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OFE Procurement Monitoring Report 2013 – 1st Snapshot

An insight into EU Member States' practice of referring to specific trademarks when procuring for Computer Software Packages and Information Systems

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EXECUTIVE SUMMARY

For the fifth consecutive year, OpenForum Europe (OFE) reports on the European Union (EU) Member States' practice of referring to specific trademarks when procuring for computer software packages and information systems.

Such a practice limits competition by excluding specific suppliers from placing a bid for a contract. Art. 23(8) of Directive 2004/18/EC, which consolidates the European Court of Justice's (ECJ) jurisprudence on the matter¹, states that “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 terms “or equivalent”.

The latest monitoring exercise examined 841 documents issued by contracting authorities procuring for computer software products over a three months period, from April 1st to June 30st 2013. It found that 17% of tender notices included technical specifications with explicit references to trademarks. This is only a slight improvement to last report's 19%, and the rate of “problematic” references (see p.8) remains stable at 13%.

These findings lead 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, national legal frameworks and existing or future national procurement guidelines should take into account discriminatory practices persisting in the procurement market and which the current legal framework does not properly address. 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 € 2,400 billion or around 19% of the EU's GDP in 2011³. EU requirements do not apply to contracts below certain thresholds, and to certain exempt sectors. So, only a part of this value, around € 425 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 2011⁴. This number shows, when compared to previous years, that procurement activity advertised on an EU wide basis has been increasing (see Table 1).

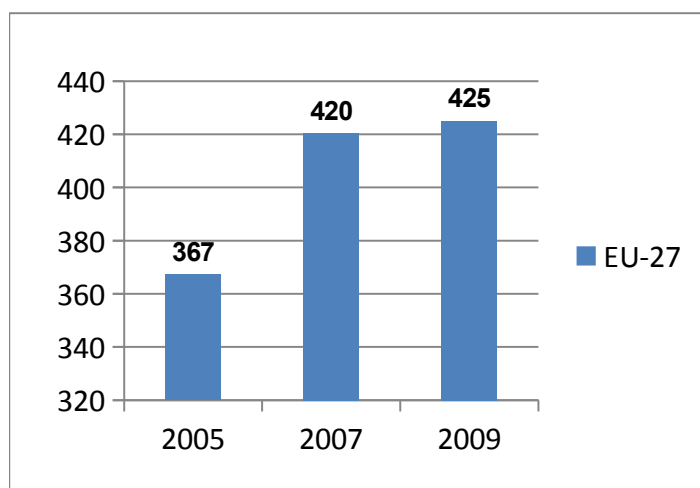


Table 1: The estimated value of tenders in billions of euros published in TED (2007, 2009 and 2011)

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

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

³ 2011 Public Procurement Indicators
http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/public-procurement-indicators-2011_en.pdf

⁴ Ibid

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 has been significantly positive. Contracting authorities 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) Modernisation of Public Procurement rules

After a consultation period, in late 2011 the European Commission released a Proposal for a revision of the 2004 so-called “Classic” Directive on Public Procurement⁸. After institutional negotiations conducted throughout 2012, a version of the text has been agreed upon by the European Parliament and the Council in July 2013⁹, and has been tabled for plenary vote in the European Parliament in November 2013. The current draft mandates technical specifications of a tender to be “open to competition as well as to achieve objectives of sustainability” and that “technical specifications should be drafted in such a way to avoid artificially narrowing down competition through requirements that favour a specific economic operator by mirroring key characteristics of the supplies, services or works habitually offered by that economic operator”.¹⁰

The European Parliament also adopted on the 25th of October 2011, as a reaction to the consultation launched by the Commission, a resolution on the modernisation of Public Procurement¹¹ whereby it was recommended that a future revision of the current rules should ensure “transparency and the proper use of taxpayers' money” and that, in particular in the ICT sector, the new rules should “ensure the interoperability of different systems and avoid lock-in”.

Europe 2020 Flagship Initiatives such as the Digital Agenda for Europe or the Innovation Union define Public Procurement as a vehicle to the economic success of Europe, to the development of European R&D and to an arena where SMEs should progressively have more access to. Under action 23 of the Digital Agenda, the European Commission has committed to “Provide guidance on ICT standardisation and public procurement”. Following a consultation in 2011, it has released in

⁵ European Economics (Sept 2006): Evaluation of public procurement Directives http://ec.europa.eu/internal_market/publicprocurement/docs/summary_en.pdf

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 Proposal for a directive of the European Parliament and of the Council on public procurement (2011) http://eur-lex.europa.eu/Notice.do?val=629214:cs&lang=en&list=629214:cs,&pos=1&page=1&nbl=1&pgs=10&hwords=&checktexte=checkbox&visu=#texte!DocNumber&lg=EN&type_doc=COMfinal&an_doc=2011&nu_doc=896

