

OFE Procurement Monitoring Report:

**EU Member States practice of referring to specific trademarks when procuring
for Computer Software Packages and Information Systems between the months of
February and April 2011**

September 2011

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www.openforumeurope.org

info@openforumeurope.org

t: +44 1372 815168

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Summary

For the past three years, OpenForum Europe (OFE) has published a report on the European Union (EU) Member States' practice of referring to specific trademarks when procuring for computer software packages and information systems. In 2011, OFE continued this practice and monitored tender notices between the months of February and April. The findings of this monitoring are the basis of this report.

As determined by Art. 23(8) of Directive 2004/18/EC, which consolidates the European Court of Justice's (ECJ) jurisprudence on the matter¹, “technical specifications shall not refer to a specific make or source, or a particular process, or to trademarks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products”. According to the law, such references can only be made if justified by the subject-matter of the contract and always accompanied by the expression “or equivalent”.

This monitoring exercise examined 441 invitations to tender by Contracting Authorities (CA) procuring for computer software products. It was found that more than 1 in 10 notices included technical specifications with explicit references to trademarks.

These findings led us to conclude that engaging in a more comprehensive and global analysis of the EU's procurement market would show that the use of discriminatory technical specifications is a widespread practice within the EU.

In light of these results, the forthcoming revision of the EU Public Procurement Directives should take into account discriminatory practices persisting in the procurement market and to which the current legal framework contributes to. Such practices are not only against the principles of competition and the fulfilment of the Single Market, but are also an obstacle to SMEs willing to compete in a market that should be open, innovative and transparent.

¹ Cf., Cases C-359/93 *Commission of the European Communities v. Kingdom of the Netherlands (UNIX)* [1995] ECR I-157 and C-59/00 *Bent Moustén Vestergaard v. Spøttrup Boligselskab* [2001] ECR I-9505.

Introduction

a) Public Procurement as an Economic Activity

The regulation of public procurement in the EU exposes an economic and a legal approach to the integration of public markets. On the one hand, the economic approach aims at bringing about competitiveness in the relevant product and geographical markets, a more efficient use of public money and, ultimately, an improvement in both the value of taxpayer's money and the allocation of resources. The legal approach, on the other hand, sees public procurement as a necessary ingredient for the fulfilment of the Single Market².

Public procurement accounts for an important proportion of economic activity in the EU, over € 2'200 billion or around 19,4% of the EU's GDP in 2009³. EU requirements do not apply to contracts below certain thresholds, and to certain exempt sectors. So, only a part of this value, around € 400 billion, represents the amount of procurement for which calls for tender have been published in the Supplement to the Official Journal of the European Union (OJEU) in 2009⁴. This number shows, when compared to previous years, that procurement activity advertised on an EU wide basis has been increasing (see Table 1).

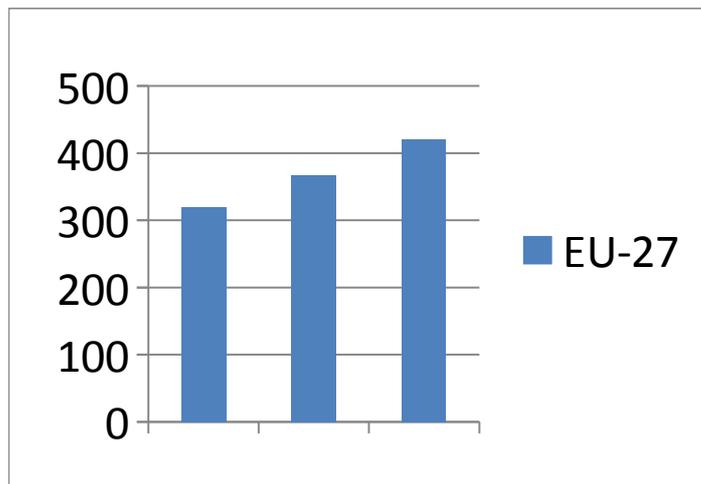


Table 1: The estimated value of tenders in billions of euros published in TED (2005, 2007 and 2009)

b) A Transparent and Open Public Procurement Market

Transparent and predictable procurement procedures improve economic efficiency by promoting competition amongst economic operators. It is important to have an idea of the magnitude of the potential savings that may result from an improved, open and competitive public procurement market. A Report on the Evaluation of Public Procurement Directives by *Europe Economics*⁵ shows that the balance of the costs of complying with the Directives and the benefits

² Cf., COM(85) 316 - White Paper from the Commission to the European Council on the completion of the Internal Market.

