

C13571151 European Union Government Procurement Study

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Chapter I: Introduction

States and governments are powerful actors in today's economies. They provide the legal framework for private economic activities and are responsible for the supervision, monitoring and sanctioning of the market actions of private citizens. The installation of specific tax codes and tax policies, to give only one example, has enormous repercussions for the volume and structure for economic actors, private and corporate alike. By means of fiscal policy and social policy, states are intervening in market processes in many ways. States and governments are not only indirectly interfering in private market transactions, though. In so far as they provide goods and services directly to their citizens, they are economic actors that are potentially heavily engaged in market transactions. As providers of goods and services they can decide whether those goods and services are produced in-house and thus provided directly by state means or whether they outsource the provision of goods and services. Public procurement is a special result of economic outsourcing decisions by state agencies.

Public consumption of goods and services represent significantly sized markets that in individual cases can go up to 20 % of GDP. In the Netherlands, for example, the share of public procurement in GDP (excluding state-owned utilities) was 21% in 2009. On average, the public procurement share in GDP of EU member states is higher than the OECD-average and well in the range of 14 to 15% of national GDPs. In general, government procurement markets can best be seen as relatively sheltered markets. From a political economy perspective, public procurement offers governments rich opportunities to serve special interest and to use public funds for narrowly defined political and economic targets. Using taxpayer's money to buy goods and services out-of province or for that matter outside the nation-state may be an efficient use of money but is not automatically appreciated by local and national businesses, nor voters. Moreover, government may see public

purchases as economic policy tools that serve wider targets. In other words, economic discrimination can pay off in political terms. Thus, from an economic point of view, public procurement is often seen as potentially an inefficient use of public money because the public demand for goods and services does not automatically follow clear-cut economically efficient mandates but can be guided by non-economic principles.

Part of the Single Market project of the European Union (EU) was the liberalization of previously nationally controlled and reigned public procurement markets of EU member states¹ (see Sohrab 1990). In the spirit of the Single Market initiative, it was suggested that the creation of a single public procurement market would increase transparency and most of all open up sheltered markets. Increased competition would improve efficiencies, and thus contribute to a better use of public funds. Since, the liberalization of those markets in the EU has moved forward and resulted in an EU-wide policy regime for public procurement that covers the single public procurement market. However, national practices still tend to differ and thus it is adequate to speak of *national sub-regimes* that interact with the overarching EU-wide public procurement regime. Those practices need to be taken into consideration if one wants to assess market opportunities of suppliers. Only recently the European Commission started a new initiative to create a level playing field in the EU by proposing rules, norms and policies that regulate the emerging single procurement market. Chapter 3 of this report provides an in-depth analysis of various national practices and discusses new elements of the procurement regime of the EU.

Putting public procurement in the trade policy agenda is a long-standing EU target. At the level of the World Trade Organization (WTO), public procurement became part of the work program at the Singapore meeting in 1996. The success of the

¹ See Julia A. Sohrab: The Single Market and Public Procurement, Oxford Journal of Legal Studies, Vol. 10. No 4).

EU, however, did not translate into respective policies. In various policy statements the EU emphasized its strong interest and political intention to open up public procurement markets with partners who are willing to enter bilateral trade agreement negotiations. Opening up previously sheltered markets has the potential to make use of comparative competitive advantages of EU-based companies, and thus to create additional income and jobs. It is not surprising then, that the EU tried to identify sectors where EU companies may enjoy such comparative advantages. In its 2010 policy statement 'Trade, Growth and World Affairs', the EU lists public transportation equipment, medical devices, pharmaceuticals as well as green technologies and low carbon technologies as items where a potential public demand from abroad meets comparative advantages. From the very beginning of the CETA project the European side made it crystal clear that the opening of Canadian public procurement markets was a key objective in the whole undertaking. In this regard, Canada as an OECD economy was seen as a model for EU's trade policy and its aim to open up public procurement markets of trade partners. This emphasis was demonstrated when the EU declared that negotiations would only be started if the federal government would be ready to formally include the provinces in the negotiations. Based on the experience of previous (failed) trade initiatives with Canada this inclusion was seen as critical².

The EU's international public procurement strategy is based on the principle of reciprocity. According to this principle, efforts to open up foreign public procurement markets can only be successful if the EU itself can guarantee a high level of openness. More so, the principle of reciprocity is supposed to generalize practices already in place in overall ten member states, including prominent ones like those of the UK and Spain, who have mechanisms in place to apply bidding and participation restrictions to economies that have no similar liberalization rules

² Kurt Hübner: Canada and the EU: Shaping transatlantic relations in the 21st century, K. Hübner (ed):Europe, Canada and the Comprehensive Economic and Trade Agreement, Routledge Studies in Governance and Change in the Global Era, 2011.

for third-party bidding in public procurement markets. In other words, the EU is prepared to reciprocate what are seen as ‘unfair practices’.

In contrast to public statements, recent research convincingly demonstrated that EU public procurement markets are *not* more open than respective markets of other developed market economies. As a matter of fact, the degree of openness towards third-party actors is relatively low. Measured as imported public procurement goods and services to overall public purchases of goods and services, the so-called import penetration ratio, third-party penetration is rather low, and on average significantly lower than the import penetration ratio of the private business sector. In other words, national private markets are more open than national public procurement markets. Such a finding confirms the hypothesis that public procurement markets can be best understood as relatively sheltered markets. Still, given the liberalization efforts that came with the European Single Market it may be a bit surprising how safeguarded those markets still seem to be.

This report will provide an analysis of the EU-wide public procurement markets and some of its sub-market segments. We start out with an economic analysis of European public procurement markets that will give an insight into size as well as mechanics of those markets (chapter 2). Also, this chapter will offer projections about the future chances and opportunities for Canadian companies in specific national market segments. Those projections have to be read as potential market opportunities. The calculated numbers are projections stemming from a range of variables that can’t be controlled for in a forecasting exercise. Still, our approach is relevant for policy-makers, and a first in applying such a methodology to the field of public procurement.

The third chapter highlights critical legal elements of the emerging EU-wide public procurement regime and discusses most recent changes in- the-making. Canada and the EU are both signing authorities in the WTO Agreement on Government

Procurement (GAP). This agreement specifies general rules and practices in regards to public purchases of goods and services and the mechanisms of openness. We analyze those specifications in order to prepare the ground for the understanding of the new policy initiatives of the European Commission in regards to public procurement and third-party access rules.

Chapter four looks into Canada's position in EU public procurement markets and provides so far unpublished data. Canadian companies are active participants in those markets, even though the overall share is miniscule. This can be seen as a weakness but also as a chance of improvement. One critical element seems to be the lack in information. Thus we explain the workings of a specific sub-unit of EU public procurement markets and how Canadian businesses can enter this segment.

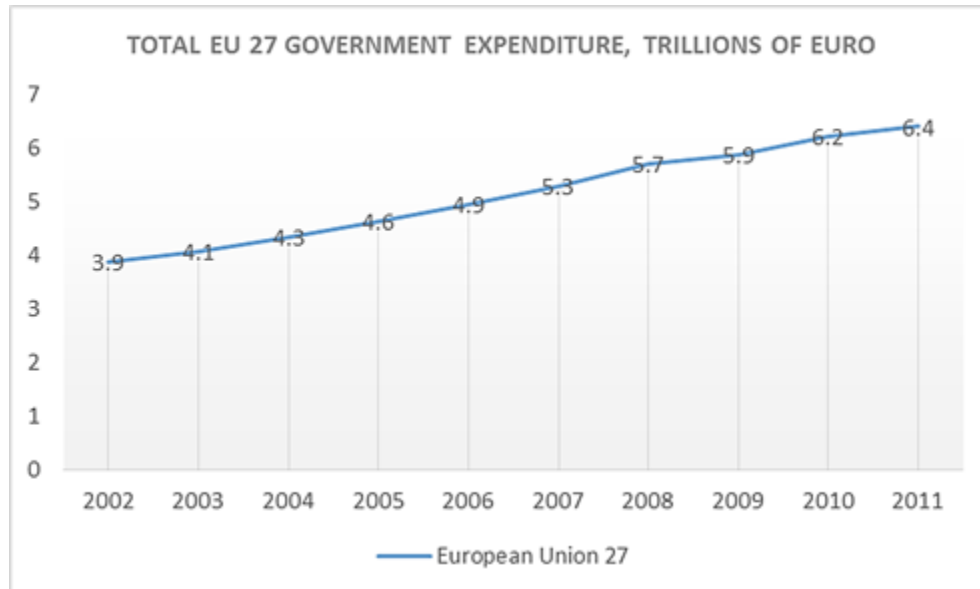
Chapter 2: Public procurement

Public procurement is typically defined as any purchases of goods, services or works, from third parties, with government funds by government agents or authorized authorities. Debatably, procurement is a subset of commissioning,³ the process whereby public sectors choose service outcomes and products required then acquire adequate ones—the potential differences are in the kinds of goods and services acquired. In this paper, the two are somewhat synonymous, total procurement being measured through national account statistics, which are not easily disaggregated into greater detail. In addition to the spending of government funds, procurement includes spending by entities controlled by governments, like public utilities, airports or nationalized institutions. In practice, public procurement is split into various sub-categories, ranging from public private partnerships, where

³ “An introduction to public procurement”, UK Office of Government Commerce, 2008.

controlling interests earn commissions from on-going revenues (concessions), to goods purchased by government and transferred unaltered to private households.

Table 1. Total Government Expenditure EU 27



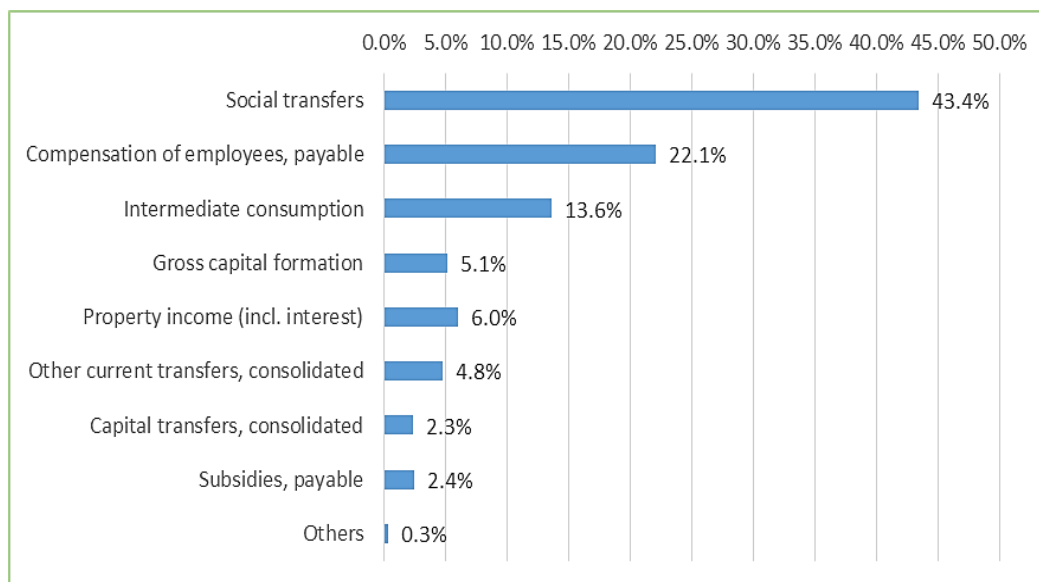
*Source Eurostat

To start then, measuring procurement begins by noting government expenditure. Table 1 shows that, from 2009 to 2011, government expenditure in the EU 27 grew from 3.9 to 6.4 trillion 2010 Euros, a 64% increase. In 2010, total government expenditure was almost half of EU 27 GDP. Comparatively, Canadian GDP is on average around 5 times smaller than EU 27 total government expenditure. Total government expenditure spans a wide variety of activities and is often expressed in economic categories, by classification of the functions of government (COFOG).

2.1. National Account Definition

An analysis of COFOG breakdowns reveal the largest expenditures by percentage are social transfers, the greater part of which are not procured at all.

Table 2. 2011 composition of total government expenditure by economic category, EU 27



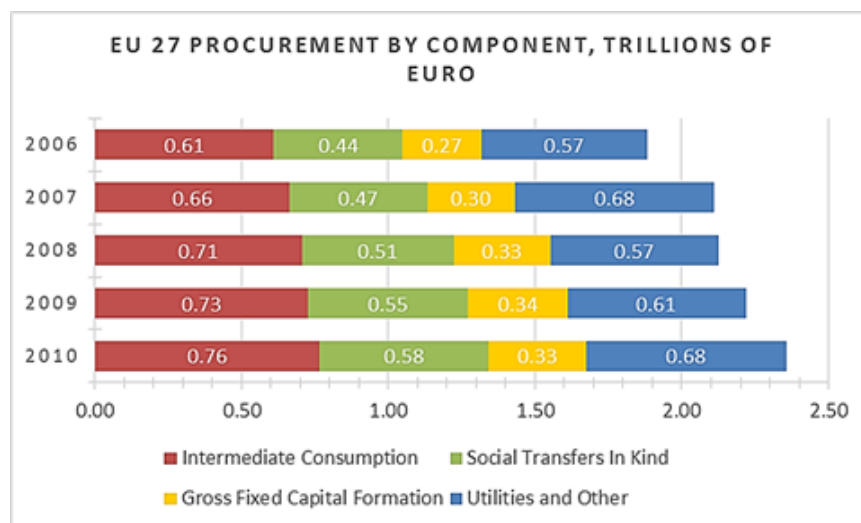
*Source Eurostat

To accurately disaggregate procurement from total expenditure is a matter of isolating expenditure data correlating with procured expenditures. Methodologically this constitutes combining intermediate consumption, gross capital formation and social transfers in kind with data on expenditures by state-owned utilities. Intermediate consumption, the aggregate of goods and services consumed by governments, such as building rentals, energy, consultancy services, medical appliances and equipment and military supplies, are taken from national account ESA 95, P2 tables. Social transfers in kind, the sum of national accounts D.6311, D.63121 and D.63131, are goods and services purchased by government from market producers and supplied to households without any transformation, like certain health and education services⁴. Gross fixed capital formation comprises the acquisition of buildings, vehicles and machinery, less their sale and is taken from national account category P51. Utilities and other data, not included in government financial statistics, can be identified with ESA 95 input-output tables,

⁴ "Manual on sources and methods for the compilation of COFOG statistics", Eurostat 2011.

and from company accounts. These are typically rail, urban transport, port, and

Table 3. Total Procurement EU 27 by COFOG Category



*Source: Eurostat

airport facilities. Utilities data used in this study are compiled by the European Commission and currently available only to 2010. Aside from a categorical breakdown, table 3 totals reveal it is not just total expenditure in the EU that is larger than Canadian GDP, total EU 27 procurement is also larger. Moreover, total Canadian procurement in 2008 was about 6.5% of EU 27 total procurement⁵.

2.2 Procurement in the EU

EU single market initiatives, established in 1993, aim to stimulate economic expansion by eliminating internal barriers to trade, labour and capital movements. Prior legislative procurement directives covering works, goods, services and utilities were updated and consolidated in 1993 and 2004, and further amended in

⁵ Government at a glance OECD, 2011.

2008. Directives set out thresholds, projects falling under their scope and over the thresholds are published in the Official Journal of the European Community (OJEC), via the online tenders data base TED. Eurostat values, in 2010

Table 4. Total TED Listed Procurement 2010



Euros, suggest that 454 billion Euro of contracts were published in the OJEC. These values are not representative, exactly, of values within the scope of the directive or indeed above the thresholds, as below threshold contracts are frequently published as well as some that are outside the scope of the directives. That said, the data are critical to the study of procurement markets and directive implementation.

2.4 Key Studies Referenced in This Paper

Demand for insights into the effectiveness of public procurement EU directives has coincided nicely with the initiation of CETA negotiations. Several studies have been commissioned utilizing the vast amounts of data generated by the OJEC online tendering site, TED. Our study relies primarily on data published by mainstream statistics producing organizations, like the OECD, Eurostat and others.

We also re-examine the results of the following two key studies, in light of the procurement case as it might apply to Canadian based economic operators seeking to access post-CETA EU procurement markets. The “Public Procurement in Europe Costs and Effectiveness” study, prepared for the European Commission

in March 2011 by Price Water House Coopers, London Economics and Ecorys, was used to analyze procedure usage, median contract values, some cross-border aspects and contract completion times. “Cross-Border Procurement, Above EU Thresholds”, by *Ramboll Management Consulting and The University of Applied Sciences HTW Chur*, also completed in March 2011, used the European System of National and Regional Accounts ESA 95 symmetric import/export tables to estimate and analyze market size and composition on a supranational and regional basis. We have used their results to analyze public sector penetration, cross-border intra-EU and extra-EU trends, as well as other aspects of the cross-border case. We also used EU Commission reports “Procurement Indicators”, specifically for number of award notices. For the more serious reader a review of the methodologies employed by these studies is recommended.

2.5 Import Penetration

Input/output tables allow for an examination of national imports and exports and arrivals and dispatches, by user category. The results highlight low public sector import penetration levels, which average 7.5% across the EU 27. These reaffirm the sheltered market case from a demand for goods perspective. Political motives for sheltering procurement only add to a situation where, as we can attest from the 2005 case, more than 90% of public sector goods are generated within national markets. Certainly, at 19.1% the private sector was more open; however, what Ramboll (2011) illustrates is that different goods are used in the different markets.

Table 5, below, ranks products by the ratio of total demand used by the public sector. As one might well presume, the total of public administration services used in the average EU country are almost entirely used by the public sector. The ratio of those products that are imported, however, is not always so high. In the public administration case, only 0.1% of public admin services are imported by the public

sector. Import penetration is certainly an important aspect of public procurement, not only because it highlights what goods and services a national market cannot (or does not) supply its government, but also because it can suggest which goods and services are more often sought outside of national borders.

Table 5. Top Ten Products by Public Sector Demand, 2005

CPA Code	Product Short Name	Public sector % of total demand	Public sector use imported %
75	Public administration etc...	94.8	0.1
80	Education services	80.3	0
85	Health and social work services	72.3	0
10	Coal and lignite; peat	52.6	47.2
90	Sewage/refuse disposal serv.	33.4	0.7
73	Research and development	26.2	6.1
40	Electrical energy/gas/steam	25.2	12.3
11	Crude petroleum/natural gas	18.9	81.1
92	Recreational, cultural services	17.7	1.4
41	Collected and purified water	16.4	0.2

*Source Ramboll (2011)

Firms seeking access to EU procurement markets are advised to undertake more detailed studies of procurement market penetration at the sector level.

2.6 Procurement Procedures

The costs and effectiveness study ties *tendering procedures* to contract procedure use. This is because the directives set out guidelines to tender awarding procedures and different nations utilize particular guidelines more than others. The guidelines themselves fall under four main categories, open procedures, restricted procedures, negotiated procedures and competitive dialogue.