⁹ See compromise text compared to previous versions

<http://www.europarl.europa.eu/document/activities/cont/201309/20130904ATT70766/20130904ATT70766EN.pdf>

¹⁰ Recital 27 of the compromise text

¹¹ European Parliament resolution of 25 October 2011 on modernisation of public procurement <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2011-0454&language=EN>

2012 an overview of current public procurement practices concerning ICT in the EU, and “Guidelines for public procurement of ICT systems”¹². In 2013, the Commission issued a “Guide for the procurement of standards-based ICT — Elements of Good Practice” with practical advice aimed at procuring officials¹³.

d) The EU and Public Procurement

The EU institutions have repeatedly expressed an interest in the openness, transparency, and efficiency of the European software market. Initiatives by the European Commission and Parliament noted above reflect an awareness and a will to tackle the problems in ICT public procurement. 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 initiatives 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 contracting authorities 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.

e) OFE and Procurement of ICT products

As a large consumer of ICT, the Public Sector must ensure that procurement of ICT products is carried in a cost efficient, transparent and non-discriminatory way and to ensure customers are not lock in to single vendor technologies.. However, our monitoring exercises suggest that, although EU public procurement rules demand that contracting authorities treat their vendors equally ; not draw up technical specifications in such a way as to exclude products that meet their requirements; and refrain from referring to a specific make, source, or process; explicit references to brands are still made.

The Guide for the procurement of standards-based ICT - Elements of Good Practice released in 2012¹⁴ recognises the relevance of procurement for ICT products and recognised the problem (*i.e.*, dependency on a single vendor or propriety standard which leads to an inhibition of competition and being lock-in).

OFE welcomes the Commission's initiative and sees it as a very valuable re-affirmation of need for improving standard-setting procedures as fundamentally important regarding the promotion of a

¹² http://cordis.europa.eu/fp7/ict/ssai/study-action23_en.html

¹³ <https://ec.europa.eu/digital-agenda/node/67038>

¹⁴ <http://cordis.europa.eu/fp7/ict/ssai/docs/study-action23/d3-guidelines-finaldraft2012-03-22.pdf>

pan-European strategy to enable good practice in procurement as an aid to delivering interoperable eGovernment services. OFE also welcomes the recognition that standards developed by private fora and consortia and that have wide market acceptance and comply with public policy requirements such as openness, transparency and balanced processes should be referenced in public procurement.

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 transparency¹⁵.

If the value of a public contract is above a specific threshold, then the contracting authorities 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.¹⁶ 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 October 2013, the minimum threshold was € 130 000 for public supply and service contracts awarded by central government authorities (ministries, national public establishments), and € 200 000 for public supply and service contracts awarded by contracting authorities which are not central government authorities, and for a number of specific cases¹⁷.

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 Directives¹⁸. 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 this threshold, having as their object the acquisition of software packages or information systems fall under the remit of Directive 2004/18/EC¹⁹. According to Art. 23(8) of the

¹⁵ Article 2 of Directive 2004/18/EC.

¹⁶ 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).

¹⁷ EU Single Market – Public Procurement - Current rules, thresholds and guidelines http://ec.europa.eu/internal_market/publicprocurement/rules/current/

¹⁸ 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).

¹⁹ Article 7 of Directive 2004/18/EC.

directive, public purchasers may draw up technical specifications, but they must allow procurement to be opened up to competition²⁰. 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.²¹

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”.²²

Article 34 TFEU has been used to challenge the technical specifications set by contracting authorities. In the *UNIX* case,²³ the contracting authority 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,²⁴ 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”²⁵. The Commission, therefore, challenged the contracting authority 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 contracting authorities.²⁶

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.

²⁰ Cf. Recital 29 and Article 23 of Directive 2004/18/EC

²¹ Cf. Case 45/87 *Commission of the European Communities v Ireland* [1988] ECR 4929

²² Case 8/74 *Procureur du Roi v Dassonville* [1974] ECR 837

²³ Case C-359/93 *Commission of the European Communities v Kingdom of the Netherlands (UNIX)* [1995] ECR I-157

²⁴ In this case, UNIX is a trademark

²⁵ Article 23(8) of Directive 2004/18/EC

²⁶ Cf. Recital 29 and Article 23 of Directive 2004/18/EC

RESULTS

a) General results

In the monitoring process, 841 tender notices were scanned for trademarks. In 147 tender notices of those, obvious reference to trademarks was included. In other words, more than 17% of the total screened notices include technical specifications which make reference to trademarks (see Table 2).