³ Estimates derived from Eurostat national accounts.

⁴ 2009 Public Procurement Indicators, available at

http://ec.europa.eu/internal_market/publicprocurement/docs/indicators2009_en.pdf

⁵ European Economics (Sept 2006): Evaluation of public procurement Directives

http://ec.europa.eu/internal_market/publicprocurement/docs/summary_en.pdf

has been significantly positive. CAs spend on average between 5-8% less than they had originally earmarked⁶. It also shows that, in general, the higher the number of bids, the greater the savings realised.

Also, according to a study from the European Commission⁷, to follow EU rules on transparency and openness in the public markets can have a “tangible macroeconomic impact”. This study suggests that savings in government procurement expenditures can translate into € 15-30 billion of gains which, consequently, raises employment numbers and the GDP.

c) OpenForum Europe (OFE) and Public Procurement

OFE and its members have a profound interest in the openness, transparency, and efficiency of the European software market. Recent initiatives from the EU seem to suggest a similar standpoint. For instance, the European Commission launched a public consultation on the modernisation of the Public Procurement Directives in the form of a Green Paper,⁸ the European Parliament will adopt an own-initiative report on the same matter⁹ and Action 23 of the Digital Agenda for Europe¹⁰ proposes the creation of detailed guidelines on how to make best use of ICT standards in tender specifications. Taking into account the fact that public procurement policy must ensure the most efficient use of public funds, with a view to supporting SMEs and job creation, the forthcoming review of public procurement legislation must ensure more flexible, transparent and competitive rules.

OFE is keen to see that the specific needs of the ICT sector are considered in these initiatives. In view that Public Sector spending on ICT in the EU is very significant, OFE defends that open procurement and, in particular, open IT procurement would represent very significant savings and enable a wider range of suppliers to compete for tenders, increasing competition (and benefiting SMEs).

Over the last few years, we have seen a number of notices in the Official Journal of the EU (OJEU) whereby CAs seeking to purchase IT supplies, when defining the technical, functional and other performance requirements of the supplies or services they require, make reference to specific trademarks, thus discriminating against a significant part of the market. This study aims at bringing this widespread and unchecked practice to the public forum.

⁶ European Economics (Sept 2006): Evaluation of public procurement Directives

http://ec.europa.eu/internal_market/publicprocurement/docs/summary_en.pdf

⁷ Internal Market Scoreboard (July 2009)

http://ec.europa.eu/internal_market/score/docs/score19_en.pdf

⁸ COM(2011) 15 final – Green Paper on the modernisation of EU public procurement policy towards a more efficient European Procurement Market.

⁹ European Parliament's Draft Report [2011/2048(INI)] on the Modernisation of Public Procurement

¹⁰ COM(2010) 254 – Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions on a Digital Agenda for Europe.

Legal Background

a) EU Public Procurement Directives

The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law is subject to the respect of the principles of the Treaty on the Functioning of the European Union (TFEU) and in particular to the principles of freedom of movement of goods, of establishment, to provide services and to the principles deriving thereof, such as the principle of equal treatment, non-discrimination and transparency¹¹.

If the value of a public contract is above a specific threshold, then the CAs intending to award that contract have to, besides respecting the general principles of the Treaty, follow the procedure laid down in the Public Procurement Directives.¹² Invitations to tender for these contracts also have to be published in the Supplement to OJEU, which online access is made available through TED. The specific threshold criteria are defined in the Directives and, as of the 1st of April 2011, the minimum threshold was € 125 000 (value is expressed in EUR, excluding VAT)¹³.