1. Open procedures can be used to award any contract. Tendering authorities are required to publish bid specifications, contracts and specifications are mandatorily published in the OJEC, any interested firms

may submit bids, bids are evaluated without negotiation and minimum time limits are provided for bid submissions.

2. Restricted procedures are also published on TED, in the form of a notice that invites economic operators to request participation. Only companies invited by contracting authorities may submit bids.
3. Negotiated procedures are similar to open procedures but less structured. Authorities advertise on TED to find suitable contractors who are selected based on pre-established criteria. Bids are then awarded through unregulated negotiations. Use of this procedure is restricted by directive to circumstance where specifications are too expansive to be easily published, where research, experiment or development constitute non-fungible goods or services and where overall pricing is not possible due to performance risk or project nature. This is the standard procedure used under the utilities directive. A form of negotiated procedure without publication allows authorities to seek out and consult contractors and award tenders on a negotiated basis.
4. Competitive dialogue can only be used when other procedures are unsatisfactory, as in extraordinarily complex circumstance. Selected economic operators responding to TED notices are admitted to dialogues where suitable solutions are developed and tender invitations selectively awarded post dialogue.
5. Accelerated time frames can be applied to restricted and negotiated procedures.

In addition to procedures various *tendering techniques* are used by different contracting authorities under different conditions.

1. Framework agreements are by directive not a distinct kind of procedure but rather a specific variation. Procedures regulations are followed up to the framework agreement when agreed on time frames, lists of suppliers, terms specifying prices and quantities envisioned are drafted into documents. In such agreements, first suppliers are included and second participating suppliers respond to ongoing calls for goods and services within agreed on terms.
2. Joint purchasing techniques allow contracting authorities to bundle procurement requirements into one joint purchasing organization.
3. Dynamic purchasing systems are very rarely used electronic processes allowing contracting authorities using open procedures to facilitate tendering.
4. Electronic auctions enable purchasers to employ automatic evaluation methods and repeat downward pricing adjustments with the aim of combining electronic and paper data while reducing time, transactions costs

and bureaucratic workloads. The systems are infrequently used and not typically integrated with electronic tenders.

Table 6. Procedures use by value of TED contracts awarded 2006-2010

Procedure	Share of total value
Open	52 %
Restricted	23%
Negotiated	14%
Negotiated without publication	5%
Competitive dialogue	4%

*Source PwC, London Economics, Ecorys (2011)

Table 7. Procedures use by number of TED contracts awarded 2006-2010

Procedure	Share of total number
Open	73%
Restricted	9%
Negotiated	14%
Negotiated without publication	7%

*Source PwC, London Economics, Ecorys (2011)

2.7 Procurement Exemptions and the Total Procurement Function

While total procurement makes up 40% of total expenditure, roughly only 20% of that expenditure is covered by legislative directives,⁶ and less than 19% is published in TED. Some purchasing activities are procured by governments in open and transparent ways and more likely to end up on TED, while other activities are likely to remain directly purchased, or covertly purchased. In addition, various national level exemptions have been legislated.

Audet (2002) establishes the practice of using government financial statistics for estimation and identifies that data quantifying expenditures in partially excluded sectors, like defence, can be factored before inclusion in total procurement calculations. Defence is used as an example because defence expenditures in early papers are included in procurement at 50%. In 2008, only 6 billion of 80 billion spent on defence across the EU 27 was above directive thresholds and within directive scope. Procurement estimations using government financial statistics data can be refined--quantifiable excluded expenditures can be factored—and in the defence case this study takes this line, but in general the process is time consuming and the results certainly far from robust. A simpler approach examines changes in the difference between calculated procurement and published procurement and thereby identifies trends in potential procurement. In this study we measure total procurement in 2010 Euros with the following function:

$$\text{Total Procurement} = [(IC + \text{Social} - \text{Transfers} - \text{in} - \text{Kind} + GFCF) - (\text{Defence Expenditure} - \text{Defence IC}) + \text{Utilities Expenditure}]$$

⁶ “Annual Public Procurement Implementation Review 2012”, Commission Staff Working Document.

Table 8. Public purchasing exempted from procurement regulation.

Purchasing Activity	Exempted by Directives?
Fuels for production of energy	Yes
Defence Procurement	Partial
Purchase of water for drinking	Partial
Works and service concessions	Partial
Service concessions	Classical
Financial Services	Yes
Joint Ventures/Public Private Partnerships	Partial
Qualified Telecommunications Activities	Partial
Research and Development	Partial
Sheltered Workshops	Partial
Secret Contracts	Yes
Projects awarded pursuant to international rules	Yes
Exclusive rights (article 18 2004/18/EC)	Yes
Stationing of troops	Yes
Purchase of immovable property	Yes
Broadcasting	Yes
Exploring for oil and gas	By nation

*Source Commission Staff Working Paper SEC (2011) 853 final

2.8 Cross-border Procurement

Identifying internationally contestable procurement projects (referred to as contestable) is more readily achievable through analysis of cross-border trends. Import/output tables track flows of goods and services between national bodies and the rest of the world. Intra-EU arrivals and dispatches and international imports and exports can be used to identify and quantify the various forms of cross-border

procurement. These procurement deals fall under two main categories, which are used extensively to describe trends.

1. ***Direct cross-border*** procurement occurs when firms bid from home markets and win contracts in other Member States.
2. ***Indirect cross-border*** procurement occurs home market firms bid and win contracts through subsidiaries based in other Member States, when domestic prime contractors outsource project components to foreign subcontractors, when foreign bidders participate in consortia with domestic firms and when domestic firms import goods and supply them to contracting authorities.

By incidence, cross-border wins account for small percentages of contracts awarded--only 0.03% of 540,000 bids assessed in the “Cost and Effectiveness” paper are cross-border. In Ramboll (2011), however, we see the values by contract are proportionately much higher. Across 2007 to 2009, cross-border contracts accounted for roughly 17% of total contract values.⁷ The rule of thumb correlating smaller countries with higher trade openness, as expressed through higher penetration ratios,⁸ does not necessarily apply to cross-border procurement. Though in many cases smaller countries award higher values and higher numbers of direct cross-border contracts, there is no evidence that this trend is size related. Whereas smaller countries have smaller pools of talented firms from which to foster competition, a wide variety of factors influence cross-border trade. As we will see, individual EU 27 nations exhibit significant varieties of both purchasing patterns and policy implementations that are important indicators of procurement market characteristics.

⁷ The number is closer to 29% when awarded indirectly through wholesalers/distributors.

⁸ Import penetration is defined as the ratio of imports to total demand

2.9 Barriers to International Procurement

Ramboll (2011) surveyed businesses and received responses citing language barriers as the main cross-border barrier. This explains the results found in TED data where, for example, “84% of all contracts awarded directly cross-border by contracting authorities in Austria are awarded to economic operators in Germany.” Ramboll (2011) also ran a multivariate analysis, employing a binary logit-model to estimate the effects of specific factors on the probability of cross-border procurement. Their results significantly suggest a common language increases the probability of cross-border procurement by 21.3%. Other factors, like the type of contract are also influential, for example supplies contracts are 168.6% more likely to be procured across borders than works contracts, services contracts are 269% more likely, and EU community fund financed projects are 110% more likely. Increased competition reduced the necessity to source extra-EU or intra-EU suppliers.

This is indication of what we might expect at the causation level, namely that the quality of, and/or demand for, specialized contractors or goods has more of an effect than the price on the incidence and value of cross-border awards. Ramboll (2011) also found that 93% of contracts were awarded within 450 kms. This is likely not only a reflection of regional preferences but also of the practicality of project communications that can be enhanced by in-person meetings and language similarities. Though it is not covered here, significant work was done in “Costs and Benefits” covering the costs paid by suppliers to bid across borders. Though there would most certainly be costs without directive covered procurement, surveyed suppliers did complain that cross-border bidding is both expensive and attached to a learning curve.

2.10 Markets in this study

This study focuses on 8 markets in the EU 27. The largest economies by GDP are included, Germany, France, United Kingdom and Italy. The Netherlands and Poland are also included. Two smaller economies with Eastern European attributes, Hungary and the Czech Republic round out the sample. While the greatest number of contracts awarded, from 2006 and 2010, were awarded in France, the highest proportion of aggregated contract values, across the same time period, were awarded in the U.K. Various other differences exist throughout the sample. For example, nations employed different ratios of techniques and procedures, and offered different levels of access to local, cross-border and international bidders. While German public expenditures were the largest in 2010, nearing almost 500 Billion Euro, the value of TED listed tenders averaged almost 3 times less than those in France. Moreover, where some national procurement markets have become increasingly open to public operators, like those in the UK, Italy and France, others have relatively constant or minimal increases in officially listed procurement projects, as in Hungary, the Czech Republic and the Netherlands. Further, roughly half of all awarded contracts in 2010 were awarded by France (26%), Poland (14%) and Germany (13%). The largest 2010 contracts by value were tendered by the UK (27%), Italy (13%) and France (12%).⁹ However, contract sizes are not entirely representative of project sizes. 70% of works contracts are below the works threshold of 4.85 Million Euro, which could be the result of disaggregated projects, whose combined values pass threshold parameters.

⁹ [Commission Paper: SWD (2012) 342 final].

2.11 EU Procurement Markets

2.11.1 The United Kingdom

Total expenditure in the UK, in 2010 was the third largest in our study at 861 billion Euro, this was the same for total procurement which was third at 374 billion. A distinguishing feature of the UK market was the relatively much larger ratio of defence expenditure, which was almost 5.5% of total expenditure and roughly 7% of total procurement.¹⁰ These were the highest ratios in our sample and indeed for the full EU 27 the ratio is between 3.1% and 3.7%. While TED defence contracts combine with housing and environment contracts to make only 3.6% of the total number,¹¹ the significance for Canadian economic operators is likely much higher.

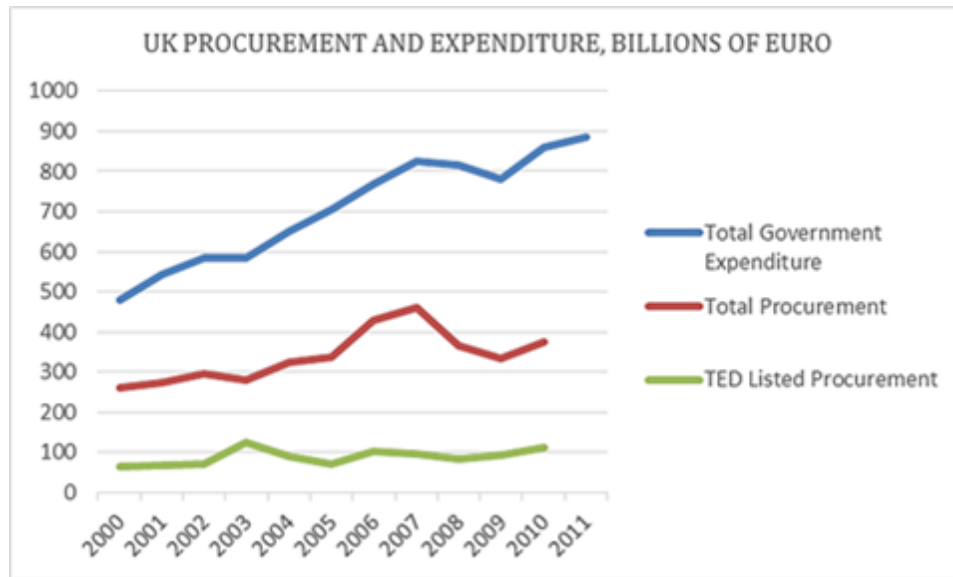
While OECD measured trade openness is similar to that in Canada at 29%, it is more open than in Italy or France and less open than in Germany or Poland. Though there appears to be little correlation between trade openness and procurement openness, in the UK, at least in the indirect market, the two indicators are equal in trend. In 2010, UK authorities awarded almost 8.5 billion Euro to internationally based bidders (extra-EU). This was less than France awarded but more than twice that awarded by Italian authorities.

¹⁰ The total procurement calculation in our sample only accounts for the intermediate consumption component of defence expenditure, which is roughly 50% of total defence expenditure across the board.

¹¹ "Public Procurement in Europe. Cost and Effectiveness." Price Water House Cooper (2011)

2.11.1.1 Expenditure and procurement

Table 9. Procurement and Expenditure, UK



*Source: Eurostat

Annualized growth rates of expenditure, procurement and TED are 5.8%, 3.7%, and 5.5%, respectively. While annualized total expenditure growth in the UK is roughly the same as that in Italy and in France, and about 2% more than that in Germany, annualized total procurement growth is the slowest in our study. Clearly while debt to GDP ratios in the UK increased after 2008, similar to countries the world over, the portion of that expenditure classified as procurement decreased. We can see from table 9 that procurement growth in 2010 is increasing again, though it is still among the lowest in our study, 3 times slower than the same growth in France and even lower than that in Germany.

2.11.1.2 Contracts and Procedures

Across 2006-2010, the UK accounted for only 8% of the number of total award notices but 24% of total contract values. The average contract value in the UK is 7.29 million, almost 80% larger than the next highest in our sample. Moreover, more than half of all contracts awarded in the UK are valued at more than 660,000 Euro. Procedure usage in the UK reflect high value average contracts—more than 50% of UK awarded contracts used restricted procedures, while 30% used open procedures. While negotiated procedures accounted for under 10% of UK contract numbers, those negotiated without publication were only 2.5%, twelve times less frequent than the EUs highest user Lithuania at 30%. Competitive dialogue in the UK is used relative other procedures more than in any other country in the EU but still less than 1.5% of the time.

2.11.1.3 Cross-border

Total direct awards from UK authorities to cross-border bidders averaged only 1.5% of the total number of awards, and only 3% of the total value of awards, which is close to the EU 27 average. Indirectly awarded numbers of contracts in the UK, on the other hand, are almost 5% higher than the EU average at 16.5%. The ratio of direct awards that go outside of the EU 27 is small, at only 12% and only 1% of these go to the US. Of the 16.5% that are indirectly awarded, only 37% are intra-EU, while 37% go to the US and 16% to affiliates of Swiss originating companies. This is the highest ratio of extra-EU foreign affiliates in the indirect procurement market (though not the largest indirect procurement market by ratio, which is in Italy). Of the indirectly awarded intra-EU 37%, 30% were awarded to German based companies, 29% to French based and 14% to those from the Netherlands. The average sizes of both direct and indirect cross-border awards in the UK are the largest in our study, but these numbers are very likely influenced by a few very

large contracts¹². Direct cross-border awards average 14.58 million Euro while indirect cross-border awards average 6.1 million Euro.

2.11.1.4 Conclusion

The procurement market in the UK, though growing at a modest rate and with a high probability for slowdown between 2010 and 2014, given the UK's current fiscal challenges, is not only one of the largest in the EU but also internationally very open, especially with respect to foreign affiliates of multi-national corporations. The market, at 394 billion Euro in 2010, is trending conservatively toward 483 billion, in 2014¹³. Growth rates suggests the UK would be expected to deliver 114.35 billion in TED awarded contracts in 2014. Of these, roughly 10 billion could be contested by international extra-EU bidders¹⁴. In the direct case this would constitute only 22 contracts, but their value would be expected to grow from some 14 million per contract to around 18 million per contract. Direct contracts, in the UK, are twice-as-likely to be supplies contracts than works or services contracts. The indirect case, relevant for Canadian businesses with UK branches would see a far higher number of 2014 contracts, at 1262, averaging 7.88 million per contract. However, contracts values in the UK are skewed, so that a few high value contracts push the averages up. Still, these would amount to about 3.73 billion of 2014 procurement that could be considered contestable by Canadian firms. The use of restricted procedures in the UK hints that contracting authorities like to choose whom they do business with, especially across borders. Because Canadians have a common language and a common institutional history, the probability of winning contracts in the UK is much higher for Canadian bidders than in other countries. For this reason, despite high levels of competition for UK

¹² Ramboll (2011), excludes large contracts from their data because of these few large contracts, we have used Ramboll's ratios transposed with Eurostat indicator volumes and TED based values.

¹³ All of our forecasts are projected in 2010 Euros, thus 2014 current dollar values, likely available by 2017 would be nominally higher, to account for changes in purchasing power.

¹⁴ 2014 forecasts use trends in number of contracts, procurement market components and ratios of TED listed to total procurement, then apply the Ramboll 2011 contract distributions. Trends in distributions couldn't be assessed given limited amounts of data.

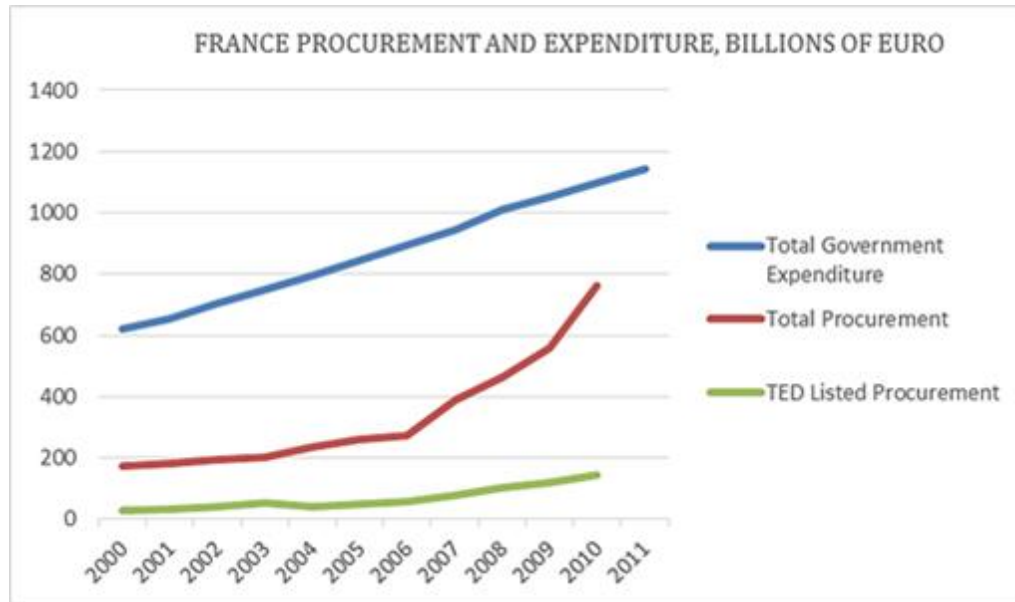
contracts, at 6.4 bids per contract, the UK is, along with France, one of the two most recommended procurement markets for Canadian economic operators seeking EU procurement opportunities.