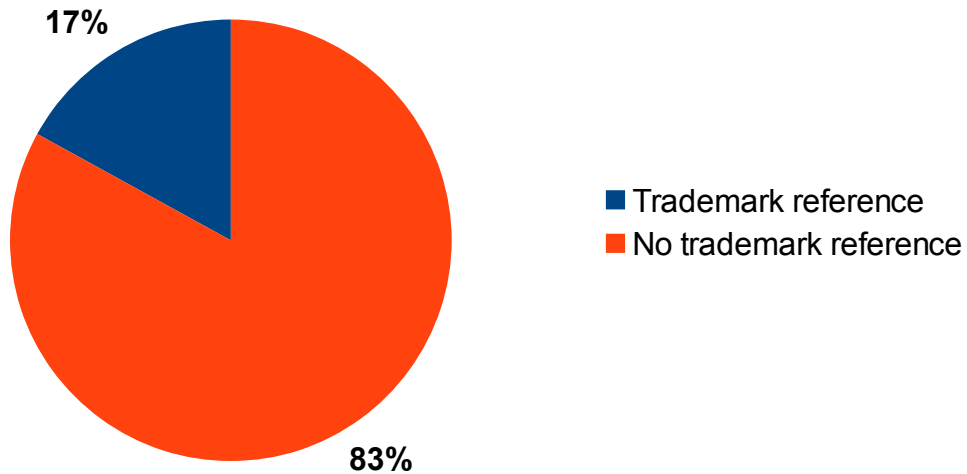


Table 2: Tender notices containing at least one trademark reference (April to June 2013)

Looking at this initial figure of 17% of tender notices containing trademark references, it should however be recognised that not all of these references are equal. More importantly, their impact on the openness and competition of a tender procedure has to be further examined. To reflect this concern, in the research conducted for this report, all tenders with trademark references were classified into four categories : Direct Acquisition, Preference, Compatibility and Others (see Table 3).

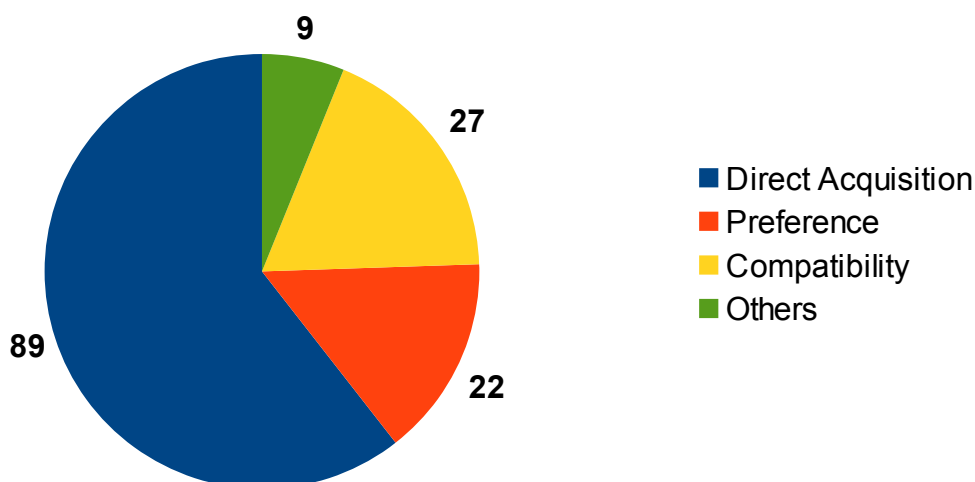


Table 3: Typology of tenders containing trademark references (April to June 2013)

“Direct Acquisition” refers to the practice of procuring for specific products or brands, without leaving open the possibility for alternatives to be considered, for example by using the term “or equivalent” as required by law (see legal background). It is a major cause of concern that the majority of tenders containing trademark references fall into this category. “Preference” includes trademark references provided as examples or followed by the expression “or equivalent”. Although not illegal in a strict sense, this can still be considered a bad practice as it effectively limits competition. Trademark references explicitly used to ensure compatibility, e.g. with existing infrastructures, fall into the “Compatibility” category.

