

OFE Procurement Monitoring Report 2014 – 1st Snapshot

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

December 2014

OpenForum Europe's mission is to encourage an 'open competitive choice for IT users' by actively supporting the employment of Open Standards, wider use of Open Source, adoption of Open Software business models, and the avoidance of locking-in. 'Not for profit' and independent, it draws membership from IT suppliers and users.

www.openforumeurope.org

info@openforumeurope.org

Table of Contents

<u>EXECUTIVE SUMMARY</u>	1
<u>Introduction</u>	2
<i>a) <u>Public Procurement in the EU</u></i>	2
<i>b) <u>A Transparent and Open Public Procurement Market</u></i>	2
<i>c) <u>OFE and Procurement of ICT Products</u></i>	3
<u>Legal Background</u>	4
<i>a) <u>Modernisation of the EU Public Procurement rules</u></i>	4
<i>b) <u>Technical Specifications</u></i>	5
<u>Results</u>	6
<i>a) <u>General results</u></i>	6
<i>b) <u>Tender Notices Breakdown by Specific Trademarks</u></i>	8
<i>c) <u>Tender Notices Breakdown by Countries</u></i>	8
<i>d) <u>Tender Notices Breakdown by Type of Authority and Main Activity</u></i>	12
<i>e) <u>Tender Notices Breakdown by Choice of Procedure</u></i>	13
<u>Are these results relevant?</u>	15
<u>Recommendations</u>	17
<u>Methodology</u>	18

EXECUTIVE SUMMARY

For the sixth 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.

This monitoring exercise examined all the **972** documents issued by contracting authorities procuring for computer software products over a three months period, from April 1st to June 30th 2014, as published on the Supplement to the Official Journal of the European Union (TED)¹. It found that **23%** of tender notices published on TED included technical specifications with explicit references to trademarks. The study also aimed to provide a cursory analysis of the discriminatory impact of these trademark references, and found that **18%** of all tender notices explicitly demanded or expressed a clear preference for the products of a specific vendor.

Despite efforts put in place notably by the European Commission to address this issue, our research concludes that no notable progress has been made in recent years, and in fact that the practice of referring to brand names in public procurement has become more widespread.

1 <http://www.ted.europa.eu/>

INTRODUCTION

a) Public Procurement in the EU

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 2011². EU requirements do not apply to contracts below certain thresholds, and to certain exempt sectors. Therefore 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 2011³.

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 transparency⁴.

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.⁵ 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 December 2013, the minimum threshold is € 134 000 for public supply and service contracts awarded by central government authorities (ministries, national public establishments), and € 207 000 for public supply and service contracts awarded by contracting authorities which are not central government authorities, and for a number of specific cases⁶.

b) A Transparent and Open Public Procurement Market

Transparent and predictable procurement procedures improve economic efficiency by promoting competition amongst economic operators. A Report on the Evaluation of Public Procurement Directives by *Europe Economics*⁷ shows that the balance of the costs of complying with the Directives and the benefits has been significantly positive. Contracting authorities spend on average

2 2011 Public Procurement Indicators

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

3 *Ibid.*

4 Article 2 of Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, and Article 18 of Directive 2014/24/EU (replacing the Directive 2004/18/EC).

5 Directive 2004/18/EC and Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal sectors (*OJ 2004 L134*) – until April 2016, when the new Directives 2014/24/EU and 2014/25/EU (replacing the Directive 2004/17/EC) will come into force (*OJ 2014 L94*).

6 EU Single Market – Public Procurement - Current rules, thresholds and guidelines

http://ec.europa.eu/internal_market/publicprocurement/rules/current/index_en.htm . See also Article 4 Directive 2014/24/EU.

7 Europe Economics (Sept 2006): Evaluation of public procurement Directives

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

between 5-8% less than they had originally earmarked⁸. 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 Commission⁹, 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.

The EU institutions have repeatedly expressed an interest in the openness, transparency, and efficiency of the European software market. 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. Under action 23 of the Digital Agenda, the European Commission has committed to “provide guidance on ICT standardisation and public procurement”.

The Commission has thus released in 2013 a “Guide for the procurement of standards-based ICT - Elements of Good Practice” with practical advice aimed at procuring officials¹⁰; this guide goes along with a Communication entitled “Against lock-in: building open ICT systems by making better use of standards in public procurement”¹¹, which identifies the problem of lock-in with ICT systems and gives an economic evaluation of its cost in public procurement.

The Commission will now ensure that these guidelines are applicable by all public procurers in ICT throughout the EU, while it commissioned a study on “Best practices for ICT procurement based on standards in order to promote efficiency and reduce lock-in”, with the purpose of organising meetings with key stakeholders and sharing best practices in applying the guide.¹²

c) OFE and Procurement of ICT products

Initiatives by the European Commission and Parliament noted above reflect an awareness and a will to tackle the problems in ICT public procurement. 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).

We have observed that 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.

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

9 Internal Market Scoreboard (July 2009) http://ec.europa.eu/internal_market/score/docs/score19_en.pdf

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

11 http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com%282013%290455/_com_com%282013%290455_en.pdf

12 <http://ec.europa.eu/digital-agenda/en/news/best-practices-ict-procurement-based-standards-order-promote-efficiency-and-reduce-lock-smart> ; the first meeting was held on the 7th of July 2014.