2.11.2. France

French procurement markets were the largest in the EU in 2010, at 760 billion Euro. These are not necessarily best interpreted as excessively high expenditure levels, but rather as a higher degree of social expenditure. By magnitude these high expenditures translate into high relative TED usage but by ratio of TED procurement to total procurement they are not extraordinarily high. In terms of openness, France is the least open by OECD indicator and, by import penetration, only slightly more open than the least, which is Italy. However, the sheer magnitude of TED awarded contracts makes France the number one country for awarding contracts to international bidders. In 2010, French authorities awarded more than 9 billion Euro internationally. On the sell-side, French economic operators are far less externally focused than their German or UK counterparts: only 0.3% of contracts awarded directly to French based operators originate outside of France. The big story in French procurement is the rapid growth in TED usage which could imply a cultural shift further toward more competitive procurement markets. If the trend expands to international procurement, Canadian bidders could do well to be more interested in French markets.

2.11.2.1 Expenditure and procurement

Table 10. Expenditure and Procurement, France



*Source: Eurostat

Annualized growth rates of expenditure, procurement and TED are 5.7%, 15.9% and 17.6%, respectively. Since 2006, total procurement has grown year for year at 29% and TED usage by value at 26%. Consequently, whereas in 2006 just over 20 cents on every dollar procured was purchased through TED, in 2010 the ratio fell to 18 cents on the dollar. Given the current global deleveraging cycle, it seems likely the rapid increase in procurement growth in France could level off somewhat or decline (if it hasn't already). Given more constant expenditure trends in the public sector, TED listing trends could be somewhat stickier, which could bode well for post-CETA French/Canadian procurement deals.

2.11.2.2 Contracts and Procedures

In France, more notices were awarded than in any other country between 2006-2010, French TED notices made up for 27% of total notices. At more than 40,000 contracts published on TED each year, more than twice the number of notices were published in France than in Germany, where the second highest number were published. However, half of the notices published were under 280,000 Euro, and the average value per contract was only 2.17 million Euro. Combined, French notices still accounted for the second highest by value in the EU, at 15% of total value. The indication is that French procurement culture is TED friendly and tendering support systems are not entirely deterring contracting authorities or economic operators. Unlike in the UK, however, the French relied on open procedures 80% of the time, while using restricted procedures closer to 5% of the time. Negotiated procedures were used 10% of the time but unpublished negotiated, accelerated and competitive dialogue were each used less than 2.5% of the time.

2.11.2.3 Cross-border

Direct cross-border procurement in France is low at only 0.9 % of total contracts awarded, which is less than average. Indirectly 14.8% were awarded cross-border, which is slightly higher than average and a reflection of the high levels of corporate culture we see in large advanced economies. When the French awarded directly across borders, they awarded only 75% within the EU, meaning 25% of their direct cross-border procurement was internationally awarded. This number is similar to that in Italy but much higher than in the UK, Germany or Poland. The bulk of contestable directly awarded procurement however was divided between French overseas territories and the Swiss. While 40% of French direct intra-EU procurement was awarded to German operators, 28% to Belgian ones, 16% to those from the Netherlands and 13% to Italian operators. Of the 14.8% indirectly

awarded, 50% was intra-EU, 33% to US based bidders, 8% to Swiss based and 9% to others, of which some were very likely from Canada. French intra-EU indirectly awarded contracts had more widespread origins, though Germany, the UK and Denmark accounted for 68% of them.

2.11.2.4 Conclusion

The French procurement market, simply put, is the largest in the EU. OLE forecasting models predict a decline in total French procurement from 760 billion Euro in 2010 to 749 billion Euro in 2014. This forecast could be expected to come down further given austerity measures across Europe. French TED listed procurement in 2010, as a ratio of total procurement, still had room to grow relative to other member states. Indeed, our model predicts a rise from 18 cents on the dollar to just over 21 cents on the dollar. The result is a forecasted rise in TED listed procurement from 143 billion Euro to 158 billion Euro. These values would be spread out across more than 47, 000 contracts. In terms of internationally awarded procurement, some 593 million Euro worth of contracts would be directly awarded to non-EU bidders, about 107 contracts averaging 5.54 million each--very few of these would be expected to go to Canadian bidders (if any). In the indirect internationally awarded case the sheer size of Frances procurement market and its international openness can be expected to result in 3,526 contracts averaging 4.33 million Euro each. These would total to about 15.27 billion Euro, 6.4 billion of which could be expected to go to French branches of American and other non-EU businesses and would be considered up for grabs for qualified Canadian based firms. Whereas in the UK, more than half of the indirectly awarded contract value would fall under the utilities directive (explaining the high average value per contract), in France's case, by far the greater part of those internationally awarded indirect cross-border contracts would fall under the classical directive. These could be about ½ supplies contracts and 1/5th service category IIB contracts, which

include rail and transport services, legal services, water transport services, investigation and security services, and others.¹⁵ In 2010, the UK and France awarded roughly equal total values of contracts to international bidders, by 2014 international procurement in France is expected to outweigh that in the UK by more than 5 Billion Euro. The effect of language barriers on procurement is high however and though firms accurately positioned to compete in French markets would be highly recommended to focus on France first, in terms of the likelihood of success, an important factor when bidding costs are factored in, the UK and France are equally the most recommended target markets for Canadian EU-procurement focused firms.

2.11.3. Germany

German procurement markets, at 456 billion Euro in 2010, were the second largest in the EU, following only those in France¹⁶. Import penetration in Germany's public sector was only 6.5%, larger than in France and very similar to import penetration in Canada, which is closer to 6.9%. On average, 26% of cross-border direct intra-EU volume was awarded to German contractors and 25% of indirect intra-EU volumes were awarded to foreign affiliates of companies originating in Germany, making Germany the number one intra-EU sell-side country. There is a distinction made in Ramboll (2011) between number of award notices and the number of contracts within each award notice. The numbers suggest it is often disaggregated contracts that are awarded directly cross-border to German contractors, implying German contractors are 26% of the time included in projects that utilize cross-border resources. The number of TED listed German contracts may be high, but there is unquestionably a low ratio of TED listed dollars per dollars procured in Germany—this could also perhaps be explained by disaggregation, which could be pushing up the ratio of below threshold and unlisted procurement. In terms of

¹⁵ For more information on Service Category descriptions see the classical directive 2004/18/EC

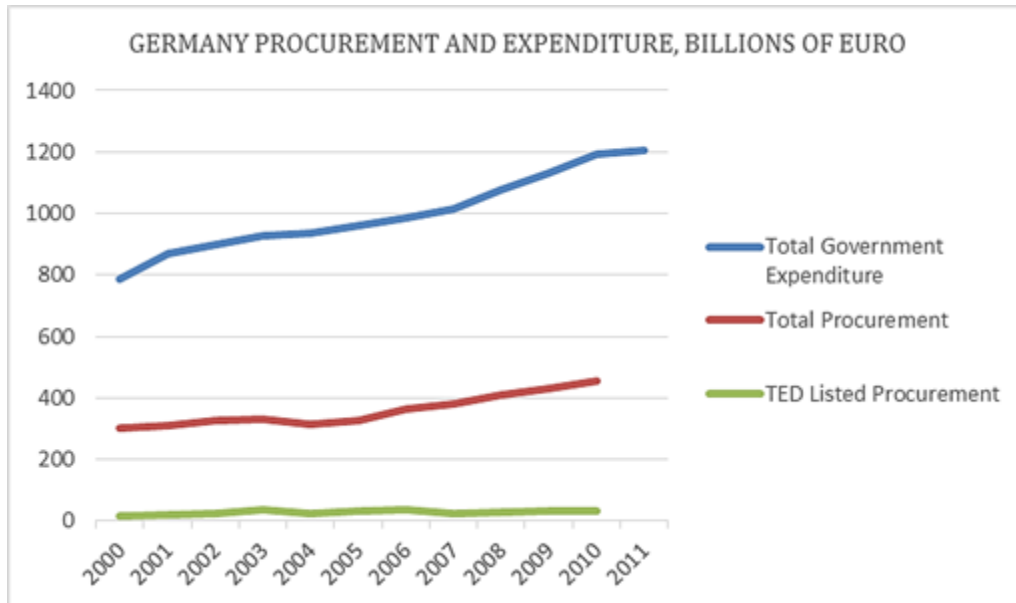
¹⁶ Thus German 2010 total procurement was equal to total EU 27 TED listed procurement.

trade openness, Germany is quite open by OECD indicator with total trade equal to 34% of GDP. Though recent intra-EU German trade surpluses are coming down (due to recession prompted lower export demand), one can well imagine that exports make up a high percentage of that total trade. In the procurement case, it turns out Germany is not as internationally open as its French or UK counterparts. That said, the low value of 2010 internationally awarded TED procurement, at 1.22 billion, is more a story of low TED usage than low international ratios. On the buy-side, when German authorities awarded contracts directly to other intra-EU countries, which happened only about 1.4% of the time, they awarded 52% of contracts to Austrian contractors, 22% to those from the UK and 15% to those from Greece.

2.11.3.1 Expenditure and procurement

Table 11, below, shows that German annualized growth rates of expenditure, procurement and TED equaled 3.9%, 4.2% and 6.4%, respectively. While TED awarded contract values nearly doubled from 17.4 to 32.4 billion, across a ten year period, procurement increased by roughly 1.5 times. Though 6.4% TED usage growth, year for year, is low compared to TED usage growth in the Czech Republic, the potential procurement gap, between total and TED procurement is growing. However, in Germany in 2010, only 7 cents out of every dollar procured, was listed on TED, 1 cent more than the Netherlands, the lowest in our sample.

Table 11. Procurement and Expenditure in Germany



*Source: Eurostat

2.11.3.2 Contracts

Germany was the third largest tendering country in our study, awarding 11% of total TED tenders. These tenders accounted for only 6% of total contract values, sixth in the EU. German contract mean values were the second lowest, at 1.7 million Euro. Moreover, roughly half all contracts awarded were below 320,000 Euro. In Germany, open procedures were used as often as the average in the EU, just over 77% of the time. Negotiated, published and unpublished, combined for more than 20% of procedures, almost double their usage in the U.K. All across the EU, 70% of works contracts listed were below the works threshold level. In Germany 95% of works contracts listed were below the works threshold, this may be an indication that TED listings are considered an efficient strategy in terms of

generating competition between contractors. In addition, German authorities finalize contracts on average within 121 days, 72 days faster than in the UK.

2.11.3.3 Cross-border

Low cross-border awarding in Germany, at 1.5% direct and 8.1% indirect, both less than average, also translated into low cross-border contract values. The mean cross-border German directly awarded contract went for only 2.02 million Euro, more than 7 times smaller than the UK average and less than half of the Italian. Indirectly, cross-border German awards were the smallest in our study at only 2.11 million Euro on average. This trend however was evident in internally awarded contracts as well and may indicate a cultural tendency to disaggregate awards. Though 95% of direct cross-border German awards were intra-EU, with the complement going to Swiss contractors, of the 8.1% indirectly awarded, 61% went intra-EU, 20% to US based companies, 10% to Swiss and 8% elsewhere, which could have included foreign affiliates of Canadian based companies. The majority of intra-EU foreign affiliate awards were divided between French, Italian, Dutch, UK and Netherlands based companies with affiliates in Germany, 26% of those originated in France.

2.11.3.4 Conclusion

While total expenditure in Germany is expected to remain the highest in the EU, at 1.299 trillion Euro forecast for 2014 (France is forecast to have 1.291 trillion), total procurement in Germany is trending to drop to third in the EU, behind the UK, a fall from 456 billion in 2010 to 448 billion in 2014. There is every indication however that TED listed procurement will remain the 5th largest in our study, at only 36.3 billion Euro, in 2014. In addition, it is anticipated that German procurement markets

will remain internationally quite closed. This is not necessarily an indication that procurement markets are strategically sheltered in Germany, as there is plenty in contemporary economic theory supporting the advantages of more competitive markets. The state of the EU however, is that German procurement markets are already the most competitive by number of bids, and that German economic operators are, along with those from the Netherlands and Austria, the most active on the sell-side, participating in roughly a quarter of the EU's internal direct and indirect cross-border markets. The language barriers and competitiveness in German markets however, put them very low on the opportunity list for Canadian firms seeking EU access, unless a clear competitive advantage is evident. In terms of forecasted international direct awards, in 2014 German authorities are anticipated to award 20 contracts, similar in number to the UK and the Netherlands, these would average 1.56 million per contract, slightly higher than those in the Netherlands but 12 times smaller than the UK contracts. These are more likely to service contracts than supplies contracts. In the indirect internationally awarded procurement markets, the model predicts German authorities in 2014 will award some 834 contracts, averaging 1.6 million per contract for a total 1.36 billion Euro, fourth in our study. 28% of this value could be contested by Canadian firms, in theory, as in the past some 20% went to German branches of U.S. based firms and 8% to German branches of other non-EU firms. In Germany, in 2014, there will be perhaps 380 million worth of contracts contestable for well positioned Canadian firms versus 6.4 billion in France.

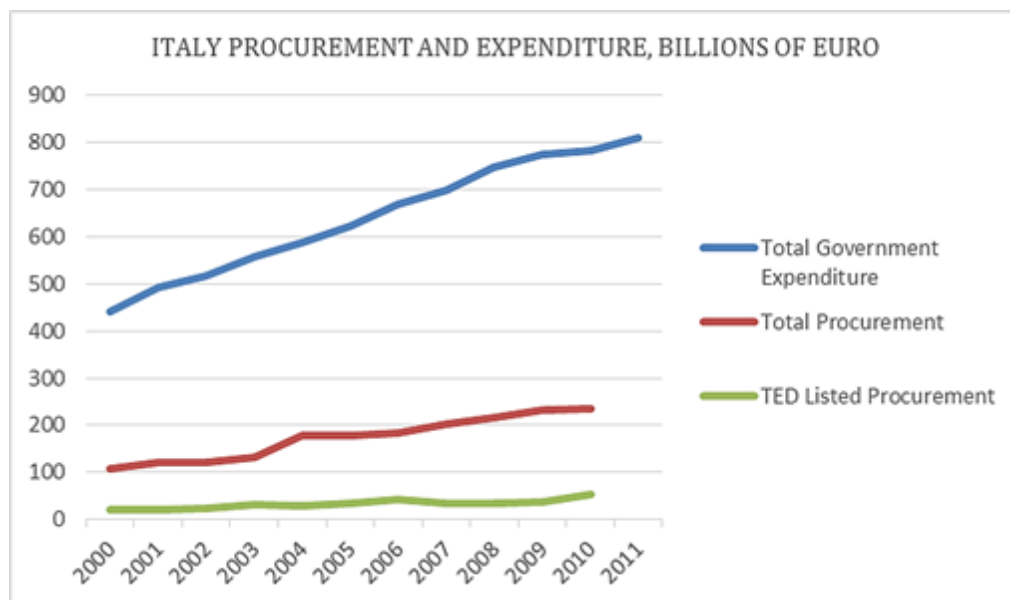
2.11.4. Italy

Total expenditure and total procurement in Italy ranked 4th in our study, though expenditure was quite close to that in the UK, while total procurement was only about 60% of UK procurement. TED listed procurement was less than half what it was in the UK. Still, in Italy about 22 cents on the dollar procured was listed on TED, this was less than the 29 cents on the dollar in the UK but still within the ratio of procurement expected to be covered by the directives. Moving to openness, we

see that Italy is less open than Canada, by OECD recorded ratio of total imports and total exports to GDP (24.1%). Moreover, public import penetration, like in most countries in our sample, was low in Italy. What we will see however is that these relatively low levels of openness do not carry over into the procurement case, where 22% of the value of procurement was awarded across borders. On the buy-side, in 2010, Italian authorities awarded just over 3.5 billion Euros to international bidders. On the sell-side, Italian contractors were not as active in other Member States as those from the Netherlands, Germany or even the UK, but, with 2.2% of contracts directly awarded to Italian contractors coming from outside Italy, they were more active than Polish or Czech contractors.

2.11.4.1 Expenditure and procurement

Table 12. Procurement and Expenditure, Italy



*Source Eurostat

Italian annualized growth rates of expenditure, procurement and TED were 5.7%, 10 % and 8.1%, respectively. In Italy in 2010, 22 cents on the dollar procured was awarded across TED. While total procurement in the UK was 42% of total expenditure, and 39% in Germany, in Italy it was only 31%. The ratio implies only that COFOG expenditures not relating to the procurement function, like social transfers, made up a higher proportion of expenditures in Italy. The potential procurement gap or the difference between total procurement and TED listed procurement was also growing in Italy but very modestly at only 3.6% annually.

2.11.4.2 Contracts

11% of the value of contracts awarded from 2006-2011 were awarded in Italy across 6% of total award notices. Though less than a fifth of the number awarded in France, more than half of contracts awarded in Italy had values higher than 790,000 Euro. The average Italian contract went for roughly 4 million Euro, but took almost twice the days to award than contracts in Poland. In Italy authorities used open procedures less than average, at just over 60%. Other procedures were used in average ways but there was a higher incidence of accelerated restricted procedure use in Italy at more than 7%. This might suggest Italians were more likely to speed up selected bidding processes, but the processes still took longer than in other countries (excepting in the UK). Tenders in Italy received only 3 offers on average, half of the number in Germany (the highest in the EU, tied with Spain).

2.11.4.3 Cross-border

In Italy only 1.3% of the number of contracts were directly awarded across borders, the number increased to 28.6% when awarded indirectly. In the direct case, the numbers are near the average, in the indirect case they are above average, an indication of the presence of supranational and international corporate contractors on the market.¹⁷ Of those contracts directly awarded across border, only 77% were intra-EU, which is comparable to the market in France and Czech Republic, but far lower than in the UK, Poland or Germany. Those that were extra-EU went to Switzerland, Macedonia and the US. Of the high number of contracts that were awarded to foreign affiliates of companies based across borders, 58% were intra-EU, while 28% went to the US and 11% to Swiss companies. The intra-EU breakdown was primarily divided between German, French and UK companies, at 26%, 18% and 13%, respectively; but also among those originating in Ireland, at 23%. More than a fifth of the indirectly awarded intra-EU procurement market in Italy went to foreign affiliates of Irish based companies, the highest number in the EU (in Spain it is 11%, while in the UK only 9%).

2.11.4.4 Conclusion

Italian procurement markets are forecast to grow to around 290 billion Euro in 2014. These are expected to be far smaller than in the UK but larger than in

¹⁷ More so than in any other procurement market in our study, and nearly 17 times the frequency found in Poland.