The Directives do not apply either to contracts falling below the relevant thresholds nor to a set of special exemptions. Nevertheless, it is well established that the award of these contracts still has to comply with Treaty principles, such as the principle of transparency or of non-discrimination. In July 2006, the Commission published an interpretative communication on the application of the general principles of EU law to the award of public contracts which fall outside the scope of the Public Procurement Directives¹⁴. The communication explains the basic standards of transparency and impartiality that must apply to the advertising, award and review of such contracts.

b) Technical Specifications

Public contracts, above € 125 000, having as their object the acquisition of software packages or information systems fall under the remit of Directive 2004/18/EC¹⁵. According to Art. 23(8) of the directive, public purchasers may draw up technical specifications, but they must allow procurement to be opened up to competition¹⁶. The thrust of these rules is to ensure the use of non-discriminatory specifications which allow all potential contractors, suppliers or service-providers to meet the requirement and prevent artificial restriction of potentially successful tenderers. In this respect, they do no more than confirm the application of the Treaty principles to the use of discriminatory technical specifications.¹⁷

¹¹ Article 2 of Directive 2004/18/EC.

¹² 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 sectors (OJ 2004 L134).

¹³ Regulation 1177/2009 of 30 November 2009 amending Directives 2004/17/EC, 2004/18/EC and 2009/91/EC of the European Parliament and of the Council in respect of their application thresholds for the procedures for the award of contracts (OJ 2009 L314/64).

¹⁴ Commission Interpretative Communication of 1 August 2006 on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives (OJ 2006 C 179).

¹⁵ Article 7 of Directive 2004/18/EC.

¹⁶ Cf., Recital 29 and Article 23 of Directive 2004/18/EC.

¹⁷ Cf., Case 45/87 *Commission of the European Communities v Ireland* [1988] ECR 4929.

The main Treaty provision is contained in Article 34 TFEU (ex Article 28 TEC). It prohibits all quantitative restrictions as well as any other measures having an equivalent effect of distorting competition. The definition contained in Article 34 TFEU is a broad one and encompasses “all trading rules [or measures] enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially intra-Community trade”.¹⁸

Article 34 TFEU has been used to challenge the technical specifications set by CAs. In the *UNIX* case,¹⁹ the CA published a tender notice in the OJEU concerning the supply and maintenance of a meteorological station. Its general terms and conditions stated that the operating system required was *UNIX*, which is the name of a software system developed by Bell Laboratories of ITT (USA) for connecting computers of different makes. The ECJ found, however, that the Directives provide that any reference made to a specific make or source, or a particular process, or to trademarks,²⁰ patents, types or a specific origin or production is not admitted. Only under exceptional circumstances, where it is not possible to provide a sufficiently detailed and intelligible description of the subject of the contract, can references be made. In this case, the reference must be accompanied by the words “or equivalent”²¹. The Commission, therefore, challenged the CA for failing to include those words in breach of the Directive and of Article 34 TFEU.

To this end, it must be possible to submit tenders which reflect the diversity of technical solutions. Accordingly, it must be possible to draw up the technical specifications in terms of functional performance and requirements and, when reference to standards is not possible, equivalent arrangements must be considered by CAs.²²

In conclusion, the Public Procurement Directives make explicit that technical specifications shall afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening up of public procurement to competition. Article 23 of Directive 2004/18/EC specifically prohibits the manipulation of the use of technical specifications in line with the ECJ’s jurisprudence in this context.

¹⁸ Case 8/74 *Procureur du Roi v Dassonville* [1074] ECR 837

¹⁹ Case C-359/93 *Commission of the European Communities v Kingdom of the Netherlands (UNIX)* [1995] ECR I-157

²⁰ In this case, UNIX is a trademark.

²¹ Article 23(8) of Directive 2004/18/EC

²² *Cf.*, Recital 29 and Article 23 of Directive 2004/18/EC

Results

In the monitoring process, 441 tender notices were scanned for trademarks. In 56 tender notices out of 441, obvious reference to trademarks was included. In other words, 13% (0.13) of the total screened notices, include technical specifications which make reference to trademarks (see Table 2).

