	**	**	**	**	**	**	**	**	**	**	**	**	**	**	**	**	**
EVALUATION - SUITABILITY OF TENDERER																									
Eligibility of tenderer to be determined on the basis of the disclosed requirements only								*													*				
EVALUATION - SUITABILITY OF TENDER																									
Restricting submission of multiple variants (if not due to innovative solutions)	*	*			*			*	*		*		*	*		*	*	*		**					
Possibility to reject abnormally low tenders										*									*						
EVALUATION PROCESS																									
Complete evaluations within the original tender validity period																	**								
Keeping real-time written records		*		*															**					*	**
Making the record available upon closing the procedure		*	**						**	*			*		*		*	*	**			**	*	*	**
Publishing the outcomes of the procedure electronically	*	*	**			**		*	**	*	**	*			*	**	*		**		*	**	**	*	**
Appropriate measures to protect confidential information								*									**			**	**				
Appropriately experienced evaluation committees															*								*		

Notes: The table presents the priority areas for reform in the regulatory framework of the the public procurement process, where corrective action is recommended. The structure of the table starts with public procurement institutional framework and follows phases of the public procurement process. The EBRD countries of operations are grouped in sub-regions. Performance gaps, as identified in the assessment are indicated with asterisks, where: ***= stands for moderate performance gaps and some room for improvement,** ****= stands for major performance gap**

Source: EBRD Public Procurement Assessment 2010

	The EU Member States in the EBRD region									The Balkan Countries and Turkey							The Eastern and European countries including Georgia and Russia					The Central Asian Republics, Caucasus and Mongolia			
	BG	EE	HU	LT	LV	PL	RO	SI	SK	AL	BA	HR	MK	ME	RS	TR	BY	GE	MD	RU	UA	AM	KG	TJ	UZ
CONTRACT MANAGEMENT																									
Mandatory administration procedures for public contracts		*	*	*											*				*		*		*		
Review and approval procedures for any modifications or waivers of contract terms	**	*	*	*				*			**			**		**									
Monitor delivery of contract (quantity, quality and deadlines)							*	*			**			*			**						*		
Monitoring supplier and contractor payments							*	*									**				*				
Fair and equitable contract administration							*								*		**		**		**				
CONTRACT PERFORMANCE																									
Ensuring delivery of contracts within the originally approved budget				*			*								**					**					
Ensuring delivery of contracts on schedule							**			*					*		**			**				*	
AUDIT AND EVALUATION																									
Carrying out procurement evaluations and regular audits														*	*		**			**		*			
Preparation of periodic reports on public procurement activities						**				**										**					

Notes: The table presents the priority areas for reform in the regulatory framework of the the public procurement process, where corrective action is recommended. The structure of the table starts with public procurement institutional framework and follows phases of the public procurement process. The EBRD countries of operations are grouped in sub-regions. Performance gaps, as identified in the assessment are indicated with asterisks, where: ***= stands for moderate performance gaps and some room for improvement,** ****= stands for major performance gap**

Source: EBRD Public Procurement Assessment 2010

Chapter 4

Efficiency of the Public Procurement Remedies in the EBRD Countries of Operations

4.1 Introduction

As part of the assessment, a survey of remedies system examined how the balance between the extensiveness and efficiency of remedies in public procurement is achieved in the EBRD region.

To provide an insight into remedies practice local legal advisers were invited to answer case studies relating and examine the application of national public procurement laws on remedies in practice. The results are presented in this chapter. There are 3 main sections:

- a presentation of the Legal Efficiency Concept as applied to the evaluation of the public procurement remedies regulation;
- an analysis of the efficiency of public procurement remedies systems for each of the country groupings in the EBRD region (the sub-regions of the Balkan Countries and Turkey, the Central Asian Republics, the Caucasus and Mongolia, the Eastern European countries, including Georgia and Russia and the EU Member States in the EBRD region), including general trends revealed by the assessment;
- a set of recommendations for improving the efficiency of public procurement remedies across the EBRD region.

In order for public procurement rules to be effective they must correctly applied and efficiently enforced.

Most of the EBRD countries have now introduced public procurement rules. However, in order to ensure that these rules are fully and correctly applied, a mechanism is necessary to ensure the compliance of the public authorities and bodies that award contracts with the detailed provisions of the public procurement legal framework. Thus, enforcement of the substantive rules is the next area of public procurement that needs to be addressed and improved by the countries in the EBRD region. This kind of enforcement is usually realised through specific procedural provisions and legal instruments that establish 'remedies procedures' of a public procurement system which provide the power needed to enforce the provisions of the public procurement rules.

The possibility of review serves both as a legal instrument for the rectification of breaches of the substantive rules, and as a deterrent to those who may act outside the law, thus encouraging compliance.*

In public procurement regulation, the concept of 'remedies' refers to legal measures which can rectify the alleged defects or irregularities in a public procurement process while it is under way.

Remedies procedures are important because they enable a procurement process to evolve according to the schedule and plan conceived by the contracting authority. At the same time, they allow disputed points to be addressed and alleged violations of the substantive rules (through acts and omissions by the contracting authority) to be reviewed and, if deemed necessary, rectified.

Remedies procedures are focused on maintaining the integrity of the public procurement system in the context of an ongoing tendering process, meaning that they aim to correct any irregularities during the course of the procedure and before the conclusion of the contract. Remedies include, for example, an order from a court or tribunal removing an unfair tender requirement, technical specification or contract clause, thereby allowing an aggrieved economic operator to participate in the tender under fair conditions. Furthermore, remedies usually guarantee an annulment of illegal acts and decisions, including the award decision, where this is the best course of action. However, both of those options are, in principle, available only until the contract has been concluded. This time constraint reduces the effectiveness of remedies.

*SIGMA PAPER No. 41 'Public Procurement Review and Remedies Systems in the European Union', GOV/SIGMA (2007)5 available at http://www.sigmaweb.org

In most jurisdictions, remedies that can be awarded by the respective review bodies normally include:

1. setting aside of any individual public procurement decision, including the award decision,

2. interim measures,

3. the annulment of a concluded contract (in some jurisdictions), and in exceptional cases, damages**

Damages may be classified as a public procurement remedy; however, the award of damages does not correct defects in the public procurement process since it accepts and leaves undisturbed the irregularities which have occurred during the awarding procedure, and offers public money as financial redress. Nevertheless, compensation can act as a deterrent for contracting authorities/entities and their staff, so a remedies system should provide for it in combination with other forms of remedies.

Remedies procedures are still a relatively new concept. Historically, governments mostly offered compensation as a means of resolving public procurement disputes, invoking the 'public interest' as grounds for the dismissal of other means of legal protection for the bidder's legitimate rights and interests. Today, remedies procedures are emerging as an important public procurement regulatory standard. However, governments face the challenge of deciding when and how remedies procedures should be available. In order to answer this core question, the regulators have to take into account the hidden costs that remedies carry. They slow down the procurement process and raise the administrative burden thereby incurring additional direct and indirect costs on the transaction. Thus, the challenge is to strike a balance between effective remedies, and the efficiencies derived from allowing the public procurement process to proceed expeditiously to its conclusion***.

For example, the opportunity to challenge illegal awards of public contracts and to bring remedies actions when infringements can still be corrected has to be embedded in any public procurement remedies system. However, such legal instruments have to be designed and used in a way that allows for the overall process to proceed at an acceptable pace. On the other hand, compensation should remain an alternative response to those cases where remedial action is not considered feasible, because it would cause disproportionate harm to the public interest.

** available only under the EU PP Directives legal framework. (2007) 5 available at http://www.sigmaweb.org

*** Law in transition Online Autumn 2010 'EBRD 2010 public procurement assessment: review of remedies systems in transition countries'

4.2 Legal Efficiency Concept and its Application in Public Procurement Remedies

Legal Efficiency Approach

There are several international legal instruments in use in the area of public procurement across the EBRD region. The assessment drew on and adapted these principles and the detailed benchmark indicators were adapted from all the major international legal instruments, including those which are already in force and some which have the status of 'accepted drafts'*.

To assess efficiency of public procurement remedies in the EBRD region a Legal Efficiency Concept, originally developed for the EBRD commercial laws assessment has been adopted.**

The concept of legal efficiency is defined as 'the extent to which a law and the way it is used fulfils the purpose for which it was designed and provides the benefits that it was intended to achieve'.

Legal efficiency is assessed by examining the means by which a particular legal framework enables the stakeholders: to achieve the basic function of the regulation, and to operate in a way which maximises economic benefit. Adopting this general framework for the analysis, separate benchmark indicators were established for basic functions and for efficiency (economic benefit).

Indicators of an effective remedies legal framework

An effective remedies system should provide aggrieved bidders with a cogent means of redress, deter the contracting authorities from breaching the rules in the first place, and build confidence in public procurement procedures among the business community and general public.

The assessment proceeded on the basis that an effective public procurement remedies legal framework should possess certain basic features, both in terms of the remedies bodies' structure and procedures. For the purposes of the evaluation, a number of 'Basic function' indicators (see Box 4.1) were used as benchmarks, in order to measure and assess the quality and efficiency of the various public procurement remedies systems in the EBRD countries of operation.

These basic function indicators set a solid foundation on which governments can build remedies structures and procedures that can accommodate the general interest in the efficient use of public expenditure at the same time as the interests of the private stakeholder participating in the public procurement process. This can be achieved by establishing an effective public procurement remedies framework that will assure the steady progress of the awarding procedures while allowing for the economic operators to seek review and redress should the conduct of the procedure be proven unlawful.

The notion of the effectiveness of a review and remedies system has already been clarified by European Court of Justice (ECJ) case law (see e.g. case C-92/00, paragraph 67 and Case C-390/98 Banks v Coal Authority and Secretary of State for Trade & Industry [2001] ECR I-6117, paragraph 121; Case C-453/99 Courage and Crehan [2001] ECR I-6297, paragraph 29).

More concretely, it appears that an efficient public procurement remedies system must comprise operational review bodies, rules on standing in review bodies, costs, rules on the effect of filing a protest, scope, the possibility to set aside individual procurement decisions including the award decision, damages, and interim measures. Moreover, aspects of effectiveness include questions of access and the degree of satisfaction with the system (frequency of proceedings, appeals against first instance decisions, etc.), and possibly, the general transparency, and even, simplicity of the system***.

Efficiency: indicators of efficient remedies procedures

If the public procurement legal framework is to operate in a way which maximises economic ben-

* 2004-2007 EU PP Legislative Package [http://eur-lex.europa.eu/el/index.htm], revised 2010 UNCITRAL PP Model Law [http://www.uncitral.org/] and revised 2007 WTO GPA [http://www.wto.org/]

** F. Dahan and J. Simpson (2008) 'Legal efficiency of secured transactions reform: bridging the gap between economic analysis and legal reasoning' in F. Dahan and J. Simpson (eds), Secured Transactions Reform and Access to Credit, pp. 122-140. Edward Elgar Publishing, Cheltenham, UK

*** SIGMA PAPER No. 41 'Public Procurement Review and Remedies Systems in the European Union', GOV/SIGMA (2007)5 available at http://www.sigmaweb.org

efit, the public procurement remedies system should function in an efficient way. It should be reliable for all stakeholders, as well as simple, fast and not exclude anyone financially. In addition, there should be clarity as to what the rules dictate and how they are applied in practice. The law should function in a manner which fits both the purchase specifics and the local context.

In order to ensure the effectiveness of the remedies system, regulators and enforcers of the rules must ensure that procurement decisions taken by the contracting authorities can be reviewed in the most effective and rapid manner.

In order to measure and evaluate the efficiency of the remedies systems in the EBRD countries, five efficiency indicators were established as the benchmark for an effective remedies procedure: simplicity, speed, cost, certainty and 'fit to context' (see Box 4.2). The certainty indicator comprised three sub-indicators, namely consistency or predictability, impartiality and resistance to corruption.

Measuring the efficiency of public procurement remedies in the EBRD region

The assessment of public procurement remedies regulation was conducted both in terms of its basic function and the efficiency indicators. The first step was to review the public procurement remedies 'law on the books' to establish the extent to which it accorded with or was conducive to the indicators presented in Box 4.2. Figure 4.1 presents the quality of legislation on public procurement remedies in the ERBD countries of operation.

The second step was to review the public procurement remedies practice. A law firm in each country assessed answers to a questionnaire on the public procurement remedies system available in their country. The questionnaire was accompanied by two case studies which tested how the answers to the questionnaire would work in practice. Since opinions on public procurement practice in the country among legal professionals can vary significantly, a test was employed, whereby several different law firms were asked to complete the questionnaire in relation to one country. The test proved positive, as the responses received were very similar in their assessments.

Based on the opinions expressed by local legal advisers, it was observed that even countries in the EBRD region which scored 'high' and 'very high' on the quality of their public procurement remedies legislation do not achieve the same results at the implementation level.

The survey revealed that it is unwise to make assumptions about the efficiency of particular types of remedies systems. For example, a remedies system that operates at high cost does not necessarily guarantee that the remedies body is well adapted to the economic, social and legal context within which it operates. Fur-

Box 4.1

Basic function indicators for a sound public procurement remedies legal framework

Basic features of the public procurement remedies function, as adopted by the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services:

- right of the tenderer to seek a review in a timely and cost-effective fashion
- right of the tenderer to seek remedial action as opposed to monetary compensation
- a dedicated public procurement remedies system
- an independent, administrative/quasi-judicial body, authorised to sanction remedial action
- access to judicial review
- where remedies procedures are not feasible, the right of the tenderer to seek compensation
- access to alternative dispute resolution

Box 4.2

Efficiency indicators for public procurement remedies legal framework

SIMPLICITY	This indicator is achieved when a reasonable balance has been struck between a user-friendly approach and the sophistication required by the local legal and business culture.
SPEED	This indicator recognises the costs involved in delay. For most aspects of the legal process, the less time it takes, the more efficient the process. However, in the field of public procurement remedies there are exceptions: sufficient time must be provided to the aggrieved bidder to obtain information about the contracting authority's illegal acts and draft and file their complaint. Therefore a standstill period and a time-limit for the submission of complaints of an appropriate length are deemed necessary. In addition, most elements of the remedies process should be conducted without unnecessary delay.
COST	This indicator recognises that there are costs on both sides: a public entity conducting the procurement process and a private economic operator participating in this process. Inevitably, higher costs have an adverse impact on the economic benefit of a transaction. Delay in contracting entity/review body decisions, unnecessary complexity of the remedies procedures and uncertainty as to the evaluation process all add to the costs of transaction. There is a direct relationship with the other aspects of legal efficiency. Some costs are, at least to some extent, within the control of the parties. The cost of legal advice on a complicated case may be outweighed by the benefits, but the cost of legal advice incurred because of defects in the legal framework always reduces efficiency, as do fixed costs (for example, complaints, notary or court fees).
CERTAINTY	This indicator refers to predictability as a critical element of any sound legal system. Even an element of uncertainty in the legal position can have far-reaching consequences. Transparency can often strengthen certainty. For instance, easy access to information on the public procurement remedies body's former decisions. If consistent, allows potential complainants to evaluate the merit of their complaint and their chances of succeeding. Three key components of this indicator for the public procurement remedies system are: • consistency or predictability, • impartiality, • resistance to corruption.
'FIT-TO-CONTEXT'	This indicator measures efficiency by examining the question of whether the remedies body is well adapted to the economic, social and legal context within which it operates. The remedies body must: achieve the particular policy objectives of the public procurement rules (that is, economic, social and environmental), reach an appropriate balance between fulfilling the contract's economic purpose and the integrity requirements of the public client, respond to the purchase characteristics (business case), and respond to the local market situation.

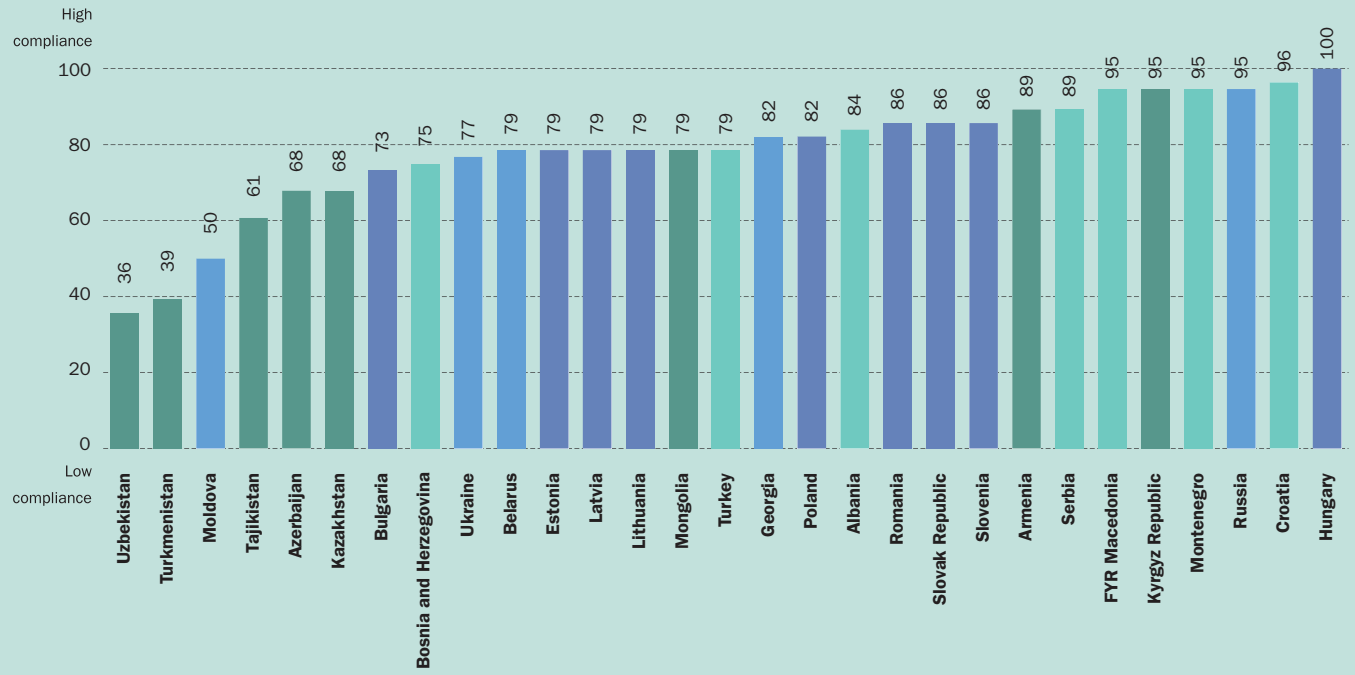
thermore, while a judicial review process is thought to lead to better quality decisions and provides, in principle, for higher integrity safeguards, court proceedings are usually more expensive and significantly slower than administrative review procedures. Figure 4.2 presents the overall performance of the regional country groupings against the five key efficiency indicators of the public procurement remedies. Figure 4.3 presents the performance of the ERBD countries of operation in the regional country groupings against the five five key efficiency indicators and as a total efficiency in public procurement remedies.

In order to determine how efficient a national remedies system is, it is necessary to look specifically at the score it achieved individually. The results for the EBRD countries of operation, by individual country and per sub-region (Balkan countries and Turkey, Central Asian Republics, the Caucasus and Mongolia, Eastern European countries and Russia and EU Member States in the EBRD region*) are depicted below. The score has been calculated on the basis of the checklist of questions regarding remedies procedures and the two case studies. Figure 4.4 presents the overall public procurement remedies efficiency performance of the ERBD countries of operation.

* Data not available for Azerbaijan, Mongolia, Kazakhstan and Turkmenistan (Central Asian Republics, Caucasus and Mongolia)

Figure 4.1

Quality of legislation on public procurement remedies in the EBRD countries of operations



Notes: The figure shows the scores on 'basic functions' of the public procurement remedies legislation for each country in the EBRD region. The score for each country has been calculated on the basis of a checklist on remedies procedures, answered by local legal advisers. Total scores are presented as a percentage, with 100 per cent representing optimum quality of the national public procurement remedies regulation in the 'basic function' LEC indicator.

Source: EBRD Public Procurement Assessment 2010

Figure 4.2

Quality of public procurement remedies practice in the EBRD sub-regions

Note: The charts present the results for the five key LEC indicators for each of the EBRD sub-region. The score has been calculated on the basis of a checklist on remedies procedures and case studies answered by local legal advisers. Total scores are presented as a percentage, with 100 per cent high representing the highest performance in LEC indicators, equivalent to full compliance with the LEC benchmark.

Source: EBRD Public Procurement Assessment 2010

Figure 4.3

Performance of the EBRD countries of operations in each of the key LEC indicators and as a total score for LEC benchmark.

	COUNTRY	SIMPLICITY %	SPEED %	COST %	CERTAINTY %	FIT TO CONTEXT %	TOTAL %
1	Albania	97	84	80	80	90	83
2	Armenia	71	69	85	74	90	76
3	Azerbaijan	–	–	–	–	–	–
4	Belarus	69	71	35	71	15	61
5	Bosnia and Herzegovina	100	79	95	77	60	79
6	Bulgaria	75	52	55	79	85	73
7	Croatia	94	77	65	86	90	83
8	Estonia	84	77	95	80	90	82
9	FYR Macedonia	94	71	75	77	85	78
10	Georgia	72	70	60	81	75	75
11	Hungary	81	64	80	86	80	81
12	Kazakhstan	–	–	–	–	–	–
13	Kyrgyz Republic	91	75	63	62	78	68
14	Latvia	88	51	83	82	60	76
15	Lithuania	77	64	70	70	85	72
16	Moldova	63	45	53	54	50	53
17	Mongolia	–	–	–	–	–	–
18	Montenegro	78	84	48	76	85	75
19	Poland	72	73	40	88	63	76
20	Romania	69	61	55	73	65	68
21	Russia	50	46	80	75	50	66
22	Serbia	88	59	63	79	75	74
23	Slovak Republic	88	77	60	79	83	78
24	Slovenia	88	71	65	81	95	80
25	Tajikistan	88	82	75	73	80	77
26	Turkey	100	86	100	77	100	85
27	Turkmenistan	–	–	–	–	–	–
28	Ukraine	72	66	48	67	80	67
29	Uzbekistan	25	54	25	57	80	53

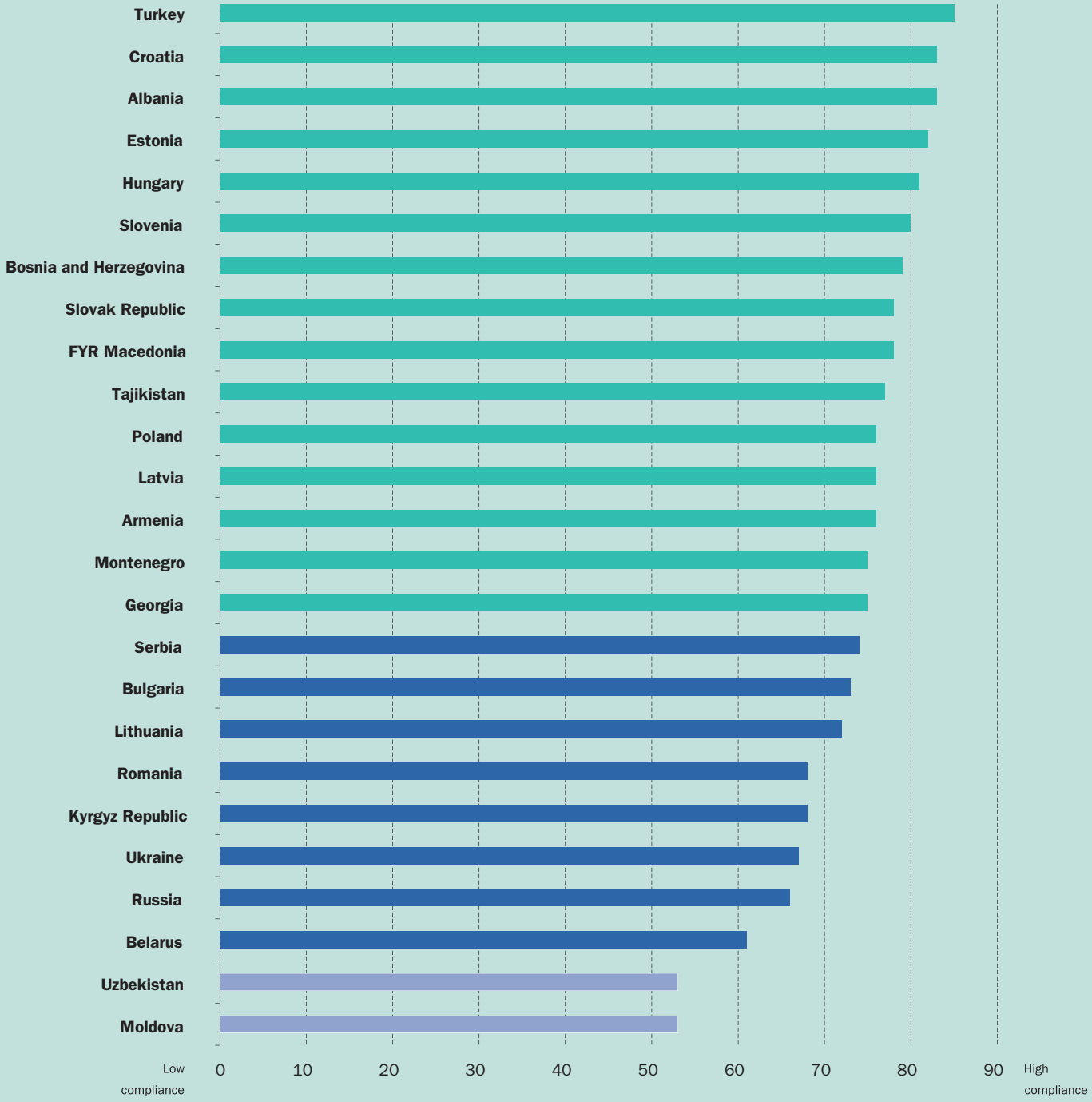
COMPLIANCE	SCORING
Very high	90% ++
High	76% – 89%
Satisfactory	60% – 75%
Low	50% – 59%
Very low	below 50%
No data	–

Notes: The figure illustrates the results of each of the ERBD countries of operations in each LEC indicator and as a total score for all LEC benchmark indicators, The scores have been calculated on the basis of a checklist on remedies procedures and case studies answered by local legal advisers. Total scores are presented as a percentage, with 100 per cent high representing the highest performance in LEC indicators, equivalent to full compliance with the LEC benchmark.