Poland. Italian growth in TED listed procurement however is predicted to be rather stagnant across 2010 to 2014, actually dropping by 500 million Euro from 52.8 billion to 52.3 billion. This forecast is less a function of anticipated austerity or fiscal challenges and more a function of prior period changes in the ratio of TED listed procurement to total procurement, which is trending downward. In the international case, Italian markets look to award some 4.71 billion in TED contracts. Prior trends would predict 31 contracts are directly awarded, averaging around 7.2 million each. Of these just under 20% could be considered contestable for Canadian firms, though historically they have gone to US, Swiss and Macedonian firms. In the indirect case, 1074 contracts averaging 4.17 million are anticipated to be awarded to non-EU international bidders in 2014. Of these, 28% could be anticipated to go to foreign affiliates of US based firms. Thus around 1.29 billion, in theory, could be contested by Canadian firms, 1/5 the value forecasted for France. The direct values are 4 times as likely to fall under the utilities directive, while the indirect values are expected to be more or less evenly divided between the two directives. The direct values are more likely to be supplies than works, while the indirect values would be twice as-likely to be services IIB or supplies contracts than services IIA. The Italian market, though very internationally open and yielding higher values of internationally awarded expected opportunities is not as recommended for Canadian firms than the Polish or Czech markets. This is based on the comparative advantages Canadian firms might bring to the latter markets and the lower levels of competition found there.

2.11.5. Netherlands

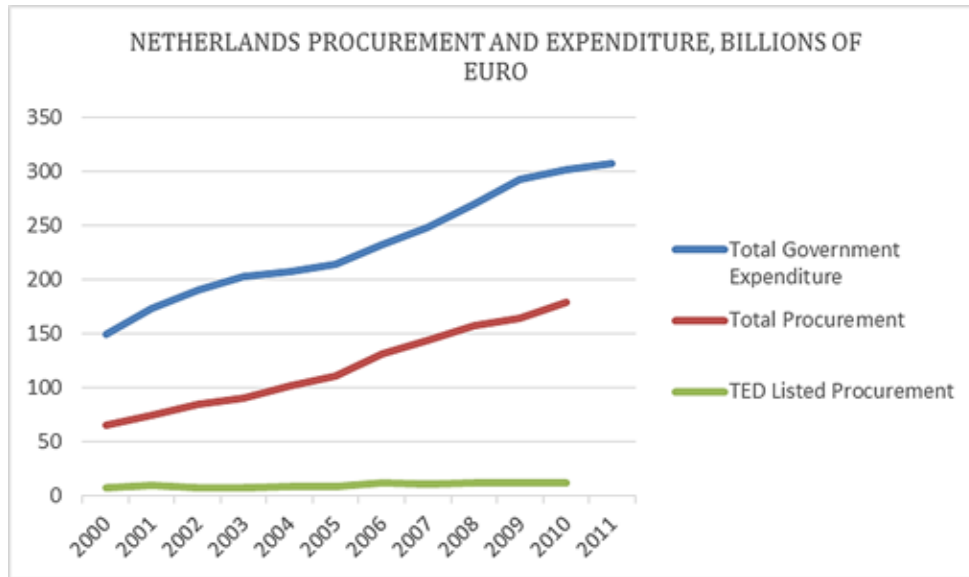
Expenditure in the Netherlands was the 5th largest in our study. While by GDP, it is less than half the size of Canada, several market characteristics indicate high levels of openness. This may suggest a cultural willingness to correlate competitiveness in trade (and thereby in procurement) with higher levels of total surplus. Firstly, the Netherlands by OECD 2009 trade openness indicators (total

imports + exports as a percent of GDP), at approximately 65.6%, are more than twice as open as Canada, which are about as open as the UK, ahead of Italy and France and not far behind Germany. Secondly, by total stock in FDI in Canada, the Netherlands holds the second highest among EU members at 8.5%; and, in the other direction, in terms of flows among EU 6 members, the Netherlands after 2009 was the second highest destination for Canadian FDI (following Luxembourg), at more than 2 billion Euro¹⁸. Further to the point, among EU 27 Member States, the Netherlands has the highest share of imports that come from outside the EU 27, at 50.6%. Public sector import penetration however augments these numbers, while it was near the highest in the EU in the private sector in 2005, in the public sector, like in most countries in our study, it was below the EU average. Moreover, in 2010 only 588 million Euros were awarded across TED to international bidders, around 1/16th that awarded by the UK, an economy roughly 3 times the size. Nevertheless, high levels of trade openness in the Netherlands may have good intonations for Canada moving toward a post-CETA public procurement environment.

¹⁸ Hübner (2012), "CETA OPPORTUNITIES AND CHALLENGES"

2.11.5.1 Expenditure and procurement

Table 13. Procurement and Expenditure, Netherlands



*Source: Eurostat

In the Netherlands, TED usage grew annually at only 4.6%. Thus it is the only country in our study where TED usage was growing more slowly annually across the full set of available data than procurement; procurement grew at 10.7% and expenditure at 6.8%. However, contract values on average were 2.8 million Euro, the third highest in our sample, and more than half the number of contracts awarded were over 500,000 Euro in value. The indication is that, though only 6 cents on a dollar procured was procured across TED in the Netherlands, many of the largest contracts were procured in that way. Potential procurement, as measured by the gap between total and TED listed procurement was also growing, far faster than it was in Italy, at 10% rather than only 3.6% annually. The potential procurement gap, though relevant is more so when the TED listed procurement to total procurement is low, because it implies there may be contracts that should fall

under the scope of the directives that are not being procured across TED (they may still be procured in other ways). This was the case in the Netherlands and in Italy.

2.11.5.2 Contracts

The Netherlands accounted for only 3% of total contract numbers and values, by GDP weight this would indicate that TED in the Netherlands was under-used relative to in other large EU economies. Indeed, though output is larger than in Poland, TED notices by number were 4.5 times smaller. Open procedures in the Netherlands accounted for roughly 70% of procedures, the next most frequent were restricted procedures, at just over 20%. Like in other Nordic countries Framework agreements were common in the Netherlands, accounting for 23% of total notices and 17% of total values.

2.11.5.3. Cross-border

9.4% of contracts awarded to economic operators in the Netherlands were awarded from cross-border contracting authorities. This was the second highest in the EU 27, where the average was only 1.6%--in our sample the next highest was Germany, at 5.3%. In terms of cross-border direct awards from the Netherlands, the ratio was only 2.9% and indirectly it was 9.8%; the direct ratio was actually the highest in our study and above the EU average, while the indirect number was below average. In the direct case, roughly 90% of these contracts were split between Germany, Belgium, Austria, France and Spain (primarily the first three), while 9% went to Swiss contactors and 1% elsewhere. Of the indirectly awarded 9.8%, 51% were intra-EU, only 12% went to the US and 37% went to other affiliates originating in other countries. It is this 37% that would be of the most interest to Canadian companies with foreign affiliates, as it is a reflection of international diversity in procurement markets in the Netherlands. The average cross-border

award in the Netherlands was the smallest in our study at only 1.76 million (close to the German average of 2 million), while the indirect average was 3.18 million, smaller only than those in Poland or the UK.

2.11.5.4 Conclusion

Total expenditure in the Netherlands grows at a slow pace. Further the growth rates are relatively constant, in terms of year for year growth, lending more credibility to a straight-line forecasting approach, which, though not employed across the board in our study,¹⁹ was employed for the Netherlands case. The results indicate an anticipated total expenditure in 2014 of only 354 billion Euro, while total procurement would near 223 billion, roughly half of that one might expect to find in Germany in 2014. The ratio of TED listed procurement to total procurement however remains constant at only 6 cents per total dollar procured, resulting in only 13.23 billion. This extraordinary low ratio is highly suggestive that national databases and tendering systems are more popular than TED listed procurement, and that directive implementation and interpretation at the national level allows enough exemptions to free tendering authorities from the necessity of listing in the OJEC. The high usage of framework agreements and highly intra-EU active sell-side economic operators are an indication that tendering authorities in the Netherlands like to use repeat contractors and have access to an adequate and skilled supply. This is echoed by the 5.6 average bids per contract, the third most competitive in our study behind Germany, at 7.6 and the UK, at 6.4. Of those contracts that were directly internationally awarded, 90% went to Swiss contractors, while only 1% would be considered contestable to Canadian contractors. 12% of indirectly internationally awarded contracts could go to foreign affiliates of US based companies, while 37% would go elsewhere. In theory then,

¹⁹ In the general case, we have forecast categorical inputs to the procurement function, then applied a forecasted ratio of TED listed procurement to total procurement, in the Netherlands case, we used prior TED data to forecast future TED data with an OLE model.

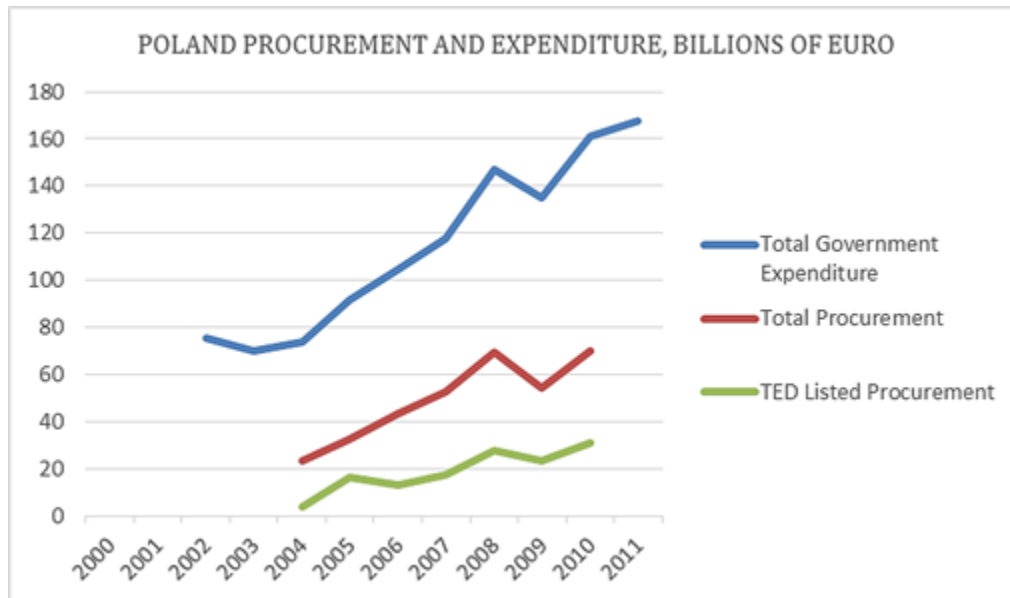
50% of indirect values could be contested by foreign affiliates of Canadian firms. This would imply that from the 277 contracts (260 indirect) internationally awarded, Canadian firms might do well to bid on 132, depending on their own, presumably more detailed, cost-benefit bid analysis. These would amount to around 360 million Euro of Canadian contestable 2014 procurement.

2.11.6. Poland

Total procurement in Poland was more than double that in Hungary and almost double that in the Czech Republic. Still, it was more than half what it was in the Netherlands and 6 times smaller than in Germany. Ted listed procurement in Poland, on the other hand, was almost equal what it was in Germany, at almost 31 billion. The TED usage trend is alarmingly positive. Moreover, though Poland is a relatively closed economy, awarding 97% of its cross-border contracts to other EU 27 Member States, of those it awarded internationally, half went to Canadian firms. By OECD openness indicators Poland is 10% more open than Canada with total imports and exports equal to 39.4% of GDP, but what we see in public sector penetration ratios is that Poland is not much different than other countries in our study, at 6.1%. In 2010, Polish authorities awarded around 265 million Euros across TED to international bidders, only around 1.2% of total Polish TED procurement. On the sell-side too, the Polish are primarily focused within Poland, across 2007-2009 only 80 contracts, from more than 200,000 awarded to Poland's contractors, were awarded from across borders.

2.11.6.1 Expenditure and procurement

Table 14. Procurement and Expenditure in Poland



*Source: Eurostat

In Poland, procurement was growing at half the rate of TED usage. Both indicators, however were growing very quickly relative to those in more Western European countries. TED usage grew in Poland at 40% annually across a 6 year time period more than tripling by value. Expenditure in Poland grew very slowly at 4.3% (in our study only German expenditure grew more slowly). That procurement was growing much faster than expenditure is a good thing, it can reflect public sector investment rather than social transfers. This kind of indicator is fitting for a country with low debt to GDP and low externally held debt to GDP, 55% and 54%, respectively. Also, the rate of TED usage growth that resulted in 44 cents on every dollar procured across TED, is a very attractive trend. Moreover, while usage by number of contracts in the UK, Italy and France were constant or declining, in Poland it

increased by 77% in only 6 years. Finally, in Poland contracts were awarded more quickly than in any other country in the EEA, save Liechtenstein.

2.11.6.2. Contracts

Poland saw the second highest incidence of published contracts in the EU27, at 13% of the total, in addition, Polish aggregated contract values were slightly higher than those in Germany, constituting 7% of total values across the sample, from 2006-2010. Polish contract values though averaged only 1.61 million Euro, the lowest in our sample; however, still more than half were over 300,000. In Poland, like in other countries, works contracts are posted on TED even when 45% of the values are lower than thresholds, suggesting TED is a means to an end rather than a requirement. However, unlike in Hungary or the Czech Republic, less than 1% of contracts below the central threshold for supplies and services were tendered on TED. In Poland, more than 75% of contracts were openly tendered, while 15% were negotiated without publication.

2.11.6.3. Cross-border

Direct cross-border procurement in Poland was the lowest in our sample at less than 1% of total, on average. Remarkably, indirect cross-border was also extraordinarily low at only 1.76%, more than six times smaller than the EU 27 average. As mentioned, of those directly awarded internationally, half went to Canada. Of those directly awarded to other EU Member States, 42% went to German contractors, 20% to Swedish and 17% to those from the UK. Of the indirectly awarded contracts, 72% were intra-EU, 12% went to US foreign affiliates and 15% to other foreign affiliates, which could very well have included foreign branches of Canadian based businesses. Indirectly awarded intra-EU contracts went primarily to German based affiliates, at 42%, Swedish based affiliates, at 20% and UK based affiliates, at 17%. Though the cross-border numbers are few,

contracts awarded from Polish authorities were larger than any others in our study, save those from the UK, averaging 7.85 million Euro for directly awarded ones and 3.79 million for indirectly awarded ones. In addition, competition in Poland is very low, with an average of only two bids per contract posted. If the rapid growth rate in TED usage is a reflection of an appreciation of competition, rather than an eagerness to abide with EU level legislation, these low levels of competition could be an invitation for international public procurement participation.

2.11.6.4 Conclusion

While total expenditure in Poland is expected to grow from 167 billion to around 203 billion by 2014, 4.5 times smaller than that in Italy, total procurement is anticipated to grow to about 96 billion, roughly 3 times smaller than in Italy. Tremendous growth rates in TED usage in Poland and declining rates in Italy could bring the two TED listed procurement markets to roughly the same size. TED listed procurement in Poland is forecast to grow from 31 billion in 2010 to 52.24 in 2014. This would make it the third largest TED listed procurement market in our study, tied with Italy, at 52.29 billion. Still, Poland's procurement markets are the most internationally closed markets in our study; the tremendous market growth, all else remaining equal, would result in about 7 times less internationally awarded procurement in Poland than in Italy. In the direct cross-border case, 1.5% by value have gone to Canadian bidders in the past and 1.5% to Swiss bidders (97% intra-EU). This was only 9.4 million Euro, of 5 contracts averaging 12.22 million Euro. In the indirect international case, 12% have gone to US and 15% to affiliates from other countries. This means potentially 29 contracts averaging 5.9 million each could be considered contestable to Canadian bidders. In total around 180.5 million of Canadian contestable 2014 procurement, around half of what could be expected in the Netherlands. These sums might be equally divided between services, supplies and works. The Polish market though, because it is closed and because only 2 bids are received per contract could be a fruitful market for Canadian bidders

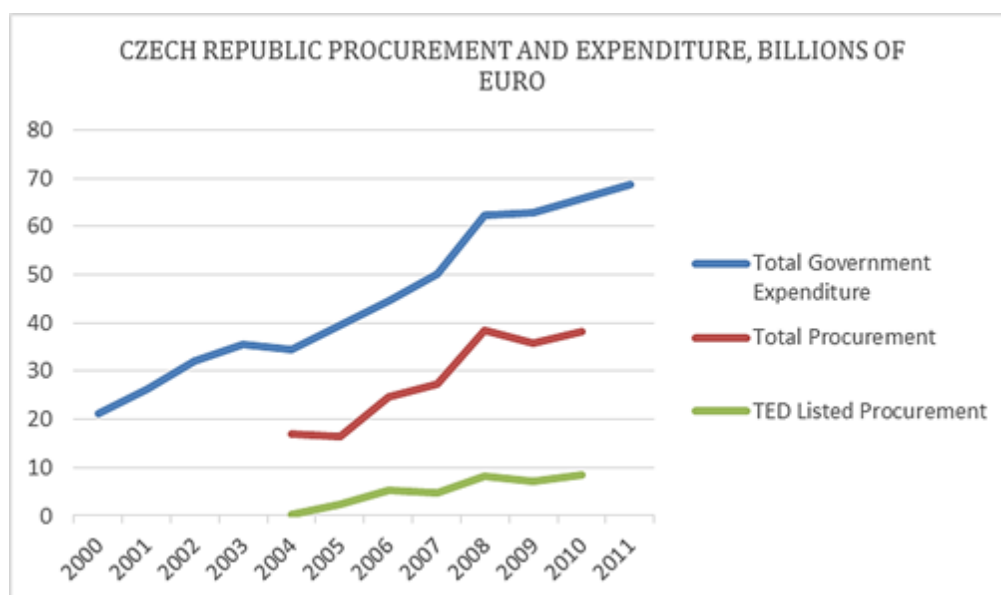
to target. Firstly, Canadian contractors have brought value to Poland before, across TED. Secondly, closed markets that are, in general, less competitive can suffer from stagnating innovation. Canadian bidders could well bring a competitive advantage into Poland's procurement markets that they could not bring to those in the Netherlands or Italy.

2.11.7. Czech Republic

Total procurement in Czech Republic was about 39 Billion in 2010, roughly 20 times smaller than in France, while GDP is only around 13 times smaller. The smaller procurement to GDP ratio does not signal a poor market, because French procurement is skyrocketing. Moreover, the small magnitude actually translates into less competitive markets. Much like in Hungary and actually similarly to in the Netherlands, the Czech Republic is extraordinarily open by total trade to GDP, at 66.4%. Public sector penetration in Czech Republic tells a similar tale, excluding the UK, for which there is no data, and Hungary where public sector penetration is also high, the percentage of public sector demand that is met by imports in the Czech Republic was more than double that of the other countries in our study, at 14%. While high levels of openness did not necessarily translate into high cross-border procurement activity in the Netherlands, in the Czech Republic, in the indirect cross-border case, it did. In total Czech authorities awarded only about 55 million to international bidders across TED in 2010, making them the least internationally open by value awarded. This was only 0.9% of TED listed procurement. On the sell-side Czech contractors were about as active as the average—only 1.7% of contracts awarded to Czech contractors originated from outside Czech borders.