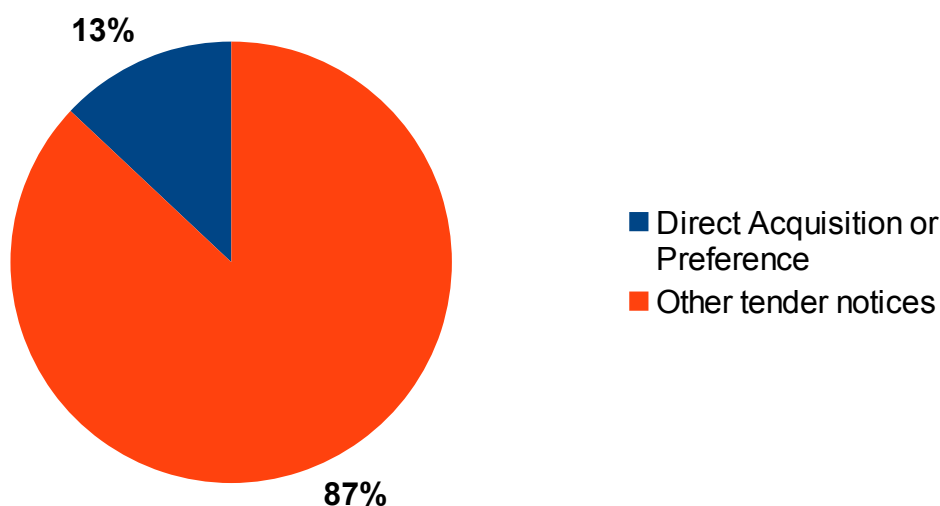


Table 4: Tender notices breakdown by discriminatory references to trademarks (April to June 2013)

As can be observed by the results, although some trademark are referenced for compatibility or other purposes (36 out of 147), a very large majority (111 out of 147) still give preference or exclusivity to products of specific brands. Even discarding the former category, this leaves a worrying figure of 13% explicitly discriminatory and potentially anti-competitive tender notices in

the data sample examined (see Table 4). For the rest of our analysis, we will use this category (trademark references falling down under “direct acquisition” or “preference”) as the leading indicator.

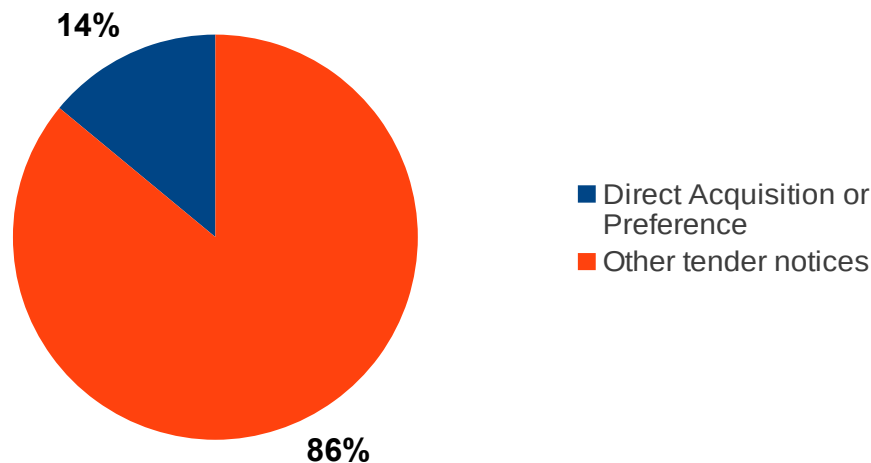


Table 5: Tender notices breakdown by discriminatory reference to trademarks (October to December 2012)

In comparison with the previous report released in February 2013, the percentage of cases where explicit reference to brands are made has remained relatively stable, with only a 1% decline (see Table 5). This shows a persistence of discriminatory practices.

b) Tender Notices Breakdown by Specific Trademarks

The total number of references to trademarks (264) is higher than the number of tender notices containing trademarks (147), reflecting the fact that many tender notices contain multiple references. This monitoring exercise shows that Microsoft products are by far the most common references, included in more than half of all tender notices containing at least one trademark reference (79/147) (see Table 6). Also notable here is the very long tail, the vast majority of trademarks only appearing once in the 841 tender notices examined.