Source: EBRD Public Procurement Assessment 2010

Figure 4.4

Ranking of the EBRD countries of operations, based on their total scores for LEC benchmark for quality of public procurement remedies practice



Notes: The figure illustrates the results of each of the ERBD countries of operations as a total score for all 5 LEC benchmark indicators, The scores have been calculated on the basis of a checklist on remedies procedures and case studies answered by local legal advisers. Total scores are presented as a percentage, with 100 per cent high representing the highest performance in LEC indicators, equivalent to full compliance with the LEC benchmark.

Source: EBRD Public Procurement Assessment 2010

4.3
The Balkan Countries and Turkey

Simplicity

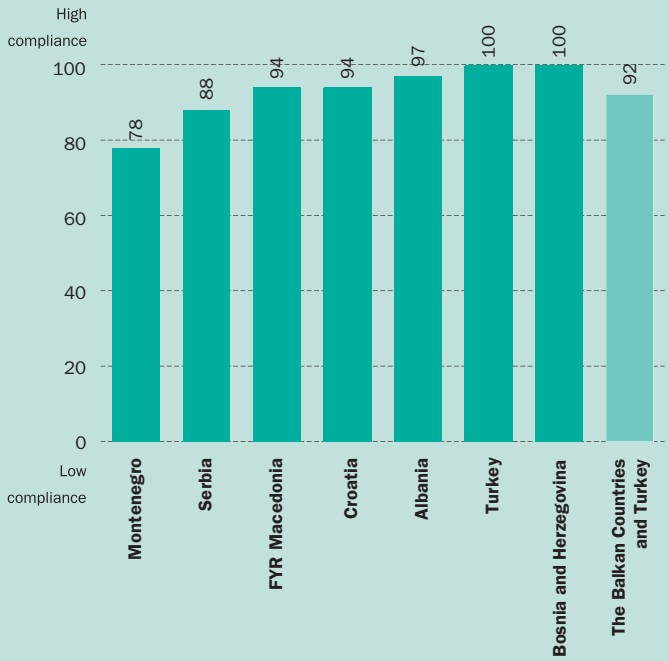
The Balkan Countries and Turkey country grouping scores an impressive 'very high' (average 92 per cent) on the simplicity indicators, which is, by far, the best average score in the four EBRD sub-regions (EU Member States in the EBRD region: 81 per cent, Eastern European Countries, including Georgia and Russia: 57 per cent, Central Asian Republics, the Caucasus and Mongolia: 70 per cent). This is an excellent level of performance, partially justified by the fact that the entire sub-region has, in recent years, been a beneficiary of several institution building and technical assistance projects. All countries in this region were able or obliged to introduce a series of significant modifications and substantial reforms to their remedies systems, in order to comply with the standards developed by international organisations (EU, UN, WTO, etc).

The investment has paid off since two of the countries in this region, namely B&H and Turkey, have notably received a 100 per cent percent score, whereas three countries (Albania, Croatia and FYR Macedonia) also score 'very high', with 97 per cent, 94 per cent & 94 per cent respectively). The last two places are occupied by Serbia (88 per cent) and Montenegro (78 per cent), both of which achieved a 'high' level of performance in the simplicity indicator. Figure 4.5 presents simplicity of remedies country scores for the Balkan Countries and Turkey.

It is clear from the analysis of the data collected through the survey, that the need to align the law and practice in the field of public procurement with EU public procurement Directives standards has resulted in the establishment of modern, dedicated public procurement remedies systems that operate on the basis of simple and user-friendly rules.

Figure 4.5

Simplicity of remedies – country scores in the Balkan Countries and Turkey



Notes: The figure illustrates the performance in each of the Balkan Countries and Turkey regarding, the simplicity of remedies indicator. The scores have been calculated on the basis of a checklist on remedies procedures and case studies answered by local legal advisers. Total scores are presented as a percentage, with 100 per cent high representing the highest performance in LEC indicators, equivalent to full compliance with the LEC benchmark.

Source: EBRD Public Procurement Assessment 2010

Some lack of clarity was noted in Montenegro and the regulatory framework was held to be not sufficiently detailed in Serbia.

It should be noted that the Balkan Countries and Turkey sub-region has opted for strengthening their remedies systems by establishing independent review structures. Some of the countries have established dedicated administrative tribunals, as recommended by EU public procurement Directives. Based on the evaluation, this choice has proven to be a well calculated step that has contributed significantly to the increased simplicity of the review procedures.

Speed

The Balkan Countries and Turkey sub-region also achieves the highest assessment on the speed indicator, scoring 76 per cent, as compared with other sub-regions (EU Member States in the EBRD region: 65 per cent, Eastern European Countries, including Georgia and Russia: 60 per cent, Central Asian Republics, the Caucasus and Mongolia: 71 per cent). Figure 4.6 presents speed of remedies country scores for the Balkan Countries and Turkey.

The best results concerning speed were reached by Turkey (86 per cent compliance rate), followed by Montenegro and Albania (both scored 84 per cent compliance). The latter does not perform as well as it did in the simplicity indicator, due to the longer time required to obtain a decision on an appeal to the administrative court (judicial review). While according to the 'law on the books,' court proceedings should finish within one month, the time taken in practice can exceed one year. B&H (79 per cent) and Albania (77 per cent) still score 'high' but significantly lower in the speed indicator, compared to their performance in the simplicity benchmark. In the case of B&H the reason is the extended time-span of the proceedings before the administrative courts. FYR Macedonia finishes in sixth place with 71 per cent, a mere medium compliance rate, which is justified by the fact that the remedies bodies usually fail to meet the time-limits and deadlines prescribed by the law. Finally, the worst performance was recorded in Serbia which scored 'low', with just 59 per cent.

Based on the findings above, the pace of progress in the remedies procedures in the Balkan Countries and Turkey sub-region is, to a certain degree, hindered by the fact that, although the 'law on the books' provides for expedient actions on behalf of the remedies bodies, they occasionally fail to meet these requirements. Thus the real efficiency gap seems to lie in the compliance level of the enforcers, a defect that can be rectified with proper administrative measures.

Cost

Cost is the benchmark against which the Balkan Countries and Turkey sub-region performs least well worst (average 76 per cent). Nevertheless, this score represents the highest level of performance in the EBRD region (EU Member States in the EBRD region: 67 per cent, Eastern European countries, including Georgia and Russia: 55 per cent, Central Asian Republics, the Caucasus and Mongolia: 62 per cent). Figure 4.7 presents cost of remedies country scores for the Balkan Countries and Turkey.

The main reason for this result is the extremely poor performances of Montenegro (48 per cent), Serbia (63 per cent) and Croatia (65 per cent). This is mainly because the review fees imposed are not considered reasonable by local SMEs. The same defect, albeit not at the same level, was detected in FYR Macedonia, which scores marginally better with 75 per cent. Albania reaches a medium compliance score for the cost indicator (78 per cent compliance rate). The fees that are imposed on the complainants are calculated as a percentage of the estimated contract value; this percentage (0.5 per cent) is considered high. Finally, two countries in the sub-region excel in the cost benchmark: Turkey with 100 per cent, and B&H with 95 per cent. Both countries have reached a very high compliance level because they have adopted a really low-cost approach for allowing access to their review mechanisms, at least at the entry-level.

Clearly there is significant room for improvement as far as remedies-cost practice is concerned in some of the countries of the Balkan Countries and Turkey sub-region, but the overall performance is judged to be adequate, especially if compared with the corresponding scores of the other countries in the EBRD region.

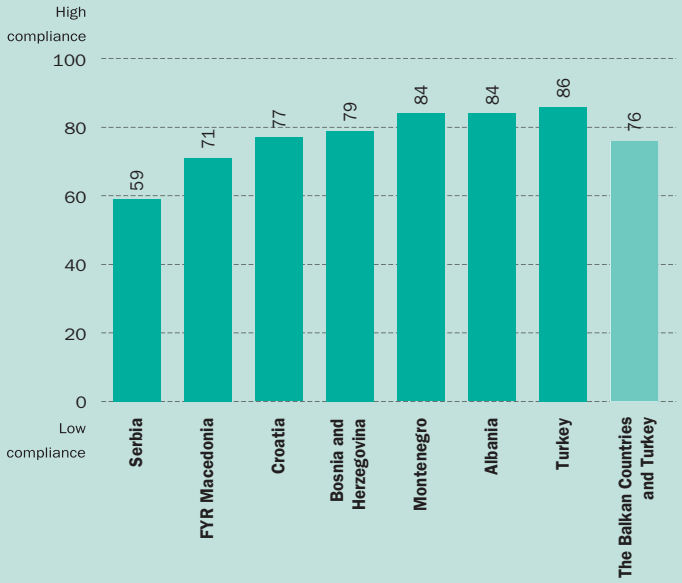
Certainty

The Balkan Countries and Turkey sub-region performs reasonably well on the certainty indicators, with an average score of 80 per cent compliance rate. First place in the certainty benchmark hierarchy is occupied by Croatia, which scores 'high' (86 per cent compliance rate).

The worst performance was recorded in Montenegro, with 76 per cent, followed by three countries in the region that share the same ranking: Bosnia, FYR Macedonia and Turkey, each achieving a score of 77 per cent (high compliance rate). Figure 4.8 presents certainty of remedies country scores for the Balkan Countries and Turkey.

Figure 4.6

Speed of remedies – country scores in the Balkan Countries and Turkey

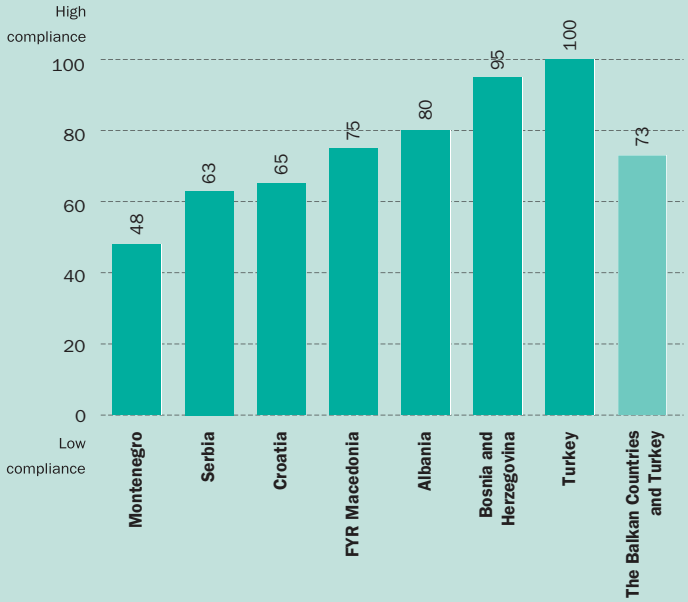


Notes: The figure illustrates the performance in each of the Balkan Countries and Turkey regarding the speed of remedies LEC indicator. The scores have been calculated on the basis of a checklist on remedies procedures and case studies answered by local legal advisers. Total scores are presented as a percentage, with 100 per cent high representing the highest performance in LEC indicators, equivalent to full compliance with the LEC benchmark.

Source: EBRD Public Procurement Assessment 2010

Figure 4.7

Cost of remedies – country scores in the Balkan Countries and Turkey



Notes: The figure illustrates the performance in each of the Balkan Countries and Turkey regarding the cost of remedies LEC indicator. The scores have been calculated on the basis of a checklist on remedies procedures and case studies answered by local legal advisers. Total scores are presented as a percentage, with 100 per cent high representing the highest performance in LEC indicator, equivalent to full compliance with the LEC benchmark.

Source: EBRD Public Procurement Assessment 2010

What is interesting about this score is the performance of Turkey, which scored 100 per cent in simplicity, cost and 'fit to context' indicators, and 86 per cent compliance rate in speed. The reason for Turkey's poor performance in the certainty indicators seems to be the diminished predictability of the Turkish remedies procedures, as well as the fact that remedies body have been suspected of corruption and lack of impartiality. The same factors determined the FYR Macedonia result.

In the case of Montenegro, the main problem lies in the unpredictability of the remedies bodies which occasionally produce 'unexpected' rulings. The same defect seems to be present in B&H, since the Procurement Review Body's (PRB) practice has varied from case to case, mainly because of the PRB staff's lack of experience. Additionally, there is a general perception of corruption in the public sector in B&H and, furthermore, the review body (especially the contracting authorities that rule on complaints in the first instance) is perceived by the respondents to have acted in a preferential way in some cases. Albania and Serbia score almost equally (80 per cent and 79 per cent respectively). In Albania, the remedies body is not perceived as corrupt, except in some cases. Moreover, local practitioners believe that the remedies bodies are acting to a certain degree, but not absolutely, in a predictable and impartial way. In Serbia there is a perception of corruption, based mainly on the fact that the review body has not been established in accordance with the transparent procedure prescribed by public procurement law. Furthermore, the remedies body's reasoning is currently perceived as unpredictable, since not all of its decisions are published on the review body's website.

The overall picture of the Balkan Countries and Turkey sub-region in the certainty indicator looks consistently average compared to the impressive results in the simplicity, speed and 'fit to context' indicators. Clearly one of the main reasons for the lower scores in this benchmark is the relatively recent establishment of the new remedies structures, which need more time to mature and develop the competences and synergies that will raise the certainty index in this region.

'Fit to context'

The Balkan Countries and Turkey sub-region scores 'high' in the 'fit to context' indicators (average score 84 per cent), a score that puts it in first place in the EBRD regions (EU Member States in the EBRD region: 79 per cent, Eastern European countries, including Georgia and Russia: 59 per cent, Central Asian Republics, the Caucasus and Mongolia: 82 per cent). Figure 4.9 presents fit-to-context country scores for the Balkan Countries and Turkey.

The sub-regional champion is Turkey, with 100 per cent, closely followed by Albania and Croatia, both scoring 90 per cent or 'very high', but also by FYR Macedonia and Montenegro, with a score of 85 per cent. Serbia achieves a 'high' score with 75 per cent. The only country in the Balkan Countries and Turkey sub-region which performed poorly in this indicator is B&H, with a medium compliance rate of 60 per cent.

In general the Balkan Countries and Turkey sub-region performed reasonably well in the 'fit to context' indicator, reaching an average score of 84 per cent.

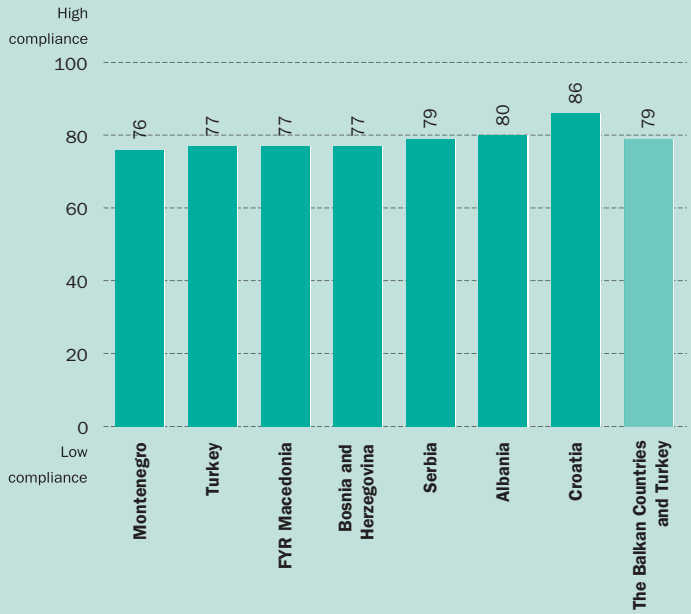
Trends

In all of the countries in the Balkan Countries and Turkey sub-region the public procurement remedies system succeeded in reaching a very satisfactory total score (Albania: 83 per cent, B&H: 79 per cent, Croatia 83 per cent, FYR Macedonia: 78 per cent, Montenegro: 75 per cent, Serbia: 74 per cent and Turkey: 85 per cent). Notably the overall performance of the Balkan Countries and Turkey sub-region is higher than the EU Member States' score in four out of the five efficiency indicators (simplicity, speed, cost and 'fit to context'). This excellent result has been achieved, despite the fact that the rules and best practice of the remedies systems in the Balkan Countries and Turkey sub-region were developed and applied in the EU area first, and are now a core component of the EU public procurement system. The Balkan Countries and Turkey sub-region countries have proven to be able reformers, since they have succeeded in creating remedies systems that are characterised by a high degree of simplicity, reasonable cost and speed. Figure 4.10 presents the performance of the Balkan Countries and Turkey in 5 key efficiency indicators.

Turkey distinguishes itself from the others by performing at an enviable level (100 per cent) in three of the five efficiency benchmarks (simplicity, cost and 'fit to context' indicators). The country that seems to have the greatest room for improvement is Serbia, which is the only country that did not reach a 'high' level, mainly due to its poor performance in the cost and speed benchmarks. Cost and speed are issues that the countries of the Balkan Countries and Turkey sub-region have not managed to tackle as efficiently as the simplicity factor. However, their performance overall remains completely acceptable. This leaves certainty as the main area for the sub-region's countries to continue to develop in the next few years.

Figure 4.8

Certainty of remedies – country scores in the Balkan Countries and Turkey

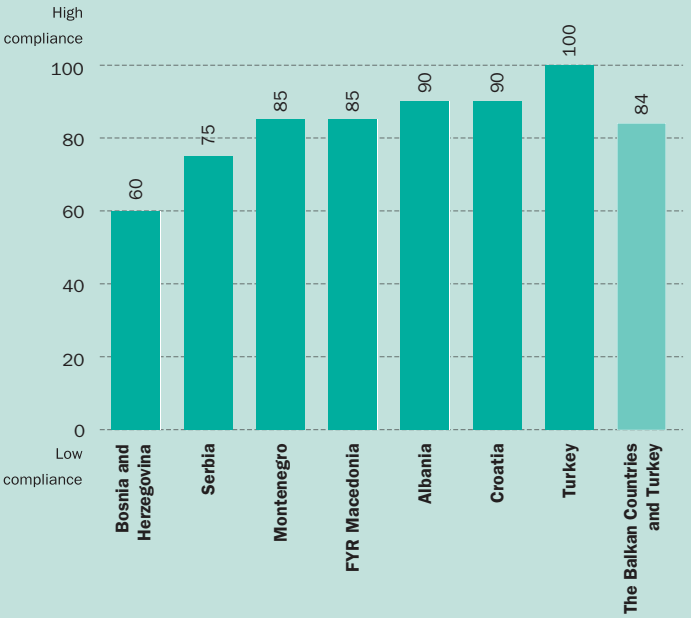


Notes: The figure illustrates the performance in each of the Balkan Countries and Turkey regarding the certainty of remedies LEC indicator. The scores have been calculated on the basis of a checklist on remedies procedures and case studies answered by local legal advisers. Total scores are presented as a percentage, with 100 per cent high representing the highest performance in LEC indicators, equivalent to full compliance with the LEC benchmark.

Source: EBRD Public Procurement Assessment 2010

Figure 4.9

'Fit to context' – country scores in the Balkan Countries and Turkey



Notes: The figure illustrates the performance in each of the Balkan Countries and Turkey regarding the 'fit to context' of remedies LEC indicator. The scores have been calculated on the basis of a checklist on remedies procedures and case studies answered by local legal advisers. Total scores are presented as a percentage, with 100 per cent high representing the highest performance in LEC indicators, equivalent to full compliance with the LEC benchmark.

Source: EBRD Public Procurement Assessment 2010

Conclusions

The countries of this sub-region have made a great deal of progress during the last decade. They have achieved, to a greater or lesser extent, a complete overhaul of their public procurement systems in order to meet modern standards of transparency and efficiency.

Out of necessity, reforms have also covered the remedies procedures applied to resolving public procurement disputes. Clearly the Balkan Countries and Turkey have benefited from the experience and the knowledge shared with the sub-region by their neighbouring EU Member States and other international stakeholders. But without the sincere and tireless efforts of the countries in the region, technical assistance, by itself, would undoubtedly have produced only regulatory relics. The results in the efficiency test prove the opposite and demonstrate the way forward for many countries, including those beyond the EBRD region.

The common ground and key factor in the success of the seven countries in the region is that they invested in establishing dedicated public procurement remedies bodies of an administrative or quasi-judicial nature. However, uncertainty is still present in the Balkan Countries and Turkey sub-region, mainly because of a persistent belief that there is corruption and a lack of impartiality in the remedies bodies.

Another key feature of the success of the Balkan Countries and Turkey sub-region is the adoption of a strategic and tactical approach that relies heavily on the administrative tier of the remedies system. Combined with the establishment of independent and dedicated public procurement remedies bodies and a set of straightforward and user-friendly remedies rules, this recipe seems to guarantee positive results.

However, simplification does not constitute a panacea. Defects in the functioning of the remedies system still exist in the Balkan Countries and Turkey sub-region. Cost and speed issues still require attention, but the problem of corruption requires vigilance and intervention through various forms of regulatory and administrative measures. Raising the level of consistency in the system and ensuring the confidence of the user, i.e. private sector stakeholders, whose interests the system is also supposed to protect can be achieved when corruption is less of a threat.

Figure 4.10

Performance of the Balkan Countries and Turkey in 5 key efficiency indicators

Notes: The figure illustrates the performance of the Balkan Countries and Turkey sub-region regarding the five remedies LEC indicators. The scores have been calculated on the basis of a checklist on remedies procedures and case studies answered by local legal advisers. Total scores are presented as a percentage, with 100 per cent high representing the highest performance in LEC indicators, equivalent to full compliance with the LEC benchmark.

Source: EBRD Public Procurement Assessment 2010

4.4 The Central Asian Republics, the Caucasus and Mongolia

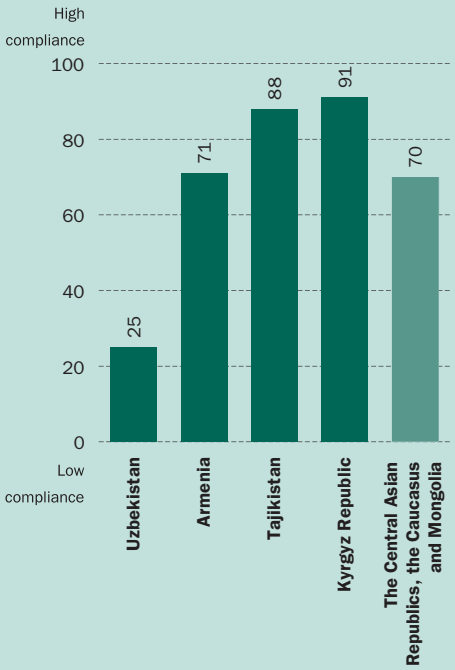
Simplicity

The Central Asian Republics, the Caucasus and Mongolia sub-region scores only a medium compliance (average 70 per cent) level on the simplicity indicators, which is worse than the score achieved by the EU Member States in the EBRD region and the Balkan countries and Turkey (EU Member States in the EBRD region: 81 per cent, Balkan countries and Turkey: 92 per cent, Eastern European Countries, including Georgia and Russia: 67 per cent). Clearly, this is a not satisfactory performance. Figure 4.11 presents simplicity of remedies country scores in the Central Asian Republics, the Caucasus and Mongolia.

The best score is achieved by the Kyrgyz Republic with 91 per cent ('very high') and Tajikistan with 88 per cent ('high'). In both countries, the remedies system provides for administrative and judicial means of review that are dedicated to public procurement disputes and are considered straightforward. Armenia scored just medium compliance with 70 per cent ('average'), primarily on the grounds that the remedies rules in public procurement law provide only rudimentary provisions and do not outline the remedies process in sufficient de-

Figure 4.11

Simplicity of remedies – country scores in the Central Asian Republics, the Caucasus and Mongolia



Notes: The figure illustrates the performance of each of the Central Asian Republica, the Caucasus and Mongolia sub-region regarding the simplicity of remedies LEC indicator. The scores have been calculated on the basis of a checklist on remedies procedures and case studies answered by local legal advisers. Total scores are presented as a percentage, with 100 per cent high representing the highest performance in LEC indicators, equivalent to full compliance with the LEC benchmark. No data is available for Azerbaijan, Kazakhstan, Mongolia and Turkmenistan.