2.11.7.1. Expenditure and procurement

Table 15 Procurement and Expenditure in Czech Republic



*Source: Eurostat

Annualized growth rates in Czech Republic for expenditure, procurement and TED usage were 11.3% 14.5% and 30.2% respectively. Roughly 1/5 of every dollar procured was procured across TED, which is in line with the rule of thumb estimating directive coverage at 20% of procurement.²⁰ That 55% of expenditure in the Czech Republic was total procurement is an indication of infrastructural development, much like in Poland. However, the similarities in expenditure and procurement growth rates could indicate infrastructural growth that is due for a slowdown. The remarkably high growth in TED usage does suggest a cultural trend toward competitive procurement, but is also to be expected of countries that are

²⁰ Commission Staff working paper: Brussels, 27.6.2011
SEC(2011) 853 final

still warming to the advantages of single market inclusion. In fact, if the first year of TED data is included in the calculation, the annualized TED usage growth rate would be more than 80%.

2.11.7.2 Contracts

In the Czech Republic, 3% of total contracts by number were awarded, this was the same as in the Netherlands, a larger country; however, both mean and median values were less, at 2.4 million and 360,000 Euro, respectively. Czech contract award times were neither fast nor slow relative to the average in our study and the number of contracts awarded were similar to those in Hungary and grew at much the same rate. Values in the Czech Republic were also similar to those in the Netherlands at 2% of the total, however, in the Czech Republic only 3 operators bid on contracts, 1 more than in Poland or Hungary.

2.11.7.3 Cross-border

In the Czech Republic, direct cross-border procurement was 1.8%, slightly higher than the EU average and higher than the other countries in our study, save the Netherlands. Indirect cross-border procurement was also the second highest in at 19.2%, behind only Italy, where it was extraordinarily high. By value per contract, directly awarded cross-border contracts were sixth, at 3.06 million Euros per contract, while indirectly awarded contracts averaged 3.12 million Euro per contract. Both numbers are lower than the average in our study. Of those contracts that were directly awarded across borders only 71% were awarded intra-EU, this makes for the highest percentage of directly awarded contracts that were awarded internationally and, save Sweden, the highest in the EU or EEA. Remarkably, of the 29% of contracts directly awarded across borders, 24% of those were awarded to Canadian contracting companies. Though the calculation makes for only around 11 contracts, the value was about 33 million Euro, no small sum. Of the 71% that were directly awarded intra-EU, 35% went to Netherlands' contractors, 23% to

German contractors, 16% to Poland's contractors and 10% to Swedish contractors. Of the 19.2% that were indirectly awarded, 99% were intra-EU and only 1% extra-EU, an indication that international foreign affiliates do not have a strong presence in the Czech public procurement market. The 99% of indirectly awarded intra-EU cross-border activity was primarily comprised of German, Austrian, French, Italian and Netherlands based foreign affiliates.

2.11.7.4 Conclusion

Expenditures in the Czech Republic are forecast to grow from 65 billion in 2010 to 83 billion in 2014. Of these total procurement is anticipated to be around 53.5 billion, just smaller than TED listed procurement in Italy or Poland. TED listed Czech procurement is predicted to more than double from 8.4 billion in 2010 to 18.7 billion in 2014. Of these, 3.9 billion might go cross-border, with 170 million of that value going extra-EU. In the past, a high percentage of direct international awards have gone to Canadian firms, this could signify relevant opportunities going toward a post-CETA international procurement market. Of 17 anticipated 2014 directly awarded international contracts, 14 could go directly to Canadian firms and the remaining three perhaps to US firms. At an average of 7.17 million per contract, the entire 125 million of 2014 international direct procurement would be considered contestable for Canadian firms. In the indirect case, 6 contracts, averaging 7.3 million, for a total of 43.8 million could be contestable to Canadian firms. In total that is nearly 169 million of 2014 Czech Republic procurement contestable for Canadian firms. The low levels of competition and frequency of Canadian Czech Republic activity are likely an indication that Canadian firms can bring a competitive advantage to Czech markets, though these markets are not as closed as their Polish counterparts.

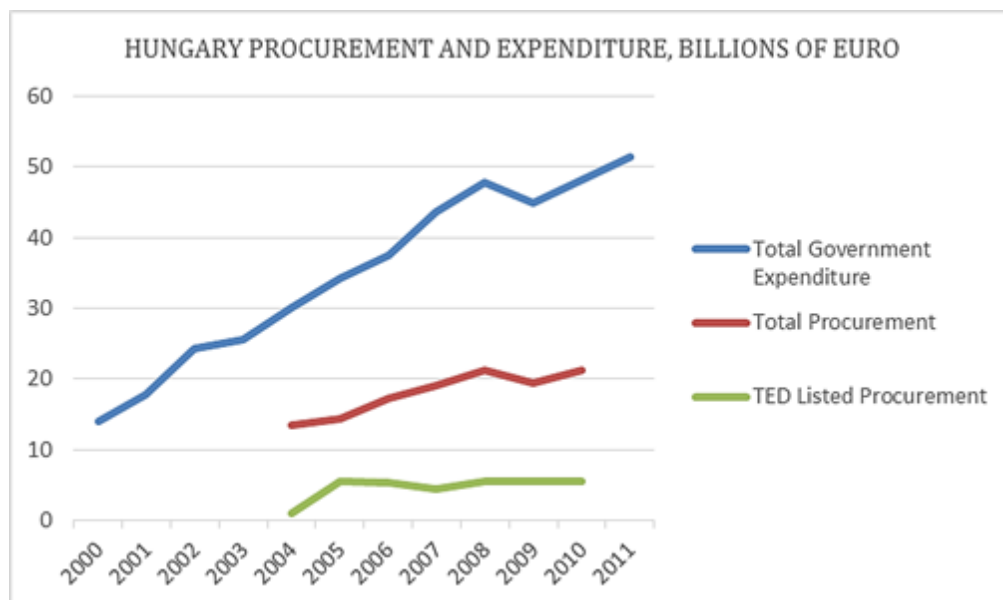
2.11.8. Hungary

Hungarian total procurement markets were the smallest in our study at about 22 billion. By GDP Hungary is about 6 times smaller than the Netherlands, by total procurement it is about 8 times smaller. TED listed procurement in Hungary was closer to half of what it was in the Netherlands. This is indication both of high TED usage in Hungary and low TED usage in the Netherlands. In terms of the OECD openness indicator, Hungary is the most open country in our study with total trade equal to 74.8% of GDP. Of the 40 countries in the OECD openness indicator ranking, only Ireland is more open, at 83%. Hungary's public sector import penetration ratio of 12.8% is also quite open, following only that of Czech Republic. This suggests that an unusually large amount of public sector consumption in Hungary was imported. In Hungary, 123.7 million Euro was awarded across TED to international based bidders, the 7th by value in our study, but still almost twice that awarded by the Czech Republic, and economy with half again the output. On the sell-side Hungarian contractors were not very active in other procurement markets.

2.11.8.1 Expenditure and procurement

Annual growth rate of TED listed procurement in Hungary is 34.5%, the highest in our sample, however, removing the 2004 data outlier, as we did with the Czech Republic, we see that TED usage by value has ceased to grow in Hungary, while procurement has grown at nearly 8% annually and expenditure at 12.6% annually. High expenditure growth in economic downturns is easily explained by increased demand for social transfers as well as those aspects of procurement growth that are not easily disaggregated from national account data and may not fall under directive scopes.

Table 16 Procurement and Expenditure in Hungary



*Source: Eurostat

This could be interpreted as a change in infrastructural development emphasis, to explain the levelling off of TED usage growth (a slowdown in the types of contracts that end-up on TED). That said, a less likely scenario would include a rise in usage of another online tendering system. In Hungary about 25 cents on every dollar procured was procured across TED, half the ratio it was in Poland and slightly lower than in the UK.

2.11.8.2 Contracts

Hungary is last among countries in this study by share of total number of contracts across 2005-2010, at 2%. Relative to other countries, open procedures in Hungary were quite low at less than 60% of total procedures used. Hungarian authorities accelerated procedures as in Italy, more than 7% of the time and, as in the Czech

Republic, 20% of Hungarian contracts were negotiated without publication. The average value of a Hungarian contract was 2.28 million Euro, similar to that in the Czech Republic. More than half of the number of contracts went for more than 310,000 Euro.

2.11.8.3 Cross-border

The Hungarian cross-border case was similar to the EU average, with only 1.7% of the number of total contracts going directly cross-border and 10.3% of contracts going indirectly across borders. By value per contract, those that were awarded directly across borders were on average worth 7.79 million Euro, the third highest in our sample and more than twice the average in France. It is primarily the UK, Poland and the Czech Republic that had high average values of directly awarded cross-border contracts. In the UK this is likely a reflection of a few very large contracts, while in Poland and the Czech Republic we can well imagine it signifies a trend toward works contracts, which have much higher contract values and would be frequently procured in economies still considered under development. Indirectly cross-border contracts awarded from Hungarian authorities were much closer to the average of our study at 3.13 million Euro. Of the 1.7% that were directly awarded cross-border, 84% were intra-EU, 9% went to American contractors (the highest in the EU), 4% went to Chinese contractors and the remainder were split between Croatian and Swiss contractors. The 84% that were intra-EU based were made up from 11 different Member States: 67% of the direct cross-border intra-EU contracts went to German, Netherlands based and Austrian contractors. Of the indirectly awarded contracts, 90% were intra-EU and 10% went to Israeli based foreign affiliates. The 90% of indirectly awarded cross-border contracts were primarily split between affiliates of German, Austrian, French and Italian based companies.

2.11.8.4 Conclusion

Expenditure, procurement and TED listed procurement were each the smallest, and are also forecasted to be the smallest. Total expenditure is trending toward 64 billion in 2014, total procurement is trending toward 27 billion and TED listed procurement toward 8.79 billion Euro. However, much of the TED growth trend is the result of early explosive 2004 TED listings growth. The current rise in nationalization in Hungary could slow those quantities of procurement that are deemed within the scope of the directives, at the national level. If this were the case, the more conservative forecast, that treats the 2004 data as a low end outlier, would be more likely, at only 5.5 billion. However, in keeping with our methodology, 2014 TED listed procurement could be 8.79 billion Euro. In terms of international direct awards, 9 contracts at an average of 8.69 million per contract could be expected in 2014. Of these, 4 at 34.8 million each could be awarded to US firms and thus are also contestable to Canadian firms. Of the 36 indirect awards, worth some 3.49 million each, all of them in the past have gone to affiliates of Israeli based firms. Though this is most certainly a case of limitations in the data set, it did span 3 years and did include a total of 901,036 contracts, plenty of evidence. As such, we deem only the 34.8 million of direct internationally awarded contracts as contestable to Canadian firms. These 4 awards are more than 3 times more likely to be either services IIB awards or supplies awards, than services IIA or works awards. Again, low competition and procurement markets, no more open than the average in the EU, could see Canadian firms bringing a competitive advantage to Hungarian procurement markets, and certainly the average contract goes for a relatively high value. However, a recommendation to focus on Hungarian markets could not be issued without a more detailed cost-benefit analysis that includes the sector level and a deeper assessment of the political trend toward nationalization in Hungary.

2.12 Canada and the EU

The previous section forecasted around 12.5 billion Euro of contestable TED listed procurement across our study of 8 EU nations, for the year 2014. This is around 2.7% of the 454 billion TED listed total between our 8 nations²¹. One question these numbers bring up is how much of that Canadian contestable procurement is currently being won by Canadian bidders?²² What we see looking at the newer Canadian data is that it is an extraordinarily low ratio. Across 2011 and 2012, when total Canadian contestable procurement across the nations in our study might have been 18.65 billion (2.7% of 382 billion forecasted for 2011 and 361 for 2012), what we see is that only 44 million was actually awarded to Canadian firms²³, 0.24% of the 18.65 billion Euro in contracts contested by international extra-EU firms. These were distributed across 25 contracts with an average value of 1.76 million Euro. 9 contracts were awarded from France, averaging 425 thousand Euro, 8 from Poland, averaging 4.56 million, 5 from the UK, averaging 504 thousand, 2 from Italy, averaging 500,000 and 1 from the Czech Republic at 98 thousand. In addition to these 25 contracts, across 2011 and 2012 there were 28 contracts awarded from 11 other EU Member States, averaging 2.8 million/contract, but none from Germany, Hungary or, the Netherlands. Clearly Canadian firms are not bidding on as much value as we have labelled contestable, or they are not winning much of what they are bidding on.

The low value and number of successful EU procurement projects completed by Canadian firms has important policy implications for Canadian governance moving

²¹ To avoid confusion: the total TED listed for the entire EU 27 in 2010 was also 454 billion, as well as, incidentally, the forecast for total expenditure in Germany, in 2014).

²² This would indicate roughly activity rather than an actual conversion rate.

²³ 3 of the 25 contracts awarded to those MS in our study had no values given and were estimated by interpolation. 9 of 28 contracts awarded to those MS outside of our study were similarly estimated.

toward post-CETA international procurement markets. What we see in the EU is that some nations are far more active on the sell-side than others. Because of the expected high numbers of those firms and their frequency in cross-border intra-EU markets, it can be anticipated that, a) they possess competitive advantage, and b) they are highly experienced in applying that advantage outside of their home nations. Post-CETA, the number of these firms finding their way to Canadian procurement markets is likely to increase. In the EU case, barriers to cross-border procurement are firstly considered to be language barriers; secondly, distance barriers; and lastly, learning curve barriers.²⁴

From a policy perspective, it seems likely those governments taking the time to create international business incentives are far more likely to post trade surpluses after the CETA deal goes through, to the extent that inviting international economic operators to ones market without visiting their reciprocal markets would result in trade deficits. The Ramboll (2011) study highlights a policy case in Ireland, whereby Irish authorities spearheaded an initiative to inform and prepare Irish firms for cross-border activity. The literature suggests these initiatives have paid big dividends in Irish trade openness.²⁵ It is this sort of policy that is recommended for Canadian governance. Entering into CETA without putting policies into place to both prepare and prompt Canadian firms toward more successful participation in Europe's procurement markets is likely to contribute to higher trade deficits with the EU.

²⁴ In a Ramboll (2011) survey participants cited lack of experience as an inhibitor to cross-border markets.

²⁵ See Ramboll (2011) page 93. Also, note one could certainly question those dividends in the capital flows case, but perhaps that is another matter.

Chapter 3: The WTO, EU and the Member States Legal Regimes on Government/Public Procurement

3.1. The WTO Regime on Government/Public Procurement and the EU

There has been little progress in regulating government procurement at the multilateral level since the era of the 1947 General Agreement on Tariffs and Trade (the GATT)²⁶. Hence, government procurement still remains outside the scope of the main disciplines of the GATT and the World Trade Organization (WTO) multilateral trade agreements²⁷, despite negotiation efforts since the 1979 Tokyo Round of GATT to formalize the so-called Tokyo Round Procurement Code as a multilateral rather than a plurilateral treaty. However, the Tokyo Round Code has become an important basis of the 1994 WTO Agreement on Government Procurement (GPA)²⁸, a plurilateral WTO agreement regulating the government markets for those WTO members who decided to become a party to it.

²⁶ The General Agreement on Tariffs and Trade (1947), April 1947, entry into force 1 January 1948, 55 UNTS 194; 61 Stat. pt. 5; TIAS 1700

²⁷ Primary WTO Multilateral Agreements are: Agreement Establishing the World Trade Organization, ("Marrakesh Agreement") 1867 UNTS 154; 33 ILM 1144 (1994), General Agreement on Tariffs and Trade 1994 (GATT 1994), 1867 UNTS 187; 33 ILM 1153 (1994), General Agreement on Trade in Services (GATS) 1869 UNTS 183; 33 ILM 1167 (1994), Multilateral Agreements on Trade in Goods 33 ILM 1154 (1994), Agreement on Trade-Related Investment Measures (TRIMs) 1868 UNTS 186, Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) 1869 UNTS 299; 33 ILM 1197 (1994), Agreement on Subsidies and Countervailing Measures, 1867 UNTS 14 (1994), Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) GATT Doc. MTN/FA li-A1A-4, 33 ILM 30 (1994), Agreement on Technical Barriers to Trade (TBT Agreement) 33 ILM. 9 (1994), Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) 1869 UNTS 401; 33 ILM 1226 (1994).

²⁸ The WTO Agreement on Government Procurement (GPA), GPA/W/297 of 11 December 2006, available online at <http://docsonline.wto.org/DDFDpci.emts/t/Pluri/GPA/W297.doc>.

Currently, there are forty-two WTO members signatories of the GPA, including the EU's twenty-seven member states and Canada.²⁹ Twenty-two other WTO members are registered as observers.³⁰ It is noteworthy that some international organizations also have the status of an observer (IMF, OECD, UNCTAD, for example).

It is noteworthy that a recent WTO expert study reveals significant benefits of the GPA accession for the full WTO members—that is, of \$US 380-970 billion annually for the total value of additional market access commitments that would result from GPA accession by the full range of WTO Members considered in this Paper is in the range, and in the range of \$US 233-596 billion annually if all of the BRICS countries (Brazil, Russia, India China and South Africa) join.³¹

The European Commission (Directorate General Internal Market and Services) represents the EU member states in the WTO negotiations regarding trade and public procurement issues, as well as in bilateral agreements with third states.

3.1.1 WTO Multilateral Rules on Government Procurement: GATT and GATS

²⁹ According to the WTO documents, the following current WTO members are also the GPA parties: Armenia, Hong Kong, Iceland, Israel, Japan, Korea, Liechtenstein, the Kingdom of the Netherlands with respect to Aruba, Norway, Singapore, Switzerland, Chinese Taipei (Taiwan), and the US. Albania, China, Georgia, Jordan, the Kyrgyz Republic, Moldova, Oman, Panama and (most recently) Ukraine applied for accession to the GPA. See the map of the GPA parties and observers online at http://www.wto.org/english/tratop_e/gproc_e/gproc_map_e.htm.

³⁰ Albania, Argentina, Australia, Bahrain, Cameroon, Chile, China, Colombia, Croatia, Georgia, India, Jordan, the Kyrgyz Republic, Moldova, Mongolia, New Zealand, Oman, Panama, Kingdom of Saudi Arabia, Sri Lanka, Turkey and Ukraine. Source:

http://www.wto.org/english/tratop_e/gproc_e/overview_e.htm

³¹ R. Anderson, et al., Assessing the Value of Future Accessions to the WTO Agreement on Government Procurement (GPA): Some New Data Sources, Provisional Estimates, and an Evaluative Framework for Individual WTO Members Considering Accession, Staff Working Paper ERSD-2011-15, 6 October 2011, available online at

http://www.wto.org/english/res_e/reser_e/ersd201115_e.pdf.