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;
 - they do 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” and the Communication “Against lock-in: building open ICT systems by making better use of standards in public procurement” recognised the relevance of procurement for ICT products and identified the problem (*i.e.*, dependency on a single vendor or propriety standard which leads to an inhibition of competition and being locked-in).

OFE welcomes the Commission's initiatives and sees them as a very valuable re-affirmation of the need for improving standard-setting procedures as fundamentally important regarding the promotion of a 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) Modernisation of the EU Public Procurement rules

A new Directive (2014/24/EU) revising the 2004 so-called “Classic” Directive on Public Procurement has been approved in February 2014¹³ – however, it will fully come into force in April 2016. The Directive 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”.¹⁴

The European Parliament also adopted in 2011 a resolution on the modernisation of Public Procurement¹⁵ whereby it was recommended that the EU rules should ensure “transparency and the proper use of taxpayers' money” and that, in particular in the ICT sector, these rules should “ensure the interoperability of different systems and avoid lock-in”.

13 Full text here: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.094.01.0065.01.ENG

14 Recital 74 of Directive 2014/24/EU.

15 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>

b) Technical Specifications

Public contracts above certain thresholds (see above, p.2), having as their object the acquisition of software packages or information systems fall under the remit of Directive 2004/18/EC – from April 2016, they will fall under the remit of Directive 2014/24/EU¹⁶. According to Art. 23(8) of the Directive 2004/18/EC, to Recital 74 and Art. 42(2) of the Directive 2014/24/EU, public purchasers may draw up technical specifications, but they must allow procurement to be opened up to competition¹⁷. 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.¹⁸

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 this article encompasses “all trading rules [or measures] enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially intra-Community trade”.¹⁹

This article has been used to challenge the technical specifications set by contracting authorities (e.g., in the *UNIX* case²⁰). According to the CJEU's jurisprudence only under exceptional circumstances – i.e. where it is not possible to provide a sufficiently detailed and intelligible description of the subject of the contract – references to a specific make or source, or a particular process, or to trademarks, patents, types or a specific origin or production can be made, but they must be accompanied by the words “or equivalent”²¹.

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.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 and Article 42 of Directive 2014/24/EU specifically prohibit the manipulation of the use of technical specifications in line with the CJEU's jurisprudence in this context.

16 Article 7 of Directive 2004/18/EC and Article 4 of Directive 2014/24/EU.

17 Cf. Recital 29 of Directive 2004/18/EC and Recital 74 of Directive 2014/24/EU.

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

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

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

21 Article 23(8) of Directive 2004/18/EC and Article 42(2) of Directive 2014/24/EU.

22 Cf. Recital 29 and Article 23 of Directive 2004/18/EC, and Recital 74 and Article 42 of Directive 2014/24/EU.

RESULTS

a) General results

In the monitoring process, all the **972** tender notices published on TED from April 1st to June 30th 2014 were scanned for trademarks. In **228** tender notices of those, obvious reference to trademarks was included. In other words, more than **23%** of the total screened notices include technical specifications which make reference to trademarks (see Table 1).

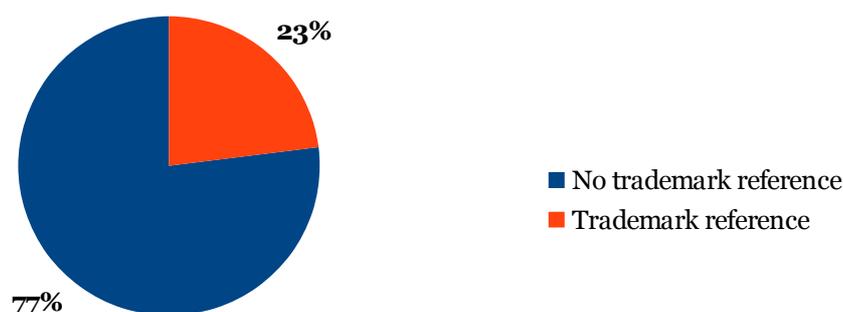


Table 1: Tender notices containing at least one trademark reference (April to June 2014)

Looking at this initial figure of 23% of tender notices containing trademark references, it should be however 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 2).

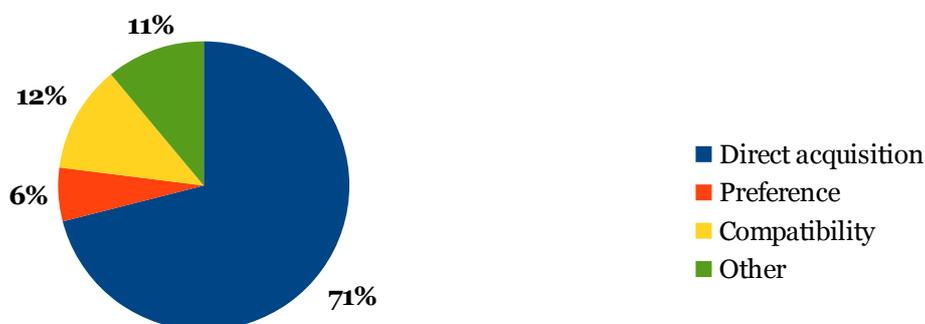


Table 2: Typology of tenders containing trademark references (April to June 2014)

“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, p.4). 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.