Source: EBRD Public Procurement Assessment 2010

tail. Moreover, a public hearing of complaints is not mandatory and such hearings are not held regularly.

The weakest country in the Central Asian Republics, the Caucasus and Mongolia sub-region as far as simplicity indicators are concerned, is Uzbekistan, which scored just 25 per cent ('very low'). This is attributed to a general regulatory gap, i.e. the absence of a dedicated set of rules for public procurement, in Uzbekistan. This means that the conduct of public procurement is based on the rules of general contract law, thus there is no remedies system, and any dispute related to public procurement is resolved by application of the provisions of commercial law, mainly by civil courts.

It is clear from the analysis that where a set of dedicated public procurement remedies rules has been introduced (e.g. the Kyrgyz Republic and Tajikistan), the Central Asian Republics, the Caucasus and Mongolia sub-region scored well in the simplicity indicators, alternatively where regulatory intervention is limited (Armenia) or almost absent (Uzbekistan), the public procurement review system becomes less straightforward and more complicated.

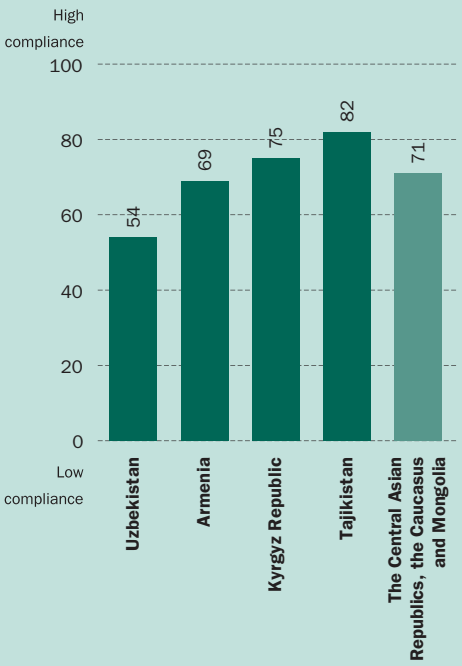
Speed

The Central Asian Republics, the Caucasus and Mongolia sub-region is second in the assessment of the speed indicators, scoring 71 per cent compliance rate, better than its immediate neighbours and the EU Member States in the EBRD region (EU Member States in the EBRD region: 65 per cent, Balkan Countries and Turkey: 76 per cent, Eastern European countries including Georgia and Russia: 60 per cent). Figure 4.11 presents speed of remedies country scores in the Central Asian Republics, the Caucasus and Mongolia.

The best results in the region concerning speed indicators have been reached by Tajikistan (82 per cent), followed by the Kyrgyz Republic (75 per cent).

Figure 4.12

Speed of remedies – country scores in the Central Asian Republics, the Caucasus and Mongolia



Notes: The figure illustrates the performance of each of the Central Asian Republica, the Caucasus and Mongolia sub-region regarding the speed of remedies indicator. The scores have been calculated on the basis of a checklist of questions regarding remedies procedures and two case studies. No data is available for Azerbaijan, Kazakhstan, Mongolia and Turkmenistan. Total scores are presented as a percentage, with 100 per cent high representing the highest performance and full compliance.

Source: EBRD Public Procurement Assessment 2010

The latter does not perform as well as it did in the simplicity indicator, because of the longer time required to obtain a decision on complaints. Armenia finishes in third place with 69 per cent compliance rate. The pace of the administrative review in Armenia is considered 'expedient' by the respondents. However, this might be considered erely reasonable to an outside observer. The delaying factor seems to be the time required for the judicial review, which is caused by the heavy workload of the administrative courts, which are the only competent judicial bodies for dealing with public procurement appeals. Uzbekistan props up the sub-region within the Central Asian Republics, the Caucasus and Mongolia sub-region, scoring 'low' (54 per cent compliance rate) in the speed indicator, since the time required to obtain a judicial decision in Uzbekistan can take several months or even a calendar year.

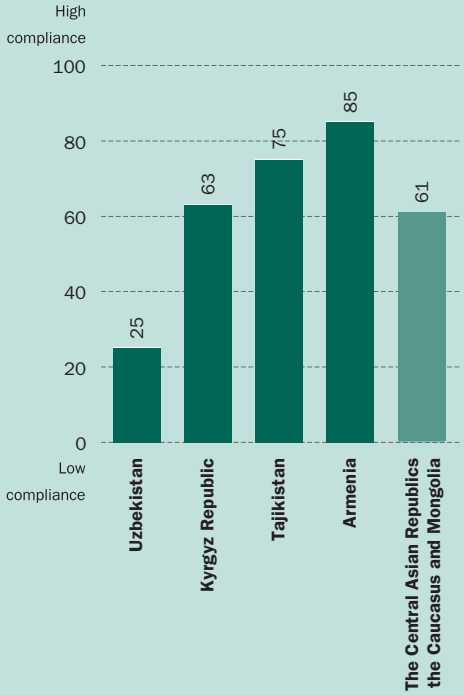
Based on these findings, the conclusion is that the process of the review procedure in the Central Asian Republics, the Caucasus and Mongolia sub-region is slowed by defects of a different nature that should be addressed by the regulators, in order to achieve a speed acceptable to the business community.

Cost

The issue of cost of the remedies is the most problematic aspect of the public procurement remedies system in the Central Asian Republics, the Caucasus and Mongolia sub-region. (In many ways this is similar to the outcome of the assessment in the Eastern European countries including Georgia and Russia region.) The Central Asian Republics, the Caucasus and Mongolia sub-region's average score is 62 per cent, a medium performance according to the evaluation matrix (EU Member States in the EBRD region: 67 per cent, Balkan countries and Turkey: 73 per cent, Eastern European countries including Georgia and Russia: 55 per cent). Figure 4.13 presents cost of remedies country scores in the Central Asian Republics, the Caucasus and Mongolia.

Figure 4.13

Cost of remedies – country scores in the Central Asian Republics, the Caucasus and Mongolia



Notes: The figure illustrates the performance of each of the Central Asian Republica, the Caucasus and Mongolia sub-region regarding the simplicity of remedies LEC indicator. The scores have been calculated on the basis of a checklist on remedies procedures and case studies answered by local legal advisers. Total scores are presented as a percentage, with 100 per cent high representing the highest performance in LEC indicators, equivalent to full compliance with the LEC benchmark. No data is available for Azerbaijan, Kazakhstan, Mongolia and Turkmenistan.

Source: EBRD Public Procurement Assessment 2010

However, the primary reason for this result is again the performance of Uzbekistan, which has attained the EBRD region's lowest score with 25 per cent. Armenia is in first place as far as Cost is concerned, since no filing fee is required for an administrative complaint and the cost for judicial review is characterised as 'nominal'. The other countries of the Central Asian Republics, the Caucasus and Mongolia sub-region (the Kyrgyz Republic and Tajikistan) fail to achieve more than a medium level of compliance, scoring 63 per cent and 75 per cent respectively. This is mainly because the fee for public procurement review is calculated according the value of the claim (2 per cent), thus resulting in a cost potentially too high to allow access to the review system.

Clearly the countries of the Central Asian Republics, the Caucasus and Mongolia sub-region, with the exception of Armenia, should rethink the cost of their remedies policy in order to strike a more acceptable balance allowing for wider access to the system and, at the same time, deterring improper use of the procedures.

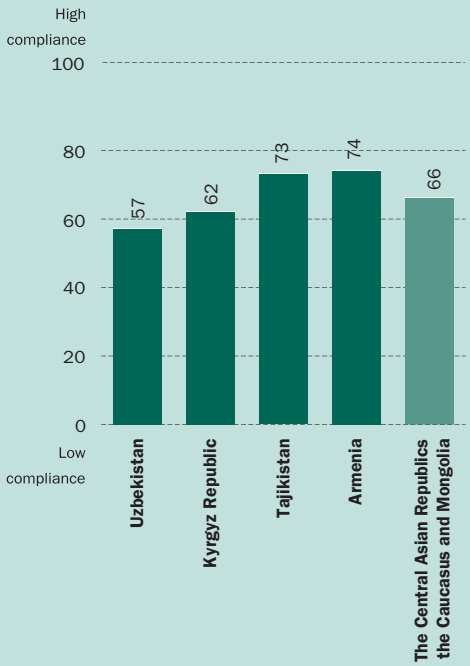
Certainty

The Central Asian Republics, the Caucasus and Mongolia sub-region performs least well on the certainty indicators (average score 66 per cent), an alarming result that represents the least best in the four sub-regions (EU Member States in the EBRD region: 80 per cent, Balkan Countries and Turkey: 79 per cent, Eastern European Countries including Georgia and Russia: average 69 per cent). Figure 4.14 presents certainty of remedies country scores in the Central Asian Republics, the Caucasus and Mongolia.

Armenia finishes first again with 74 per cent, which is a medium compliance rate, according to the evaluation matrix. First of all, the remedies body is suspected, to some extent, of corruption. As respondents characteristically suggest 'even though conspicuous procurement and review procedures are in place, it is widely believed that a random supplier will rarely be awarded a large contract'. Furthermore, there is a perception of a lack of impartiality, mainly because of the wide power the government has to intervene and influence

Figure 4.14

Certainty of remedies – country scores in the Central Asian Republics, the Caucasus and Mongolia



Notes: The figure illustrates the performance of each of the Central Asian Republica, the Caucasus and Mongolia sub-region regarding the certainty of remedies indicator. The scores have been calculated on the basis of a checklist of questions regarding remedies procedures and two case studies. No data is available for Azerbaijan, Kazakhstan, Mongolia and Turkmenistan. Total scores are presented as a percentage, with 100 per cent high representing the highest performance and full compliance.

Source: EBRD Public Procurement Assessment 2010

the course and the outcome of public procurement review procedures. Finally, as far as the predictability of the system is concerned, decisions on complaints are published in the official gazette as well as on the official website of the procurement agency. Nevertheless, serious doubts remain in respect to the predictability of the review decisions as part of an overall distrust of public authorities at large. The poorest level of performance was achieved by Uzbekistan which achieved a 'low' level of performance, scoring just 57 per cent. The other countries of the Central Asian Republics, the Caucasus and Mongolia sub-region (the Kyrgyz Republic and Tajikistan) fail to achieve above the medium compliance level, scoring 62 per cent and 73 per cent respectively. This is mainly because of the fact that the remedies bodies in those countries are perceived to be corrupt and their impartiality is questioned in part. In the case of the Kyrgyz Republic, the evaluation illustrates that complaints are not heard by a court or by an impartial and independent review body. Put differently, a body with no interest in the outcome of the procurement the members of which are secure from external influence during the term of appointment.

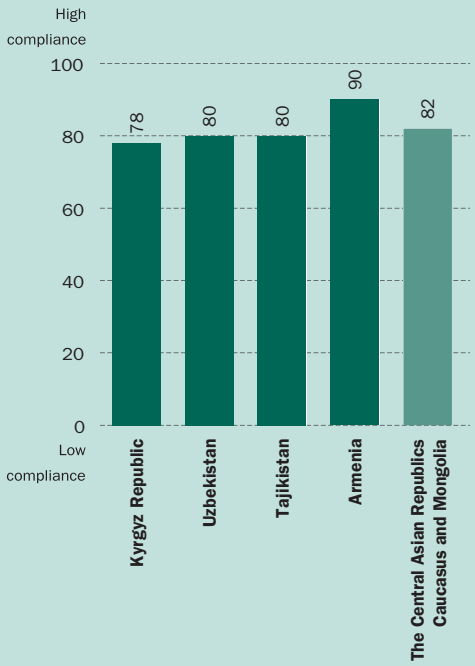
Based on the findings described above, the restricted level of certainty of the remedies systems in the Central Asian Republics, the Caucasus and Mongolia sub-region represents the gravest efficiency defect. It calls for immediate action on behalf of the sub-region countries both at the regulatory as well as the administrative level in order to raise the sub-region's performance in this key efficiency indicator.

'Fit to context'

The Central Asian Republics, the Caucasus and Mongolia sub-region scores 'high' in the 'Fit to context' indicators (average compliance rate 82 per cent), which places it in second place in the EBRD regions (EU Member States in the EBRD region: 79 per cent, Balkan Countries and Turkey: 84 per cent, Eastern European Countries including Georgia and Russia: 59 per cent). Figure 4.15 presents fit-to-context scores in the Central Asian Republics, the Caucasus and Mongolia.

Figure 4.15

'Fit to context' – country scores in the Central Asian Republics, the Caucasus and Mongolia



Notes: The figure illustrates the performance of each of the Central Asian Republica, the Caucasus and Mongolia sub-region regarding the certainty of remedies LEC indicator. The scores have been calculated on the basis of a checklist on remedies procedures and case studies answered by local legal advisers. Total scores are presented as a percentage, with 100 per cent high representing the highest performance in LEC indicators, equivalent to full compliance with the LEC benchmark. No data is available for Azerbaijan, Kazakhstan, Mongolia and Turkmenistan.

Source: EBRD Public Procurement Assessment 2010

In all the countries the remedies procedures are deemed to fit the local context. Armenia again ranks first with 90 per cent (very high compliance rate), closely followed by Tajikistan and Uzbekistan (both 80 per cent). The worst performance recorded was in the Kyrgyz Republic with 78 per cent, still a high compliance rate according to the evaluation matrix.

Based on these scores, it seems that the remedies bodies in the sub-region are held to be well adapted to the economic, social and legal context within which they operate.

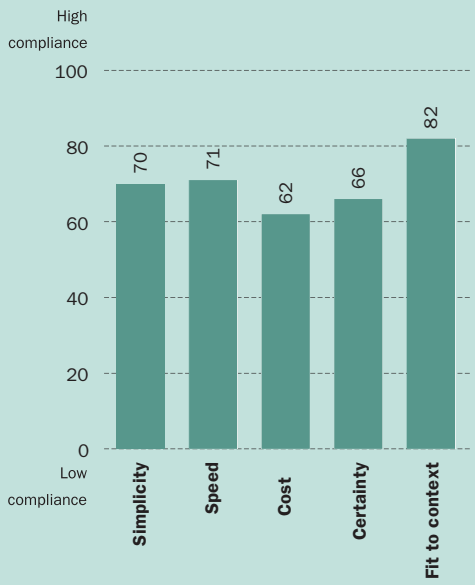
Trends

The Central Asian Republics, the Caucasus and Mongolia sub-region fail to reach a high efficiency score. In four out of five performance indicators the sub-region performs at medium compliance level (simplicity: 70 per cent, speed: 71 per cent, cost: 62 per cent, certainty: 66 per cent). No country stands out, since each country presents strengths in some areas of the assessment and weaknesses in others. For example, Armenia does very well in the Cost and 'Fit to context' indicators but scores poorly in the Simplicity and Speed benchmarks and average in the Certainty indicator. Similarly, Tajikistan performs reasonably well in the Speed and 'Fit to context' indicators, well in the Simplicity factor, but poorly in the Certainty and Cost benchmarks. The country that seems to suffer most due to its regulatory gap in efficiency in practice is Uzbekistan, which scores very low/low in three of the five benchmarks (simplicity, cost and speed indicators). In terms of total scores, Armenia and Tajikistan fare well, with 76 per cent and 77 per cent respectively, whereas the Kyrgyz Republic with 67 per cent and Uzbekistan with 53 per cent fail to reach an acceptable level. Figure 4.16 presents performance of the Central Asian Republics, the Caucasus and Mongolia sub-region in five key efficiency indicators.

The sub-region's worst performance is identified in the Cost and Certainty indicators, with 62 per cent and 66 per cent respectively. In addition, the complexity is regarded as high (simplicity score:

Figure 4.16

Performance of the Central Asian Republics, the Caucasus and Mongolia sub-region in 5 key efficiency indicators



Notes: The figure illustrates the performance of each of the Central Asian Republica, the Caucasus and Mongolia sub-region regarding the five LEC indicators. The scores have been calculated on the basis of a checklist on remedies procedures and case studies answered by local legal advisers. Total scores are presented as a percentage, with 100 per cent high representing the highest performance in LEC indicators, equivalent to full compliance with the LEC benchmark. No data is available for Azerbaijan, Kazakhstan, Mongolia and Turkmenistan.

Source: EBRD Public Procurement Assessment 2010

70 per cent). The greatest threat and risk in the sub-region remains the Certainty benchmark.

The independence, impartiality and integrity of the review bodies that are entrusted with the resolution of public procurement disputes, as well as the predictability of their decisions are questioned by many stakeholders. Furthermore, cost and time factors undermine the efficiency of the remedies systems by depriving them of key characteristics for their effectiveness. However, it should be noted that the Central Asian Republics, the Caucasus and Mongolia sub-region is ranked in two indicators (speed and 'fit to context') in second place in the EBRD sub-regions, scoring higher than the EU Member States in the EBRD sub-region.

Taking into account all of the findings, the core aspect of the remedies issue to be addressed by governments in the Central Asian Republics, the Caucasus and Mongolia sub-region seems to be the integrity and predictability of the remedies bodies. Furthermore, there is significant room for improvement in the areas of simplicity and speed, in order to make the rules more user-friendly and ensure that the overall response of the system is better adapted to the needs and pace of a modern public procurement market.

Conclusions

It is evident that the countries of the Central Asian Republics, the Caucasus and Mongolia sub-region have not yet succeeded in creating efficiently functioning public procurement remedies systems.

Due to varying reasons in each country, defects arise in almost every efficiency indicator and undermine the overall performance of the system. One important conclusion that derives from the findings of the study is that the remedies systems of the Central Asian Republics, the Caucasus and Mongolia are not well balanced, a fact that indicates that regulatory and administrative measures are necessary in order to reach an acceptable degree of cohesion, consistency and functionality within the remedies systems.

Review of the procurement process is available in every country, but often the administrative review is restricted or non-existent and the remedies rules are held, in general, to be complicated. Administrative reviews progress at a reasonable pace, whereas the judicial procedures are rather cumbersome and time-consuming.

However, apart from the issues of complexity, cost and time overruns, the most important area requiring intervention by the governments of the Central Asian Republics, the Caucasus and Mongolia is the integrity aspect of the remedies systems.

Like their neighbours in the Eastern European Countries, including Georgia and Russia sub-region, the Central Asian Republics, the Caucasus and Mongolia should boost their efforts in order to establish fully independent and professionally qualified remedies bodies that will undertake the resolution of administrative complaints in a transparent, expedient and objective way, thus reducing corruption and guaranteeing impartially and equal treatment of cases.

Furthermore, the introduction of such review structures will accelerate the procedures, relieve congestion in the courts and restrict the costs, thus raising the overall efficiency of the system.

Based on these conclusions, it is clear that the EBRD countries in the Central Asian Republics, the Caucasus and Mongolia sub-region should consider introducing specific institutional and administrative reforms in their public procurement remedies systems, in order to strengthen the administrative branch by establishing independent administrative or quasi-judicial review structures.

Finally, if the new architecture is also supported with a set of simplified but procurement-dedicated procedural rules that lower the cost and increase the speed of the process, it is reasonable to expect significant improvements in the enforcement of substantive, as well as procedural, public procurement rules will be achieved in the short-term.

4.5 The Eastern European Countries, including Georgia and Russia

Simplicity

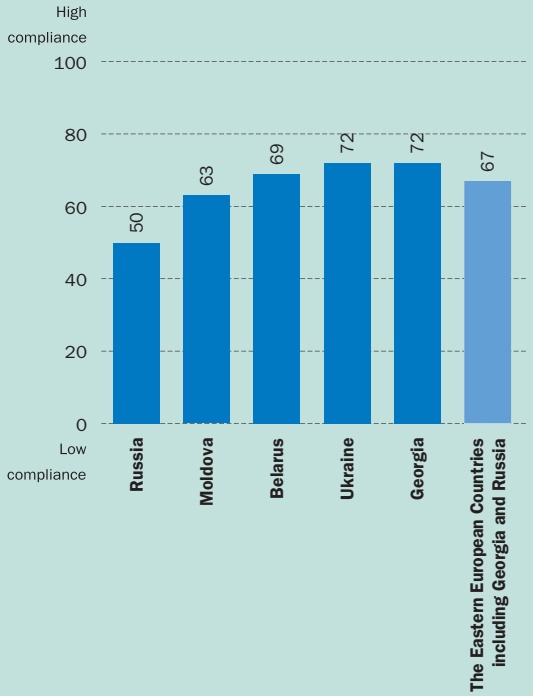
The Eastern European Countries, including Georgia and Russia sub-region scored below 70 per cent (average 67 per cent) in the simplicity indicator. This is the lowest average score in the four EBRD sub-regions (EU Member States in the EBRD region: 81 per cent, Balkan Countries and Turkey: 92 per cent, Central Asian Republics, the Caucasus and Mongolia: 70 per cent). Figure 4.17 presents simplicity of remedies, country scores in the Eastern European Countries including Georgia and Russia.

Clearly, this is not a satisfactory performance, and is perhaps indicative of the fact that the Eastern European Countries, including Georgia and Russia were not obliged to introduce complex remedies options and instruments, unlike the countries of the European Union.

In general the remedies rules are stipulated in national law; however, they are mostly deemed to be complicated and regarded as not straightforward.

Figure 4.17

Simplicity of remedies – country scores in the Eastern European Countries including Georgia and Russia



Notes: The figure illustrates the performance of each of the Eastern European Countries and Russia regarding the simplicity of remedies LEC indicator. The scores have been calculated on the basis of a checklist on remedies procedures and case studies answered by local legal advisers. Total scores are presented as a percentage, with 100 per cent high representing the highest performance in LEC indicators, equivalent to full compliance with the LEC benchmark.

Source: EBRD Public Procurement Assessment 2010

It appears that the lack of clarity and a general approach that serves mainly the public interest in the Eastern European Countries, including Georgia and Russia sub-region has led to the introduction of remedies rules that are complex and create an institutional and legal environment that is difficult for economic operators to use.

The highest score was achieved by Georgia and Ukraine (both scored 72 per cent), whereas the weakest country concerning simplicity is Russia (50 per cent). In the case of Georgia, the public procurement remedies rules provide for both administrative and judicial remedies options that are regulated by clear and straightforward remedies procedures. On the other hand, in Russia the system is considered rather complex and not user-friendly, scoring only 50 per cent. Finally, Belarus reached a medium compliance level (average 69 per cent compliance rate).

It is clear from the analysis that the absence of detailed remedies rules adapted to the needs of the public procurement process, has resulted in a high degree of complexity in the remedies systems across the sub-region.

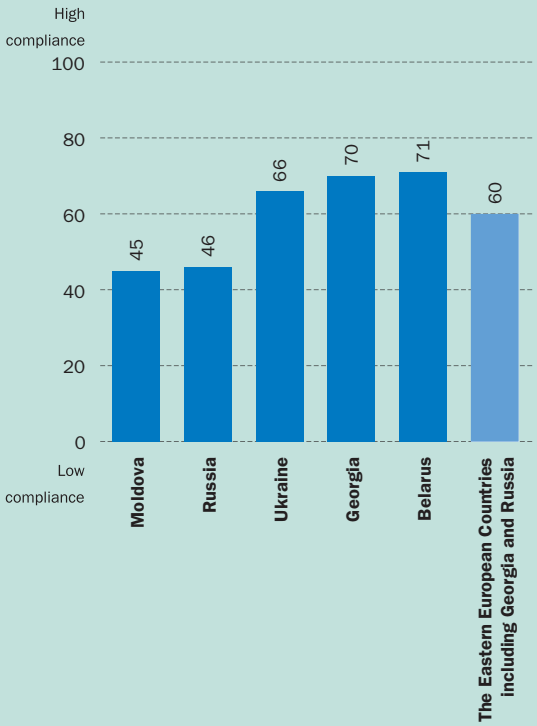
Speed

The Eastern European Countries, including Georgia and Russia sub-region is also last in the assessment of the speed indicators, scoring only 60 per cent (EU Member States in the EBRD region: 65 per cent, Balkan Countries and Turkey: 76 per cent, Central Asian Republics, the Caucasus and Mongolia: 71 per cent). Figure 4.18 presents speed of remedies, country scores in the Eastern European Countries including Georgia and Russia.

The best results for speed were reached by Belarus and Georgia (71 per cent and 70 per cent respectively).

Figure 4.18

Speed of remedies – country scores in the Eastern European Countries including Georgia and Russia



Notes: The figure illustrates the performance of each of the Eastern European Countries and Russia regarding the speed of remedies LEC indicator. The scores have been calculated on the basis of a checklist on remedies procedures and case studies answered by local legal advisers. Total scores are presented as a percentage, with 100 per cent high representing the highest performance in LEC indicators, equivalent to full compliance with the LEC benchmark.

Source: EBRD Public Procurement Assessment 2010

In both those countries, despite the fact that there is a two-tier review system in place (administrative and judicial) and, on top of that, a standstill obligation has been imposed by contracting authorities, the strict deadlines for submitting complaints by economic operators and for ruling on them by contracting authorities/review bodies, has ensured a relatively satisfactory pace for the remedies procedures.