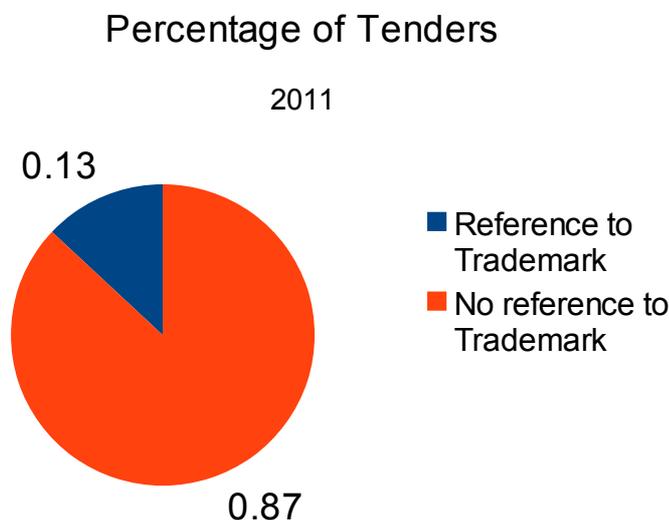


Table 2: Tender Notices breakdown by reference to Trademarks (2011)

In the 2008 and in 2009 monitoring exercises, the number of scanned tender notices was smaller, 136 and 171 tender notices respectively (see Table 3 and 4). The percentage of tender notices using references to trademarks was of 25% (34 out of 136) in 2008²³, and 22% (37 out of 171) in 2009²⁴. In 2010 and in 2011 the sample was widened to 441 and the criteria was refined .

The reason for using a bigger sample in 2010 and 2011 was due to the fact that in this past two years, the number of tender notices published in the OJEU was more than double than in the previous years. This increase might be linked to the fact that in 2009 the Member States had to transpose Directive 2007/66/EC²⁵. This new legislation substantially amends the Remedies Directives²⁶. This new regimen departs from the position whereby aggrieved bidders were restricted to damages once a contract had been awarded in breach of the rules. Now, the courts will be empowered to declare the contract ineffective for any Public Sector and Utility contracts awarded in

²³ http://www.openforumeurope.org/openprocurement/open-procurement-library/ofe_procurement_monitoring_report_final_16_october_2008.pdf/view

²⁴ http://www.openforumeurope.org/openprocurement/open-procurement-library/OFE_Procurement_Monitoring_Report_2009.pdf/view

²⁵ Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/655/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ 2007 L335).

²⁶ 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 (OJ 1989 L395) and 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 (OJ 1992 L76).

breach of EU public procurement rules. CAs or utilities that have acted in breach of those rules will also be liable to financial penalties.

The new legal framework increases and shifts the procurement risk burden, given that the CAs will bear the burden rather than the claimant. CAs might be more inclined to comply with the EU public procurement rules such as the publicity provisions by which invitations to tender above a certain threshold have to be advertised in a EU-wide level.

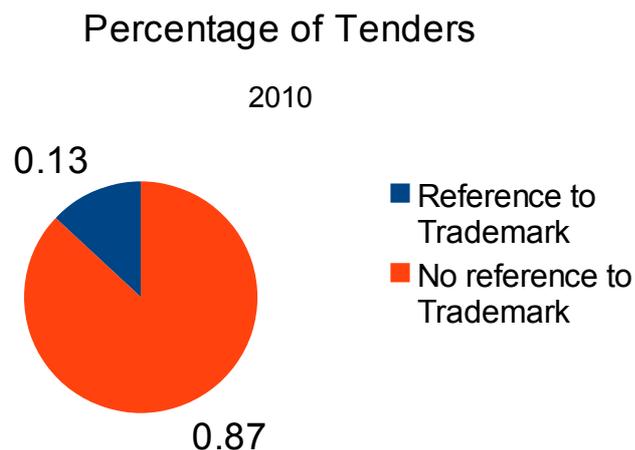


Table 3: Tender Notices breakdown by reference to Trademarks (2010)

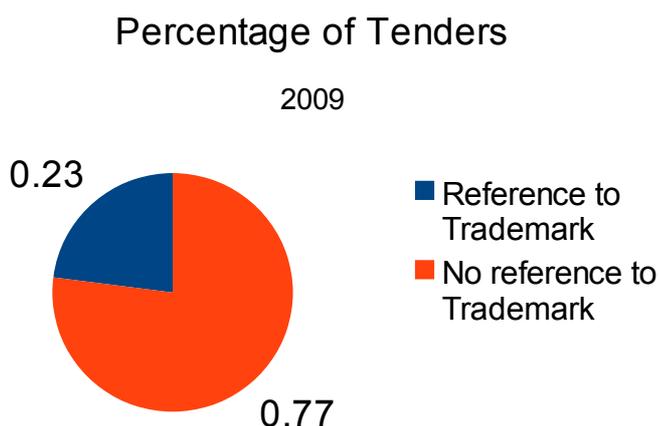


Table 4: Tender Notices breakdown by reference to Trademarks (2009)