The “Other” category includes all those cases in which the explicit reference to trademark does not fall in the three categories above (*e.g.* when the reference is made among the required skills of the members of the project teams that can apply for the tender).

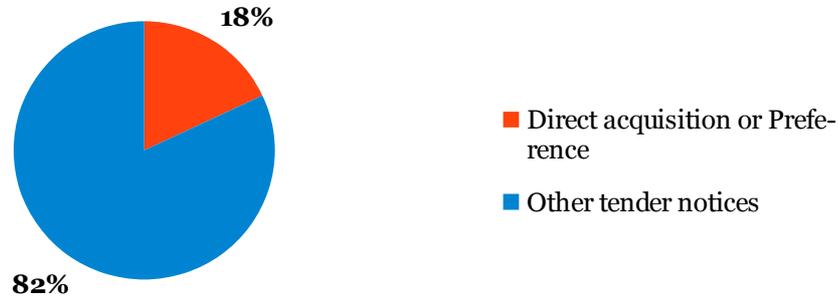


Table 3: Tender notices breakdown by discriminatory reference (Direct Acquisition or Preference) to trademarks (April to June 2014)

As the results show, although some trademark are referenced for compatibility or other purposes (51 out of 228), a very large majority (177 out of 228) still give preference or exclusivity to products of specific brands. Even discarding the former category, this leaves a worrying figure of 18% explicitly discriminatory and potentially anti-competitive tender notices in the data sample examined (see Table 3). For the rest of our analysis, we will use this category (trademark references falling down under “Direct acquisition” or “Preference”) as the leading indicator.

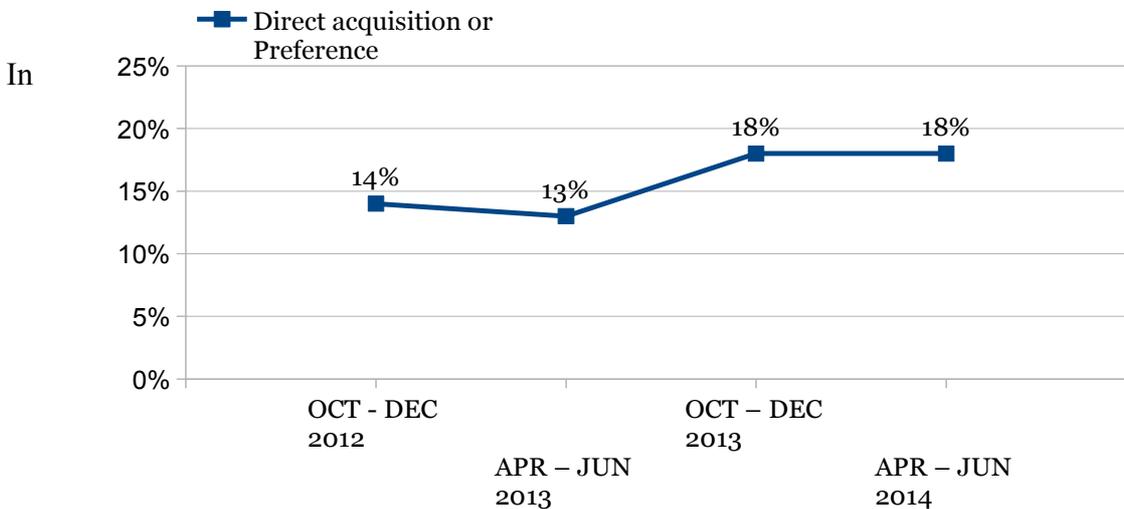


Table 4: Trend in tender notices including discriminatory references to trademarks

comparison with our previous reports, the percentages of cases where explicit discriminatory references to brands are made show a persistence of discriminatory practices over the years (see table 4).

b) Tender Notices Breakdown by Specific Trademarks

The total number of references to trademarks (463) is higher than the number of tender notices containing trademarks (228), 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 a third of all tender notices containing at least one trademark reference (89/228) (see Table 5). Also notable here is the very long tail pattern, as the vast majority of trademarks only appears once in the 972 tender notices examined.