Government procurement is excluded from the main non-discrimination principle of GATT and General Agreement on Trade in Services (GATS). Consequently, there are no obligations on national treatment (NT) and most favoured nation (MFN) in relation to procurement. In sum, that means that WTO member states are free to discriminate in favor of their domestic companies as suppliers for government procurement and that they are free to create procurement policies and procedures that favour their suppliers in participating in government contracts over suppliers from other WTO member states, subject to limitations in the GPA to which some, but not majority, of the WTO members, are signatories.

3.1.1.1. GATT

Article III GATT specifically states that it does not apply to government procurement:

“8. (a) The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.

(b) The provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products.”

Although there is no explicit exclusion of the application of the MFN principle³², as embedded in Article I GATT, on government procurement, many legal scholars, such as, for example, Arrowsmith and Dischendorfer³³, interpreted the relevant GATT text to the exclusion of its application on procurement.

3.1.1.2. GATS

GATS has a specific article dealing government procurement agreements as an exception for the general application of GATS principles:

“Article XIII: Government Procurement

1. Articles II, XVI and XVII shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale.

2. **There shall be multilateral negotiations on government procurement in services** under this Agreement within two years from the date of entry into force of the WTO Agreement.”

In Accordance with Article XIII:3 and in order to facilitate the negotiations at the multilateral level on government procurement in services the Council for Trade in

³² GATT Article I. 1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

³³ S. Arrowsmith, *Government Procurement in the WTO* (The Hague: Kluwer Law International, 2003), and M. Dischendorfer, “The Existence and Development of Multilateral Rules on Government Procurement under the Framework of the WTO” (2000) 9 Public Procurement Law Review 1.

Services has established the Working Party on GATS Rules. The negotiations are still on-going. The EU is very active in the negotiating process.

In GATS, Article II contains MFN provisions, Article XVII contains NT principle, whereas GATS Article XVI contains provisions related to market access.

3.1.1.3 GATT/WTO Transparency Principle and Government Procurement

One of the most important principles of GATT, the principle of transparency, is important for government procurement regime of WTO member states. Although GATT Article X, which contains general obligations for governments of WTO members to publish their laws, does not explicitly refer to measures on government procurement, it is possible to imply such application of Article X relevant provisions:

- “1. Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. Agreements affecting international trade policy which are in force between the government or a governmental agency of any contracting party and the government or governmental agency of any other contracting party shall also be published. [...]
1. [...]

3. (a) Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.”

Similar transparency provisions are contained in GATS Article III:

“1. Each Member shall publish promptly and, except in emergency situations, at the latest by the time of their entry into force, all relevant measures of general application which pertain to or affect the operation of this Agreement. International agreements pertaining to or affecting trade in services to which a Member is a signatory shall also be published.”

Anderson and Arrowsmith claim that in addition to holding states accountable for publishing their laws and regulations related to government procurement, the multilateral transparency obligations, (that is, GATT Article X and GATS Article III) “may have some potential role in controlling the procurement of state trading companies”.³⁴

In sum, general transparency principle as embedded in GATT and incorporated in the WTO Agreement, remains very relevant to government procurement. Consequently, transparency obligations of states feature prominently in the GPA and its recent revised text.

³⁴ R. D. Anderson & S. Arrowsmith, *The WTO Regime on Government Procurement: Challenge and Reform* (Cambridge: Cambridge University Press, 2012), at 7.

3.1.2. The WTO Plurilateral Rules: Agreement on Government Procurement (GPA), 1994 and 2006

3.1.2.1 The 1994 GPA

The 1994 GPA was negotiated parallel to the broader Uruguay Round negotiations on the establishment of the WTO and it was concluded at Marrakesh in 1994 as a plurilateral agreement applicable to WTO members who are signatories of the GPA. It entered into force in 1996. It was based on the 1979 Tokyo Round Procurement Code but was substantively and procedurally more ambitious regime than the one offered in the Code. Briefly, the GPA guarantees access to procurements of WTO members who signed the agreement to their trading partners under reciprocal arrangements. The GPA does not provide an automatic opening of the public procurement markets of for the GPA Parties and the level of access (scope of coverage and derogations) varies from country to country, especially in the area of utilities procurement.

The scope and of the GPA is defined in Article 1 and in Appendix I, Annexes 1-3, which respectively list all central, provincial and local government entities, as well as other covered entities. Accordingly, GPA Article 1 states that the agreement applies to “any law, regulation, procedure or practice regarding any procurement by entities covered by this Agreement, as specified in Appendix I” and that it covers variety of contracts for procurement of goods and services (but not concessions)³⁵ of a particular threshold value specified in Appendix I³⁶. The construction services are regulated separately in Annex 5 of Appendix I.

³⁵ GPA Article I. 2. This Agreement applies to procurement by any contractual means, including through such methods as purchase or as lease, rental or hire purchase, with or without an option to buy, including any combination of products and services.

³⁶ GPA Article I. 4. This Agreement applies to any procurement contract of a value of not less than the relevant threshold specified in Appendix I.

The allowed tendering processes are: open tendering, selective tendering, and limited tendering. Article VII:3 provides for definitions of the three processes as follows:

“(a) Open tendering procedures are those procedures under which all interested suppliers may submit a tender.

(b) Selective tendering procedures are those procedures under which, consistent with paragraph 3 of Article X and other relevant provisions of this Agreement, those suppliers invited to do so by the entity may submit a tender.

(c) Limited tendering procedures are those procedures where the entity contacts suppliers individually, only under the conditions specified in Article XV.”

Anderson and Arrowsmith summarize the **main substantive obligations of the GPA** as follows:

1. **Guarantees of NT and non-discrimination** for the goods, services and suppliers of Parties to the Agreement and with respect to procurement of covered goods, services and construction services set out in each Party’s schedules specified in Appendix I;
2. **Minimum standards** regarding national procurement processes, including **transparency, non-discrimination, and competitiveness** of tendering procedures;
3. Additional requirements on transparency of procurement-related information;
4. **Procedure for modifications** and rectifications of Parties **coverage commitments**;

5. **Availability of bid challenge or domestic review procedures** in all Parties to the GPA;
6. Applicability of the **WTO Dispute Settlement Understanding (DSU)**.³⁷

It is clear that GATT/WTO principles of transparency and non-discrimination are the basis for the 1994 GPA regime directed towards liberalization of government procurements systems of its Parties. NT is explicitly elaborated in Article III. It is noteworthy that the GPA provisions do not mandate application of MFN which means that MFN would be applicable to the Parties who offer the same reciprocal concessions. Transparency of tendering procedures is specifically addressed in Article XVII but many other articles of the 1994, such as Article XVII on information and review of obligations of government entities, and article XVIII on information and review of obligations of states, the GPA Parties, also address transparency rules. It is possible to argue that transparency is the basis for the GPA rules on challenge procedure in Article XX mandating each GPA Party to establish domestic procedures allowing suppliers to claim breach of the GPA. Having a transparent process and the right to make a claim regarding alleged breaches of the GPA is very important for suppliers because the GPA provision does not have direct effect in the sense of conferring directly rights on private parties/suppliers.

³⁷ R. D. Anderson & S. Arrowsmith, *supra* note 8, at 21.

Table 17. GPA Parties' thresholds

COUNTRY	ANNEX 1			ANNEX 2			ANNEX 3		
		Services except construction	Construction		Services except construction	Construction		Services except construction	Construction
	Goods	services	services	Goods	services	services	Goods	services	services
Armenia	130,000	130,000	5,000,000	200,000	200,00	5,000,000	400,000	400,000	5,000,000
Canada	130,000	130,000	5,000,000	355,000	355,000	5,000,000	355,000	355,000	5,000,000
European Union (and its member States)	130,000	130,000	5,000,000	200,000	200,000	5,000,000	400,000	400,000	5,000,000
Hong Kong, China	130,000	130,000	5,000,000	n.a	n.a	n.a	400,000	400,000	5,000,000
Iceland	130,000	130,000	5,000,000	200,000	200,000	5,000,000	400,000	400,000	5,000,000
Israel	130,000	130,000	5,000,000	250,000	250,000	5,000,000	355,000	355,000	5,000,000
Japan	130,000	130,000	4,500,000	200,000	200,000	15,000,000	130,000	130,000	4,500,000 or 15,000,000
			Architectural services: 450,000			Architectural services: 1,500,000			Architectural services: 450,000
Korea	130,000	130,000	5,000,000	200,000	200,000	15,000,000	450,000		15,000,000
Liechtenstein	130,000	130,000	5,000,000	200,000	200,000	5,000,000	400,000	400,000	5,000,000
Netherlands-Aruba	130,000	130,000	5,000,000	n.a.	n.a.	n.a.	400,000	400,000	5,000,000
Norway	130,000	130,000	5,000,000	200,000	200,000	5,000,000	400,000	400,000	5,000,000
Singapore	130,000	130,000	5,000,000	n.a	n.a	n.a	400,000	400,000	5,000,000
Switzerland	130,000	130,000	5,000,000	200,000	200,000	5,000,000	400,000	400,000	5,000,000
Chinese Taipei	130,000	130,000	5,000,000	200,000	200,000	5,000,000	400,000	400,000	5,000,000
United States	130,000	130,000	5,000,000	355,000	355,000	5,000,000	250,000 (USD) or 400,000	250,000 (USD) or 400,000	5,000,000 or

*Source: WTO

Annex 1: Central government entities

Annex 2: Sub-central government entities

Annex 3: All other entities which procure in accordance with the Agreement, in general public enterprises or public authorities such as utilities.

3.1.2.2 The 2006 GPA revisions

The 1994 GPA has a set of provisions in Article XXIV:7, the so-called “built-in-agenda,” to facilitate further negotiations for improvement of the Agreement by the Parties, in particular to expand the coverage of the GPA, modernize the agreement to reflect developments in information technology and procurement methods, and to eliminate remaining discriminatory measures.³⁸ These negotiations, however, are not part of the multilateral Doha Round of negotiations, but rather limited on the GPA as a plurilateral agreement. Thus the negotiations started in 1997, a draft was prepared in 2003 (leaving the coverage-related issues to be negotiated later) and, at the end of 2006, the GPA Parties reached provisional agreement on the revised GPA text.³⁹ The GPA coverage-related negotiations continued in 2010 and 2011, resulting in the formal adoption of the Decision on the Outcomes of the Negotiations under Article XXIV:7 of the Agreement on Government Procurement.⁴⁰

The Parties of the 1994 GPA agreed that the revised text should be the basis for negotiations of accession of countries wanting to join the agreement.

³⁸ For summary of the GPA revision negotiations see http://www.wto.org/english/tratop_e/gproc_e/negotiations_e.htm.

³⁹ Report (2006) of the WTO Committee on Government Procurement to the General Council (GPA/89, 11 December 2006).

⁴⁰ GPA/113 available online at <http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/PLURI/GPA/113.DOC>.

There are **several important aspects of the revised text**, some of which have been pushed by the EU procurement policy.

1. **The coverage of the revised GPA is broader and better defined** than the one in the 1994 text. For example, a new Article I(a) defines commercial goods or services as being “goods or services of a type generally sold or offered for sale in the commercial marketplace to, and customarily purchased by, non-governmental buyers for non-governmental purposes.” Furthermore, Article I(c) defines construction services as “a service that has as its objective the realization by whatever means of civil or building works.” Article II:3 explicitly states what is NOT covered by the GPA. It specifically excludes the application of the GPA rules on procurement conducted for the specific purpose of providing international assistance, including development aid, and under the particular procedure or condition of an international organization, or funded by international grants, loans or other assistance.⁴¹
2. Another interesting revision of the 1994 GPA rules came with respect to the **rectification and modification rules** in Article XXIV:6 in cases of entities being transferred from one annex to another. The revised text specifically addresses the situation where a party asks to withdraw an entity from the GPA application because that entity has changed its status by not being under government control and influence anymore. This is usually the case of privatization or liberalization of entities providing for public procurement. Article XIX:1 of the revised text specifically mandates that the GPA Party proposing the modification includes in notification evidence of elimination of government control or influence over the entity’s covered procurement.⁴²

⁴¹ The revised GPA Article II:3(i) and (III).

⁴² The revised GPA Article XIX:1(a).

Anderson and Arrowsmith have commented that the EU will soon wish to utilize this new modification rule, especially since the EU Utility Directive introduced certain mechanism for exclusion of recently privatized entities from the EU procurement rules.⁴³

3. In order to **strengthen the GPA Parties obligation to establish challenge/remedies procedures** and give the right to suppliers to challenge the Parties' alleged breach of the GPA in domestic law, the revised text also improves provisions of the 1994 text of Article XX:2.

3.1.2.3 The GPA system of remedies and the EU

Two mechanisms of dispute resolution and remedies are established in the GPA: (i) Challenges before the national review bodies or a national challenge procedure, and (ii) challenges at the intergovernmental level by restoring to the WTO DSU.

The provisions of the 1994 GPA Article XX address irregularities in procurement proceedings without specifically indicating what phases of the procurement process are covered. Some authors question if they could be applicable to concluded contracts when national review authorities are interfering with already concluded contracts.⁴⁴

In general, the GPA rules on national challenge procedure and remedies are influenced by the EU remedies Directives 89/665/EEC and 92/13/EEC. The four main principles on the national challenge procedures stipulated in the 1994 GPA

⁴³ R. D. Anderson & S. Arrowsmith, *supra* note 8, at 28.

⁴⁴ See S. Arrowsmith, "The Character and Role of National Challenge Procedures under the Government Procurement Agreement" (2002) 11 Public Procurement Law Review 241 and Xinglin Zhang, "Constructing a System of Challenge Procedures to Comply with the Agreement on Government Procurement" in R. Anderson and S. Arrowsmith, *The WTO Regime on Government Procurement: Challenge and Reform*, *supra* note 8, at 483.

text are non-discrimination, timeliness, transparency and effectiveness. They remain the basis of the revised text as well.

Similar to the EU remedies regime, both the 1994 GPA and the 2006 revised text enumerate three specific remedies:

1. **Interim measures** including the award of **suspension of a measure** of the procuring entities/procurement process in order to correct the breach of the GPA provisions and allow suppliers to participate in the procurement (Article XX:7(a));
2. **Correction** of the breach **or compensation for the loss/damages** suffered (Article XX:7 (c)).

The 1994 GPA Article XX:7(c) provision that provides that damages should compensate for the loss suffered and “which may be limited to costs for tender preparation or protest” is revised in the 2006 to mean that both costs for tender preparation and protest can be recovered. There is no explicit indication that loss of profit can be covered in damages in neither the 1994 or the 2006 GPA texts. The requirements to obtain damages, including the method of calculation of damages, seem to be left to be determined by national rules on challenge procedures

As mentioned above, in the context of the 2006 revised GPA text, a new article relevant for the Parties’ obligation to establish an adequate system of remedies is now Article XVIII: Domestic Review Procedures. It not only mandates that “Each Party shall provide a timely, effective, transparent and non-discriminatory administrative or judicial review procedure” to **challenge not only a breach of the Agreement but also a “failure to comply with a Party’s measures implementing this Agreement.”**

The intergovernmental mechanism of dispute resolution and remedies is established in the GPA by the reference to the WTO DSU. If the Party fails to establish a required domestic review procedure other Parties could initiate the WTO dispute settlement mechanism, provided for in Article XX of the revised GPA.

Although the 1994 GPA Article XXII mandates the use of the WTO DSU by the GPA Parties as a dispute settlement mechanism,⁴⁵ that has not happened very often and it seems that disputes never went beyond the consultation stage. The data reveals that the EU appeared twice as a complainant (respondents were the US and Japan respectively) and in both cases disputes were settled before a report of the panel or the appellate body has been made. Moreover, only one of the four reported cases was decided by a panel (WTO DS163, report of the panel published in 2000). Canada has never been a respondent or complainant in cases involving the GPA compliance.

In the Japan case—Procurement of a Navigation Satellite--the EU claimed that Japan's Ministry of Transport's procurement tender call for a purchase of a satellite for air traffic management providing for specifications that explicitly referred to the US specifications, constituted violation of the GPA obligations of Japan as specified in Appendix I, Annex 1. In particular, the Europeans claimed that Japan violated GPA Articles VI:# which requires neutral specifications and XII:2 that requires that listed entities should be treated equally and be considered as suppliers. The dispute has been settled in the consultation phase.

⁴⁵ In the revised GPA text dispute settlement rules are now in Article XX.

Table 18. WTO DSU cases

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4 case(s) cite this agreement in the request for consultations.

> [Click here for the text of this agreement](#)

<u>DS163</u>	Korea, Republic of — Measures Affecting Government Procurement (Complainant: United States)	<p>Consultations requested: 16 February 1999</p> <p>Current status: Report(s) adopted, no further action required</p>
<u>DS95</u>	United States — Measure Affecting Government Procurement (Complainant: Japan)	<p>Consultations requested: 18 July 1997</p> <p>Current status: Settled or terminated (withdrawn, mutually agreed solution)</p>
<u>DS88</u>	United States — Measure Affecting Government Procurement (Complainant: European Communities)	<p>Consultations requested: 20 June 1997</p> <p>Current status: Settled or terminated (withdrawn, mutually agreed solution)</p>
<u>DS73</u>	Japan — Procurement of a Navigation Satellite (Complainant: European Communities)	<p>Consultations requested: 26 March 1997</p> <p>Current status: Settled or terminated (withdrawn, mutually agreed solution)</p>

*Source: wto.org

3.1.2.4. The EU implementation of the GPA: experience and objective

The EU has not been satisfied with the GPA and with the protection from violations of the agreement, as well as with the effectiveness of the use of WTO DSU in

government procurement. In particular, the EU claims that its government procurement rules, that strictly comply with the GPA commitments, have created an open public procurement market, while other GPA Parties, in particular the US, and some non-GPA parties, such as China, have created barriers that prevent EU entities from bidding for government contracts. In order to deal with such behavior of third countries, the European Commission has proposed a new legislation to deal with the access of third country goods and services to the European Union's internal market in public procurement. These initiatives will be discussed further in the next section of the report when the EU laws and policy towards public procurement are analyzed. As far as we know, those considerations were already included into ongoing CETA negotiations.

3.2. The EU Regime on Government Procurement

3.2.1. Current EU legislation and institutional structure

The EU public procurement regime originates from the 1970s and the rules broadly apply to public bodies (such as central government and local authorities) which are not acting commercially. The main objective of the EU public procurement regime has been to ensure the competitiveness of the market for public contracts across the EU and to allow suppliers from all member states to compete with domestic suppliers for public contracts.