Percentage of Tenders

2008

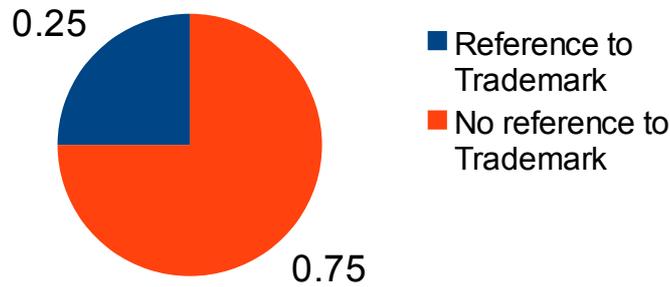


Table 5: Tender Notices breakdown by reference to Trademarks (2008)

a) Tender Notices Breakdown by Reference to Specific Trademarks

The monitoring exercise shows that, in 2011, 29 invitations to tender specifically made reference to Microsoft products. In contrast to other tender notices also requiring branded products, the reference to Microsoft supplies amounts to more than 52% (see Table 5).

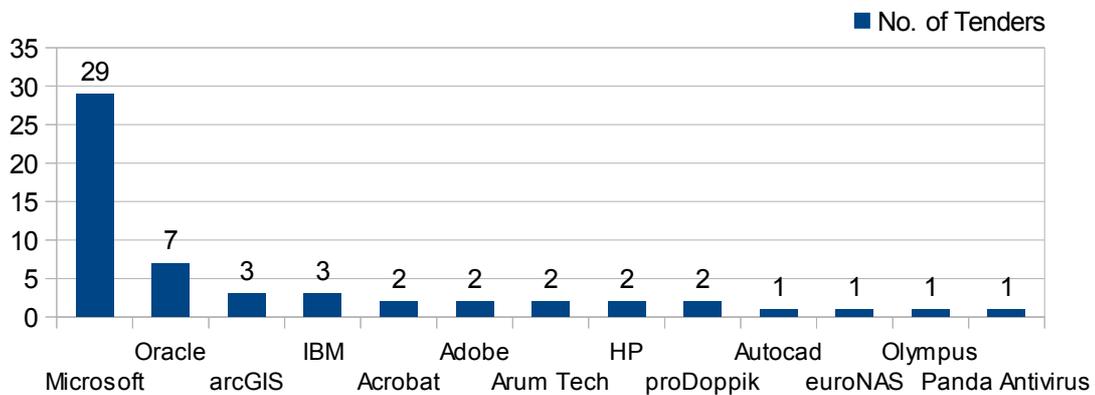


Table 6: Tender Notices breakdown by reference to Specific Trademarks (2011)

b) Tender Notices Breakdown by Countries Referring to Trademarks

In 2011, the highest number of invitations to tender with specific references to trademarks were issued by CAs coming from Poland, Germany and France (see Table 6).