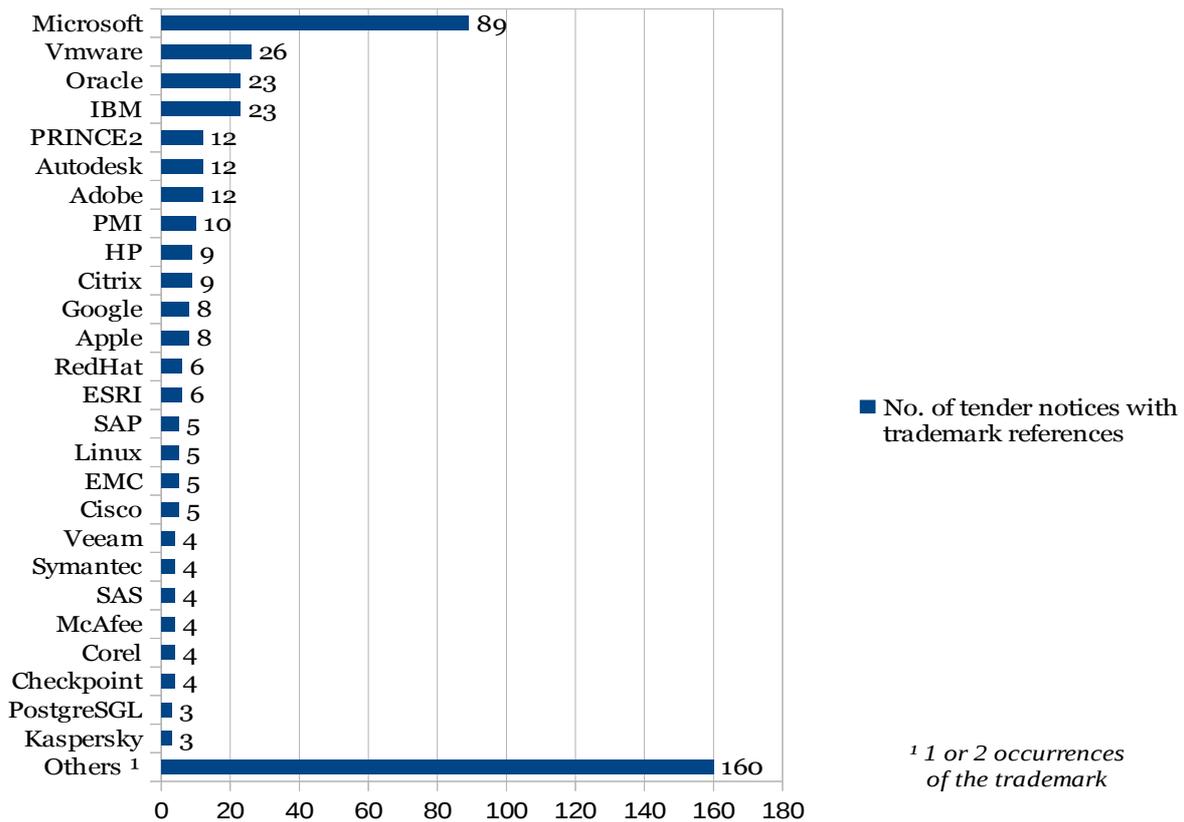


Table 5: Tender notices breakdown by reference to specific trademarks (April to June 2014)

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 177 tender notices). The results (see Table 6) show that Poland is by far the largest issuer of these tender notices, with almost a quarter (48/177) originating from Polish public authorities, followed by Germany and France.

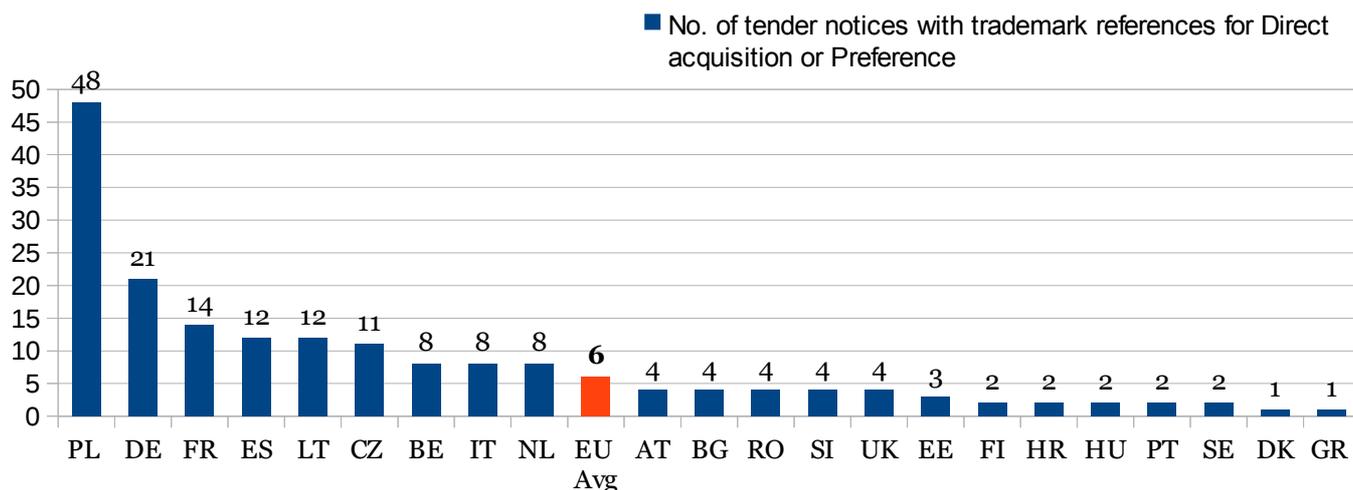


Table 6: Tender notices breakdown by countries including discriminatory references to specific trademarks (April to June 2014)

Note: countries not listed had no tender notices with discriminatory references to trademarks

However, 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 7). We observe that the high number of discriminatory tender notices issued by Poland only amounts to 18% (in line with the EU average), due to a very large total number of tenders notices issued over this period (267). Among the countries with a significant data sample, the worst performers appear to be Lithuania, Spain and Belgium, which are all above the EU average of discriminatory tender notices.