The lowest scores were achieved by Moldova (45 per cent) and Russia (46 per cent). In both countries, the speed of the administrative remedies is considered satisfactory, but the duration of proceedings before the courts can vary significantly. Proceedings vary according to the specific case and, in some instances, require months or even years. Ukraine (66 per cent) scores better than Russia and Moldova, but also fails to attain the 70 per cent threshold.

This is mainly due to the relatively long time-limits for the submission and resolution of complaints and the uncertainty concerning the duration of the judicial process in cases where the aggrieved economic operator opts to challenge the alleged illegal acts, decisions and omissions of the contracting authorities before the competent courts.

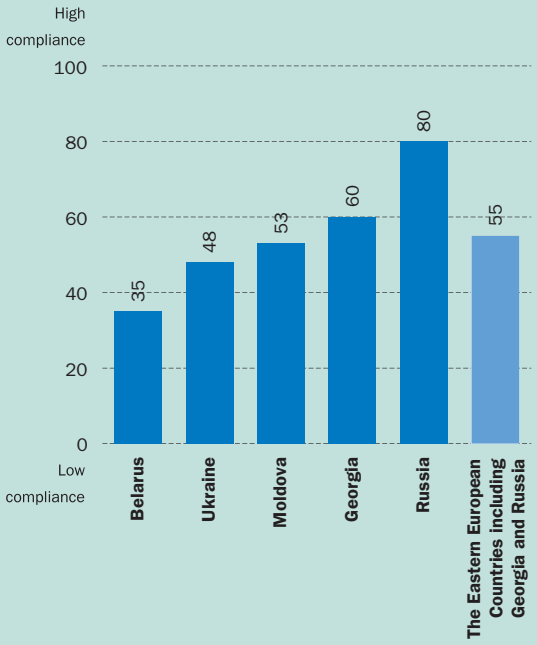
From those examples, it is evident that the functioning of the remedies systems in the Eastern European Countries, including Georgia and Russia sub-region has to be improved.

Cost

Cost is the most problematic aspect of the public procurement remedies system in the Eastern European Countries, including Georgia and Russia. The average score is 55 per cent, a performance level that is characterised as 'low' according to the evaluation matrix (EU Member States in the EBRD region: 67 per cent, Balkan Countries and Turkey: 73 per cent, Central Asian Republics, the Caucasus and Mongolia: 62 per cent). Figure 4.17 presents cost of remedies, country scores in the Eastern European Countries including Georgia and Russia.

Figure 4.19

Cost of remedies – country scores in the Eastern European Countries including Georgia and Russia



Notes: The figure illustrates the performance of each of the Eastern European Countries and Russia regarding the cost of remedies LEC indicator. The scores have been calculated on the basis of a checklist on remedies procedures and case studies answered by local legal advisers. Total scores are presented as a percentage, with 100 per cent high representing the highest performance in LEC indicators, equivalent to full compliance with the LEC benchmark.

Source: EBRD Public Procusrement Assessment 2010

Even more alarming are the results in Belarus and Ukraine, which score even worse (35 per cent and 48 per cent respectively), a 'very low' level of performance. This is mainly because of uncertainty over the cost of the overall remedies procedures. Georgia and Moldova also displayed a poor performance as far as cost is concerned, mainly due to the fact that the cost is considered unbearable for SMEs by the respondents.

Finally, Russia performed extraordinarily well in the Cost indicator compared to other countries in the sub-region, achieving a 'high' score of 80 per cent, which places it in the sixth position in the EBRD countries reviewed. This score can be attributed to the fact that the submission of complaints before an administrative body is free of charge and state fees for considering claims through a court procedure are usually low. This allow economic operators in general, but SMEs in particular, to gain easy access to the public procurement remedies system.

Clearly there is significant room for improvement as far as the remedies cost indicator in the Eastern European countries, including Georgia and Russia sub-region is concerned, in order to reach a balance that will reconcile the need for easy access to the system with the necessity to avoid phenomena such as the misuse of the remedies procedures.

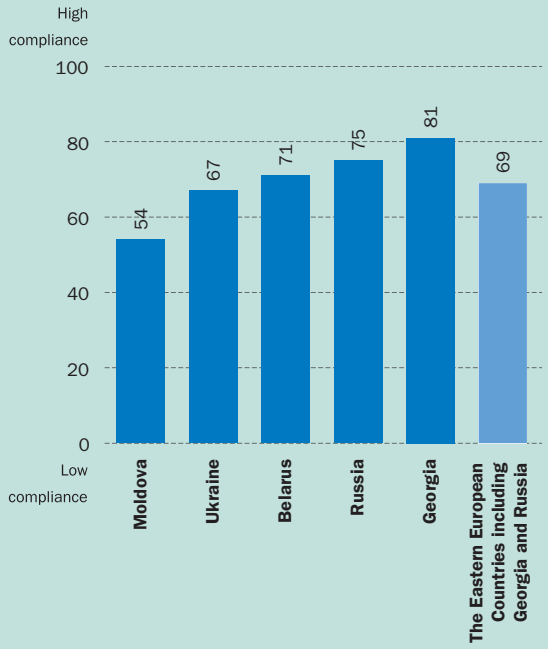
Certainty

Certainty is the efficiency indicator on which the Eastern European Countries, including Georgia and Russia sub-region scored best (average sub-region score: 69 per cent), achieving medium compliance level. However, it still finishes in third place (EU Member States in the EBRD region: 80 per cent, Balkan Countries and Turkey: 79 per cent, Central Asian Republics, the Caucasus and Mongolia: 66 per cent). Figure 4.20 presents certainly of remedies, country scores in the Eastern European Countries including Georgia and Russia.

The lowest level of performance is achieved by Moldova, just exceeding the low/very low line with 54 per cent.

Figure 4.20

Certainty of remedies – country scores in the Eastern European Countries including Georgia and Russia



Notes: The figure illustrates the performance of each of the Eastern European Countries and Russia regarding the certainty of remedies LEC indicator. The scores have been calculated on the basis of a checklist on remedies procedures and case studies answered by local legal advisers. Total scores are presented as a percentage, with 100 per cent high representing the highest performance in LEC indicators, equivalent to full compliance with the LEC benchmark.

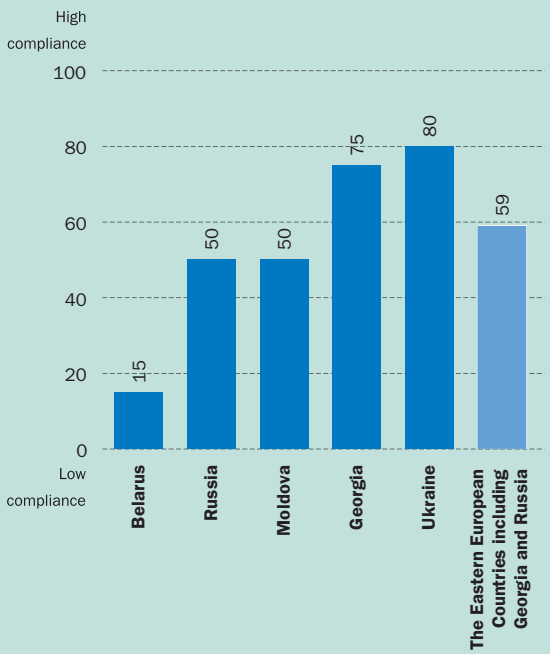
Source: EBRD Public Procurement Assessment 2010

This is mainly because of the suspicion of corruption recorded during the evaluation combined with the unpredictability of the remedies bodies' rulings and their questionable impartiality. The performance of Belarus was assessed at medium compliance level , scoring 71 per cent. The other countries in this region perform better with two of them reaching a 'high' level, namely Georgia with 81 per cent and Russia with 75 per cent. In both countries the review bodies are considered impartial and not corrupt. Furthermore, in Russia the Federal Anti-monopoly Services Committee (FAS) publishes its resolutions on its website, thus raising the degree of predictability, whereas no evidence of similar best practice in Georgia was produced by the respondents.

Finally it should be noted that remedies bodies in Ukraine are perceived as corrupt in some aspects, thus leading to a score of only 67 per cent concerning the certainty indicator.

Figure 4.21

'Fit to context' – country scores in the Eastern European Countries including Georgia and Russia



Notes: The figure illustrates the performance of each of the Eastern European Countries and Russia regarding the 'fit to context' of remedies LEC indicator. The scores have been calculated on the basis of a checklist on remedies procedures and case studies answered by local legal advisers. Total scores are presented as a percentage, with 100 per cent high representing the highest performance in LEC indicators, equivalent to full compliance with the LEC benchmark.

Source: EBRD Public Procurement Assessment 2010

Given those findings, it is clear that the countries of Eastern Europe, including Georgia and Russia sub-region should consider further reforms both at the regulatory and the administrative level. This reform should restrict corruption and improve perceptions of the consistency and predictability of their public procurement remedies bodies and systems.

'Fit to context'

The Eastern European Countries, including Georgia and Russia sub-region scores 'low' in the 'Fit to context' indicator (average score 59 per cent). Ukraine demonstrates the best result (80 per cent). The worse result is achieved by Belarus, with just 15 per cent, since the means of recourse available are deemed 'inadequate'. Moreover, two of the five sub-region countries, namely Moldova and Russia, reached just 50 per cent for this indicator. In the case of Russia, it is clear that the limited application of the remedies rules that restrict the number and types of decisions made by the contracting authority which can be challenged through an administrative complaint influences the final score significantly.

On the other hand, Georgia has again reached a high compliance level, since it seems to have succeeded in establishing a regulatory framework that is, both in theory and in practice, well balanced between the formalities imposed by the public nature of the public procurement sector with the agility and responsiveness required for efficiency. Put differently, a 'fit to context' remedies system for public procurement disputes.

Trends

According to total efficiency results in four out of five of the countries in the Eastern European Countries, including Georgia and Russia sub-region (Belarus: 61 per cent, Moldova: 53 per cent, Russia: 66 per cent and Ukraine: 67 per cent), the public procurement remedies system fails to reach a satisfactory result as far as efficiency is concerned. Georgia (75 per cent) distinguishes itself from the others, since it scores reasonably well in all five efficiency indicators. However, the Eastern European countries, including Georgia and Russia score, on average, below 70 per cent. Figure 4.22 presents the performance of the Eastern European Countries including Georgia and Russia in five key efficiency indicators.

The sub-region's worst performance is identified in the Cost and 'Fit to context' indicators, with scores of 55 per cent and 59 per cent respectively. Furthermore the sub-region has the lowest score in four out of the five efficiency indicators (simplicity, speed, cost and 'fit to context') compared to the other EBRD sub-regions (EU Member States in the EBRD region, Balkan Countries and Turkey, Central Asian Republics, the Caucasus and Mongolia). The independence, impartiality and integrity as well as the predictability of the administrative and the (quasi-) judicial bodies that resolve public procurement disputes are, to a greater or lesser extent, questioned by many stakeholders.

The countries of Eastern Europe, including Georgia and Russia have not opted for the establishment of a dedicated procurement remedies system, but decided instead to assign this duty mostly to the judiciary as well as to other governmental agencies and state authorities that are entrusted with a variety of public financial and economic issues (e.g. in Moldova the Agency for Material Reserves, Public Acquisition and Humanitarian Assistance, in Russia the FAS, in Ukraine the Anti-monopoly Committee).

Conclusions

It is evident that the countries of Eastern Europe, including Georgia and Russia have not invested adequately in its public procurement remedies system, but opted instead to assign this duty mostly to the judiciary and governmental agencies and state authorities that deal with a variety of issues and whose work is not dedicated to public procurement.

Administrative and judicial reviews are available in every country, but costs, delays and uncertainty seem to undermine the ability of the public procurement remedies systems in the countries in the sub-region to meet the goals they are required to achieve.

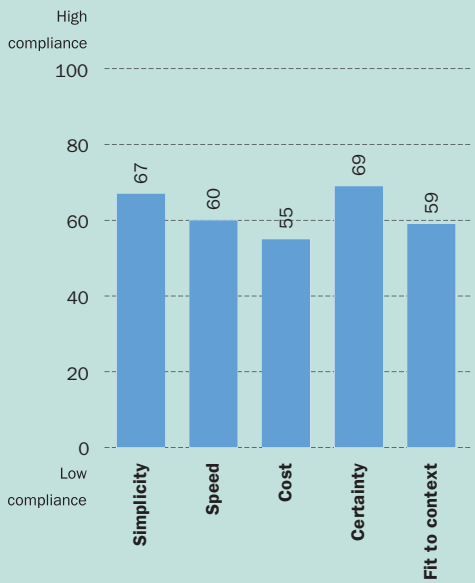
Apart from the complexity and the delays caused by the complicated architecture of the systems, and the less than straightforward nature of the respective rules and legal instruments, a common ground for the poor performance in all efficiency indicators is that all the countries in the sub-region lack a fully independent public procurement remedies body. This body should be staffed with legal and technical experts that are properly trained and qualified to recognise the peculiarities of public procurement disputes and resolve them in the most efficient manner for all stakeholders.

Furthermore, increased hidden costs depending on the progress of the procedure, delays and uncertainty concerning the final result seem to undermine the ability of the public procurement remedies systems of the countries in the Eastern Europe, including Georgia and Russia sub-region to reach the desired degree of efficiency. The result is that in many cases the remedies systems and the review bodies seem to be 'out of context' with the general public procurement institutional and legal framework as well as the local public procurement market.

From the results, it is clear that countries of Eastern Europe, including Georgia and Russia sub-region must consider restructuring their public procurement systems in order to introduce the principles, rules and instruments that will allow their public procurement remedies system to serve as an effective mechanism for the enforcement of the substantive public procurement rules.

Figure 4.22

Performance of the Eastern and European Countries including Georgia and Russia in 5 key efficiency indicators



Notes: The figure illustrates the performance of each of the Eastern European Countries, including Georgia and Russia regarding the five LEC indicators. The scores have been calculated on the basis of a checklist on remedies procedures and case studies answered by local legal advisers. Total scores are presented as a percentage, with 100 per cent high representing the highest performance in LEC indicators, equivalent to full compliance with the LEC benchmark.

Source: EBRD Public Procurement Assessment 2010

4.6 European Union Member States in the EBRD Region

Simplicity

The EU Member States in the EBRD region score 'high' (average 81 per cent) in the simplicity indicator, which is the second best average score in the four sub-regions (Balkan Countries and Turkey: 92 per cent, Eastern European Countries including Georgia and Russia: 57 per cent, Central Asian Republics, the Caucasus and Mongolia: 70 per cent). This is a very good performance, and is testament to the fact that the EU Member States in the EBRD region were obliged to introduce multiple reforms and alterations to their remedies system in order to comply with the EU rules for public procurement remedies*.

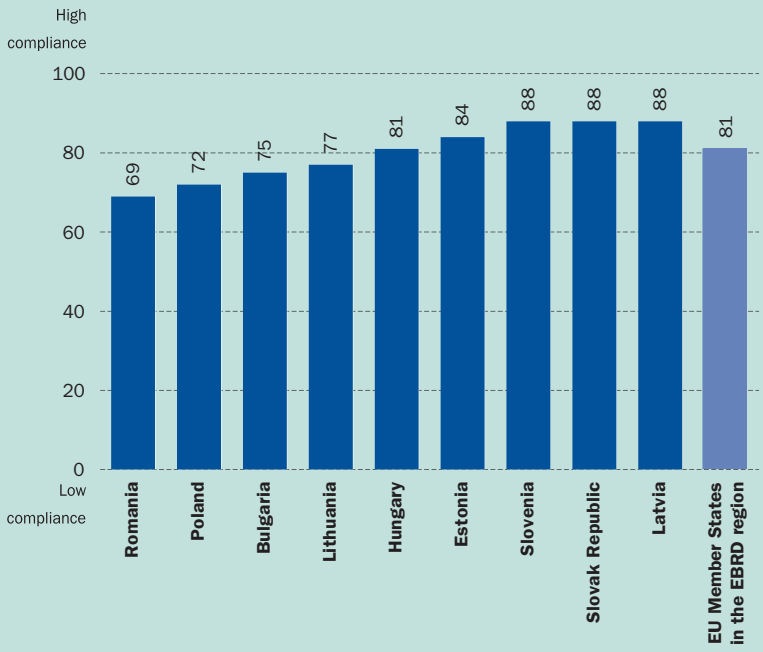
Figure 4.23 presents simplicity of remedies, country scores in the EU Member States in the ERBD region.

Moreover, seven out of the nine EU Member States in the EBRD region score high. The first place is occupied by Latvia, the Slovak Republic and Slovenia, each scoring 88 per cent, followed closely by Estonia (84 per cent) and Hungary (81 per cent). In general, remedies rules in the countries listed above are held to be straightforward and effective. There are multiple options available for those seeking a review of a decision or omission by the contracting authority utilising either administrative or judicial remedies.

* EC Directive 89/665/EEC [L 395/30.12.1989 p. 33]; EC Directive 92/13/EC [L 76/23.3.1992, p. 14]; EU Directive 2007/66/EC [L 335 /20.12.2007 p. 31]

Figure 4.23

Simplicity of remedies – country scores in the EU Member States in the EBRD region



Notes: The figure illustrates the performance of each of the EU Member States in the ERBD region regarding the simplicity of remedies LEC indicator. The scores have been calculated on the basis of a checklist on remedies procedures and case studies answered by local legal advisers. Total scores are presented as a percentage, with 100 per cent high representing the highest performance in LEC indicators, equivalent to full compliance with the LEC benchmark.

Source: EBRD Public Procurement Assessment 2010

Finally, standstill obligations apply to the procurement procedures, providing the aggrieved bidders with sufficient time to study the case file and decide whether to exercise their right to challenge the decision of the contracting authority. Two countries of EU Member States in the EBRD region score below the 80 per cent mark, but these marks are still considered 'high': Bulgaria (75 per cent) and Lithuania (77 per cent). In both countries, review procedures are considered relatively clear but, to some extent, complicated. Finally, the system is considered rather complex and not user-friendly in Poland (72 per cent) and Romania (69 per cent). In the case of Poland, the problem is found mostly in the different interpretations of the rules by the administrative and judicial review bodies. In Romania there is no automatic suspension effect (standstill) and the remedies procedures under the public procurement act are considered 'not very detailed'.

It is clear from the analysis of the results that the need to comply with the acquis communautaire in the area of public procurement has resulted in a substantial modernisation of the public procurement remedies system across the EU Member States in the EBRD region.

Despite the variety of remedies that are available, the rules are, in most cases, regarded as simple and straightforward, thus increasing the overall efficiency of the system.

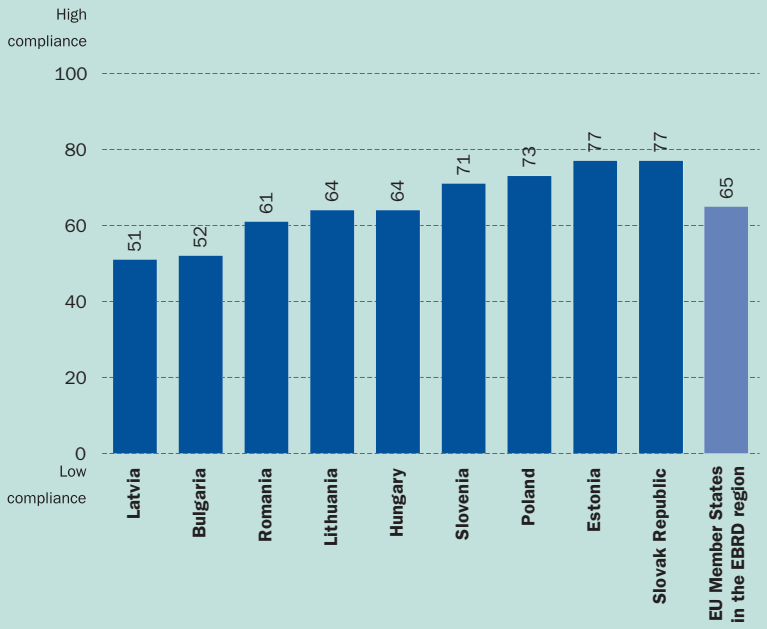
Speed

In contrast to the simplicity benchmark, the EU Member States in the EBRD region do not fare very well on the speed indicator. The sub-region's average score (65 per cent) is just 'medium compliance' which means that the sub-region is in the third position when comparing the four EBRD sub-regions (Balkan Countries and Turkey: 76 per cent, European Countries including Georgia and Russia: 60 per cent, Central Asian Republics, the Caucasus and Mongolia: 71 per cent). Speed is the indicator on which the EU Member States in the EBRD region perform worst.

One common ground for the poor performance of the sub-region on this indicator is the view that the average length of judicial proceedings is excessively long. This leads to significant delays in the overall review process, if a bidder decides to bring a case before the courts. On the other hand, administra-

Figure 4.24

Speed of remedies – country scores in the EU Member States in the EBRD region



Notes: The figure illustrates the performance of each of the EU Member States in the ERBD region regarding the speed of remedies LEC indicator. The scores have been calculated on the basis of a checklist on remedies procedures and case studies answered by local legal advisers. Total scores are presented as a percentage, with 100 per cent high representing the highest performance in LEC indicators, equivalent to full compliance with the LEC benchmark.

Source: EBRD Public Procurement Assessment 2010

tive procedures are relatively expedient, despite the fact that a mandatory standstill obligation applies in most of the sub-region's countries, in accordance with EU public procurement rules. Figure 4.24 presents speed of remedies, country scores in the EU Member States in the ERBD region.

The best results concerning speed are reached by Estonia and the Slovak Republic (77 per cent each). In the former, the decision on an administrative complaint has to be issued within ten days and in the latter in seven days. The urgency drops in Poland (73 per cent), where a resolution on an administrative complaint can take up to fifteen days and the court proceedings can take up to three months. In Slovenia (71 per cent), the overall time span is estimated at between one and two months. The process really slows down in Hungary (64 per cent), Lithuania (64 per cent), and Romania (61 per cent) which score medium compliance level on the speed indicator. In the case of Lithuania, although the time limits are reasonable, according to the 'law on the books', they are not observed in practice. Furthermore, if a court decision is appealed before a court of second instance, the duration of the procedure may increase significantly. The worst performance, as far as the speed benchmark is concerned, was recorded in Bulgaria (52 per cent) and Latvia (51 per cent). In both countries, the main reason for the 'low' score is the duration of the court proceedings.

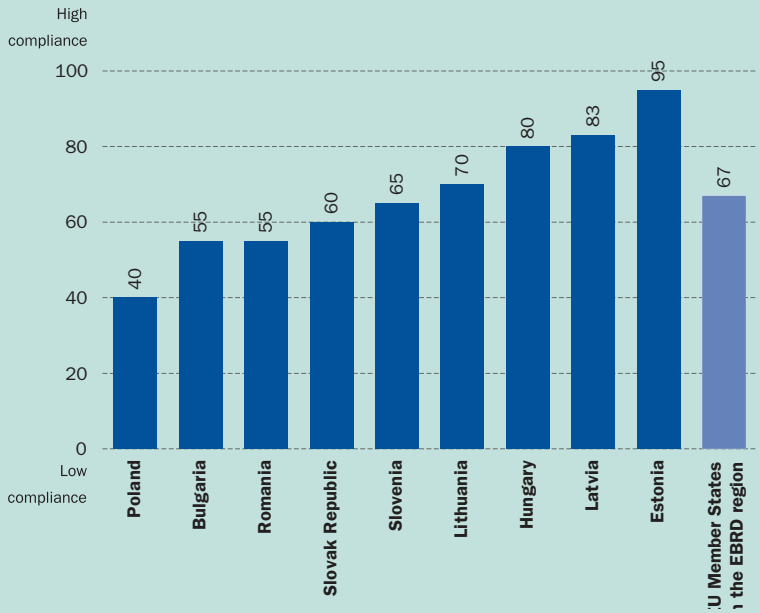
Based on the examples above, it is evident that the diversity of the remedies options and the provision of multiple tiers of administrative and judicial review, combined with standstill obligations, consume more time than might reasonably be expected. However, the real reason behind the delays in the overall duration of the awarding procedures is not the structure or function of the administrative review mechanisms, which in all countries operated at a more or less satisfactory pace. The main time-consuming factor lies in the lengthy court proceedings. This is where intervention by the regulator is required in order to streamline the procurement review process.

Cost

Cost is, after speed, the second most problematic aspect of the public procurement remedies system in the EU Member States in the EBRD

Figure 4.25

Cost of remedies – country scores in the EU Member States in the EBRD region



Notes: The figure illustrates the performance of each of the EU Member States in the ERBD region regarding the cost of remedies LEC indicator. The scores have been calculated on the basis of a checklist on remedies procedures and case studies answered by local legal advisers. Total scores are presented as a percentage, with 100 per cent high representing the highest performance in LEC indicators, equivalent to full compliance with the LEC benchmark.

Source: EBRD Public Procurement Assessment 2010

region. The average score is 67 per cent, a performance that is characterised as a medium compliance level according to the evaluation matrix (Balkan Countries and Turkey: 73 per cent, European Countries including Georgia and Russia: 55 per cent, Central Asian Republics, the Caucasus and Mongolia: 62 per cent). Figure 4.25 presents cost of remedies, country scores in the EU Member States in the ERBD region.