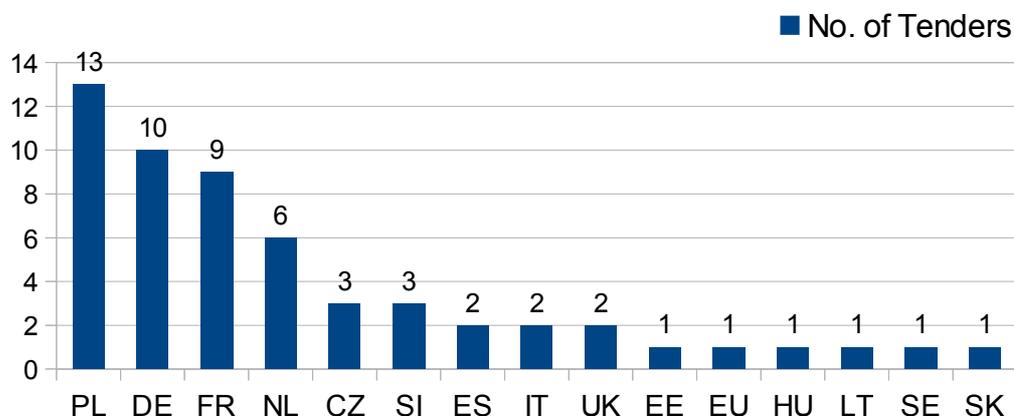


Table 7: Tender Notices breakdown by Countries referring to Specific Trademarks (2011)

As noticed in the 2010's report, Poland, Germany and France continue to be the least compliant Member States. Currently holding the rotating presidency of the Council of the European Union, it is advisable that Poland reviews its practices in light of the ongoing legislative revision of the public procurement framework.

This monitoring exercise also detected an invitation to tender by an European Union Directorate-General (*i.e.*, EuropeAid) where, to set out the technical specifications of the required product, reference to a specific trademark was made. EuropeAid launched in 2007 the Development Cooperation Instrument (DCI) which has a 7-year financial endowment of up to € 17 000 billion earmarked for the elimination of poverty in developing countries.

Under the framework of this instrument, EuropeAid issued on the 18th of February 2011 a tender for the supply of ICT and identification systems hardware, operating and application software for 2 ASEAN Member States, Cambodia and Vietnam. On closer study of the technical specifications that tenderers are required to offer EuropeAid, explicit reference to MS Windows and Linux Red Hat is made.

The legal basis for European institutions' procurement is not the same as the procurement rules applicable to Member States. It currently consists of the relevant articles of Regulation 1605/2002 laying down the rules for the establishment and the implementation of the general EU budget (the "Financial Regulation")²⁷ and of Regulation 2342/2002 implementing the Financial Regulation (the "Implementing Regulation").²⁸

²⁷ Council Regulation (EC, Euratom) 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities, *OJ [2002] L 248/1*.

²⁸ Commission Regulation (EC, Euratom) 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, *OJ [2002] L 357/1*.

Despite some differences, the directives applicable to Member States and the regulations applicable to EU institutions are largely similar, and the Financial and Implementing Regulations frequently refer to the Public Sector Directive. Together, the directives and the regulations set forth a framework for public procurement that seeks to ensure that contracting authorities comply with several fundamental principles of EU law, in particular equal treatment, non-discrimination, transparency, and proportionality.

c) Tender Notices Breakdown by Choice of Procedure

This report also analysed the choice of procedures used to award contracts (see Table 7). Besides the use of the default procedure, which is the open procedure whereby all economic operators can submit a tender, it was also noticed a significant recourse to procedures which can only be applied under exceptional circumstances (*i.e.*, Negotiated procedure²⁹ with and without competition and the competitive dialogue³⁰).

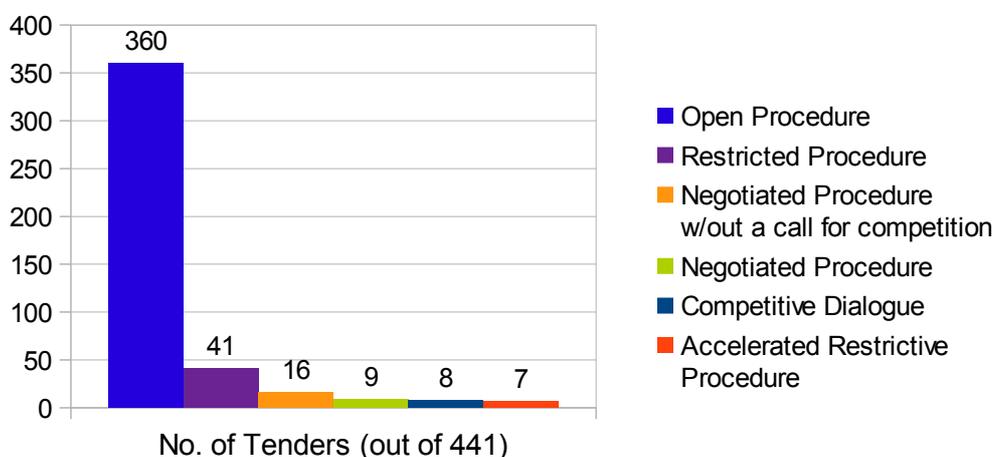


Table 8: Tender Notices by Choice of Procedure (2011)