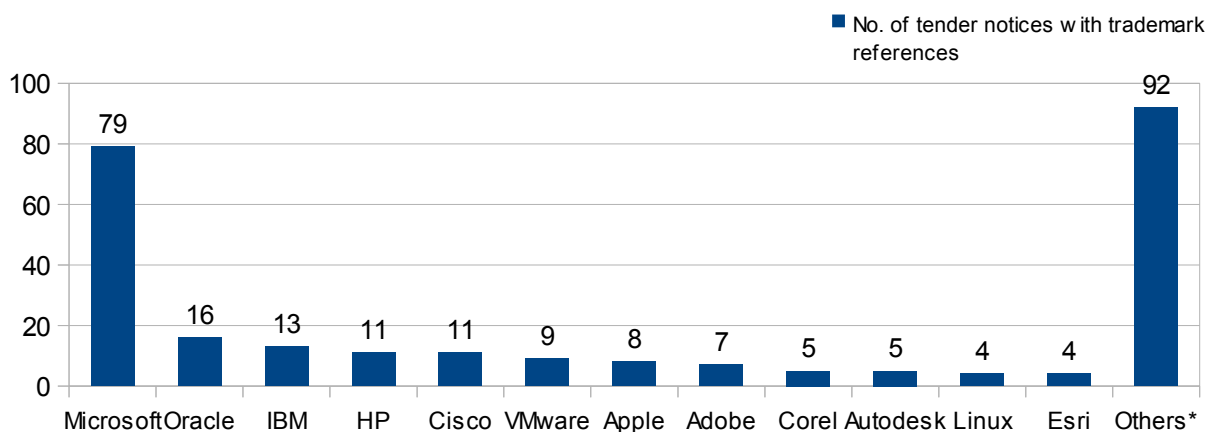


Table 6: Tender notices breakdown by reference to specific trademarks (April to June 2013)

*Others: 75 different trademarks with max. 3 occurrences.

c) Tender Notices Breakdown by Countries

For the country by country comparison, we decided to include only the two most relevant categories of references to trademarks, i.e. Direct Acquisition and Preference (in total 111 tender notices). The results (see Table 7) show that Poland is by far the largest issuer of these tender notices, with more than a third (31/111) originating from Polish public authorities.

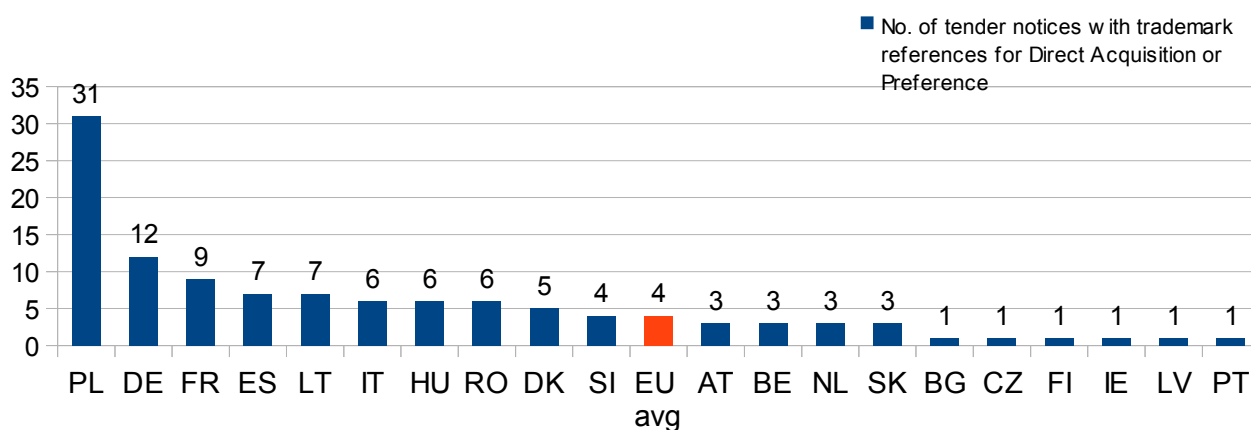


Table 7: Tender notices breakdown by countries referring to specific trademarks for Direct Acquisition or Preference (April to June 2013)

Note : countries not listed had no tender notices with trademark references for Direct Acquisition or Preference.

Two elements should be noted here, that are likely to distort the results for the country breakdown. First, some of the procurement for IT products is done through Framework Agreements are therefore not recorded on TED.eu, while brand references are a very common practice in this type of procurement (usually using a product list with ordering information). This is for instance the case of the Swedish Framework Agreement Licensförsörjning 2010²⁷. Secondly, the amount of

²⁷ <http://www.avropa.se/Hitta-ramavtal/Ramavtalsomraden/IT-och-telekom1/Programvaror-och-licenser/Licensforsorjning-2010>

information available on TED (see methodology p.17) varies from country to country, sometimes to a large extent. Poland for example consistently provides lengthier summaries of its tender notices, which could partly explain the high number of trademark references identified in these documents. On the other hand, Sweden and France were found to provide generally smaller summaries, which tends to suggest that the actual figures are higher than reported in this analysis.

To get the full picture of the country analysis we also need to compare these results with the total number of tender notices examined (see Table 8). We observe that the high number of discriminatory tender notices issued by Poland only amounts to a slightly above the EU average (15%) due to a very large total number of tenders notices issued over this period (225). The worst performers appear to be Italy, Slovenia, Romania and Hungary, which are all close to or well above twice the EU average of discriminatory tender notices (13%).