The current EU rules on public procurement are not presented in a single piece of legislation and the piecemeal development of the regime has resulted in series of regulations and directives covering the area. The EU rules have to be implemented and applied in all twenty-seven Member States. Regulations related to the public procurement are directly applicable and no further legislative action of the Member States is needed to facilitate its domestic application. However, directives need to

be incorporated into domestic legislation of Member States by enactment of specific domestic statutes within the timeframe provided for by the EU directives.

The European Commission is the main EU institutions that on the basis of the founding treaties on the establishment of the EU has the power to monitor and supervise the Member States' compliance with their obligations to comply with the EU law, including the obligation to incorporate directives into their national legislation properly and in a timely fashion.⁴⁶

3.2.2 Thresholds

The current **thresholds** for the application of the EU rules on the public procurement and utilities are specified in Council Regulation 1177/2009 of 30 November 2009 amending Directives 2004/17/EC, 2004/18/EC and 2009/81/EC of the European Parliament and of the Council in respect of their application thresholds for the procedures for the award of contracts⁴⁷ as follows:

1. For Utilities Directive 2004/17/EC:
 1. Works contracts: 5 000 000 EUR
 2. All supplies and services contracts, all design contests: 400 000 EUR
2. For Public Sector Directive 2004/18/EC:

⁴⁶ For the recent infringements related to the EU regime on public procurement see http://ec.europa.eu/internal_market/publicprocurement/infringements/cases/index_en.htm.

⁴⁷ [2009] OJ L314/64.

Table 19. Threshold values

Central Government authorities	Works contracts, works concessions contracts, subsidized works contracts		5 000 000 EUR
	All contracts concerning services listed in Annex II B, certain telecommunications services and R&D services; all design contests concerning these services and all subsidized services		200 000 EUR
	All contracts and design contests concerning services listed in Annex II A except contracts and design contests concerning certain telecommunications services and R&D services		130 000 EUR
	All supplies contracts awarded by contracting authorities not operating in the field of defence		130 000 EUR
	Supplies contracts awarded by contracting authorities operating in the field of defence	Concerning products listed in Annex V	130 000 EUR
		Concerning other products	200 000 EUR
Sub-central contracting authorities			
	Works contracts, works concessions contracts, subsidized works contracts		5 000 000 EUR
	All service contracts, all design contests, subsidized service contracts, all supplies contracts		200 000 EUR

*Source European Commission

3.2.3 National contracting authorities

The European Commission has passed a decision to enlist all national contracting entities or authorities once separately listed in Public Sector Directive and Utilities Directive. Commission Decision 2008/963/EC of 9 December 2008 amending the

Annexes to Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council on public procurement procedures, as regards their lists of contracting entities and contracting authorities (Decision on Contracting Entities).⁴⁸

Member States' contracting entities are enlisted as follows:

3. Annex I: contracting entities in the sectors of transport or distribution of gas or heat,
4. Annex II: contracting entities in the sectors of production, transport or distribution of electricity
5. Annex III: contracting entities in the sectors of production, transport or distribution of drinking water
6. Annex IV: contracting entities in the field of rail services
7. Annex V: contracting entities in the field of urban railway, tramway, trolleybus or bus services
8. Annex VI: contracting entities in the postal services sector
9. Annex VII: contracting entities in the sectors of exploration for and extraction of oil or gas
10. Annex VIII: contracting entities in the sectors of exploration for and extraction of coal and other solid fuels
11. Annex IX: contracting entities in the field of maritime or inland port or other terminal facilities
12. Annex X: contracting entities in the field of airport installations
13. Annex XI: list of bodies and categories of bodies governed by public law as referred to in the second subparagraph of Article 1(9)
14. Annex XII: central government authorities

⁴⁸ [2008] OJ L 349/1.

3.3. Main EU public procurement legislation

The EU public procurement legislation applies to EU-wide competitive tendering in public procurement market and regulates both **direct cross-border public procurement** (when a member states awards public contracts to operators (suppliers) from other EU member state) and **indirect cross-border procurement** (when a Member State awards public contracts to operators domiciled in that same Member States but being in fact subsidiaries, affiliates or partners/wholesalers/distributors of corporations seated in another Member State or other country. Thus, indirect cross-border procurement is a form of public procurement that may involve a bidder from Canada as a subcontractor of a local EU bidder, or as a mother company with an EU subsidiary in a Member State, or through consortia with local companies within a Member State. As such, a participant in the indirect cross-border procurement a Canadian company is subject to EU public procurement rules. According to the European Commission 2011 report on cross-border procurement above EU thresholds and reflecting on the period between 2007 and 2009 more indirect cross-border contracts were awarded in the EU than direct cross-border contracts.⁴⁹ According to the same report, 40% of all indirect cross-border procurement went to affiliates from non-EU Member States. The most successful of them were the US based companies (24 %).⁵⁰

The EU public procurement legislation also applies in the European Economic Area, or within Norway, Iceland and Liechtenstein which are not EU Member States but which are by the virtue of the EEA Agreement included into the EU single market.

⁴⁹ European Commission, DG Internal Market and Services, March 2011, p.38, table 16.

⁵⁰ Ibid, p. 52, table 26.

Two main public procurement directives in force are 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 (Public Sector Directive)⁵¹ and Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors.(Utilities Directive).⁵² Defence and security related procurement is regulated by Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 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, and amending Directives 2004/17/EC and 2004/2004/18/EC (Defence and Security Directive).⁵³

Separate EU legislation now deals specifically with review procedures concerning the award of public contracts—Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/6645/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (Remedies Directive).⁵⁴

3.3.1 Directive 2004/18/EC: Public Sector Directive

This is a major piece of the EU legislation that governs award of public contracts and relationships between contracting authorities/entities and economic operators (or contractors, suppliers, and service providers, as defined in Article 1(8)).

⁵¹ [[2004] OJ L134/144.

⁵² [2004]OJ L134/1.

⁵³ [2009] OJ L216/76.

⁵⁴ [2007] OJ L335/31.

Public sector entities covered are classified into four categories in Article 1(9): the state, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law.

Public contracts in the context of this Directive are pecuniary contracts concluded in writing between economic operators and contracting authorities for public work, public supply or public service (Article 1(2)). Service contracts are further divided into “priority” services, which are subject to the full rules under the directives, and “non-priority” services, which are subject only to the rules on technical specifications, award notices, and certain obligations on provision of statistics. “Priority” services are listed in Annex IIA and those are, for example, maintenance of vehicles, IT services, and accountancy. Services not listed in Annex IIA are “non-priority” services (legal services, for example).

Concession work or service contracts are defined separately in the Directive Article 2(1)(3) as contracts of same type as a public works/service contracts except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the work or in this right together with payment. Concessions are differently regulated from other public contracts: work concessions are subject to a limited number of provisions in the Directive whereas service concessions are excluded from the Public Sector Directive Article 17) and the Utilities Directive.

There is a long list of public contracts to which this Directive does not apply. For example, excluded from this Directive are contracts covered by the Utilities Directive, that is, contracts in water, energy, transport and postal services (Article 12). Also excluded are secret contracts related to defence and security (Article 14), public contracts governed by international rules (Article 15), specifically excluded

contracts such as concession service contracts (Article 18) and reserved contracts (Article 19).

Transparency, equality, and non-discrimination are the basic principles that govern public procurement contracts (Articles 2-3). It is noteworthy that Article 6 also provides for confidentiality to be observed in the tendering process if required by national laws of a Member State of a contracting authority.

Procurement methods proposed by the Directive in Article 28 are: open, restricted and negotiated procedures, and competitive dialogue. However, the Directive also mandates that Member States and their authorities awarding public contracts should primarily apply the open or restricted procedure, while they may award contract by the competitive dialogue especially in particularly complex contracts, and may apply a negotiated procedure only in special circumstances. According to Article 1(11) an open procedure means a procedure whereby any interested economic operator may submit a tender while a restricted procedure means a procedure in which any economic operator may request to participate, but only those economic operators who are invited by a contracting authority may submit a tender.

Rules on advertising are very detailed and an ad for tenders is referred to as a 'contract notice'. Notices have to be sent in a standard form regulated by the Commission Regulation 1564/2005 of 7 September 2005 establishing standard forms for the publication of notices in the framework of public procurement procedures pursuant to Directives 2004/17/EC and 2004/18/EC. Products purchased by governments have to be described and given a reference number on the basis of the Common Procurement Vocabulary (CVP) introduced by Regulation 2195/02 of the European parliament and of the Council on Common Procurement Vocabulary of 5 November 2002.⁵⁵

⁵⁵ [2002] OJ L340/1.

Award of the contract procedure is also well defined and regulated in the Directive. The basic award criteria for open or restricted procedure are lowest price or economically advantageous tender (Article 53). Interesting provision is found in Article 55(1)(3) with respect to suspiciously low bids and the right of the contracting authority to reject the bid and its obligation to inform the European Commission of a low bid:

“11. f, for a given contract, tenders appear to be abnormally low in relation to the goods, works or services, the contracting authority shall, before it may reject those tenders, request in writing details of the constituent elements of the tender which it considers relevant.

3. Where a contracting authority establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender can be rejected on that ground alone only after consultation with the tenderer where the latter is unable to prove, within a sufficient time limit fixed by the contracting authority that the aid in question was granted legally. Where the contracting authority rejects a tender in these circumstances, it shall inform the Commission of that fact.”

3.3.2. Directive 2004/17 EC: Utilities Directive

This Directive provides specific public procurement rules when contracting authorities engage in **specific utilities activities**, such as **water** (Article 4), **transport** (Article 5), **energy** (Article 3) and postal services (Article 6).

Public sector entities covered by the Utilities Directive are the same as bodies covered in the Public Sector Directive. However, this Directive also covers also other bodies engaged in **utilities** activities such as public undertakings (Article

2(1)(b), usually undertakings mainly controlled or finance by public authorities which engages in commercial activities, and entities carrying out covered activities on the basis of special or exclusive rights (Article 2(3), such as an entity engaged in the activities covered by the directive on the basis of operating licenses granted by the government. Utilities Directive does not apply to entities operating in competitive markets (Article 30).

Utilities contracts covered by the Directive are contracts for works, supply and services, in writing and for pecuniary interest. Definitions of works, supply and service are the same as in the Public Service Directive. Similarly to the Public Service Directive, certain utilities contract are excluded from the rules of this directive: contracts for secrecy, defence and security (Article 21), contracts awarded by international rules and bodies (Article 22) and contracts for services provided by a public authority which has an exclusive right to provide them (Article 25).

Article 18 of the Utilities Directive excludes the application of its rules **to works and services concessions**, although not to the same degree: **work concessions are subject to limited obligations, and service concessions are completely excluded. Neither Public Service Directive nor Utilities Directive have rules on supply concessions.**

Transparency, equality, and non-discrimination are the basic principles the Utilities Directive as well, and they are expressly noted in Article 10.

Contract Award Procedures in the Utilities Directive are the same as in the Public Service Directives (open procedure, restricted procedure, and negotiate procedure) but with some differences such as time limits and the freedom to use negotiated procedures for any contract.

Requirements for a call for competition/advertising the contract are less strict in this Directive than in the Public Sector Directive. According to the Article 42(1) there are three methods of making a call: individual contract notice, periodic indicative notice (PIN), and advertisement for a qualification system. Article 40(3) specifies exemptions from the call for competition to include a case of “bargain purchases, where there is a particularly advantageous opportunity available for a short period of time at a price considerably lower than normal market price.

Award procedures under the Utilities Directive is similar to but more flexible than award procedures in the Public Sector Directives. Differences are summarized in a table below compiled by Sue Arrowsmith⁵⁶:

⁵⁶ S. Arrowsmith, *EU Public Procurement Law*, 2011.

Table 20. Differences between Utilities and Classical award procedures

The Main Differences between Contract Award Procedures for Utilities and those under the Public Sector Directive	
1. Choice of award procedures	<ul style="list-style-type: none"> Utilities have a free choice between the open procedure, restricted procedure and the competitive form of the negotiated procedure; under the Public Sector Directive open or restricted procedure must be used unless specific grounds justify other procedures. No formal provision for competitive dialogue under Utilities Directive (but utilities can use that kind of approach within the competitive form of the negotiated procedure)
2. Advertising	<ul style="list-style-type: none"> Utilities have three methods to advertise contracts: <ul style="list-style-type: none"> i) Contract notice ii) Periodic indicative notice (PIN) iii) Advertisement of a qualification system. <p>Under the Public Sector Directive contracts must be advertised by a Contract Notice</p>
3. Exceptions to the requirement for an advertisement and competition	<ul style="list-style-type: none"> Utilities Directive contains an exemption from competitive procurement not found in the Public Sector Directive, for particularly advantageous opportunity available only for a very short time and when the price is considerably lower than the market price.
4. Suitability and selecting firms to tender/negotiate	<ul style="list-style-type: none"> The rules for utilities on selecting firms to participate in restricted and negotiated procedures allow the utility to use any "objective" rules and criteria; the Public Sector Directive contains more precise express exclusion criteria. (However, it is not clear how far, if at all, this difference in wording gives more flexibility to utilities)
5. More flexible tender deadlines in restricted procedures and competitive negotiated procedures	<ul style="list-style-type: none"> The deadlines for tendering under the Public Sector Directive are fixed; under the Utilities Directive the time limit can be agreed with suppliers. If there is no agreement there is a fixed period but this can be reduced by the utility for good reason - such as the fact that it is a very simple purchase. Under the Public Sector Directive, such a reduction is permitted only for the case of urgency.
6. Use of supplier lists	<ul style="list-style-type: none"> Utilities can exclude firms which are not on their qualification lists, provided that these lists are run in accordance with the Utilities Directive; the Public Sector Directive does not allow exclusion of firms merely because they are not registered on supplier lists.
8. Rules on third country offers	<ul style="list-style-type: none"> Utilities may give preference to goods originating in the EU as opposed to third countries and in certain cases, EU goods <i>must</i> be given a preference; no such rules apply under the Public Sector Directive
9. Time limits for publishing contract award notices	<ul style="list-style-type: none"> Utilities have two months to submit contract award notices to the <i>Official Journal</i>; under the Public Sector Directive only 48 days is given.

*Source: WTO

3.3.3 Defence and Security Directive

Defence procurement in the EU is considered to be an important but sensitive area of procurement for one buyer, the state, of military equipment, food and clothing for soldiers. Some procurement items are considered to be hard defence material (tanks, ammunition) governed by specific rules of this Directive. Yet, it is important to have EU rules on defence procurement, especially considering that suppliers of defence equipment seem to be spread across many EU Member States allowing for cross border competition.

Even the TFEU provides for numerous exceptions from the application of EU market rules on defence procurement using a more general term of public policy and public security exceptions (Articles 36, 45, 52, 65, 72, 346 and 347 (ex Articles 30, 39, 46, 58, 64, 296 and 297 TEC)),

This Directive is very similar to the Public Sector Directives, such as terms of exemptions of contracts, procedures for awarding contracts, but has some specific provisions, such as on security of information and security of supply.

3.3.4. Remedies in public procurement (Remedies Directive)

The new Directive 2007/66/EC of the European Parliament and of the Council with regard to improving the effectiveness of review contracts (the New Remedies Directive) was implemented to improve the system of legal remedies available before the award of a public contract by dealing efficiently with illegal contracts, or practice of awarding public contracts without prior publication of a contract notice, and by dealing with a “race to sign the contract” practice, which involves lack of

standstill period between the notification to unsuccessful bidders and the conclusion of a public contract. It amends both Public Sector Remedies Directive and Utilities Remedies Directive.

3.3.4.1. Race to sign a contract and Remedies

To some extent this directive codifies jurisprudence of the CJEU in Alcatel case and mandates in Article 2(s) a minimum standstill period of ten calendar from the date of notification of the contract award decision before the conclusion of a public contract with a successful tenderer if notification is sent by e-mail or fax and at least fifteen days if the award information was given by other means of communication. At the same time, it allows Member States to introduce a longer standstill period in their national legislation if they prefer. The same article also provides explicitly for derogations from the obligation.

If there is an alleged infringement of the mandatory standstill period and a non-successful tenderer has started a review process of the award decision an automatic suspension of the possibility to conclude a contract must be granted (Article 1(5)).

3.3.4.2. Illegal Contracts and Remedies:

If a contracting authority awards a public contract without competitive tendering or the process lacks transparency, the Directive mandates that a national court (or a review body independent of the contracting authority) declares a contract ineffective (Article 2d(1) of the Directive. Consequently, a contracting authority involved in an illegal contract would have to re-advertise its tender.

It is noteworthy that the Directive does not deal directly with consequences of ineffective contracts but defers the issue to national legislators of Member States (Article 2(e)(1)). However, it does state that damages are not considered to be an appropriate penalty and that alternative penalties shall be the imposition of fines on the contracting authority or the shortening of the duration of the contract (Article 2(e)(2)).

3.3.5 Public-private partnerships (PPPs)

The Commission proposed for the future new forms of cooperation of public authorities and private sector in delivering of public services and modernization of public infrastructure. It published the Green Paper on public-private partnerships and Community law on public contracts and concessions⁵⁷ and set the tone of discussions at the EU level. The Commission wanted to encourage changes that would contribute to better public use of money, better management of public services and infrastructure, to increased transparency, accountability, and competitiveness in public tendering.

In many Member States there are fairly developed national legal framework regulating PPP projects although the size of public infrastructure affected by PPPs differs greatly. For example, in UK PPPs responsible for 24% of public investments, while in Ireland, Sweden, Finland, Germany, Greece, Italy, Netherlands, Portugal and Spain this involvement is smaller – between 5-15%.⁵⁸ It is noteworthy that many new Member States, such as Czech Republic, Hungary and Poland are also

⁵⁷ COM (2004) 327 final. This Green Paper was followed by another Commission's initiative-- Communication from

the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Public-Private Partnerships and Community Law on Public Procurement and Concessions, COM (2005) 569 final.

⁵⁸ C. Bovis, *EU Public Procurement Law*, 2nd ed. (Cheltenham: Edward Elgar, 2012), p.431.

following this trend⁵⁹. Thus, private sector is seen in the EU as an important partner to public authorities in financing and delivering public infrastructure projects or public services. Different types of PPPs are engaged: concessions, the contractual PPPs, and institutional PPPs (or joint-venture model).

In 2011, the Commission has proposed a new directive to harmonize concession rules related to PPPs across the internal market—Directive of the European Parliament and of the Council on the award of concession contracts⁶⁰ but it has not yet been adopted. Until then, PPPs are currently regulated by patchwork of national laws of the EU Member States.