Even more alarming are the results in Bulgaria, Poland and Romania, which score below average (55 per cent, 40 per cent and 55 per cent respectively), a 'very low' performance according to the evaluation methodology. The main reason the three countries to have such low scores is uncertainty over the cost of the overall remedies procedure and the fact that claimants are forced to furnish costly guarantees, usually calculated as a percentage of the total contract value. This can result in high costs for remedies. The Slovak Republic, Slovenia and Lithuania also display medium performance as far as cost is concerned. They score 60 per cent, 65 per cent and 70 per cent compliance rate, respectively, mainly due to the fact that the remedies cost is considered unreasonable by the respondents, at least as far as awarding procedures for contracts of relatively high value are concerned.

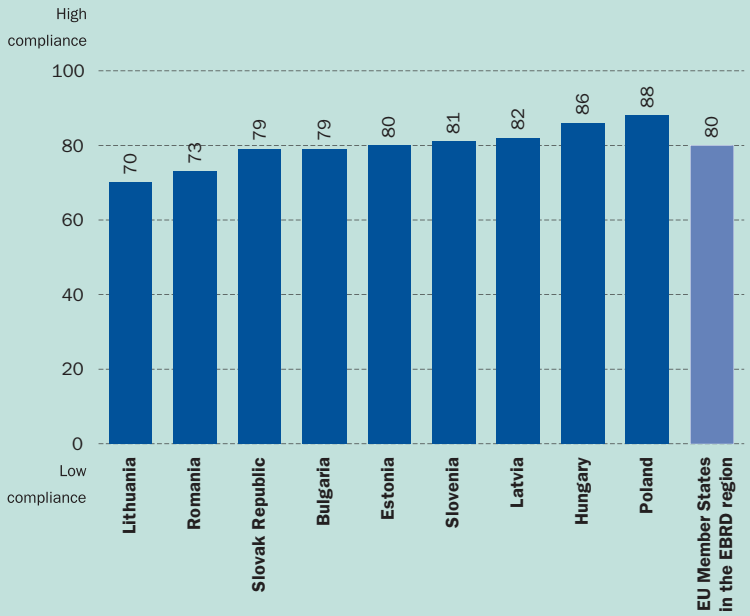
However, the cost factor is, to a certain degree, contained by provisions that set an upper limit for complaint and court fees. Hungary and Latvia scored significantly better with 80 per cent and 83 per cent respectively: they are both in the 'high' scoring zone. The cost in those countries is bearable for SMEs. In Latvia an administrative complaint is free of charge, whereas in Hungary the cost is reasonable for contracts of low value, but relatively expensive for contracts with a value higher than the thresholds detailed in the EU public procurement directives 2004/17/EC and 2004/18/EC.

Finally, the best score in the cost benchmark across the EU Member States in the EBRD region was achieved by Estonia with 95 per cent ('very high') due to the fact that the fees for filing an administrative complaint, regardless of the contract value, are considered reasonable by local practitioners.

Based on the examples above, it is clear that the quality and diversity of public procurement remedies usually comes at a price.

Figure 4.26

Certainty of remedies – country scores in the EU Member States in the EBRD region



Notes: The figure illustrates the performance of each of the EU Member States in the ERBD region regarding the certainty of remedies LEC indicator. The scores have been calculated on the basis of a checklist on remedies procedures and case studies answered by local legal advisers. Total scores are presented as a percentage, with 100 per cent high representing the highest performance in LEC indicators, equivalent to full compliance with the LEC benchmark.

Source: EBRD Public Procurement Assessment 2010

Multiple-tier systems, providing for administrative complaints resolved by panels of experts as well as judicial means of review heard by specialist courts are expensive systems to maintain. However, in some EU Member States in the EBRD region the cost factor has increased disproportionately to the options and the results it offers to the aggrieved bidders. The obvious reason behind this development is the understandable wish of the regulators to restrict access to the system in order to avoid misuse and delays that might be caused by too many complaints in a more accessible system. However, the real challenge is to strike the proper balance between these two aspects of the cost issue, something that some EU Member States in the EBRD region failed to achieve.

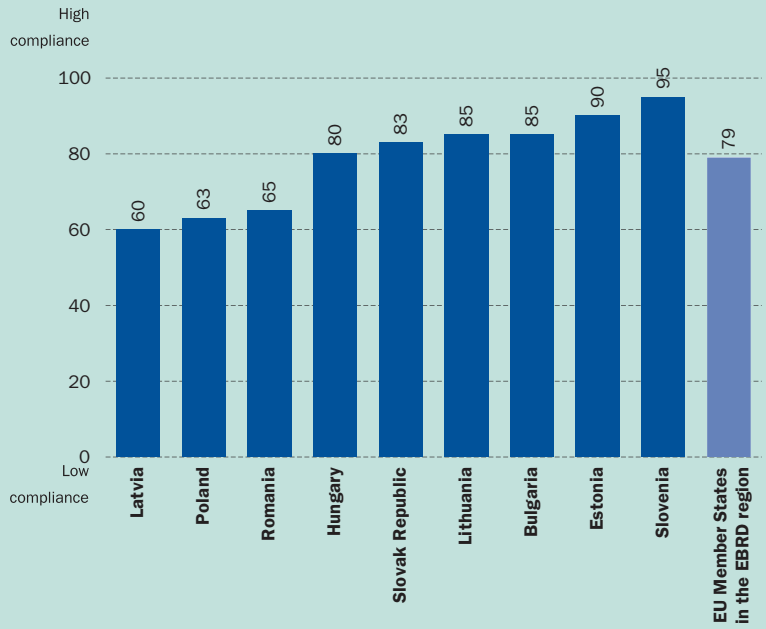
Certainty

Certainty is the efficiency indicator on which EU Member States in the EBRD region perform best (average sub-region score: 80 per cent) compared to the other EBRD sub-regions (Balkan Countries and Turkey: 79 per cent, European Countries including Georgia and Russia: 69 per cent, Central Asian Republics, the Caucasus and Mongolia: 66 per cent). Figure 4.26 presents certainty of remedies, country scores in the EU Member States in the ERBD region.

The lowest level of performance is found in Lithuania, with 70 per cent, mainly because of the perception that the judicial bodies may be corrupt and the impartiality of the contracting authorities that review administrative complaints has been questioned. Romania (73 per cent) also fails to achieve a satisfactory compliance level. The remedies bodies there are perceived as corrupt and not predictable and, to some extent, lacking impartiality. Bulgaria and the Slovak Republic both score 79 per cent, a 'high' level of performance according to the evaluation matrix. In Slovakia the impartiality and integrity of the Public Procurement Office (PPO) was, to some extent, questioned and its decisions are characterised as unpredictable, although they are published on the PPO's website. The other EU Member States in the EBRD region score at or above 80 per cent (Estonia: 80 per cent, Hungary: 86 per cent, Latvia: 82 per cent, Slovenia: 81 per cent). The main problem detected in those countries is the limited predictability of

Figure 4.27

'Fit to context' – country scores in the EU Member States in the EBRD region



Notes: The figure illustrates the performance of each of the EU Member States in the ERBD region regarding the 'fit to context' remedies LEC indicator. The scores have been calculated on the basis of a checklist on remedies procedures and case studies answered by local legal advisers. Total scores are presented as a percentage, with 100 per cent high representing the highest performance in LEC indicators, equivalent to full compliance with the LEC benchmark.

Source: EBRD Public Procurement Assessment 2010

the remedies bodies. This problem should be addressed, according to the respondents. Finally, the best performance on the certainty indicator is Poland, with 88 per cent, which is the highest score achieved across the entire EBRD region. However, even in Poland, the impartiality of the National Appeals Chamber has been questioned, since it is considered to be an agency that protects, above all, the public stakeholder's interests. Furthermore, some respondents expressed the view that case law is, to a certain extent, not uniform and the bidders are unable to predict the results of the proceedings.

'Fit to context'

The EU Member States in the EBRD region score 'high' on the 'fit to context' indicator (average score 79 per cent). This result puts the sub-region in the third position compared to the other EBRD sub-regions (Balkan Countries and Turkey: 84 per cent, European Countries including Georgia and Russia: 59 per cent, Central Asian Republics, the Caucasus and Mongolia: 82 per cent).

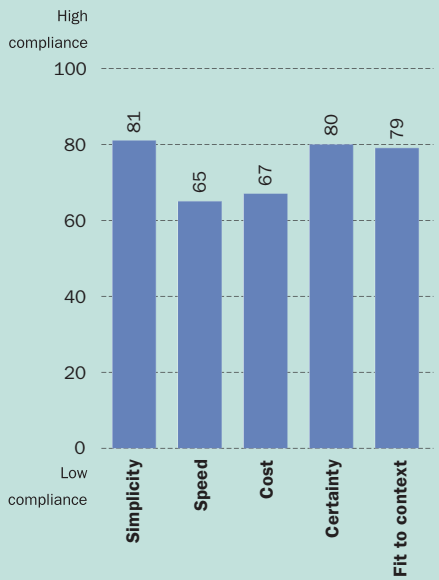
Figure 4.23 presents 'fit to context', country scores in the EU Member States in the ERBD region.

Slovenia (95 per cent) and Estonia (90 per cent) demonstrate the best results, both scoring 'very high'. Bulgaria, Hungary, Lithuania and the Slovak Republic also scored very well (85 per cent, 80 per cent, 85 per cent and 83 per cent respectively). However, there are also three countries in the sub-region that recorded low to medium compliance level, namely Latvia (60 per cent), Poland (63 per cent) and Romania (65 per cent). According to the respondents, this may be due to the insufficient business experience of the remedies body members. In review procedures, external experts are rarely appointed, which may adversely affect the appropriateness of review decisions in cases where specialist knowledge is required.

Based on the performance of these countries, it is important for all stakeholders to bear in mind that the high cost of a remedies system does not necessarily translate to a 'fit-to-context' remedies body.

Figure 4.28

Performance of the EU Member States in the EBRD region in 5 key efficiency indicators



Notes: The figure illustrates the performance of each of the EU Member States in the ERBD region in the five LEC indicators. The scores have been calculated on the basis of a checklist on remedies procedures and case studies answered by local legal advisers. Total scores are presented as a percentage, with 100 per cent high representing the highest performance in LEC indicators, equivalent to full compliance with the LEC benchmark.

Source: EBRD Public Procurement Assessment 2010

Trends

Only five out of the nine EU Member States in the EBRD region succeed in reaching a 'high' total score in the remedies efficiency benchmarking test (Estonia: 82 per cent, Hungary: 81 per cent, the Slovak Republic: 80 per cent, Poland: 76 per cent and Latvia: 76 per cent), but none achieved a very high level (>90 per cent).

Furthermore, four EU Member States in the EBRD region scored a medium compliance rate (Romania: 65 per cent, Lithuania: 72 per cent and Bulgaria: 73 per cent).

It seems that the remedies systems in the EU Member States in the EBRD region suffer mostly from inefficiencies in the fields of speed and cost.

The EU Member States in the EBRD region scored acceptably on the simplicity and certainty indicators but did not meet expectations regarding the quality of the basic functions. Moreover, in some of the EU Member States in the EBRD region, the remedies bodies and procedures seem to be out of context.

Conclusions

The existence of multiple types and tiers of review procedures establishes a robust and comprehensive public procurement remedies system that grants the economic operators a broad choice of instruments for challenging acts and decisions that are issued by contracting authorities within the course of a procurement process.

These facilities require time, funds and resources to thrive. However, they can nurture an element of confusion and unpredictability, because of the diversity of the procedures and the involvement of many stakeholders. Furthermore, the defects may gradually lead to systems that are perhaps too elaborate and sophisticated, as well as out of context in practice.

However, it is evident that, although the EU Member States in the EBRD region have invested heavily in their public procurement remedies systems, the results could be improved, as far as the overall efficiency performance of the review mechanisms is concerned.

Administrative and judicial reviews are available in every country, but often evolve at a slow pace and the results are not always predictable. Furthermore, they are usually available at a high price; a fact that restricts access to the system, especially for SMEs.

Based on the results of the evaluation, it is clear that the EU Member States in the EBRD region should consider rethinking their public procurement remedies policies in order to streamline and simplify the processes, and restrict cost and time demands as much as possible. Extra effort and initiatives are also required in order to combine and coordinate all types of review bodies. Such a streamlined system should aim to achieve consistency and predictability of the remedies systems, and allow them to serve as an effective mechanism for the enforcement of the substantive public procurement rules.

4.7 Recommendations

Based on the findings of the survey, it is evident that different degrees of remedies efficiency have been achieved in the countries of the four EBRD sub-regions.

It is clear from the analysis that the EU Member States in the EBRD region and the Balkan Countries and Turkey sub-region have undertaken bold and drastic measures that have improved the quality and the efficiency of their remedies systems, both at the regulatory as well as the practical level. The European Countries including Georgia and Russia and Central Asian Republics, the Caucasus and Mongolia sub-regions have failed to achieve similar results, mainly due to the fact that the transition to an open, transparent, fair and competitive public procurement market is still underway.

However, in all four sub-regions different issues related to the quality and efficiency of public procurement remedies systems remain, to a greater or lesser extent, open to improvement and require further reform initiatives.

In the last section of this chapter, a series of proposals for possible interventions of both a regulatory and administrative nature is offered in order to serve as the basis for further debate and future planning.

Regulatory measures

Establishment of independent administrative review bodies

An important conclusion from the study is that remedies systems which are structurally deficient rarely exhibit any significant efficiency. Thus, systems which do not have a dedicated remedies body will be, in general, less accessible, more costly and time-consuming than others.

Based on this fundamental finding, the EBRD countries that have up to now opted not to establish an independent dedicated remedies body for public procurement disputes should rethink their policy and set up such a body. These bodies act as multiplying factors within remedies systems, since they concentrate expertise and knowledge, accumulate expertise, ensure institutional memory over the years of operation and disseminate information and knowledge to all stakeholders.

At the same time they relieve pressure on the other players in the remedies regime, i.e. contracting authorities and courts, thus decreasing the cost of the system, establishing confidence in the correct interpretation and application of both the substantive and procedural public procurement rules and accelerating the overall procurement process.

Finally, independent remedies bodies enhance integrity as well as the predictability and consistency of the public procurement system.

Strengthen the administrative branch

Another key finding of the evaluation is that the systems which neglect the administrative branch of the remedies system pay a heavy price in terms of confusion, unpredictability, cost and speed overruns.

A public procurement remedies system should, as a matter of course, provide for administrative review of procurement decisions prior to the initiation of court proceedings. By utilising this option and, provided that the administrative complaint is heard by an independent and objective review body and not by the contracting authority itself, the system will become more cost and time efficient since it will allow for the resolution of disputes at an early stage, through simplified and expedient procedures.

At the same time it will also reduce the workload of the courts, thus allowing the courts to focus on the more complex and financially important cases, since straightforward and minor disputes will be resolved at the administrative level.

Standstill, setting aside of contracts

As described at the beginning of this chapter, the principal purpose of a public procurement remedies system is to ensure that the bidder retains a real chance to win the contract by being able to rectify any infringement of the rules and overturn an illegal act or omission by the contracting authority. In order to achieve this goal, two key options should be incorporated in every remedies system.

The first is the standstill obligation, which allows the tenderer to be informed of any decision that harms his/her interest, study it, collect the necessary evidence and decide if he/she will challenge it and by which means.

The second is the option to annul a contract even after it has entered into force (subject to specific conditions and derogations on the grounds of protection of the public interest), which is a very powerful deterrent to those responsible for irregularities in the public procurement process.

Increase the integrity safeguards

One of the key features of a successful public procurement remedies system is confidence on behalf of all stakeholders, either public or (mainly) private in the integrity of the institutions and bodies that are responsible for the review procedures. In order to achieve that ideal, the rules that guarantee integrity should be intensified and expanded. Regulators should adopt specific rules that enhance integrity and foster predictability, such as: (i) the establishment of an efficient system of checks and balances that will enable the monitoring of the operation of the remedies bodies according to established legal principles and ethics, (ii) the adoption of a transparent and objective system for the staffing of the remedies bodies, (iii) the introduction of an obligation for widespread publicity and information sharing by the remedies bodies (including public hearings, publication of decisions, etc.) to increase the predictability of the system and restrict adverse phenomena such as corruption and a lack of impartiality.

Cost

Cost policy imposed on public procurement remedies systems should be designed very carefully in order to be proportional and reasonably balanced. Costs should be bearable for all types of enterprises at the entry-level and increase gradually at the higher levels of the remedies process.

Costs should be linked to the complexity and the specifics of each case, and not used as a way of deterring misuse of the system, thus depriving some economic operators, unable to pay the fees, of its benefits. On the other hand, cost policy should provide specific penalties for bidders that systematically misuse the system.

Procurement Capacity Building

Training

The study revealed that in many jurisdictions, the staff of the remedies bodies, both administrative and judicial, are not adequately qualified to deal with the variety and complexity of modern public procurement disputes. The staff of the contracting entities are not usually aware of recent developments in public procurement case law and judges, in general courts who rule on a variety of cases, are not sufficiently familiar with the peculiarities of the public procurement sector. Furthermore, private stakeholders, such as business staff and technical experts who are not legally trained, may not be aware of the rights and obligations that derive from the remedies rules.

The review has highlighted the need for a broadly based training programme, primarily for staff serving on the remedies bodies, in order to raise the level of their professional understanding and expertise to that required by a modern public procurement regulatory framework and practice. Further training activities should also address the needs of other groups of stakeholders, including the staff of contracting authorities, lawyers, economic operators etc., that actively participate in the operation of the public procurement remedies system. Training should be tailored to the specific needs of each group and delivered in various appropriate forms such as seminars, workshops, study visits, distance-learning, on-the-job training etc...

Networks of information and documentation

Finally, the efficiency of the remedies systems in the EBRD countries of operation could be multiplied by the establishment of an informal expert network for sharing and disseminating information, such as compilations of legislative texts in multiple languages, practical guides and standard forms used by the remedies systems in specific jurisdictions of the EBRD region etc...

Chapter 5

Sustainable Public Procurement in Practice in the EBRD Region

5.1 Introduction

Sustainable public procurement is defined as a process whereby organisations meet their needs for goods, services, works, and utilities in a way that achieves value for money on a whole life basis in terms of generating benefits not only to the organisations, but also to society and the economy, whilst minimising damage to the environment.

Sustainable procurement seeks to achieve the appropriate balance between the three pillars of sustainable development i.e. economic, social, and environmental.

In the assessment the sustainability of local public procurement practice has been analysed based on a status assessment of benchmarks set by the project 'Implementing Sustainable Public Procurement in Developed and Developing Countries' - a UN project carried out by the MTF.*

This benchmark was selected as the most comprehensive in comparison to other international legal instruments in the field such as the EU green procurement policy.

Because it was originally designed to be applied in both developing/transition and developed countries, it is appropriate to use it for the countries at varying stages of development found in the EBRD region.

Box 5.1 presents a framework for sustainability in public procurement and includes the three pillars of sustainable development and their indicators.

* http://esa.un.org/marrakech-process/tfsuspubproc.shtml

Box 5.1

Sustainability in Public Procurement

ECONOMIC FACTORS	in line with good financial management, costs of products and services over their entire life cycle (Life Cycle Costing), such as: • acquisition • maintenance • operations • end-of-life management costs (including waste disposal)
SOCIAL FACTORS	• social justice and equity • safety and security • human rights • employment conditions
ENVIRONMENTAL FACTORS	• emissions to air, land and water • climate change • biodiversity • natural resource and water use over the whole product life cycle

5.2
Public Procurement Sustainability in Local Practice in the EBRD Countries of Operations

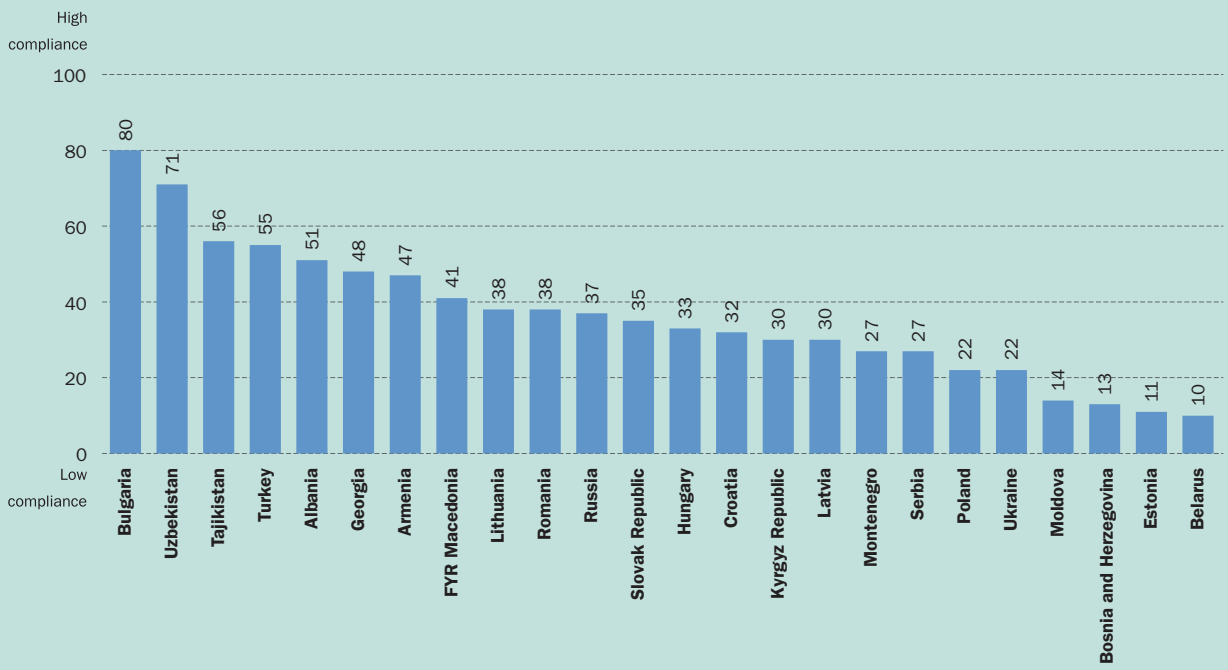
Measuring sustainability in public procurement practice

On the basis of the MTF status assessment, a special questionnaire was designed and feedback requested from local contracting entities in the EBRD region regarding their consideration of sustainability factors when awarding public contracts. In total, twenty-four countries in the EBRD region participated in this part of the research (no feedback has been received from Azerbaijan, Kazakhstan, Mongolia, Slovenia, and Turkmenistan). Figure 5.2 presents the scores on public procurement sustainability in practice for each country in the ERBD region.

The assessment results reveal that the sustainability of public procurement is a totally new concept, very seldom implemented in local procurement practice by contracting entities in the EBRD countries of operation, including the EU Member States in the EBRD region.

Figure 5.2

Sustainability in public procurement practice in the ERBD countries of operation



Notes: The figure shows the score on public procurement sustainability in practice for each country in the EBRD region. The score has been calculated on the basis of a checklist of questions regarding sustainability in practice of contracting entities. Total scores are presented as a percentage, with 100 per cent representing highest performance. No data is available for Azerbaijan, Kazakhstan, Mongolia, Slovenia and Turkmenistan.

Source: EBRD Public Procurement Assessment 2010

Public procurement sustainability in local practice in the EBRD countries of operations

Contracting entities apply sustainability criteria in contracts awarded as part of the public procurement process only in the case of some goods or services contracts. The assessment results in seventeen out of twenty-four countries reveal that local contracting entities do not include any mechanism to encourage tenderers to offer more sustainable products or services than specified in their tender documentation. Figure 5.3 presents the sustainability contract award criteria in the public procurement process in the ERBD countries of operation.

In the development of contract award criteria, the most popular aspects are related to the economy of the purchase, if life cycle costing can be appropriately applied. Social factors were applied to some extent in only six countries in the EBRD region. Even in the EU Member States in the EBRD region, where EU Public Procurement Directives directly enable contracting entities to take account of the environmental or social impact of public purchases while developing the tender documentation, the contracting entities do not take advantage of this opportunity. Only in three out of eight EU Member States in the EBRD region have the contracting entities declared that they apply sustainability contract award criteria to a wide range of goods or services.

Moreover, the sustainable approach to purchasing is not widely used in the pre-qualification and evaluation of suppliers. The main requirements taken into consideration during the pre-qualification of suppliers revolve around their economic and/or financial capacity to deliver public contracts. Nonetheless, this evaluation does not usually include the broader impact of the supplier on the development of the region where the public contract is awarded. During the pre-qualification process little emphasis is placed on the impact of the suppliers' business activity on the natural and social environment. Only in three countries in the EBRD region, namely Albania, Armenia and Bosnia and Herzegovina, are the key suppliers pre-qualified on the basis of certificates issued by independent institutions. These certificates confirm the application of procedures and quality standards, allowing suppliers to certify that identified sustainability objectives have been used in their respective production processes. Figure 5.4 presents the sustainability requirements in the pre-qualification of tenderers in the ERBD countries of operation.