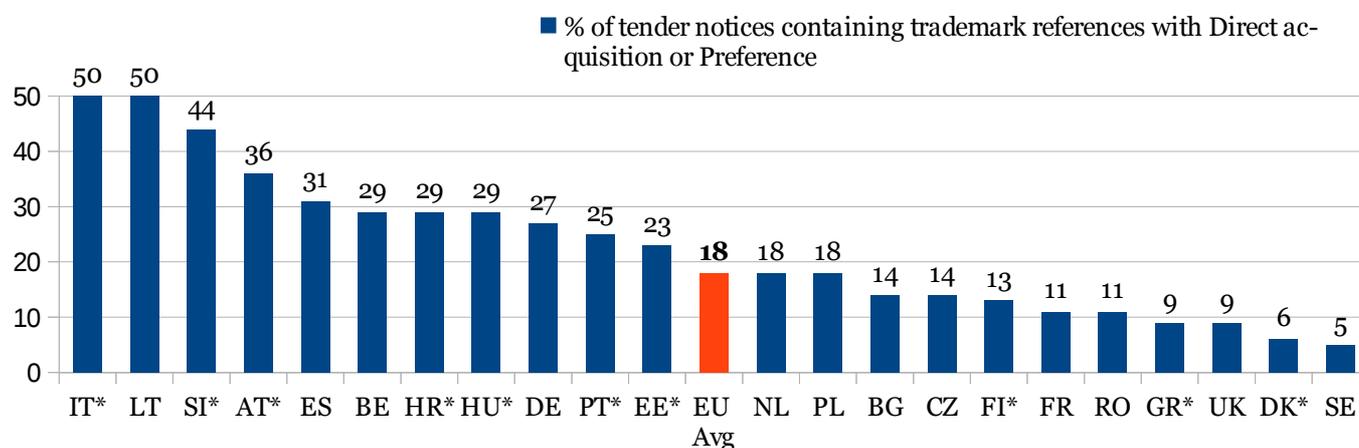


Table 7: Proportion of tender notices with a discriminatory impact, by countries (April to June 2014)

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

** Small data sample (up to 20 tender notices)*

A comparison with our previous reports show that a number of countries (e.g. France and the Netherlands) have somehow regular patterns in their practice of referring to specific trademarks in a discriminatory way, while others (such as Italy, Lithuania and Romania) experience steep variations in their discriminatory references to specific trademarks (see Tables 8a and 8b – countries listed in alphabetical order).