In comparison to the results of the reports from previous years, the percentage of tenders by recourse to special procedures seems to be stable. However, doubts persist regarding the legitimacy to use such procedures. Being derogations to the general regime and limiting the number of bids, they can only be used if exceptional requirements are fulfilled.

²⁹ Arts 30 and 31 of Directive 2004/18/EC

³⁰ Art. 29 of Directive 2004/18/EC

Is 13% a relevant figure?

Yes it is. While this report clearly shows that there is a EU-wide level practice of CAs making reference to specific trademarks when seeking to purchase IT supplies, this is merely the “tip of the iceberg”.

To complete this project within a limited budget the following criteria were applied:

- Language: Monitoring tender documents in 23 official EU languages is a daunting task. This has been undoubtedly the most important factor limiting the scope and results of the monitoring. Given that Bulgarian and Greek do not use a Latin alphabet, tender notices from these countries were not considered, since the use of symbols made the identification of trademarks very difficult;
- The EU threshold: The monitoring covered only tenders above the minimum threshold, thus excluding a significant proportion of tenders advertised only at a national level. Eurostat calculates the proportion of total procurement that is published in the OJEU. According to the most recent calculation, in 2009 the value of calls for tender published in the OJEU was only 18.3% of the total value³¹. As a result, a significant percentage of invitations to tender were not considered;
- Scope: This report only seeks to identify the appearance of trademarks; other examples of possible discrimination, such as the examples singled out in Directive 2004/18/EC such as “patents, types or a specific origin”, were not considered. The scope of the report was also only focused on software packages and information systems, excluding the purchase of other supplies, the execution of works or the provision of services;
- Time-frame: Only a three month snapshot was analysed for this report
- Discriminatory wording: The monitoring consisted of a simple scanning of contract notices texts for trademarks, given only a cursory understanding of the full text, this may have resulted in the omission of possible discriminatory wording of contracts notices in general (*e.g.*, some invitations to tender may require technical specifications that, even though no reference to a trademark is made, can only be fulfilled by vendors of branded supplies).

Considering that public procurement amounts to about 19.4% of the economic activity in the EU, an unchecked widespread discriminatory practice can have a very important impact in the market. In this view, bearing in mind the specific limitations of this report, 13% is undoubtedly a relevant figure.

³¹ http://ec.europa.eu/internal_market/publicprocurement/docs/indicators2009_en.pdf

Recommendations

In light of the up-coming modernisation of the EU Procurement Rules, these results suggest that any legislative revision should take into account the discriminatory practices happening in the procurement market. The EU decision-makers have to take a series of measures to open up public procurement to all economic operators, including SMEs, by removing artificial obstacles and improving procedures and encouraging the widest possible participation. By ensuring that procurement policies and processes do not discriminate against certain types of business models or suppliers, the existing barriers to entry will be reduced.

Barriers to exit should also be taken into account. If these barriers persist in the market, this may have the effect of allowing inefficient suppliers to remain in the market. It may persuade CAs to apply exceptional awarding procedures to extend existing contracts, instead of inviting other economic operators to bid. As derogations of the principles of competition, these procedures should only be applicable under exceptional circumstances.

The existing rules, in combination with the implementation measures at national and regional levels, plus the set of soft law communications put forward by the Commission, have given rise to a confusing and far from transparent set of rules. Incorrect implementation of the Directives by the Member States leads to the misapplication of procedural rules and to inaccurate, even if unwilling, choice of contract awarding procedures.

The review of the EU Procurement Rules should lead to more transparency, openness and more competition. This should also be reflected in the Commission's specific procurement rules.

Finally, as a result of this report, OFE has recommended its members to engage with procurement authorities across the EU to ensure that: (a) no predatory behaviour occurs and (b) that they encourage public authorities to mandate that procurement follows open standards – which is the crucial issue for software interoperability. In this domain, industry and government should be aligned. Openness, transparency, and efficiency serves all stakeholders.