If sustainability requirements are included in the supplier audit, the procedure mainly concentrates on evaluation of the influence their business activity has on the natural environment and the impact of their products on public health. The suppliers are also assessed on the basis of their compliance with employment conditions and regulations. Another group of requirements is linked with the promotion of local products, materials and resources, creating new work places and recruiting unemployed people, and finally promoting SMEs. Figure 5.5 presents the sustainability requirements in the audit of suppliers in the ERBD countries of operation.

Figure 5.3

Sustainability contract award criteria in the public procurement process in the EBRD countries of operations

	COUNTRY	Economic factors	Environmental factors	Social factors
1	Albania			
2	Armenia			
3	Belarus			
4	Bosnia and Herzegovina			
5	Bulgaria			
6	Croatia			
7	Estonia			
8	FYR Macedonia			
9	Georgia			
10	Hungary			
11	The Kyrgyz Republic			
12	Latvia			
13	Lithuania			
14	Moldova			
15	Montenegro			
16	Poland			
17	Romania			
18	Russia			
19	Serbia			
20	The Slovak Republic			
21	Tajikistan			
22	Turkey			
23	Ukraine			
24	Uzbekistan			

No sustainability criteria are applied.
Sustainability criteria are applied to some products and services and these products and services are purchased e.g. recycled paper, energy efficient light bulbs, energy efficient IT (Energy Star), Fairtrade products etc
Sustainability criteria are applied to a wide range of products and services and these products and services are purchased e.g. recycled paper, energy efficient light bulbs, energy efficient IT (Energy Star). Tenderers are encouraged to offer more sustainable products and services than originally specified.
Sustainability criteria are applied to a wide range of products and services and these products and services are purchased. Tenderers are encouraged to offer more sustainable and innovative solutions and these are often purchased.
All products and services purchased are assessed for sustainability impact and priorities identified. Sustainability criteria are applied to all priority products and services purchased. Where there are gaps in the market, incentives exist for tenderers to provide new products/services.

Notes: The figure shows the score for the applicability of sustainability award criteria in the public procurement process for each country in the EBRD region. The score has been calculated on the basis of a sustainability questionnaire, answered by local contracting entities in the EBRD countries of operations. No data is available for Azerbaijan, Kazakhstan, Mongolia, Slovenia and Turkmenistan. The descriptions are graded from what is considered to be the least (marked in green) to the most satisfactory (marked in blue).

Source: EBRD Public Procurement Assessment 2010

Figure 5.4

Sustainability requirements in the pre-qualification of tenderers in the EBRD countries of operations

	COUNTRY	Economic aspects	Environmental aspects	Social aspects
1	Albania			
2	Armenia			
3	Belarus			
4	Bosnia and Herzegovina			
5	Bulgaria			
6	Croatia			
7	Estonia			
8	FYR Macedonia			
9	Georgia			
10	Hungary			
11	The Kyrgyz Republic			
12	Latvia			
13	Lithuania			
14	Moldova			
15	Montenegro			
16	Poland			
17	Romania			
18	Russia			
19	Serbia			
20	The Slovak Republic			
21	Tajikistan			
22	Turkey			
23	Ukraine			
24	Uzbekistan			

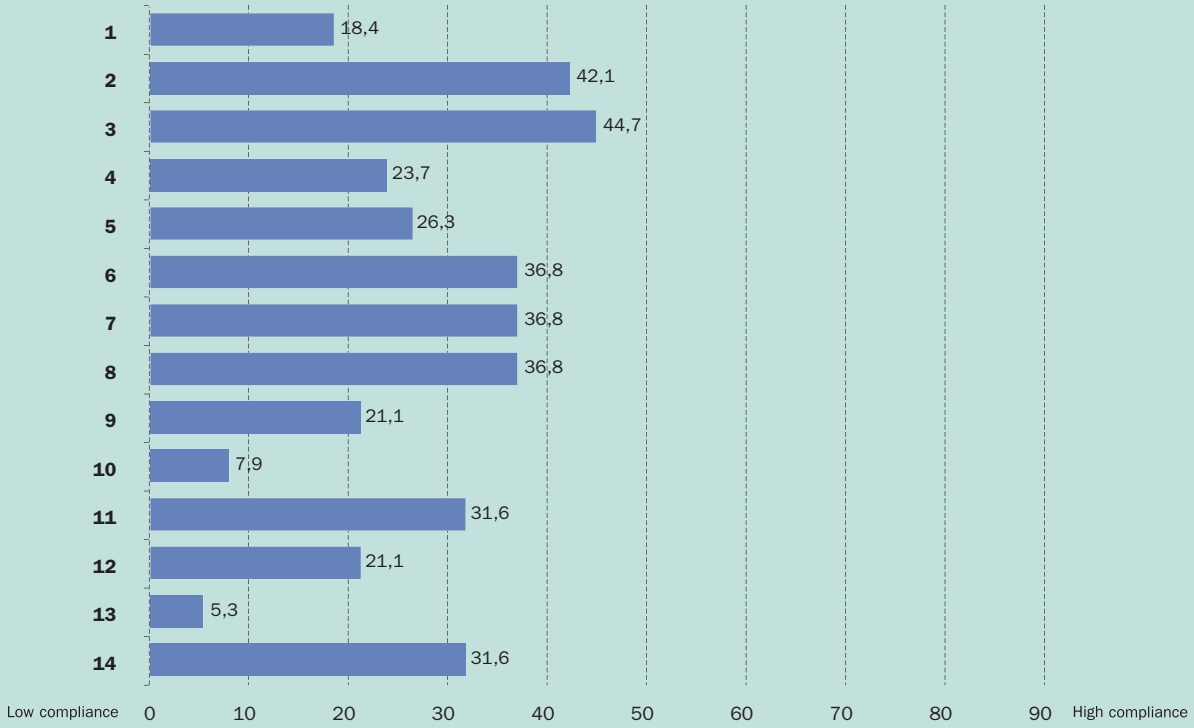
It does not evaluate suppliers.
Potential suppliers are evaluated to ensure they are fit to supply e.g. financial stability, quality, service, performance, capacity.
Supplier evaluation includes a few sustainability criteria, e.g. legislative, compliance, policies.
Supplier evaluation includes the main sustainability impact associated with the products or services supplied. Suppliers are required to prove that their policies are being applied.
Key suppliers demonstrate independent evidence that their policies are being applied. Examples include EMAS, ISO, ILO core conventions etc are independently audited by an accredited organisation. Supplier compliance with standards is regularly reviewed.

Notes: The figure shows the score for the use of sustainability requirements in the pre-qualification of suppliers in the public procurement process conducted in each country in the EBRD region. The score has been calculated on the basis of a sustainability questionnaire, answered by local contracting entities in the EBRD countries of operations. No data is available for Azerbaijan, Kazakhstan, Mongolia, Slovenia and Turkmenistan. The descriptions are graded from what is considered to be the least (marked in green) to the most satisfactory (marked in blue).

Source: EBRD Public Procurement Assessment 2010

Figure 5.5

Sustainability requirements in the audit of suppliers in the EBRD countries of operation



1. Job creation (e.g. recruiting unemployed people)
2. Impact on the environment
3. Health impact of products and services
4. Education (e.g. apprenticeships, training for young people)
5. Human rights (e.g. discrimination)
6. Working conditions (e.g. minimum wage, health and safety)
7. Use of innovative environmental technologies
8. Encourage, where possible, the percentage of local materials, components, and labour contributing to the finished product
9. Promote SMEs
10. Promote suppliers from less privileged areas within the country
11. Promote transfer and development of skills and technologies
12. Promote supplies which create opportunities for disadvantaged groups
13. Other
14. None

Notes: The figure presents the extent to which contracting authorities conduct audit's of suppliers' compliance while or after awarding public contracts. The sustainability criteria, ranging from job creation to the promotion of small and medium enterprises, are listed above and numbered one to fourteen. The score has been calculated on the basis of a sustainability questionnaire, answered by local contracting entities in the EBRD countries of operations. No data is available for Azerbaijan, Kazakhstan, Mongolia, Slovenia and Turkmenistan. The descriptions are graded from what is considered to be the least (marked in green) to the most satisfactory (marked in blue).

Source: EBRD Public Procurement Assessment 2010

5.3 General Trends

If any sustainability considerations are incorporated in the public procurement processes, the local contracting entities include mainly economic factors. Based on the assessment results, environmental and social factors are rarely taken into account in awarding public contracts in the EBRD countries of operations. On average, nineteen out of the 24 countries that responded scored below 50 per cent compliance rate which indicates a very low compliance with the benchmark.

The contracting entities generally do not apply the sustainability approach when preparing the procurement plan or tender documents. Half of the contracting entities admitted that they do not conduct any reviews of the economic, environmental or social impact of their purchases. Few contracting entities said that the products they purchase have a significant influence on the environment (e.g. paper, electronic devices). In only twelve countries did the local contracting entities acknowledge that they actually take steps aimed at reducing the eventual negative effect exerted by the products purchased.

A similar response was received when contracting entities were asked about including sustainability criteria in contract award criteria applied by the contracting entities when buying certain products or services or adopting sustainability requirements in the tenderers' pre-qualification for public contract award.

Chapter 6

Summary of Results and Recommendations

6.1 General Trends

This chapter presents a summary of the assessment results and country rankings as a whole as well as a review of the results for selected public procurement policy areas, including answers to the following four questions:

- Do public procurement laws cover public sector procurement as a whole?
- Is public procurement policy-making appropriate to the national business culture and local market development?
- Do public procurement laws regulate the entire procurement process in the public sector?
- Do public procurement laws enable the efficient selection of tender type or method based on the specifics of the purchase and contract profile?

The EBRD 2010 assessment revealed that in terms of public procurement policy development traditional geographical divisions and regional associations in the EBRD region are no longer valid. Figure 6.1 presents the score for quality (extensiveness) of national public procurement laws and quality (effectiveness) of local public procurement practice in the ERBD countries of operations.

According to the level of development attained in terms of their public procurement laws and local procurement practice, countries in the EBRD region can be re-categorised as follows:

1. **Advanced policy development:** EU Member States in the EBRD region and the Balkan countries and Turkey that aim for full compliance with EU Public Procurement Directives have achieved a medium to high level of compliance with international standards, scoring on average similar results (except for B&H and Serbia). Regardless of different public procurement policy objectives, the group of the most advanced countries should also include Armenia which completed the WTO GPA accession process in 2010 and Georgia which has made substantial progress in policy and practice development within the last two years.

2. **Intermediate policy development:** Russia, the Eastern European Countries (except for Moldova), the Central Asian Republics, and Mongolia have achieved a medium or better level of compliance with international standards, yet on average, scored differently in the key benchmark indicators (except for Russia where development of policy and practice is more consistent). In these countries public procurement legislative reform is underway, but their procurement laws and practice have yet to comply with international standards.

3. **Initial stages of policy development:** Azerbaijan, Belarus, Moldova, Turkmenistan, Ukraine and Uzbekistan, where procurement legislation is rudimentary and comprehensive new public procurement legislation is needed.

Figure 6.2 presents a summary ranking of the public procurement assessment for the 29 EBRD countries of operations.

For each country in the EBRD region compliance rates for the 'law on the books' and the 'law in practice' assessment are presented as well as the overall compliance rate per country based on a total average scores in the assessment of the 'law on the books' and the 'law in practice'. The figure presents the summary rankings of the assessment.

Quality of public procurement legislation

The first ranking of the countries of the EBRD region is based on the assessment result for the quality of the 'law on the books'. The scores for the quality of the 'law on the books' have been calculated on the basis of a legislation questionnaire developed from the Core Principles benchmark.

In the assessment of 'law on the books', Hungary scored a very high rate of compliance. Albania, Bulgaria, Georgia, Latvia, Lithuania, Montenegro, and Turkey were evaluated as highly compliant with the Core Principles' benchmark. National laws in Armenia, Belarus, B&H, Croatia, Estonia, FYR Macedonia, Kazakhstan, the Kyrgyz Republic, Moldova, Mongolia, Poland, Romania, Serbia, the Slovak Republic, Slovenia, Russia and Tajikistan achieved a medium level of compliance. Ukraine and Azerbaijan scored a low level of compliance, whereas Turkmenistan and Uzbekistan achieved a very low level of compliance.

Quality of public procurement practice

The second ranking of the countries of the EBRD region is based on the results of the survey of local procurement practice. In this survey the scores have been calculated on the basis of a practice questionnaire developed from the Core Principles benchmark and answered by local contracting entities.

In the assessment of local procurement practice no country in the EBRD region achieved a very high level of compliance. Local practice in seventeen countries achieved a high level of compliance (Albania, Armenia, Bulgaria, Croatia, Estonia, Georgia, Hungary, FYR Macedonia, Montenegro, Latvia, Lithuania, Poland, Russia, the Slovak Republic, Slovenia, Tajikistan, and Turkey).

Local contracting entities in Belarus, B&H, the Kyrgyz Republic, Romania, Serbia, Ukraine, and Uzbekistan achieved a medium level of compliance. Local practice in Moldova was evaluated at a low level of compliance. Although several attempts were made, it was not possible to interview contracting entities in four countries in the EBRD region, namely Azerbaijan, Kazakhstan, Mongolia and Turkmenistan, therefore the assessment results are incomplete as no data on local public procurement practice in these countries has been obtained.

Quality of public procurement remedies procedures

The third ranking is based on the results of the review of national public procurement remedies systems. In this review the scores for the quality of the public procurement remedies legislation were based on a legislation questionnaire developed from the Core Principles benchmark. The scores for the quality of remedies practice were based on a checklist and two case studies developed from the LEC benchmark and answered by local contracting entities and local legal advisors.

In the assessment of 'law on the books', Hungary scored a very high rate of compliance. Albania, Bulgaria, Georgia, Latvia, Lithuania, Montenegro, and Turkey were evaluated as highly compliant with the Core Principles' benchmark. National laws in Armenia, Belarus, B&H, Croatia, Estonia, FYR Macedonia, Kazakhstan, the Kyrgyz Republic, Moldova, Mongolia, Poland, Romania, Serbia, the Slovak Republic, Slovenia, Russia and Tajikistan achieved a medium level of compliance. Ukraine and Azerbaijan scored a low level of compliance, whereas Turkmenistan and Uzbekistan achieved a very low level of compliance.

Final assessment ranking

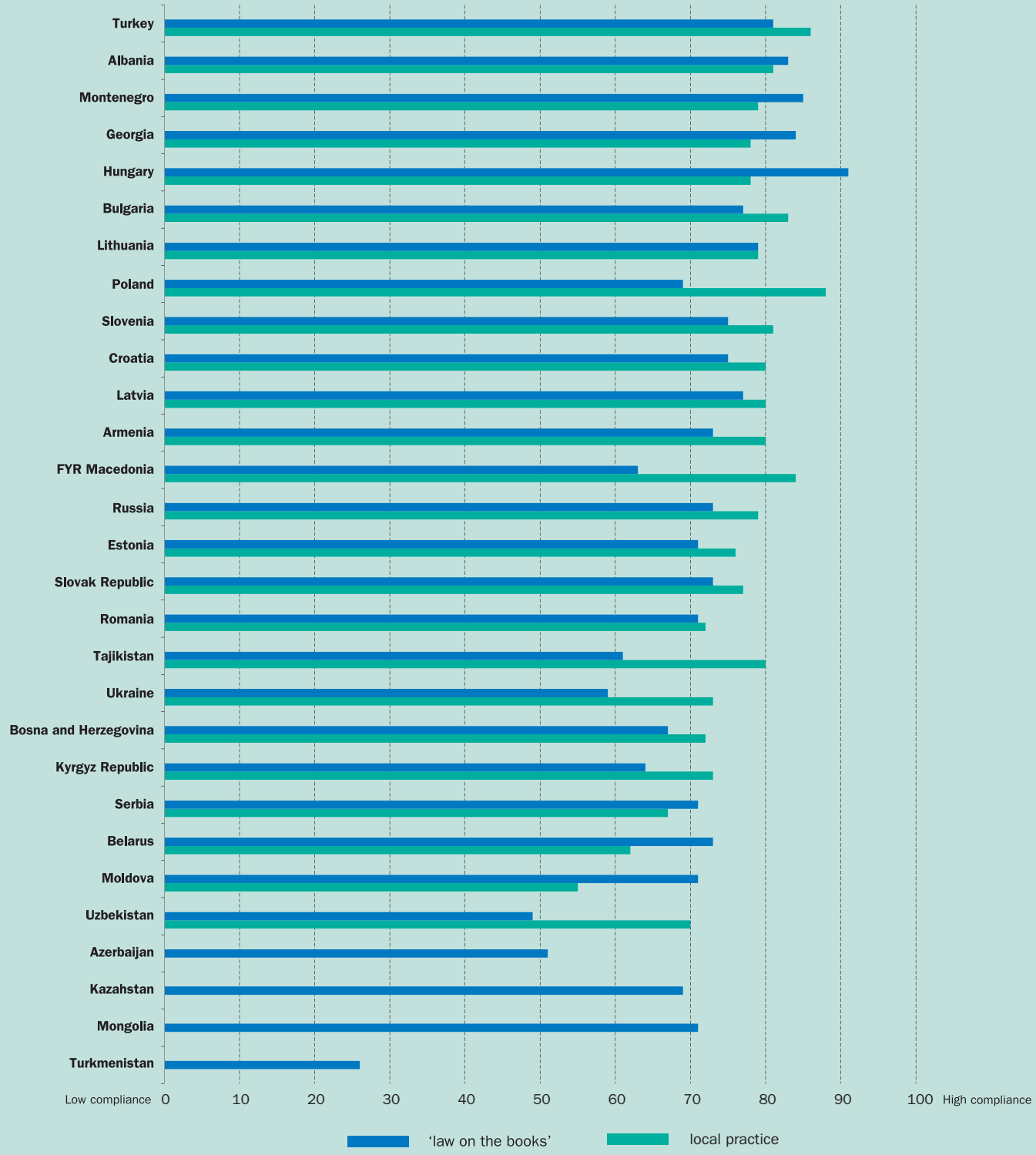
The fourth ranking presents the total scores calculated from the results of the legislation assessment, the survey of local procurement practice, and a review of national public procurement remedies systems. In the final assessment ranking based on average scores for quality of laws and practice Turkey scored best and achieved a high level of compliance, with Montenegro and Albania following.

Sustainability of local public procurement practice

The fifth ranking presents results from the review of the sustainability of local procurement practice. In this review scores were calculated based on a questionnaire developed from the MTF status assessment benchmark.

Figure 6.1

The assessment results in the EBRD countries of operations



Notes: The figure presents the summary results for quality of national public procurement laws and quality of local procurement practice in the EBRD countries of operations. The scores for the quality of laws have been calculated on the basis of a legislation questionnaire developed from the Core Principles benchmark. The scores for the quality of the local procurement practice have been calculated on the basis of a practice questionnaire, a checklist for public procurement process, and two case studies developed from the Core Principles benchmark and answered by local contracting entities and local legal advisors. The scores are presented as a percentage, with 100 per cent representing the highest scores available for quality of laws and practice. For the assessment of the quality of local procurement practice no data was obtained from Azerbaijan, Kazakhstan, Mongolia and Turkmenistan.

Source: EBRD Public Procurement Assessment 2010

Figure 6.2

The EBRD Public Procurement Assessment 2010 – summary ranking

	Law on the books		Local Practice*		Review and remedies		Total score**		Sustainability***
1	Hungary	1	Poland	1	Slovenia	1	Turkey	1	Bulgaria
2	Montenegro	2	Turkey	2	Hungary	2	Montenegro	2	Uzbekistan
3	Georgia	3	FYR Macedonia	3	Estonia	3	Albania	3	Tajikistan
4	Albania	4	Bulgaria	4	Croatia	4	Hungary	4	Turkey
5	Turkey	5	Slovenia	5	Slovak Republic	5	Georgia	5	Albania
6	Lithuania	6	Albania	6	Bulgaria	6	Bulgaria	6	Georgia
7	Bulgaria	7	Armenia	7	Turkey	7	Lithuania	7	Armenia
8	Latvia	8	Tajikistan	8	Romania	8	Slovenia	8	FYR Macedonia
9	Croatia	9	Croatia	9	Georgia	9	Poland	9	Lithuania
10	Slovenia	10	Latvia	10	FYR Macedonia	10	Latvia	10	Romania
11	Slovak Republic	11	Montenegro	11	Albania	11	Croatia	11	Russia
12	Armenia	12	Lithuania	12	Kyrgyz Republic	12	Russia	12	Slovak Republic
13	Russia	13	Russia	13	Armenia	13	FYR Macedonia	13	Hungary
14	Belarus	14	Georgia	14	Lithuania	14	Armenia	14	Croatia
15	Mongolia	15	Hungary	15	Latvia	15	Estonia	15	Kyrgyz Republic
16	Moldova	16	Slovak Republic	16	Ukraine	16	Slovak Republic	16	Latvia
17	Serbia	17	Estonia	17	Bosnia and Herzegovina	17	Ukraine	17	Montenegro
18	Romania	18	Ukraine	18	Belarus	18	Romania	18	Serbia
19	Estonia	19	Kyrgyz Republic	19	Serbia	19	Tajikistan	19	Poland
20	Kazakhstan	20	Bosnia and Herzegovina	20	Tajikistan	20	Kyrgyz Republic	20	Ukraine
21	Poland	21	Romania	21	Montenegro	21	Serbia	21	Moldova
22	Bosnia and Herzegovina	22	Uzbekistan	22	Poland	22	Bosnia and Herzegovina	22	Bosnia and Herzegovina
23	Kyrgyz Republic	23	Serbia	23	Azerbaijan	23	Belarus	23	Estonia
24	FYR Macedonia	24	Belarus	24	Russia	24	Moldova	24	Belarus
25	Tajikistan	25	Moldova	25	Kazakhstan	25	Uzbekistan	25	
26	Ukraine	26		26	Moldova	26		26	
27	Azerbaijan	27		27	Uzbekistan	27		27	
28	Uzbekistan	28		28	Turkmenistan	28		28	
29	Turkmenistan	29		29	Mongolia	29		29	

* No data available for Azerbaijan, Kazakhstan, Mongolia and Turkmenistan
** No data available for Azerbaijan, Kazakhstan, Mongolia and Turkmenistan
*** No data available for Azerbaijan, Kazakhstan, Mongolia, Slovenia and Turkmenistan

Note: The figure presents the summary rankings of the assessment. The first ranking of the countries of the EBRD region is based on the assessment result for the quality of the 'law on the books'. The scores for the quality of the 'law on the books' have been calculated on the basis of a legislation questionnaire developed from the Core Principles benchmark. The second ranking of the countries of the EBRD region is based on the results of the survey of local procurement practice. In this survey the scores have been calculated on the basis of a practice questionnaire developed from the Core Principles benchmark and answered by local contracting entities. The third ranking is based on the results of the review of national public procurement remedies systems. In this review the scores for the quality of the public procurement remedies legislation were based on a legislation questionnaire developed from the Core Principles benchmark. The scores for the quality of remedies practice were based on a checklist and two case studies developed from the LEC benchmark and answered by local contracting entities and local legal advisors. The fourth ranking presents the total scores calculated from the results of the legislation assessment, the survey of local procurement practice, and a review of national public procurement remedies systems. The fifth ranking presents results from the review of the sustainability of local procurement practice. In this review scores were calculated based on a questionnaire developed from the MTF status assessment benchmark.

Source: EBRD Public Procurement Assessment 2010

6.2
Some Trends in Detail

Public sector versus government procurement

In the assessment of what areas of procurement are covered by the public procurement regulatory framework the following categories were used: (a) government procurement, (b) local government procurement, including municipalities (a) and (b) together covering so–called 'government procurement', (c) utilities sector procurement (public services monopolies), (d) public law institutions' procurement, and (e) public grants beneficiaries' procurement. Figure 6.3 presents the scope of the public procurement legislation in the ERBD countries of operation.

It is important to note that, in quite a few countries, it is only government procurement which is covered by public procurement laws, with a large portion of the municipalities and utilities sector remaining outside the general regulation, or covered by public procurement legislation on a state ownership basis only.

Policy-making: anti-corruption safeguards versus procurement efficiency

The assessment results show that few of the countries in the region achieved an appropriate balance between the integrity safeguards and efficiency measures in their public procurement policies. In addition, the legal frameworks of several countries showed that the 'regulatory gap' between what has been achieved and what remains to be achieved in integrity is greater than that in efficiency measures. This may be a significant challenge for countries associated with low standards of business ethics and a high level of corruption. Figure 6.4 presents the public procurement policies preferences in the ERBD countries of operation.

Public procurement process versus tendering procedures

The assessment analysed whether public procurement laws and internal procurement policies cover the entire procurement process, including the pre-tendering, tendering, and post-tendering phases. All of these phases are crucial to distribute public spending in compliance with the actual market value of goods and services.

According to modern procurement best practice, the public procurement process should be understood as a process which starts much earlier than publication of the tender notice. Sound planning of procurement is essential. The contracting entity shall determine what goods, works, and services are required to carry out the project, establish time limits, standards to be met, the most suitable procedure for the contract etc...