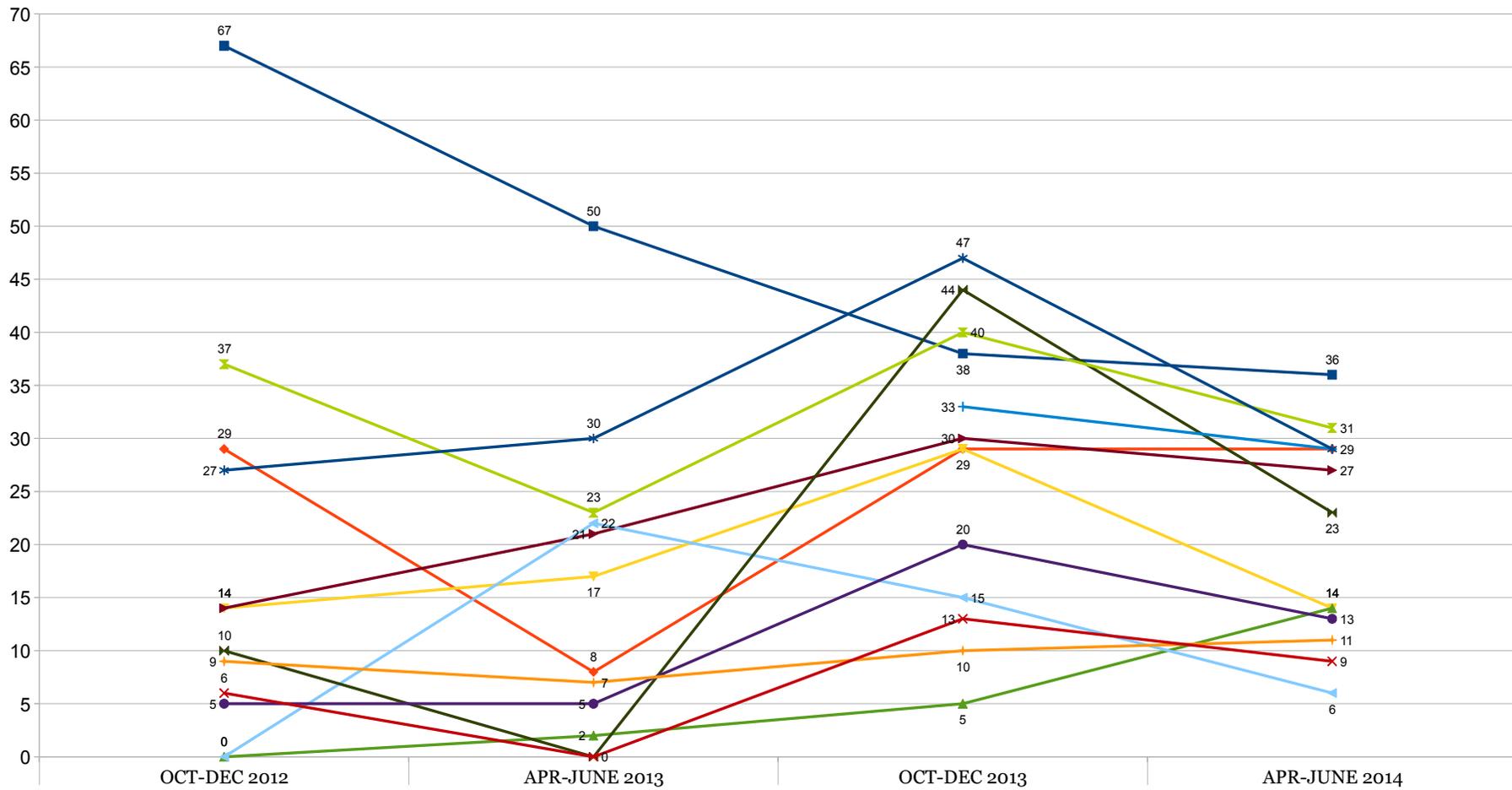


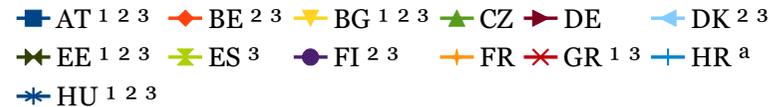
Table 8a: Trends in tender notices with a discriminatory impact (percentages)

Note: Countries not listed had no tender notices with a discriminatory impact in the period considered

^a Croatia joined the EU in July 2013

Small data sample (up to 20 tender notices examined):

¹ Apr-June 2013 // ² Oct-Dec 2013 // ³ Apr-June 2014



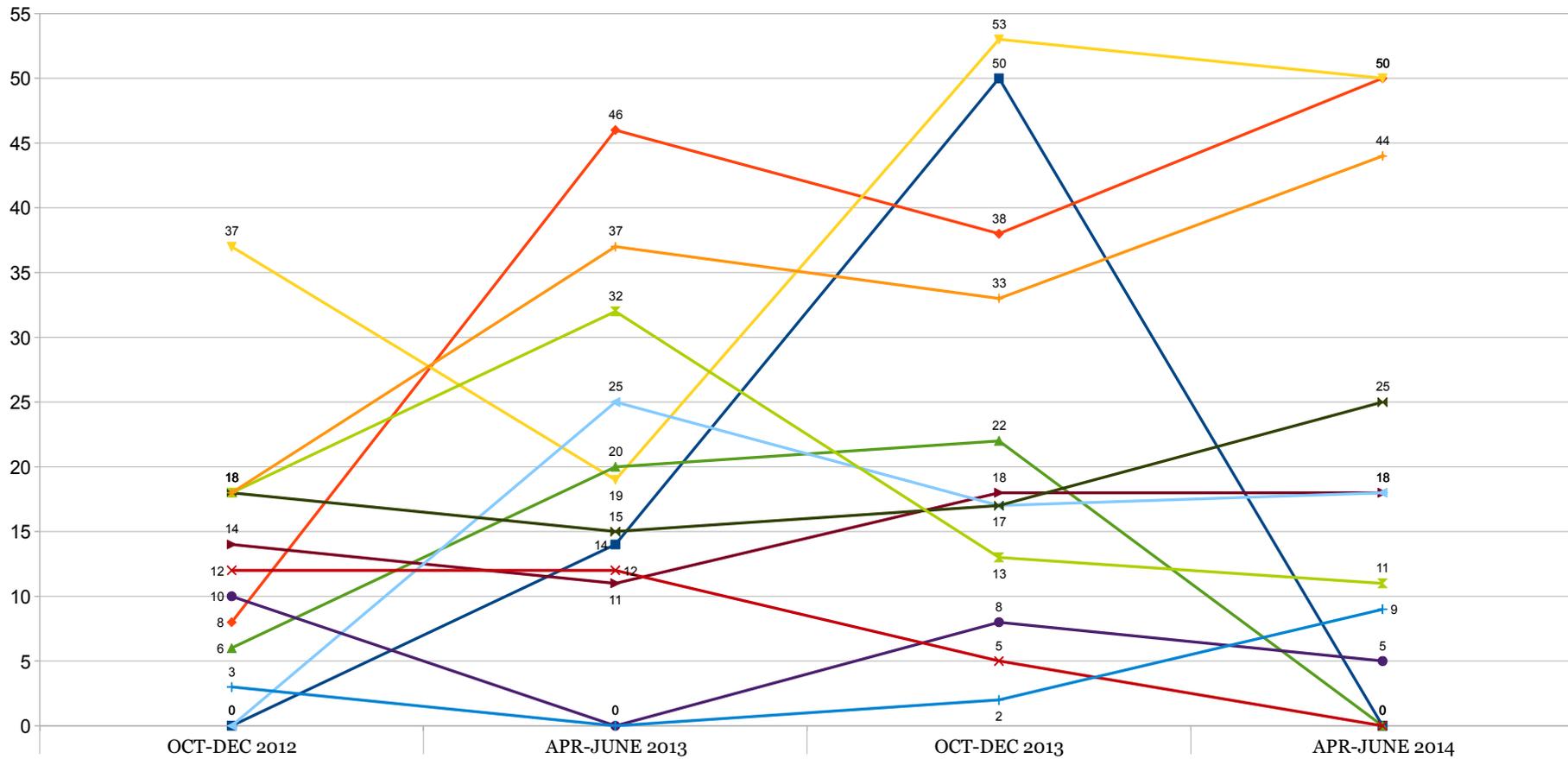


Table 8b: Trends in tender notices with a discriminatory impact (percentages)

Note: Countries not listed had no tender notices with a discriminatory impact in the period considered

Small data sample (up to 20 tender notices examined):

¹ Apr-June 2013 // ² Oct-Dec 2013 // ³ Apr-June 2014



It should be noted that the amount of information available on TED (see Methodology, p.16) varies from country to country, sometimes to a large extent. For example, Poland 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, Portugal and Denmark were found to provide generally shorter summaries, which tends to suggest that the actual figures might be higher than reported in this analysis. 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.²³

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

For the third time in the OFE Procurement Monitoring Report, we also collected the data related to the nature of the contracting authority. The data (see Table 9) suggests the persistent practice of referencing trademarks in tender notices issued by national or federal authorities, a result which is consistent with our previous reports.