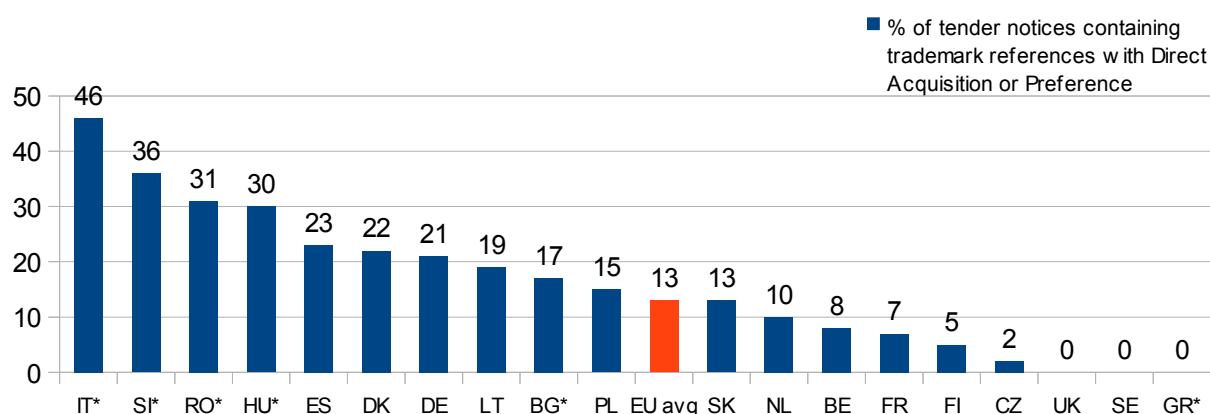


Table 8: Proportion of tender notices with a discriminatory impact, by Countries (April to June 2013)

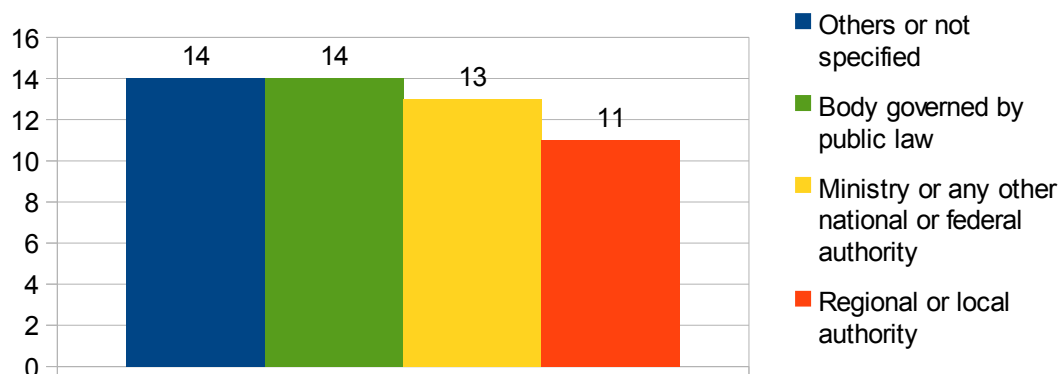
Note : results for countries having issued less than 10 tender notices falling under the remit of this research are considered statistically inconclusive and are excluded from this graph.

* Small data sample (10-20 tender notices examined)

In light of these results, it is clear that the situation in each country is very different and that European efforts to improve open and fair procurement have to be accompanied by a deeper reflection of the specific problems at the national level.

d) Tender Notices Breakdown by Type of Authority and Main Activity

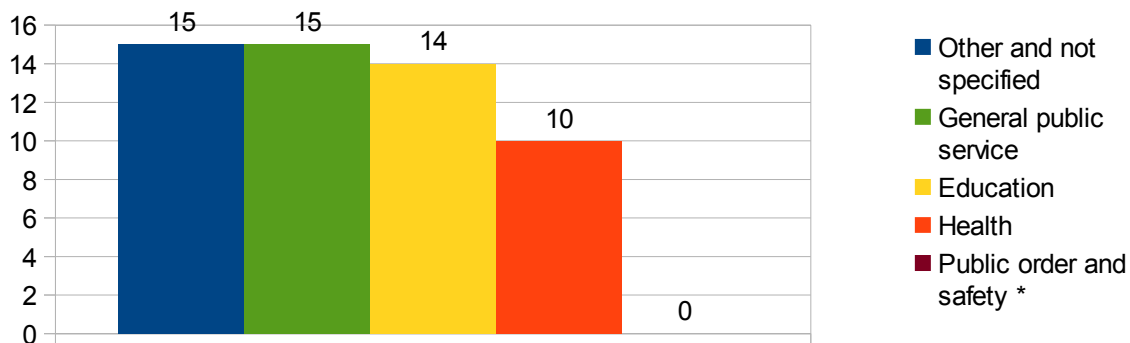
For the first time in the OFE Procurement Monitoring Report, we also collected the data related to the nature of the contracting authority. The data suggests no clear correlation between the type of authority and the practice of referencing trademarks in tender notices (see Table 9).