As described in detail in the public procurement process benchmark, included in the Annex 1 to the report, the procurement process comprises:

- The pre-tendering phase (assessment of needs, budget available, qualification and award criteria, contract profile, tender procedure selection, management of the process (planning, people, time, costs),
- The tendering phase (main activities: tender notices/invitations, communication, documentation amendments, language(s), currency used, opening sessions, exclusion based on: eligibility, technical capacity, financial and economic capacity, enrolment on professional or trade registers, evaluation of offers: rejection of the offer, abnormally low price, procedure annulment, standstill measures, availability of remedies),
- The post-tendering phase (contract management).

National laws in the EBRD countries of operations generally have no requirements for the implementation of a proper assessment of contracting entities' needs and contract valuation. This is the case in dedicated public procurement legislation and in public finance laws.

Figure 6.3

Scope of the public procurement regulation in the EBRD countries of operations.

Country	Goverment	Local goverment	Utilities	Public law institutions
Albania				
Armenia				
Azerbaijan				
Belarus				
Bosnia and Herzegovina				
Bulgaria				
Croatia				
Estonia				
FYR Macedonia				
Georgia				
Hungary				
Kazakhstan				
Kyrgyz Republic				
Latvia				
Lithuania				
Moldova				
Mongolia				
Montenegro				
Poland				
Romania				
Russia				
Serbia				
Slovak Republic				
Slovenia				
Tajikistan				
Turkey				
Turkmenistan				
Ukraine				
Uzbekistan				

Fully covered by PP primary laws
Covered by PP primary or secondary laws, with some exceptions
Not covered by PP primary or secondary laws

Note: The table illustrates to what extent national public procurement legislation of each country in the EBRD region applies to different categories of public sector entities. The grades have been calculated on the basis of a legislation questionnaire developed from the Core Principles benchmark and are allocated from what is considered to be the least (marked in green) to the most satisfactory (marked in light blue), representing optimum coverage of public procurement laws.

Based on assessment scores for all countries as at 22 July 2010, except Bulgaria.

Source: EBRD Public Procurement Assessment 2010

Public procurement laws require mandatory planning in most countries in the EBRD region (19 countries: Albania, Armenia, Belarus, Bulgaria, Croatia, FYR Macedonia, Georgia, Hungary, Moldova, Kazakhstan, Lithuania, Mongolia, Montenegro, Romania, Russia, Serbia, Slovenia, Tajikistan, and Turkey).

If, however, appropriate budget authorisation and preparation of a contract profile is included, the number where proper planning is required decreases to eleven countries (Albania, Armenia, Belarus, Bulgaria, Croatia, Georgia, Kazakhstan, Mongolia, Montenegro, Turkey, and Turkmenistan).

Regulation of the post-tendering phase is rare. Only in Albania, Armenia, Hungary, Moldova, Mongolia, Latvia, and Uzbekistan do the national laws request that contracting entities provide for public contract management; in other countries that phase of the procurement process is unregulated. Consequently, in eighteen countries in the EBRD region laws do not contain specific provisions for public contract administration, amendments, or cancellation. Nor do they provide for compensation in cases where a contract has been cancelled.

The evaluation of local procurement practice, based on the legal efficiency concept, confirms the assumption that good laws influence the quality of practice. In the most regulated phase of the public procurement process, the tendering phase, higher results were achieved by local contracting entities than in the pre-tendering and post-tendering phases.

In several countries of the EBRD region, including some of the EU Member States in the EBRD region, the legal framework lacks appropriate regulation of the pre-tendering phase (procurement planning in particular) and the post-tendering phase (public contract management in essence). Figure 6.5 presents the extent to which the national regulatory framework covers the pre-tendering and post-tendering phases of the public procurement process.

In the pre-tendering phase, the assessment of local practice reveals that some of the gaps in the legislative frameworks are compensated for by internal procurement policies and rules. Even in these countries, project-oriented management should be strengthened, in particular by engaging in activities such as preparing an economic justification for purchases, detailed procurement plans, regular market surveys as a tool for proper contract valuation, and mandatory justification for the choice of the procedure.

Examples of best practice in the pre-tendering phase were observed in Albania, FYR Macedonia, and Poland. The main factors behind their successful performance can be found in their strict approach to authorising purchases, setting up the contract profile and integrating procurement planning with the budgeting function. The countries with the lowest scores, Moldova and Belarus, have problems with the assessment and economic justification of needs as well as the technical and financial planning of purchases.

From the strong regulatory base found in the evaluation of local procurement practices in the tendering phase, tweenty countries out of twenty-five (where the feedback on the local practice had been provided) reached the highest level of compliance. In this phase of the procurement process the assessment revealed major problems in local practice in Belarus, B&H, and Moldova. In Moldova, major gaps were observed in notification arrangements, in setting up the submission of tenders and tender evaluation.

Local contracting entities in the countries which achieved a high level of compliance (85 per cent and more), in principle, provided:

- A single point of access approach, in a national official tender gazette or website (the 'one-stop shop' scheme facilitates easier access to public procurement),
- Considerable support for the work of the evaluation committee with training and guidelines, standard tender documents and report templates and ICT solutions,
- The public opening of tenders, promptly after the expiry of the submission deadline,
- A written record of the procurement proceedings, which, with the exception of confidential information, should be made available to tenderers or the wider public upon request.

The results of the evaluation of practice in the post-tendering phase revealed diversification among countries in the EBRD region. In total nine countries scored high compliance (Albania, Armenia, Bulgaria, Croatia, Hungary, Latvia, Poland, Slovenia and Uzbekistan) while Belarus and Romania scored very low and low compliance rates respectively.

Figure 6.4

Prevailing pubic procurement policies as identified in the EBRD Public Procurement Assessment

COUNTRY	Integrity safeguards		Efficiency instruments	
	'Law on the books'	Local practice	'Law on the books'	Local practice
Albania	89	79	81	82
Armenia	75	75	75	81
Azerbaijan	57		53	
Belarus	73	70	71	59
Bosnia and Herzegovina	63	73	66	67
Bulgaria	78	83	74	82
Croatia	72	78	75	78
Estonia	68	79	70	73
FYR Macedonia	61	86	63	80
Georgia	83	83	86	75
Hungary	89	77	88	75
Kazakhstan	73		71	
Kyrgyz Republic	68	71	59	74
Latvia	78	81	76	77
Lithuania	78	75	81	81
Moldova	65	59	78	58
Mongolia	78		72	
Montenegro	82	78	94	80
Poland	65	89	71	85
Romania	59	80	85	67
Russia	77	85	73	78
Serbia	68	67	71	70
Slovak Republic	73	75	71	70
Slovenia	68	78	80	85
Tajikistan	62	81	53	80
Turkey	86	80	79	84
Turkmenistan	13		21	
Ukraine	55	77	56	68
Uzbekistan	38	66	48	80

Notes: The table presents the prevailing public procurement policy in the EBRD countries of operations as identified in the assessment. For some countries the integrity safeguards prevail in the 'law on the books' but are not implemented to the same extent in practice. For other countries in the EBRD region efficiency instruments are the most important element of the public procurement policy, still the assessment revealed that these policies are not always implemented in practice. In the table the prevailing policy in the country is either an efficiency instruments or an integrity safeguards, which are marked in green. Where, based on a survey of local procurement practice, the prevailing policy has been reported as not implemented in practice this is indicated on the table in light blue. For the assessment of the quality of local procurement practice no data was obtained from Azerbaijan, Kazakhstan, Mongolia and Turkmenistan.

Source: EBRD Public Procurement Assessment 2010

In practice among contracting entities, the post-tendering phase (which is commonly unregulated by law in most countries) is regulated by internal procurement policies and rules. However, this does not occur as often as for the pre-tendering phase and not in the whole population surveyed. Lack of appropriate procedures ensuring review and approval for contract modifications or waivers of contractual terms, as observed in Bulgaria, B&H, Estonia, Lithuania, Slovenia, Montenegro, and Turkey is alarming.

Tenders versus specialised procurement procedures

The assessment also considered the flexibility of the public procurement legal framework to provide the background for an analysis of the extent to which specialised negotiation procedures are available to the contracting entities in the region. The 'law on the books' assessment and the local practice survey revealed that, contrary to recommended best practice, in several countries (the Central Asian Republics and Russia in particular), the only procurement procedure available is the lowest price tender. Figure 6.6 presents the results for open tender and negotiated procedures in public procurement in the ERBD countries of operation.

The laws incorporate the explicit requirement that 'an open tender' is the default procurement method in every country in the EBRD region, except for Croatia, Turkmenistan and Uzbekistan. In addition, in most countries of EBRD operation the laws provide not only for tenders but also for negotiated procedures. In such cases, a clear test as to the choice between tendering and negotiated procedures is usually incorporated in law. In a few countries negotiated procedures are not available even for specific or complex contracts (Azerbaijan, Belarus, Kazakhstan, Mongolia, and Turkmenistan). In Russia, the Kyrgyz Republic, Tajikistan, Ukraine, and Uzbekistan, (i.e. countries where the laws do not generally provide for negotiated procedures), a direct contracting procedure is allowed in specific circumstances.

Figure 6.5

Regulation of the pre-tendering and post-tendering phases of public procurement in the EBDR countries of operations

COUNTRY	Assesment of contracting entity's needs		Procurement Planning		Conract management	
	'Law on the books'	Local practice	'Law on the books'	Local practice	'Law on the books'	Local practice
The Balkan Countries and Turkey						
Albania	x	x	v	v	v	x
Bosnia and Herzegovina	x	x	x	x	x	x
Croatia	x	x	v	v	x	x
FYR Macedonia	x	x	v	v	x	x
Montenegro	v	x	v	v	v	x
Serbia	x	x	v	v	x	x
Turkey	x	x	v	v	x	x
The Central Asian Republics, the Caucasus and Mongolia						
Armenia	x	x	v	v	v	x
Azerbaijan	x	–	x	–	x	–
Kazakhstan	x	–	v	–	x	–
The Kyrgyz Republic	x	x	v	v	v	x
Mongolia	x	–	v	–	v	–
Tajikistan	x	x	v	v	x	x
Turkmenistan	x	–	x	–	x	–
Uzbekistan	x	x	x	v	v	x
The Eastern European Countries, including Georgia and Russia						
Belarus	v	x	v	v	x	x
Georgia	v	x	v	v	v	x
Moldova	x	x	v	v	v	x
Russia	x	x	v	v	x	x
Ukraine	x	x	v	v	x	x
The EU Member States in the EBRD Region						
Bulgaria	v	x	v	v	v	x
Estonia	x	x	x	x	v	x
Hungary	x	x	v	v	v	x
Latvia	x	x	x	v	v	x
Lithuania	x	x	v	v	x	x
Poland	x	x	x	v	x	x
Romania	v	x	v	x	v	x
The Slovak Republic	x	x	x	v	v	x
Slovenia	x	x	v	v	v	x

V The issue is regulated **X** Issue is not regulated **–** No data available

Notes: The figure illustrates to what extent the pre-tendering and post-tendering phases of public procurement are regulated, on the example of the assessment of contracting entities' needs, procurement planning, and contract management regulation. The assessment revealed that in several countries in the EBRD region national legislation does not regulate the pre-tendering or post-tendering phases of the public procurement process. However, for some countries one or both of these procurement phases are in practice regulated by local contracting entities.

Source: EBRD Public Procurement Assessment 2010

Figure 6.6

Open tender and negotiated procedures in public procurement in the EBRD countries of operations

COUNTRY	Open tender		Negotiated procedures	
	'Law on the books'	Local practice	'Law on the books'	Local practice
The Balkan Countries and Turkey				
Albania	v	v	v	v
Bosnia and Herzegovina	v	v	v	v
Croatia	v	v	v	v
FYR Macedonia	v	v	v	v
Montenegro	v	v	v	v
Serbia	v	v	v	v
Turkey	v	v	v	v
The Central Asian Republics, the Caucasus and Mongolia				
Armenia	v	x	v	x
Azerbaijan	x	–	x	—
Kazakhstan	x	–	x	–
The Kyrgyz Republic	v	x	v	x
Mongolia	x	–	x	–
Tajikistan	x	v	x	v
Turkmenistan	x	–	x	–
Uzbekistan	x	v	x	v
The Eastern European Countries, including Georgia and Russia				
Belarus	x	v	x	v
Georgia	v	v	v	v
Moldova	v	x	v	x
Russia	x	v	x	v
Ukraine	x	v	x	v
The EU Member States in the EBRD Region				
Bulgaria	v	v	v	v
Estonia	v	v	v	v
Hungary	v	v	v	v
Latvia	v	v	v	v
Lithuania	v	v	v	v
Poland	v	v	v	v
Romania	v	v	v	v
The Slovak Republic	v	v	v	v
Slovenia	v	v	v	v

V The issue is regulated **X** Issue is not regulated **–** No data available

Notes: The figure indicated whether open tender and/or negotiated procedures are available by law in the EBRD countries of operations, and to what extent these procurement methods are applied in local procurement practice.

Source: EBRD Public Procurement Assessment 2010

6.3
Summary of Results and Recommendations

The Balkan Countries and Turkey

National public procurement laws in this region cover the public sector, except in Montenegro, Serbia, and Turkey. Local laws have incorporated the majority of recommended policy instruments; however, the pre-tendering and post-tendering phases of the public procurement process are under-regulated, hindering the efficiency of public procurement. Box 6.1 presents a summary of the results and recommendations for the Balkan Countries and Turkey.

The quality of laws and practice was generally evaluated at a medium to high level of compliance with Core Principles' benchmark, with some exceptions (B&H, Serbia). Public procurement laws are newly revised or recently adopted and fairly comprehensive. If it is possible to trust feedback provided by local practitioners, in terms of legal efficiency, local procurement practice does not differ significantly from the practice in the EU Member States in the EBRD region.

This unexpected result may be partly attributable to divergent perceptions held by local practitioners in relation to what level of compliance is expected or acceptable.

In the Balkan Countries and Turkey the remedies systems seem to be one of the strongest points in the legal framework and practice. The countries have established dedicated public procurement remedies bodies or tribunals of a quasi-judicial nature combined with a set of straightforward and user-friendly remedies rules. However, uncertainty is still present, mainly because of a lack of confidence in the probity of the remedies bodies.

The Central Asian Republics, the Caucasus and Mongolia

National public procurement laws in this region do not cover the public sector; in most cases only government procurement is regulated. As local laws have not yet adopted the majority of recommended policy instruments, all phases of the public procurement process are under-regulated, hindering both the integrity and efficiency of public procurement.

Box 6.1

The Balkan Countries and Turkey – a summary of the results and recommendations

The Balkan countries and Turkey have:

- Average medium to high levels of compliance with the Core Principles' benchmark
- Public procurement laws that promote competition and transparency; incomplete regulation of the pre-tendering and post-tendering phases of public procurement
- General implementation problems in Albania, Montenegro
- High scores for the enforceability indicators due to dedicated mechanisms (simple and 'fit to context')
- Medium procurement capacity but widely standardised tender documents, notices and procurement reports

Areas where there is room for further improvement:

⇒ Developing the economy and efficiency of procurements,

⇒ Developing eProcurement solutions,

⇒ Strengthening procurement capacity.

Box 6.2 presents a summary of the results and recommendations for the Central Asian Republics, the Caucasus and Mongolia.

The quality of the laws and practice was generally evaluated at a low to medium level of compliance with benchmark indicators, with some exceptions (Azerbaijan, Turkmenistan, and Uzbekistan).

The 2010 assessment revealed that current public procurement laws do not entirely reflect the principles of the 1994 UNCITRAL Model Law. Public procurement laws are fragmented and incomprehensive. They are also outdated.

Marks for the performance of local entities are better than the scores in the respective areas of the 'law on the books' assessment. If it is possible to trust feedback provided by local practitioners, in terms of legal efficiency, local procurement practice does not differ significantly from the practice in the Balkan Countries and Turkey or the EU Member States in the EBRD region. This result may be partly attributable to divergent perceptions held by local practitioners in relation to what level of compliance is expected or acceptable.

Review and remedies systems are generally nonexistent. A remedies system reflecting international best practice should replace the existing fragmented regulation of public procurement review. The lack of demonstrably independent and professionally qualified remedies bodies negatively influences marks for enforceability in the Central Asian Republics, the Caucasus, and Mongolia.

The Eastern European Countries, including Georgia and Russia

In the Eastern European Countries and Russia public procurement laws do not cover the whole public sector, leaving a significant number of public entities outside public procurement regulation. Procurement in the utilities sector is covered by laws without exceptions only in Georgia. Box 6.3 presents a summary of the results and recommendations for the Eastern European Countries, including Georgia and Russia.

Except for Georgia, a gap in the adoption and implementation of integrity safeguards was revealed by the assessment and should be underlined as a major weakness of their public procurement laws and practice. In addition, the assessment highlighted a significant gap in the implementation of efficiency measures, mainly because of deficiencies in planning and preparation of public procurement. In such areas as an assessment of procurement needs, alignment of the planning process with budgeting procedures, selecting the procurement method and establishing a contract profile.

Box 6.2

The Central Asian Republics, the Caucasus and Mongolia – a summary of the results and recommendations

The Central Asian Republics, the Caucasus and Mongolia have:

- Average low to medium level of compliance with the Core Principles' benchmark
- Legislation based on outdated standards which is now incomprehensive, except for Armenia
- Incomplete regulation of the pre-tendering and post-tendering phases of public procurement, except for Armenia
- Limited access to information on procurement opportunities and lack of transparency in procurement decisions, except for Armenia, Kazakhstan and Mongolia
- Inadequate, complicated or expensive enforcement

Areas where there is room for further improvement:

⇒ implementing integrity safeguards

⇒ implementing efficiency instruments,

⇒ developing e-Procurement solutions,

⇒ strengthening procurement capacity,

⇒ removing barriers to foreign tenderers.

Efficiency of public procurement cannot be achieved without dedicated monitoring and audit procedures, which are not generally in place or rarely used in practice. Inadequate enforcement mechanisms, specifically the lack of an independent public procurement remedies system was mentioned by local practitioners. Instead of an independent system, public procurement enforcement duties were assigned to the general administration or administrative courts, state authorities entrusted to deal with a variety of public sector issues. Administrative or judicial review is available in almost every country, but costs, delays, and uncertainty seem to undermine potential success in meeting the goals the review and remedies systems are required to achieve.

In terms of procurement capacity building, laws, in general, in this sub-region do not require adequate formal training programmes for procurement staff and, in practice, their training needs are not met.

The EU Member States in the EBRD Region

In the EU Member States in the EBRD region public procurement laws cover national and local government procurement as well as procurement for public law institutions and the utilities sector. The assessment revealed unexpected gaps in the regulation of the pre-tendering and post-tendering phases of public procurement. On the other hand, tiny gaps were identified in adopting and implementing recommended regulatory instruments for the tendering phase. In practice, however, local contracting entities have adopted internal procurement policies incorporating rules on procurement planning and public contract administration, so marks for local practice are exceptionally high.

In the EU Member States in the EBRD region the performance gap is generally smaller than the regulatory gap. Regardless of EU policy bias towards integrity safeguards, local contracting entities, driven by sound financial management and market needs, have aligned their practice with international procurement efficiency instruments, even if these are not mandatory by law.

In legal efficiency, local procurement practice in the EU Member States in the EBRD region, except for Romania, scored at a high level of compliance. Box 6.4 presents a summary of the results and recommendations for the EU member states in the ERBD region.

Even if marks for the quality of local practice in the EU Member States in the EBRD region are good in principle, there has not been full implementation of laws. Detailed analysis has shown that in each country there is insufficient implementation of laws in at least one benchmarked area.

Box 6.3

The Eastern European Countries, including Georgia and Russia – a summary of the results and recommendations

The Eastern European Countries, including Georgia and Russia have:

- Average medium to high level of compliance with the Core Principles' benchmark
- Public procurement laws that promote competition and transparency
- Some general implementation problems
- Low procurement capacities among the local contracting entities, except for Georgia
- Inadequate, complicated or expensive enforcement
- Attacked corruption, while ignoring the need for efficiency

Areas where there is room for further improvement:

⇒ increasing the economy and efficiency of procurements,

⇒ developing e-Procurement solutions,

⇒ strengthening procurement capacity building,

⇒ removing barriers to international trade.

In Hungary, Albania, Montenegro, and Serbia implementation problems were revealed in most of the key benchmark indicators. In other EU Member States (in the EBRD region) lower performance has been identified in three key indicators which were scored highest in the 'law on the books' assessment. Public procurement laws set forth very high standards for competition, transparency, and uniformity measures and local practice has not yet achieved the standards required by law.

The opposite situation was observed in the efficiency and economy indicators, where (with one small exception) the contracting entities pay attention to the 'value for money' principle, without special encouragement from the legislation. In a situation where local practice results prevail, the evaluation of the laws should be assessed as positive. However, this could encourage differences in local practice, as it depends directly on internal procurement policies adopted by individual contracting entities.

In the EU Member States in the EBRD region sophisticated review and remedies procedures have been established.

The region scored well enough in terms of simplicity and certainty of the remedies, but not according to expectations for the speed and cost of the remedies procedures. Moreover, in some countries, the remedies bodies are perceived as legalistic and unprepared to consider sector or market specific issues when reviewing complaints.

Box 6.4

EU Member States in the EBRD region – a summary of the results and recommendations

EU Member States in the EBRD region have:

- Average high to very high levels of compliance with the benchmark
- Public procurement laws which ensure competition and transparency,
- A comprehensive legal and institutional framework,
- Good procurement capacity. (In practice local contracting entities adopt internal procurement rules to increase economy and efficiency of procurement.)

Areas where there is room for further improvement:

⇒ procurement planning,

⇒ methods of contract valuation,

⇒ strengthening e-Procurement solutions,

⇒ public contract management,

⇒ openness to currencies and languages other than the national one.

6.4 Conclusions

Public procurement reform in the EBRD region needs to continue, with special emphasis on standardisation of public procurement planning, pre-qualification and public contract management. The lack of uniform regulation for procurement planning, budgetary approval procedures and contract management are common weaknesses. New legislation should be implemented together with procurement capacity building programmes, aimed at improving the business skills of procurement officers.

The unexpected gap in adopting and implementing integrity safeguards should be eliminated. Potential conflict of interest should be carefully managed and following a code of ethics should be mandatory for all procurement staff. In the Eastern European Countries, including Georgia and Russia, and in the Central Asian Republics, the Caucasus and Mongolia adequate regulation of internal processes should be implemented, including evaluation and auditing arrangements, which have not been voluntarily adopted by local contracting entities.

Utilities sector procurement should be covered by public procurement laws, as there is limited competition in these sectors across the EBRD region, and there are a variety of methods in which national authorities influence the purchasing decisions of these entities (participation in their capital shareholding, representation in supervisory bodies, etc.). The closed nature of the utilities' markets makes it necessary to regulate procurement decisions of the entities in the utilities sector.

Attention must be given , however for different reasons, to the public procurement review and remedies systems. The Balkan Countries and Turkey should increase impartiality and predictability of their remedies bodies and their resistance to corruption. The Eastern European countries, the Central Asian Republics, Russia, and Mongolia should increase their efforts to establish independent and professionally qualified remedies bodies that can undertake their reviews in a transparent, expedient, and objective manner. Improvements in the remedies bodies will diminish the number of cases of corruption and guarantee impartiality and equal treatment of cases. The EU Member States in the EBRD region should consider rethinking their remedies policies in order to increase the speed of the process and decrease costs. Extra effort and initiatives are also required in order to merge different types of review and remedies bodies into dedicated, independent administrative tribunals in order to achieve consistency and predictability of local procurement practice.

Preferential treatment in its various forms should be reduced. In the majority of the Central Asian Republics, the Eastern European Countries, and Mongolia domestic preferences are generally allowed. In the entire EBRD region access to information about procurement opportunities and tender documents could be opened up by implementing mandatory free-of-charge online publication. Tender documents are still prepared exclusively in the official language of the contracting entity, except in Georgia, even when the contract could be of interest to international trade. Electronic communication and submitting pre-qualification documents and proposals electronically is not generally enabled. The assessment results suggest a need to rethink public procurement participation costs, both direct costs such as a tender documents fee or a participation fee, but also indirect costs such as the cost of preparing a too-extensive proposal, an unjustified tender security, or contract performance security.

Whilst several countries in the EBRD region are attempting to conduct procurement using electronic workflows, in only a few countries were such eProcurement solutions found to be mandatory. Procurement records are rarely available to the public electronically, which negatively influences the tenderers' access to procurement information. eProcurement solutions, which could replace all paper-based procedures, are frequently limited to public procurements conducted by central purchasing bodies.