Methodology

This report has been based on a monthly monitoring of public procurement notices available on Tenders Electronic Daily website (TED) between the 1st of February and the 30th of April 2010.

The Directives only apply when CAs intend to award a contract above a specific value. Only the tenders above the relevant threshold have to be published in the Supplement to the OJEU, which online access is made available through TED. The specific threshold criteria are defined in the Directives and, as of the 1st of April 2011, the minimum threshold was € 125 000 (value is expressed in EUR, excluding VAT)³².

Bearing in mind that TED contains all the public procurement invitations to tender published in an EU-wide level, which amounts to around 1000 notices per day; specific browsing criteria were employed. So, from a population of thousands of invitations to tender, a sample was found using the following criteria:

- Common Procurement Vocabulary (CPV)³³: code 48000000 which corresponds to the division “software package and information systems”;
- Publication date: from the 1st of February to the 3rd of April 2011;
- Type of contract: public supply contracts as defined by Article 1(2)(c) of Directive 2004/18/EC;
- Countries: all Member States of the European Union except those countries which official languages use a non-Latin alphabet (*i.e.*, Bulgaria and Greece);
- Type of Authority: all admissible CAs as defined by Article 1(9) of Directive 2004/18/EC, excluding the Armed Forces and CAs exercising one or more of the defined activities in the utilities sector³⁴. When the CA is an European Institution or an agency (in practice a department from the Commission), the applicable framework consists of the relevant articles of the Financial Regulation³⁵ and the rules for the implementation of the Financial Regulation (“the Implementing Rules”);³⁶
- Procedure: the three primary procedures (*i.e.*, open procedures, restricted procedures and negotiated procedures) and the new procedure, the competitive dialogue.

³² Regulation 1177/2009 of 30 November 2009 amending Directives 2004/17/EC, 2004/18/EC and 2009/91/EC of the European Parliament and of the Council in respect of their application thresholds for the procedures for the award of contracts (OJ 2009 L314/64)

³³ Regulation 2195/2002/EC of the European Parliament and of the Council of 5 November 2002 on the Common Procurement Vocabulary. The CPV is a classification system that standardizes the references used by CAs to describe the subject matter of their contracts. The CPV attaches to each numerical code a description of the subject of the contract.

³⁴ These public contracts are covered by Directive 2004/17/EC

³⁵ Council Regulation 1605/2002/EC of 25 June 2002 concerning public contracts concluded by the Commission on its own account.

³⁶ Commission Regulation 2342/2002/EC of 23 December 2002 concerning public contracts concluded by the Commission on its own account and corresponding articles of the Financial Regulation.

The sample includes invitations to tender from all Member States of the EU except from Bulgaria and Greece. Seeing as the official written languages of these two countries do not use Latin symbols and, consequently, the impossibility of identifying a trademark within a notice text, tenders from these countries were excluded from this monitoring exercise.

For the purpose of understanding the regular behaviour of CAs when calling for bidders, the exceptional regimes were not considered since they would not have a relevant impact in this analysis. The utilities sector was not considered in view of the fact that it enjoys a more flexible set of procedures and is, in the whole, a separate regime. Defence procurement was also not considered. Although it represents a significant proportion of government expenditure, it usually remains outside the scope of the Directives or is, at least, subject to an alternative framework³⁷.

The monitoring consisted on scanning, for each month separately, 147 contract notices texts for trademarks. In total, 441 notices were scanned. This number is about half of the total number of notices available on the TED website after applying the conditions described above.

³⁷ Cf., Article 10 of Directive 2004/18/EC according to which, the Public Sector Directive does not apply to contracts awarded by CAs in the field of defense where the products are subject to the provisions of Article 296(1)(b) TFEU.

OpenForum Europe

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www.openforumeurope.org

info@openforumeurope.org

t: +44 1372 815168

Brussels' Office:

Boulevard Bischoffsheim, 36

1000 Brussels

Belgium

t: +32 (0) 2 210 02 80

OpenForum Europe, Ltd.

Registered in England under the Number: 5493935

VAT Reg. No. GB 864 6576 78