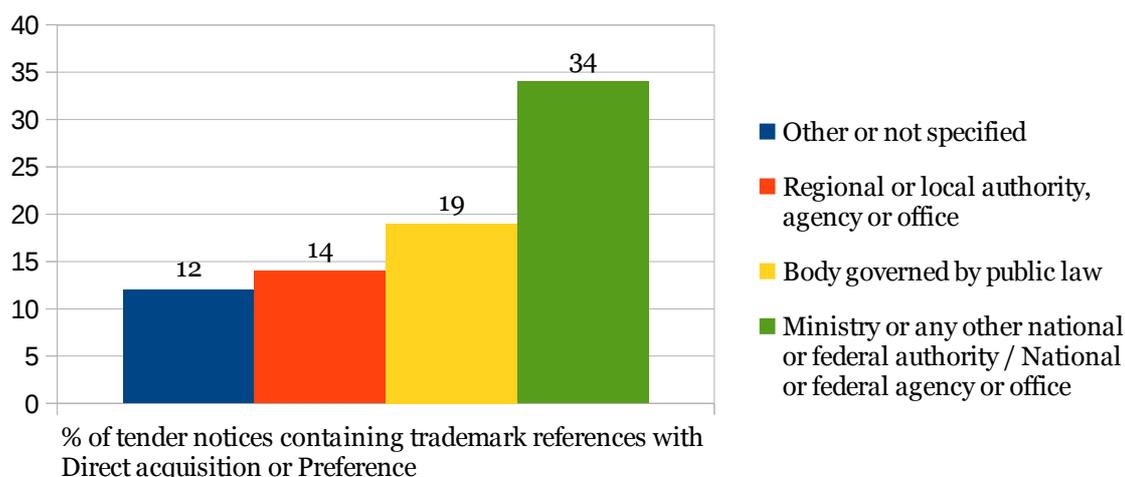


Table 9: Proportion of tender notices with a discriminatory impact, by type of contracting authority

We found no clear correlation between the domain of activity of the contracting authority and the practice of referencing trademarks in tender notices, with the notable exception that the highest percentage has been found in tender notices issued by Defence institutions or organisations (see Table 10).

²³ The Single Market Scoreboard contains useful information on this issue: http://ec.europa.eu/internal_market/scoreboard/index_en.htm

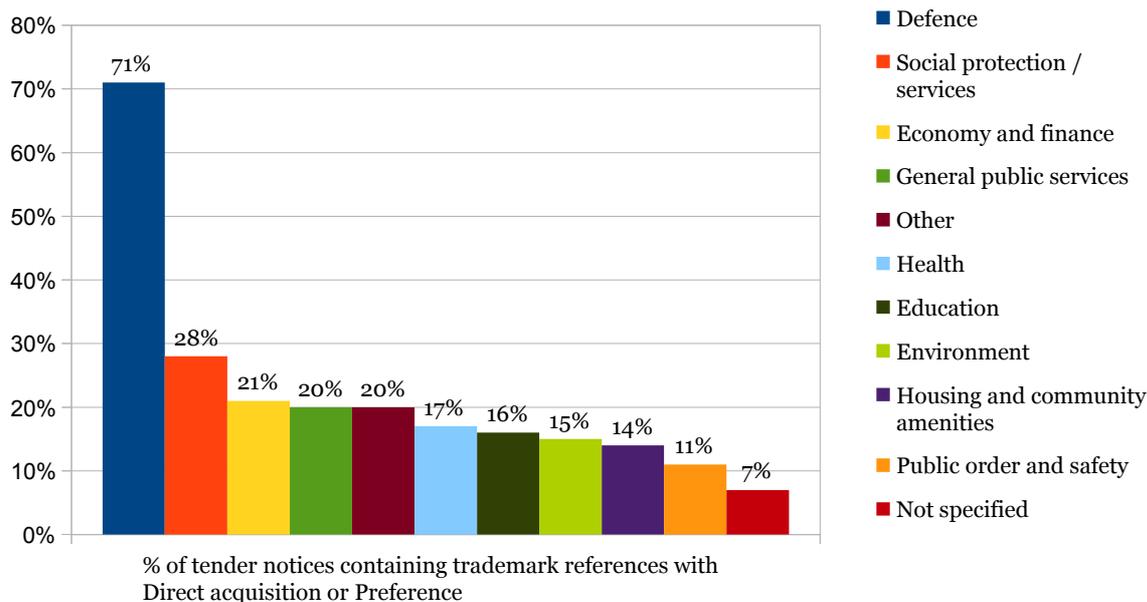


Table 10: Proportion of tender notices with a discriminatory impact, by main activity of the contracting authority

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 85% (825/972) of all tender notices. Besides this, a significant recourse to procedures which can only be applied under exceptional circumstances (*i.e.*, negotiated procedure, accelerated or not, and without competition²⁴) was also noticed. This is consistent with results from previous years, with just a slight increase in the percentage of negotiated procedures without a call for competition. In comparison to the results of the reports from previous years, the percentage of tenders by recourse to all special procedures seems to be relatively stable, with just a small decrease.