% of tender notices containing trademark references with Direct Acquisition or Preference

Table 9: Proportion of tender notices with a discriminatory impact, by type of contracting authority (April to June 2013)

We found no clear correlation between the domain of activity of the contracting authority and the practice of referencing trademarks in tender notices, although it is notable that no discriminatory trademark references were found in tender notices issued by public order and safety organisations (see Table 10).



% of tender notices containing trademark references with Direct Acquisition or Preference

Table 10: Proportion of tender notices with a discriminatory impact, by main activity of the contracting authority (April to June 2013)

* Small data sample (35 tender notices examined)

e) Tender Notices Breakdown by Choice of Procedure

This report also analysed the choice of procedures used to award contracts (see Table 11). The default 'open procedure' whereby all economic operators can submit a tender remains by far the most widely used, with 83% (701/841) of all tender notices. Besides this, a significant recourse to

procedures which can only be applied under exceptional circumstances (*i.e.*, negotiated procedure²⁸ with and without competition and the competitive dialogue²⁹) was also noticed. This is consistent with results from previous years, with no significant change. In comparison to the results of the reports from previous years, the percentage of tenders by recourse to special procedures seems to be relatively stable.

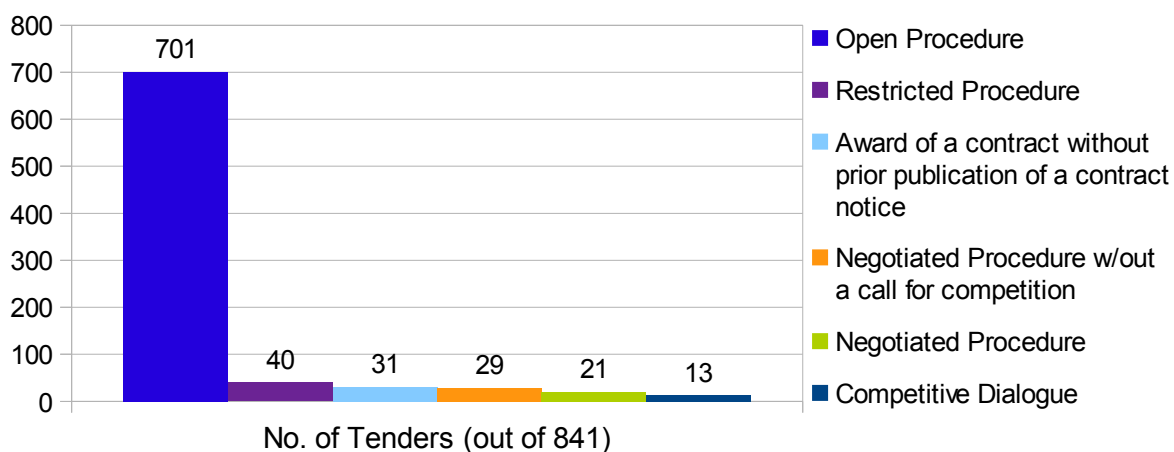


Table 11: Tender notices by choice of procedure (April to June 2013)

No clear correlation could be established between the choice of procedure and the practice of procuring for specific products or brands, mostly because of the small data samples for special procedures.

Contracting authorities should be free to use special procedures, particularly when it is difficult to assess what the market can offer in terms technical, financial or legal solutions. In the ICT sector, as with most complex innovative projects, such obstacles may arise. These procedures give greater flexibility to contracting authorities to tender for works, supplies and services that are more adapted to their specific needs.

Their use should be encouraged as it releases contracting authorities from a lengthy and costly procedure. However, such procedures must be accompanied by adequate safeguards and the principles of equal treatment and transparency must be observed. Exceptional procedures demand exceptional requirements precisely to avoid abuses. In order to remove doubts regarding the legitimacy to use such derogations to the general regime, objective justification needs to be given in a clear way.

²⁸ Arts 30 and 31 of Directive 2004/18/EC

²⁹ Art. 29 of Directive 2004/18/EC

ARE THESE RESULTS RELEVANT ?

The fact that 13% of all tender notices examined contain trademark references giving unjustified preference or exclusivity to a specific vendor (see p.8) clearly shows that there is still a EU-wide level of discriminatory practices in the purchase of IT supplies. Worryingly, the following considerations suggest that this is merely the “tip of the iceberg”.