Annex 1

The Public Procurement Process Benchmark

PHASE OF PROCUREMENT CYCLE		BEST PRACTICE
PRE-TENDERING PHASE		The pre-tendering phase includes the programming and planning of a public procurement requirement by the contracting entity. Sound planning is crucial. The decisions made during the pre-tendering phase influence all subsequent stages of the public procurement process. The programming of the procurement should be conducted in line with the fundamental principles of accountability, efficiency, economy and integrity to allow the tendering process to be fair and transparent.
ASSESSMENT OF CONTRACTING ENTITY'S NEEDS	Before the procurement starts the contracting entity needs to clarify its priorities and interests.	1. Public resources linked to public procurement should be used in accordance with intended purposes. 2. Public sector investments should be economically justified. 3. Procurement should be aligned with overall investment decision making. 4. The assessment of the contracting entity's needs should result in a match of good business case and realistic budget.
BUDGET ALLOCATION		The public procurement process should not normally be initiated until the appropriate budget has been allocated or financing for the project is defined.
AGGREGATION OF LOTS	The contracting entity should not divide contracts into small lots, unless it is absolutely unavoidable.	1. Valuation of public procurement contract shall take into account all forms of remuneration, including any form of option and renewals of the contract, any premiums, fees, commissions and interest receivable and shall be valid from the time that the contract notice or invitation is sent. 2. Tender prices shall be requested on the basis of Incoterms CIP, DDU or similar, for foreign goods and ex-factory for local goods. 3. Tender prices for supply of goods must include import duties and taxes payable on imported goods and on directly imported components to be incorporated locally supplied goodsand all costs associated with the supply, delivery, handling and insurance of the goods to the final destination. 4. Tender prices for works and services contracts to be substantially executed in the purchaser's country may be requested inclusive of all duties, taxes and other levies.
ESTABLISHING A CONTRACT PROFILE	It is prerequisite for a contracting entity to establish a sound contract profile to avoid economically unjustified purchase.	1. The contracting entity shall determine what goods, works and services are required to carry out the project, when they must be delivered, what standards are needed and which procurement and contracting procedure is most suitable for each contract. 2. The contracting entity shall complete the overall procurement plan before any procurement begins.
SETTING REQUIREMENTS	The contracting entity decides what competences of tenderer are required to ensure proper delivery of a public contract.	The candidate qualification criteria shall be based entirely upon the capability and resources of prospective tenderers to perform the particular contract satisfactorily, taking into account such factors as their (a) experience and past performance on similar contracts, (b) capabilities with the respect to personnel, equipment, and construction or manufacturing facilities, and (c) financial position.

PHASE OF PROCUREMENT CYCLE		BEST PRACTICE
AWARD CRITERIA	Establishing the award criteria decides what technical features are required to satisfy the contracting entity procurement needs.	1. The tender evaluation aims at identifying the most economically advantageous tender. 2. The contracting entity shall award the contract to the tenderer who meets the appropriate standards of capability and resources and whose tender has been determined (a) to be substantially responsive to the tender documents and (b) to offer the lowest evaluated cost. 3. Factors which may be taken into consideration include, inter alia, the costs of inland transport to the project site, the payment schedule, the time of completion of construction or delivery, the operating and maintenance costs, the efficiency and compatibility of the equipment, performance and quality, environmental benefits, the availability of service and spare parts, and minor deviations, if any. 4. The factors other than price to be used for determining the lowest evaluated tender shall be expressed in monetary terms or, where that is not possible for demonstrable reason, given a relative weight in the evaluation provisions of the tender documents.
SELECTION OF TENDER TYPE AND OR PROCEDURE	The contracting entity makes a decision what procurement procedure is to be employed to ensure the best terms of a public contract.	1. The contracting entity shall obtain goods, works and services through open or restricted tendering procedures, which may include qualification of tenders and two-stage tendering. 2. Other procedure may be appropriate for special circumstances, depending on the nature and value of the goods, works or services to be obtained, the required completion time and other considerations. 3. All procurement methods other than open tendering shall be clearly justified.
SAFEGUARDS	The contracting entity may decide that it is necessary for a tenderer to confirm the validity of the tender with a payment of refundable tender security – the amount of cash that is returned to the tenderer once the procedure is completed.	1. When the contracting entity requires tenderers to provide a tender security: a. The requirement shall apply to all tenderers; b. The tender documents may stipulate that the issuer of the tender security as well as the form of the tender security, must be acceptable to the contracting entity; 2. The contracting entity shall specify in the tender documents any requirements with respect to the issuer and the nature, form amount and the other principal terms and conditions of the required tender security; any requirement that refers to directly or indirectly to conduct by the tenderer shall not relate to conduct other than: a. Withdrawal or modification of the tender after the deadline for submission of tenders; b. Failure to sign the procurement contract if required by the contracting entity to do so; c. Failure to provide a required security for the performance of the contract after the tender has been accepted or to comply with any other condition precedent to signing the procurement contract specified in the tender documents.

PHASE OF PROCUREMENT CYCLE		BEST PRACTICE
		3. The contracting entity shall make no claim to the amount of the tender security, and shall promptly return, or promptly procure the return of the tender security document, after whichever of the following that occurs earliest: a. The expiry of the tender security; b. The entry into force of a procurement contract and the provision of a security for the performance of the contract, if such a security is required by the tender documents; c. The termination of the tendering proceedings without the entry into force of a procurement contract; d. The withdrawal of the tender prior to the deadline for the submission of tenders.
TENDER DOCUMENTS	The tender documents prepared by the contracting entity consists of terms of reference for the public contract.	1. The tender documents must furnish all information necessary to permit tenderers to submit responsive tenders. 2. The tender documents shall clearly define the scope of works, goods, services to be supplied, the rights and obligations of the contracting entity and of the tenderers and the conditions to be met in order for a tender to be declared responsive, and they shall set out fair and non-discriminatory criteria for selecting the wining tender. 3. The tender documents should include an invitation to tender, instructions to tenderers, the form of tender, tender security requirements, the conditions of contract, advance payment guarantees, performance security requirements, technical specifications and drawings, a schedule or requirements for the goods , works and services, and the form of contract. 4. The tender documents should be published on the contracting entity website, whenever possible and appropriate.
TENDERING PHASE		The tendering phase of the public procurement process begins with the publication of contract notice or circulation of invitations to tender.It encompasses the publication of tender documents, collection of the tenders and evaluation of the tenders and finishes with the contract award. It is essential for the tendering phase to ensure fair competition, equal treatment of tenderers and full integrity and transparency of the process.
NOTICES AND INVITATIONS TO TENDER		1. General procurement notice. Contracting entities are encouraged to publish in the appropriate paper or electronic medium as early as possible in each fiscal year a notice regarding their future procurement plans. The general procurement notice should include the subject-matter of the procurement, the planned date of the publication of the contract notice and a statement that interested suppliers or contractors should express their interest in the procurement to the contracting entity. Whenever the suppliers or contractors expressed their interest, the contracting entity should invite them to tender once the intended procurement is started. 2. Contract notice. A contracting entity shall publish a contract notice of intended procurement in the appropriate paper or electronic medium and such notices shall remain readily accessible to the public by electronic means free of charge, through a single point of access, until expiration of the tender submission deadline indicated in the notice. The notice shall contain at least following information:

PHASE OF PROCUREMENT CYCLE		BEST PRACTICE
		a. The subject-matter of the procurement; b. The final date for the submission of requests for participation in the procurement, proposal or tenders; c. The website from which tendering documents relating to the intended procurement may be obtained. 3. Contract award notice. For any procurement a contracting entity shall publish a notice of contract award in the appropriate paper or electronic medium, accessible to the public by electronic means free of charge, through a single point of access.
COMMUNICATION	In the public procurement process communication between the contracting entity and tenderers should be made by a means that provide a record of the content of the communication.	1. (All communication may be executed by post, by fax, by electronic means or by a combination of those means, according to the choice of the contracting authority. 2. Providing for the law of the country the proposals and tenders may be submitted by any means generally available to ensure the validity of the offer. 3. Communication shall be carried out in such a way as to ensure that the integrity of data and the confidentiality of tenders and proposals are preserved within stipulated deadlines.
OPENING OF TENDERS	With the expiry of the deadline for the submission of the tenders the contracting entity collects all received tenders and opens them to start the evaluation.	1. The time for the tenders opening shall be the same as for the deadline receipt of tenders or promptly thereafter, and shall be announced, together with the place for tenders opening, in the invitation to tender. 2. The contracting entity shall open all tenders at the stipulated time and place. 3. Tenders shall be opened in public; tenderers or their representatives shall be allowed to be present (in person or online, when electronic tendering is used). 4. The name of the tenderer and total amount of each tender, and of any alternative tenders if they have been requested or permitted, shall be read aloud (and posted online when electronic tendering is used) and recorded when opened. 5. Tenders received after the stipulated deadline for the submission of tenders shall be returned unopened to the tenderer.
GROUNDS FOR EXCLUSION	The tenderers need to know in advance whether are eligible to be awarded a public contract.	1. Grounds for exclusion must be objectively justifiable and must not discriminate on grounds of nationality. 2. No affiliate of the contracting entity, or of a procurement agent engaged by the contracting entity shall be eligible to tender or participate in a tender in any capacity unless it can be demonstrated that there is not a significant degree of common ownership, influence or control amongst the contracting entity or the contracting entity's agent and the affiliate. 3. Exclu Phase of Procurement Life Cycle sion of tenderer is permitted only on the grounds of: a. non eligibility: bankruptcy or similar, pursuant to administrative suspension or disbarment proceedings, conviction of a criminal offence by the firm or its directors concerning professional conduct, failure to fulfil certain tax and social security obligations;

PHASE OF PROCUREMENT CYCLE		BEST PRACTICE
		b. personal disqualification: lack of financial standing to perform the contract, lack of legal capacity to perform the contract, lack of technical standing to perform the contract, false statement or misrepresentation in providing information (exclusion in discretionary if the information is merely in accurate or incomplete); c. tender's technical inadequacy
LANGUAGES	The tenderers need to know in advance what languages are to be used in the procedure.	1. The tender documents shall be formulated in the contracting entity's official language and in a language customarily used in international trade except where: a. The procurement proceedings are limited solely to domestic suppliers or contractors; b. The contracting entity decides, in view of the low value of the goods, construction or services to be procured, that only domestic suppliers or contractors are likely to be interested. 2. Similar principles should apply to all communication, including proposals and tenders.
AMENDMENTS OF TENDERS, PROPOSALS AND CONTRACTS	In the procedure a contracting entity decides on completeness of the proposal and tenders.	1. A tender must, at the time of opening, conform to the essential requirements of the notices or tender documents and be from a supplier or contractor which complies with the conditions for participation in the tender. 2. Variation of the submitted proposal and tenders or signed contracts should be generally prohibited.
METHODS OF EVALUATION	Tender documents specify the relevant factors to be considered in tender evaluation and the manner in which they will be applied for the purpose of determining the best tender.	1. (The contracting entity shall make the award to the tenderer who has been determined to be fully capable of undertaking the contract and whose tender is either the lowest tender or the tender which in terms of the specific criteria and essential requirements set forth in the notices or tender documentation is determined to be the most advantageous. 2. The tender with the lowest evaluated cost, but not necessarily the lowest submitted price, shall be selected for award.
ABNORMALLY LOW TENDERS	The contracting entity needs to be instructed on how to deal with a tender that is significantly lower than all other tenders received.	1. The contracting entity should be able to ask for clarifications of the tender which is abnormally low. 2. If the clarifications are unsatisfactory the contracting entity should be able to reject the tender or increase the contract security to limit perceived risks.

PHASE OF PROCUREMENT CYCLE		BEST PRACTICE
REJECTION OF ALL OFFERS	The tenderers need to know in advance whether and why the contracting entity may terminate the procedure without the contract award.	1. The contracting entity may reject all offers only if: a. All tenders remain substantially above the budget; b. One tender is received; c. Two tenders with the same price are submitted; d. There is a lack of competition. 2. Lack of competition shall not be determined solely on the basis of the number of tenderers. 3. (Even when only one tender is submitted, the tendering process may be considered valid, if the tender was satisfactorily advertised and prices are reasonable in comparison to market values.
RECORDS OF TENDER EVALUATION	For the reason of accountability the public procurement process shall be recorded.	1. The contracting entity shall maintain a real time record of the procurement proceedings containing, at a minimum, the following information: a. a brief description of the goods, construction or services to be procured, or of the procurement need for which the procuring entity requested proposals or offers; b. the names and addresses of tenderers that submitted tenders, poroposals, offers or quotations, and the name and address of the tenderer with whom the procurement contract is entered into and the contract price; c. information relative to the qualification or lack thereof, of suppliers or contractors that submitted tenders, proposals, offers or quotations; d. the total price and a summary of the other principal terms and conditions of tenders where these are known to the contracting entity; e. a summary of the evaluation and comparison of tenders and proposals; f. if all tenders were rejected statement to that effect and the grounds therefore; g. in procurement procedure involving methods of procurement other than open tendering grounds and circumstances on which the procuring entity relied to justify the selection of the method of procurement used; h. if, in procurement procedure involving methods of procurement other than open tendering, those proceeding did not result in a procurement contract, a statement to that effect and of the grounds therefore; i. a summary of any requests for clarification of the tender documents, the response thereto, as well as a summary of any modification of those documents. 2. The record shall, on request, be made available to any person after a tender has been accepted or after procurement proceedings have been terminated without resulting in a procurement contract. 3. However, except when ordered to do so by a competent court, and subject to the conditions of such an order, the procuring entity shall not disclose: a. information if its disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice legitimate commercial interests of the parties or would be inhibit fair competition;

PHASE OF PROCUREMENT CYCLE		BEST PRACTICE
		b. information relating to the examination, evaluation and comparison of tenders; c. proposals, offers or quotations, and tender, proposal, offer or quotation prices, other than the summary.
STANDSTILL PERIOD	Suspension of the procedure to allow the verification of the compliance of the decision of the contracting entity.	The timely submission of a compliant shall suspend the procurement proceedings for a period of then days, provided that the compliant is not frivolous and contains a declaration the contents of which, of proven, demonstrate that the supplier or contractor will suffer irreparable injury in the absence of a suspension, it is probable that the compliant will succeed and the granting of the suspension would not cause disproportionate harm to the procuring entity or to other suppliers or contractors.
REMEDIES	For the reasons of accountability of the public procurement process the procedure to verify the compliance of the decisions of the contracting entity may be employed.	1. The remedies shall provide non-discriminatory, timely, transparent and effective procedures enabling suppliers or contractors to challenge breaches arising in the context of procurement in which they have, or have had, an interest. 2. The remedies procedures shall be recorded and documentation relating to all aspects of the process shall be retained. 3. The interested tenderer may be required to initiate a remedies procedure and notify the contracting entity within specified time-limits from the time when the basis of the compliant is known or reasonably should have been known, but in no case within a period of less than 10 days. 4. Challenges shall be heard by a court or by an impartial and independent review body with no interest in the outcome of the procurement and the members of which are secure from external influence during the term of appointment. 5. A review body shall have procedures which provide that: a. participants can be heard before the opinion is given or a decision is reached; b. participants can be represented and accompanied; c. participants shall have access to all proceedings; d. proceedings can take in public; e. opinions or decisions are given in writing with a statement describing the basis for the opinions or decisions; f. witnesses can be presented; g. documents are disclosed to the review body. 6. A review procedures shall provide for: a. rapid interim measures to correct breaches and to preserve commercial opportunities; b. an assessment and possibility for a decision on the justification of the challenge; c. correction of the breach or compensation for the loss or damages suffered, which may be limited to costs for tender or compliant preparation; d. completion in a timely fashion.

PHASE OF PROCUREMENT CYCLE		BEST PRACTICE
POST-TENDERING PHASE		The post-tendering phase of the public procurement process starts with the formal signature of the public contract and finishes with the complete delivery of the contract. It is essential for the post-tendering phase to preserve the outcome of the tendering and ensure accountability, integrity and transparency of the public contract delivery.
MANAGEMENT OF THE PUBLIC PROCUREMENT CONTRACT	If not provided for, outcome of the tendering can be annulled by mismanagement of the contract delivery or fraudulent payments.	1. The contracting entity shall administer contracts with due diligence and shall monitor the performance of contracts. 2. Any modification or waiver of the terms and conditions of a contract or granting an extension of the stipulated time for performance (except in cases of extreme urgency brought about by unforeseeable events not attributable to the procuring entity) shall be subject to the review.

Annex 2

EBRD Core Principles for an Efficient Public Procurement Legal Framework

The core principles on an efficient public procurement framework (the 'Core Principles') are based on a review conducted by the EBRD in September 2009. The review looked at international public procurement standards and current best practice relating to the procurement cycle, and all international public procurement instruments presently under revision.

The Core Principles reflect the standards generally regarded as international best practice in the public procurement process. The principles also draw on the practical experience of the EBRD as a direct investor and financier in the region.

The Core Principles are based on the assumption that the primary role of a public procurement law is to accommodate the business process of negotiating a contract in a public governance context. As public procurement constitutes a major economic activity for all governments, regulation is a sensitive component of a country's legal framework, and is an essential supplement to public finance legislation. Since power dynamics within the public procurement process are inherently unequal, regulatory and enforcement institutions are of immense importance. Consequently, the Core Principles focus, in particular, on the issues of objectivity, consistency and enforceability of public procurement regulation.

The principles apply not only to the tendering phase, but also to the pre- and posttendering phases. The contracting entity launching the public procurement needs to ensure that the fundamental principles of public procurement are maintained throughout the entire process.

Modelling the content of a national public procurement framework will depend on the contractual traditions of individual transition countries. At the same time, public procurement legislation needs to comply with international standards to ensure that key internationally recognised public governance values are respected. The Core Principles therefore may serve as an aide-mémoire and a checklist for the drafting process.

1. Accountability

The framework should promote accountability across all stages of the procurement process, balancing public and business dimensions of the process.

In the procurement process, accountability begins with a requirement for a clear chain of responsibility between management, budget, technical, legal and procurement officials. Furthermore, a separation of duties and authorisation should be enforced to ensure a transparent and smooth decision making process. Public procurements should be managed by a dedicated procurement specialist, responsible for coordinating of the entire procurement process and acting as a contact point for all tenderers competing for a contract.

It is essential that the framework require a sound contract profile and procurement plan to be established before the tendering process is launched, to avoid economically unjustified and unnecessary purchases. For large value contracts a special approval process should be in place.

The framework should also require technical specifications of tenders to be based on relevant quality characteristics and/or performance requirements.

The scope for rejecting all valid tenders should be clearly and narrowly defined. In cases where all tenders are rejected, the framework should require the contracting entity to provide reasons, and compensation, if valid tenders are received in response to the terms of reference, whenever appropriate.

A public procurement remedies system should strike a balance between protection of public finance and the right of the tenderer to seek effective remedy or compensation. There should be an independent review body with the authority to impose sanctions upon parties who do not comply with the public procurement values. In resolving disputes, the review body must treat contracting entities and tenderers in a fair and impartial way.

2. Integrity

The PP framework should promote integrity between the procurement function, transparency

in delivering government policy and value for money.

The law should ensure that the behaviour of management and procurement officials is consistent with the public purpose of their organisation. It should contain measures to limit the scope for undue influence and to avoid conflict of interests at all stages of the procurement process.

Disclosure of a public investment and procurement information should be broad but regulated and information should be provided equally to all parties of the process.

In the public procurement process, communication between the contracting entity and tenderers should be made by best available means (preferably electronic) that provide a record of the content of the communication.

The law should limit the opportunities for negotiations or amendments to final tenders and proposals after submission.

3. Transparency

For public procurement to be acceptable to all stakeholders it should be seen to be public, transparent and objective. Any suggestion of an un-disclosed resolution must be avoided. The law should promote the extensive use of e-procurement as one of the methods to prevent collusion with tenderers.

PP regulation should:

- require an effective, official and dependable publicising of the procurement opportunities, through a single point of access;
- underline the importance of advance procurement and contract award notices;
- and require the public procurement process is real-time recorded, preferably through electronic means, accessible to the public free of charge.

A contracting entity should whenever possible publish tender documents free of charge on the contracting entity's website, instead of supplying same by request only and for a fee.

As a rule, tenders should be opened in public opening session promptly after the deadline for the submission of tenders.

A contract award notice should be published for all contracts finalised by the contracting entity.

4. Competition

To begin with, the PP framework should promote fair competition and prevent discrimination in public procurement. Tenders and tenderers of equivalent status should be given equal treatment, without regard to nationality, residency or political affiliation. The law should not allow domestic preferences.

For regular understanding of grounds for exclusion, the PP framework should distinguish between the public procurement eligibility criteria, qualification and technical requirements to be met by tenderers.

3The law should comprise minimum tender deadlines to ensure a level playing field and should demand consistency in its application throughout the procedure. In addition, where tenderers are eliminated, a sufficient standstill period or an alternative procedure should be in place to provide for immediate conservatory and protective measures.

Secondly, the law should encourage competitive contract through the tendering process. Sound PP law should permit both tendering and competitive negotiations, wherever appropriate, to ensure fit-for-purpose outcome. Selection of tender type or procedure should be based on the value of the tender, specifics of the purchase and the contract profile. The law should provide clear tests for the choice of procedure – it should be explicit to both the contracting entity and potential tenderers what circumstances may justify exceptions to open tender arrangements.

To ensure genuine competition takes place it is essential for the law to require tendering processes to stipulate reasonable technical specifications, requirements and suitable award criteria, adequate to the scope and value of the contract prior to embarking on the tendering process. The law should enable potential tenderers to decide quickly whether to tender. Confusions or complexities in the tender documents may result in too few or too many submitted tenders or a biased evaluation.

For the same reason, the contracting entity should be instructed on how best to deal with an abnormally low tender – it should be able to ask for clarifications and either reject the tender or increase the contract security to mitigate or limit perceived risks.

5. Economy of the process

The law should enable public procurement to be accomplished professionally in a reasonable time. Formal requirements essential for transparency reasons should be kept simple and the costs low. All of the costs involved in the public procurement process are eventually paid for by taxpayers' money. High costs of participation in the procurement procedure (including tender document fees, cost of certified statements and translations, inappropriate cost of producing a tender excessive in size, disproportionate tender security and so on) will increase the cost of contract and diminish the efficacy of the process. Enforcement costs will reduce the profit margin on the contract and may negatively impact the quality of contract delivery.

The law should grant the tenderers an ability to submit an inquiry or tender in a confidential but simple and time and cost-effective manner.

The PP law should encourage aggregation of lots, and whenever possible, the use of a life cycle costing for the purchase of goods and works. It should instruct the contracting entity in the pre-tendering phase not to divide contracts into small lots unless it is absolutely unavoidable. Aggregation of lots also allows for a 'double check' of the accuracy of the needs assessment.

6. Efficiency of the public contract

Sound programming and planning of the procurement is crucial to agree a cost effective and accurate public contract. An efficient public contract starts with an accurate and unbiased assessment of the contracting authority's needs. Once this his been achieved, the public procurement process should not normally be initiated until the appropriate budget has been allocated or a source of financing is defined.

The PP framework should ensure value for money is achieved, and promote methods of tender evaluation considering both the quality and cost of purchase.

Contract terms and conditions should be fair and balanced and reflect the best available business practice. The law should clearly identify when a contracting entity may obtain a tender deposit or contract security, and specify relevant limits.

The law should mandate proper contract management. The mismanagement of the contract or fraudulent payments may increase the costs of the contract. Variations to the signed contract should be permissible, once carefully scrutinised from an integrity perspective, and should be prohibited when amendments significantly alter the economic balance of the contract in favour of the tenderer in a manner which was not provided for in the tender and terms of the initial contract.

7. Proportionality

Effective and efficient procurement regulation calls for a proportionality rule. Although these core principles apply to any public procurement, the formality and extent of the procedure should reflect the scope and size of the procurement. The contracting entity should align the value and scope of the contract with a choice of the contract type and formal tendering procedure.

The PP law should comprise cascaded (monetary and other) thresholds to instruct contracting entities how to produce an effective procurement strategy for a public contract.

The proportionality test should also be employed to decide on the use of languages; the contracting entity should allow proposals, offers or quotations to be formulated in a language customarily used in international trade except where, due to the low value of the goods, works or services to be procured, only domestic tenderers are likely to be interested.

8. Uniformity

For public procurement to be feasible, the PP regulation should be unitary, comprehensive and cover all public contracts. Notwithstanding, state/municipal budget contracting authorities and the entities in a utilities sector may have very different requirements in terms of function and commitments and an effective PP framework should be clear in determining the requirements of contracting entities of a different status.

At the same time, the PP framework should limit the exemptions from regulation to contracts outside the public procurement domain for evident and justified reasons, specifically defence procurement, special housing arrangements or development projects. For example, in providing finance to development and transition projects, International organisations are bound by their charters to observe special arrangements in relation to procurement, and have as a result developed special procurement policies, quality assurance systems and methods for publishing information pertaining to procurement opportunities. For this reason, all

international PP regulation instruments, including the WTO Government Procurement Agreement, EU Treaty and UNCITRAL Public Procurement Model Law recommend that national procurement laws should not apply to public contracts awarded pursuant to international rules.

9. Stability

To make the process efficient, stakeholders must learn their roles, rights and obligations, within a stable legislative framework. Any market with a public procurement sector cannot operate smoothly if there are frequent changes to the law.

10. Flexibility

At the same time, the framework should be capable of flexible so as to accommodate the changing market. This is often best done through secondary legislation. Rules of the procedure should be reasonably constant, with a primary legislation constituting the basic principles and general framework of the procurement process. Secondary legislation should model specific matters, giving sufficient instruction to produce satisfactory tender documents and procurement reports.

11. Enforceability

Public procurement law should be easy to enforce. Regulatory mechanisms should be able to assess the compliance of the contracting entities and employ corrective measures when necessary.

The dedicated national PP regulatory agencies should be professional, independent and provide audit and monitoring of the PP sector to raise the profile of procurement and drive up PP sector capability.

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