²⁴ Article 31 of Directive 2004/18/EC and Article 32 of Directive 2014/24/EU.

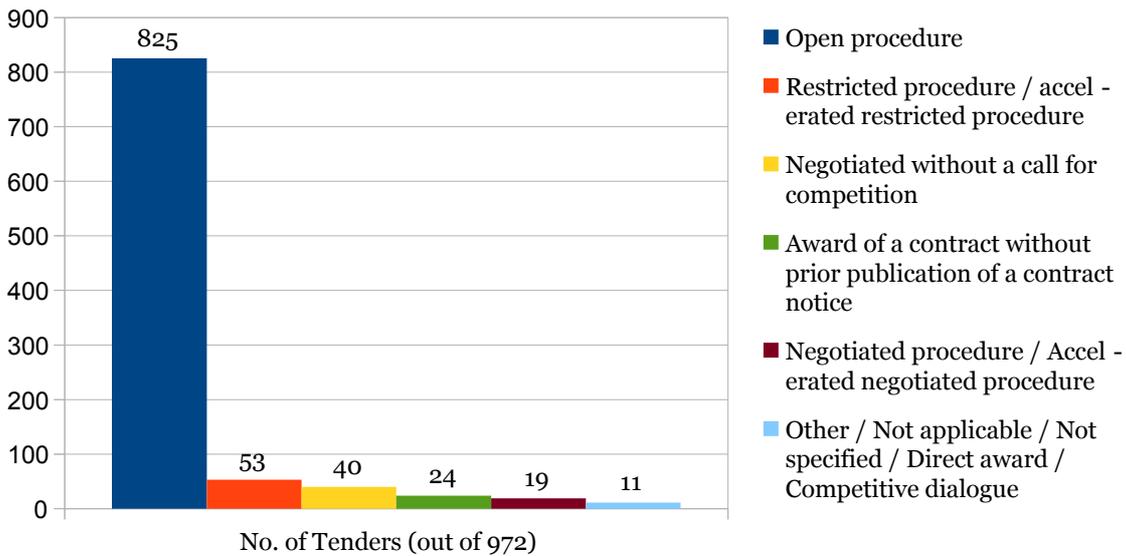


Table 11: Tender notices by choice of procedure

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 of 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.

ARE THESE RESULTS RELEVANT?

The fact that **18%** of all tender notices examined contain trademark references giving unjustified preference or exclusivity to a specific vendor (see p.7) 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 18% 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 on TED. According to the most recent calculation, in 2011 the value of calls for tender published on TED was only 17.7% of the total value of public procurement²⁵. 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/EC²⁶ and in Directive 2014/24/EU²⁷ (“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 is necessary to have access to all information.

25 2011 Public Procurement Indicators

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

26 *Cf.* Article 23.

27 *Cf.* Article 42.

Furthermore, 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.

Considering that public procurement amounts to about 19% of the economic activity in the EU²⁸, 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, **18%** is thus undoubtedly a relevant figure, and without the limitations noted above this analysis might have shown an even higher number of tender notices with a discriminatory impact.

28 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 new 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 rules²⁹.

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 pp. 10-11) 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.

29 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 the 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 2014.

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 December 2013, the minimum threshold was € 134 000 for public supply and service contracts awarded by central government authorities (value is expressed in EUR, excluding VAT)³⁰.

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)³¹: code 48000000 which corresponds to the division “software package and information systems”;
- Publication date: from the 1st of April to the 30th of June 2014;
- Type of contract: public supply contracts as defined by Article 1(2)(c) of Directive 2004/18/EC and by Article 2(1)(8) of Directive 2014/24/EU;
- 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 2(1)(1) of Directive 2014/24/EU, excluding the Armed Forces and contracting authorities exercising one or more of the defined activities in the utilities sector³². 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 Regulation³³ and the rules for the implementation of the Financial Regulation (“the Implementing Rules”)³⁴. For the purpose of understanding the

30 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*). See also Article 4 of Directive 2014/24/EU.

31 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.

32 These public contracts are covered by Directive 2004/17/EC and by Directive 2014/25/EU.

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

34 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.

regular behaviour of contracting authorities 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 framework³⁵.

- 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.

35 Cf. Article 10 of Directive 2004/18/EC, Recital 13 and Article 15 of Directive 2014/24/EU, according to which the Public Sector Directive does not apply to contracts awarded by contracting authorities in the field of defence where the products are subject to the provisions of Article 296(1)(b) TFEU and where the contracts fall within the scope of Directive 2009/81/EC (on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security).

About OpenForum Europe

OpenForum Europe's mission is to encourage an 'open competitive choice for IT users' by actively supporting the employment of Open Standards, wider use of Open Source, adoption of Open Software business models, and the avoidance of locking-in. 'Not for profit' and independent, it draws membership from both the supply and user communities.

www.openforumeurope.org

info@openforumeurope.org

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