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

- Discriminatory references: As explained in the presentation of the results, the 13% figure covers only the Direct Acquisition and Preference categories, and excludes referencing of trademarks for compatibility or other purposes;
- 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 TED. According to the most recent calculation, in 2011 the value of calls for tender published in TED was only 17.7% of the total value of public procurement³⁰. 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).
- Access to information: in order to understand whether an invitation to tender has potentially illicit references to trademarks, access to all information is necessary, particularly the annexes detailing the technical requirements. In some cases, a compulsory registration as a potential bidder was necessary to have access to all information.

It may be possible that further references to brand names could be found in the original contracts, considering TED is only provided with summaries of public procurement notices in which public authorities may have not included all the information.

³⁰ 2011 Public Procurement Indicators

http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/public-procurement-indicators-2011_en.pdf

Considering that public procurement amounts to about 19% of the economic activity in the EU³¹, 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 2011 Public Procurement Indicators
http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/public-procurement-indicators-2011_en.pdf

RECOMMENDATIONS

In light of the current revision of the EU Procurement Rules, the aspirational goals of the Europe 2020 Strategy, namely the Digital Agenda and Innovation Union flagship agendas, 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 adopt 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 contracting authorities 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 results. 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. Improved EU and national procurement guidelines should lead to more transparency, openness and more competition. This should also be reflected in the Commission's specific procurement rules³².

The inconsistencies in the amount of information available on TED is a cause of concern and make it difficult to correctly assess the full extent of the problem. Some countries are doing much better than others in this regard (see p. 11) and exchange of best practices should be encouraged.

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.

³² 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" - 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.*) and of Regulation 2342/2002 implementing the Financial Regulation (the "Implementing Regulation" - 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.

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 April and the 30th of June 2013.

The Directives only apply when contracting authorities 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 October 2013, the minimum threshold was € 130 000 for public supply and service contracts awarded by central government authorities (value is expressed in EUR, excluding VAT)³³.

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)³⁴: code 48000000 which corresponds to the division “software package and information systems”;
- Publication date: from the 1st of April to the 30th of June 2013;
- Type of contract: public supply contracts as defined by Article 1(2)(c) of Directive 2004/18/EC;
- Type of document: all except prior information notice, corrigenda, additional information and contract award. These were excluded to avoid double counting.
- Countries: all Member States of the European Union;
- Type of Authority: all admissible contracting authorities as defined by Article 1(9) of Directive 2004/18/EC, excluding the Armed Forces and contracting authorities exercising one or more of the defined activities in the utilities sector³⁵. When the contracting authority 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 Regulation³⁶ and the rules for the implementation of the Financial Regulation (“the Implementing Rules”)³⁷. For the purpose of understanding the regular behaviour of contracting authorities when calling

³³ 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)

³⁴ 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 contracting authorities to describe the subject matter of their contracts. The CPV attaches to each numerical code a description of the subject of the contract.

³⁵ These public contracts are covered by Directive 2004/17/EC

³⁶ Council Regulation 1605/2002/EC of 25 June 2002 concerning public contracts concluded by the Commission on its own account.

³⁷ 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.

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 framework³⁸.

- Procedure: all types of procedures were included in this analysis.

For the preparation of the graphs shown in this study, each public procurement notice was classified into different categories. These are, and in order of relevance:

- Direct Acquisition: This includes references of software products of a particular brand without mentioning the term "or equivalent" or explicitly allowing the possibility of alternatives;
- Preference: This includes references of software products of a particular brand used as an example or mentioning the term "or equivalent";
- Compatibility: This includes references of software products of a particular brand for reasons of compatibility;
- Other: This includes references of software products of a particular brand that do not fall under any of the above categories. Also when the reference to the brand name is not directly linked to the object of the contract, but it is for some kind of prerequisite (e.g., need of specialists with specific certificates/diplomas/etc. issued by trademark holders).

For the sake of clarity, whenever a public procurement notice fell under two or more categories, only the category of most relevance was applied to it.

The search for references to brand names within the public procurement notices was unbiased. An analysis of the summaries in their original languages of the public procurement notices available on TED was made in order to find any explicit reference to brand names. It may be possible that further references to brand names could be found in the original contracts, considering TED is only provided with summaries of public procurement notices in which public authorities may have not included all the information.

Our data set is available upon request.

³⁸ Cf. Article 10 of Directive 2004/18/EC according to which, the Public Sector Directive does not apply to contracts awarded by contracting authorities in the field of defense where the products are subject to the provisions of Article 296(1)(b) TFEU.

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