3.3.6. CJEU jurisprudence: EU public procurement regime and compliance procedure

The Court of Justice of European Union (sometimes referred to as the ECJ or European Court of Justice) has jurisdiction to decide on interpretation and validity of, and compliance with EU public procurement law within the EU. Consequently, the Court will deal with several types of cases:

1. **direct actions** cases **against Member States** due to their failure to fulfill obligations under the EU law, including proper transposition of EU law into national laws; such actions against Member States can be brought by the **European Commission** (Article 258 TFEU) or by **other Member States** (Article 259 TFEU); these are also called the enforcement actions against Member States;
2. **preliminary rulings** cases whereby the Court replies to a question on **interpretation of EU law** asked by national courts dealing with particular

⁵⁹ Ibid.

⁶⁰ COM (2011) 897 final.

- cases involving the effect of EU law on a **private party** seeking remedies in national courts (Article 267 TFEU);
3. **direct actions against the EU institutions** for annulment or judicial review of legislative acts (directives, decisions and regulations) of the EU institutions (Article 263 TFEU) and for failure to act of the EU institutions (Article 265 TFEU); such actions could be brought by Member States, the European Parliament, the Council and the Commission (so-called privileged applicants); by the Court of Auditors and the European Central Bank in cases where their prerogatives are affected (semi-privileged applicants); and any natural or legal person (individual or business) where that person is the addressee of the EU act, where that act is of “direct and individual concern” to the applicant and where a regulatory act which is of direct concern to the applicant does not entail implementing measures.

All cases decided by the CJEU (including the European Court of Justice and General Court) are available to public online at <http://curia.eu.int>. According to the 2012 published statistics of the Court, of all 679 cases registered in the Court of Justice in 2011, only 12 cases were on the subject matter of EU public procurement rules. No direct actions were recorded in that court in 2011, only 9 preliminary proceedings and 3 appeals from the General Court of European Union.⁶¹ Moreover, in the period from 2007 to 2011, there were only 7 completed cases in 2011, while there was no reported completed case in any other year of that period. During the same period from 2007 to 2011, most infringement cases related to the EU procurement law were dealt with by the General Court which is the court of first instance for the EU. The General Court’s statistics for 2012 reveal 11 cases (out of total 522) completed in 2007, 31 (out of total 629) in 2008, 19 (out of 568) in

⁶¹ Statistics concerning the judicial activity of the Court of Justice, p. 94, available online at http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-06/ra2011_statistiques_cour_en.pdf.

2009, 15 (out of 636) in 2010, and 18 (out of total 722) cases completed in 2011.⁶² All cases in the General Court were examined as direct actions.

It is thus noteworthy that a **private party, including any company operating in EU and affected by a legal act of the EU institution or by the application of EU law in Member States, has a very limited direct access to the CJEU**—that is, only in the process of direct actions against the EU institutions. **Most often private parties' concerns regarding their rights established on the basis of EU law are brought before the CJEU in preliminary rulings**, in the form of a reference from a national court where the claim of a private party has originally been heard and which will decide the case once a preliminary ruling decision from the CJEU has been obtained. In other words, the issues related to enforcement of EU law are most often resolved in national courts. There is an indirect avenue for private claimants or aggrieved bidders to access the CJEU—that is through initiating the Commission's investigation under Article 258 TFEU. Indeed, most of the complaints regarding the infringements of EU have been investigated by the Commission on the basis of the initial information/complaint provided in this way. According to the Commission's Annual Report 2012, in five Member States (Belgium, Estonia, Finland, Hungary and Latvia) all complaints were originated from tenderers, while In Germany and Italy half of the complaints comes from citizens or civil society, while in Netherlands all complaints come from citizens.⁶³

There are probably thousands of judgments in national courts dealing with the enforcement of EU procurement rules and those cannot be analyzed in this report. This section will focus on selected jurisprudence on implementation of EU public procurement laws by Member States (direct actions against Member States) and

⁶² General Court, Annual Report 2011, p196, available online at http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-06/ra2011_statistiques_tribunal_en.pdf.

⁶³ SWD (2012) 342 final, 9 September 2012, p. 30.

some preliminary rulings that clarified interpretation of the EU public procurement rules.

An excellent reference to the CJEU jurisprudence related to public procurement rules, especially to the Court interpretation of the EU rules, is provided by Christopher Bovis in his recent book *Public Procurement: Law, Policy and Regulation in the European Union*⁶⁴ and Sue Arrowsmith in *EU Public Procurement Law: An Introduction*.⁶⁵

3.3.7. Application of the EU public procurement laws at national levels⁶⁶

There have been over one hundred such rulings against Member States. The court proceedings and judgments are a final stage of the enforcement proceedings controlled by the Commission, the institutions that monitors whether the Member States are implementing EU public procurement laws correctly. The Commission recently published its Annual Public Procurement Implementation Review 2012,⁶⁷ which surveyed how Member States national transposition measures relate to the four public Procurement Directives (Public Service, Utilities, Defence and Security, and Remedies Directive). The survey is a snapshot of the compliance as of November 2011 and it reveals ongoing investigations and open cases. There are more cases of wrong application of EU law (97) than cases of incorrect transpositions (18).⁶⁸ It is noteworthy that the Commission also recorded that in 59 cases Member States made voluntary compliance at various stages of the procedure before the cases reach the Court.

⁶⁴ C. Bovis, *Public Procurement: Law, Policy and Regulation in the European Union*, 2nd ed. (Cheltenham: Edward Elgar, 2012).

⁶⁵ S. Arrowsmith et al, *EU Public Procurement Law: An Introduction*, available online: <http://www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/eupublicprocurementlawintroduction.pdf>.

⁶⁶ Commission actions against Member States –direct actions under Article 258 TFEU

⁶⁷ SWD (2012) 342 final, 9 September 2012.

⁶⁸ Ibid, pp. 29-30.

The following are the examples of most often reoccurring **wrong application** of EU procurement laws by central and sub-central levels of government:

1. illegal use of the negotiated procedure without publication of a notice (7 cases);
2. discrimination (7 cases);
3. direct awards (6 cases);
4. lack of transparency (3 cases);
5. illegal amendment of the contract (2 cases);
6. incorrect application of the in-house rules (2 cases); and
7. infringement of general principles of the Treaty (2 cases).⁶⁹

The following are the most frequent cases of incorrect transposition of EU public procurement laws:

1. Public sector Directive: incorrect transposition of the definitions, the principle of equal treatment, the obligation for tendering economic operators to assume a specific form, the conditions for the performance of the contracts, use of open, restricted and negotiate procedures and of competitive dialogue, cases justifying use of the negotiated procedure without publication of a contract notice, publicity requirements and the personal situation of the tenderer;
2. Utilities Directive: the definition of contracting entities, the principle of equal treatment and the conditions for performance of the contract.

⁶⁹ Ibid, p. 29.

3.3.8. Review procedures at national level

According to the Annual Public Procurement Implementation Review 2012, it is difficult to evaluate the review system for public procurement as given by MS on the basis of the EU law. However, Member States have the primary responsibility for enforcement of EU law and for correct implementation of the EU law. Although it is only logical that review procedures before the national review bodies should outnumber review procedures of the Commission, such comparison is difficult to make due to incomplete reporting by the Member states. Interestingly, the sectors most affected by procurement problems in Member States are similar to the infringement at the EU level: the most affected and sectors of health and infrastructure.⁷⁰

3.4. Commission's proposal for changes:

The European Commission has made several initiatives aimed at simplification and modification of the EU public procurement regime (the 2011 Green paper) on the modernization of EU public procurement policy: Towards a more efficient European Procurement Market)⁷¹ and at strengthening its competitive position with respect to third countries goods and services in the EU market and possibilities for EU suppliers to access public procurement market of third countries (the 2012 Proposal for a Regulation establishing rules on the access of third country goods and services to the EU internal market in public procurement).⁷² The two proposals will be analyzed below.

⁷⁰ Ibid. p. 32.

⁷¹ COM (2011) 15 final.

⁷² COM (2012) 124 final

It is noteworthy that the European Parliament also discussed public procurement modernization and commented on the work of the Commission in its own resolution on the Green paper.⁷³ Although the Resolution in general supports the Commission's proposal for changes, it identifies six tasks of the modernization of public procurement in EU: improving legal clarity, developing the full potential of public procurement—best value for money, simplifying the rules and allowing more flexible procedures, improving access for SMEs, ensuring sound procedures and avoiding unfair advantages, and expanding the use of e-procurement. The Parliament emphasizes the need for legal clarity and it warns on the issue of Member States non-compliance with the EU public procurement rules. It is interesting that the Parliament emphasized that the introduction of any new procurement rules “below the EU thresholds should be avoided, as it may jeopardize legal certainty established at national level”⁷⁴ At the same time, the Parliament warns that any reassessment of thresholds for supply and services contract, especially the need to raise them, should be carefully considered in the context of the WTO commitments and legally binding provisions of GPA.⁷⁵ The Parliament proposes that the criterion of lowest price as a factor in determining one for the award of contract should be replaced by a different criterion—that of most economically advantageous tender, “in terms of economic, social and environmental benefits.”⁷⁶ It also asks the Commission to encourage governments and contracting authorities to “increase the use of sustainable public procurement, supporting and promoting high-quality employment and providing quality services and goods in Europe.”⁷⁷

⁷³ European Parliament Resolution of 25 October 2011 on modernization of public procurement (2011/2048(INI))

⁷⁴ Ibid, at para 10.

⁷⁵ “It should also be borne in mind that raising thresholds in Europe could easily lead to further complications for EU trade policy”, *ibid*, para. 24.

⁷⁶ Ibid, para. 13.

⁷⁷ Ibid, para 14.

3.4.1. The Green Paper on the modernization of EU Public Procurement Policy

The main goal of the European Commission was to simplify and update the EU procurement regime by primarily making the award of contracts more flexible and to enable better use of public contracts to support other EU policies.⁷⁸ That goal has been stated in the Single Market Act of 2010 and in the Europe 2020 strategy for smart sustainable and inclusive growth.⁷⁹ The Europe 2020 strategy emphasized that public procurement policy should be based on efficient spending of public funds and the principle of open EU public procurement markets.

The objectives of the Green Paper are at least twofold:

1. to modernize and improve the tools and methods of public procurement provided for in Directives 2004/17/EC and 2004/18/EC for public authorities; this could possibly mean unification of the two procurement regimes under the framework of the Utilities Directive, which is more flexible (proposal of some EU legal academics such as Sue Arrowsmith);
2. to consider respond to criticism of EU suppliers that the EU procurement market is more open than the procurement markets of other GPA Parties and non-GPA countries. In particular, the proposal is to use EU procurement rules to restrict access to the EU public procurement goods and utilities procurement market in the areas not committed internationally by the EU, either through the GPA or regional and bilateral agreements signed by the EU with third countries.

In sum, the Commission's Green Paper proposal does not consider changing the procurement market access rules for foreign suppliers originating from the GPA

⁷⁸ Communication for the Commission to the European Parliament, the Council, the Economic and Social Committee and to Committee of the Regions, COM (2010) 608.

⁷⁹ COM (2010) 2020.

signatories such as Canada for as long as their procurement transactions are within the areas covered by the GPA. It is important to consider the areas of the EU's commitments under the GPA as given in the GPA Appendix 1, especially the list of services in annex 4 and the list of constructions services in annex 5. That change has been recently proposed in the form a new regulation that will be reviewed in a section below. The green Paper also does not propose any changes to the system of remedies or concessions.

3.4.2. Proposal for an EP and EC Regulation establishing rules on bilateral goods and services procurement market access between the EU and third party countries

As mentioned above, there is a widespread opinion among the EU stakeholders that the EU has opened its on public procurement markets too much vis-à-vis third countries. Although there is a generally positive internal impact of open market on the EU GDP, there are concerns that it may weaken international competitiveness and limit business opportunities for EU stakeholders due to the fact that third countries procurement markets are not as open as the EU's one is. This is especially case with China's public procurement market.

The Commission made several policy proposals how to solve problems of EU international commitments to public procurement market openness: “nothing happens”, non-legislative option (soft law and dispute settlement mechanism), legislative option with supervision by the Commission, legislative approach without supervision by European Commission, “buy Europe” option, and correcting unfair abnormally low tenders. **It preferred a legislative approach with supervision by the European Commission (so-called option 3b)** which will exclude companies, goods and services not covered by the EU's commitments, subject to notification

of the Commission and Commission option to restrict action to the procurement market.

The Commission explains its legislative initiative for a regulation as an attempt to strengthen the position of the EU when negotiating access for EU companies' access to the public procurement markets of third countries and to clarify the rules governing access to the EU public procurement market of third country companies, goods and services. In other words, **if such a regulation is enacted it would have an impact on access of Canadian companies** to the EU public procurement market. Indeed, it could potentially make Canadian access to the EU market more difficult.

The Commission proposes a regulation as a form of legislation because it wants to ensure uniform action in all Member States and secures the monitoring and enforcing powers by the Commission. Moreover, the proposed Regulation gives the Commission power to investigate restrictive procurement measures by third countries on its own initiative or at the request of Member States or interested parties (Article 8) As such, the proposed Regulation will also be applicable in European Economic Area and it would cover public procurement contracts covered by other public procurement directives (Public Service, Utilities and Concessions Contract Directives).

The Commission proposes that good or service originating in a country with which the EU has concluded an international agreement in the field of public procurement and those originating from least-developed countries (listed in Annex I to the Regulation 732/2008) equally to goods and services originating in the EU (Article 4 of the proposed Regulation). Annex to the proposal of this Regulation lists the following countries as the ones with such an international agreement with the EU: Mexico, Switzerland, Macedonia, Monte Negro, Albania, and South Korea. **Goods and services coming from other countries (including Canada if CETA is not**

signed/ratified) are considered as non-covered goods and services and *may* be subject to restrictive measures taken by the Commission upon request of individual contracting entities designated in the proposed Regulation (Article 5) and according to the rules set out in the proposed Regulation (Article 6).

When a contracting authority in the EU intends to accept an abnormally low tender where the value of non-covered goods and services exceeds 50% of the total value of goods and services included in the tender it must inform the other tenderers in an award procedures of such a decision.

The Commission has also produced an impact assessment accompanying the Proposal for a Regulation⁸⁰. According to the Impact Assessment and based on its GPA commitments, the EU has committed its street lighting and broadcast equipment market to Canada with no restrictions, while has not make any commitments in defence, postal sorting, railway and port equipment, urban buses, power generation and waste management and environment services. In a number of areas the EU has made restricted commitments (for example in medical equipment, financial services, pharmaceuticals, IT services).

The Commission emphasizes that although both the US and Canada are in the group of the 12 major trading partners of the EU, they have not committed their regional or local procurement at all to the GPA regime. The Commission indicates that the EU should try to negotiate such commitments from its trading partners outside the GPA negotiations, preferably in bilateral or regional trade negotiations. **In particular, this document indicates that the EU is aware that Canadian type of federalism is a potential source of protectionism.** More specifically, this document indicates that it will be difficult to ensure commitment of Canadian sub-central and/or local government because they tend to “use procurement as tool of

⁸⁰ SWD (2012) 57 final.

local economic development”.⁸¹ It is very likely this skeptical view that prompts the EU to demand, throughout CETA negotiations, the binding inclusion of the Canadian provinces and territories in the deal. Annex 6 of the Impact Assessment provides the list of entities and purchases that Canada has not committed to under the GPA and estimates that due to such restrictions Canada is cutting the access to some 51 billion EUR (above the GPA thresholds).⁸²

3.5. Member States’ Regimes on Government Procurement

In the areas not covered by the EU public procurement rules, the EU Member States apply their national rules on procurement. The EU public procurement rules specified in directives are transposed or incorporated by the Member States through their national legislative acts. Member States have significant discretion in implementing directives and that often results in differences across Member States in implementation mechanisms and administrative procedures established to ensure compliance with the EU directives. The Treaty on European Union and Functioning of the European Union, also referred to as the Treaty of Lisbon,⁸³ is also directly applicable in all Member States, meaning no transposing domestic legislation is needed. Some of the treaty provisions also have direct effect, which means that the CJEU has established that individuals may seek enforcement of their rights established in the Treaty directly in national courts. In practice, that means that regardless of the existence of domestic laws of Member States, UK is

⁸¹ Ibid., p. 14.

⁸² Ibid, Annex 6/11, p. 16.

⁸³ Consolidated version of *The Treaty on the European Union and Functioning of the European Union*, 30 March 2012, OJ C83/13.

obliged to comply with its Treaty obligations related to equal treatment, non-discrimination and transparency.

The Treaty on the European Union and Functioning of the European Union, as well as the EU regulations and decisions are directly applicable in the Member States so there is no need to reflect on their transposition into domestic laws of Member States. Due to the supremacy principle the EU law takes precedence over all prior or subsequent national laws governing the same issues. If there are any domestic public procurement rules that are violating the Treaty that violation would be dealt through the infringement procedure before the CJEU under the Articles 258 and 259 TFEU as described below. The following survey is focusing on the legislative actions of Member States related to transposition of EU public procurement law, national institutions responsible for public procurement legislation and policy, and the system of administrative and judicial review of procurement decisions. It is based on the Commission's Annual Public Procurement Implementation Review 2012, the Comparative Survey on the National Public Procurement Systems undertaken during the Italian Presidency of the Public Procurement Network in 2010.⁸⁴

3.5.1 The United Kingdom

The following legislation transposes the relevant EU public procurement directives into UK domestic laws in England, Wales and Northern Ireland:

1. Public Contracts Regulations 2006 (Statutory instrument 5/2006 implementing Directives 2004/18 and 89/665)

⁸⁴ Bianchi & V. Guidi, eds., *The Comparative Survey on the National Public Procurement Systems Across the PPN*, Rome 2010, available online at <http://www.publicprocurementnetwork.org/docs/ItalianPresidency/Comparative%20survey%20on%20PP%20systems%20across%20PPN.pdf>.

2. Utilities Contracts Regulations 2006 (Statutory instrument 5/2006 implementing EC Directives 2004/17 and 92/13)
3. Defence and Security Public Contracts Regulations 2011 (No.1848) implementing the EU Defence Directive 2009/81, (came into force on 21 August 2011).

It is important to note that the EU Remedies Directive has been implemented in 2009 by amendments to the two above Public Procurement Regulations. They have been further amended in 2011 by the Public Procurement (Miscellaneous Amendments) Regulations 2011 (No. 2053).

Scotland has transposed the relevant EU directives in a similar fashion, but introducing its own regulations: Scottish Statutory Instruments 1/2006 and 2/2006. Devolved Scottish Administration has amended the two instruments in 2009 to comply with the EU Remedies Directive.

There are no specific laws and regulations in the UK that could govern procurement not covered by the EU directives or that would cover below threshold procurement. The general principles of non-discrimination, transparency and openness found in the EU Treaty and the UK Local Government Act apply.

As already mentioned, the OGC was the main UK government body in charge of the national public procurement legislation compliance with the EU laws and it is responsible for the national procurement policy, except for Scotland. However, since 15 June 2010, OGC has become a part of the Efficiency and Reform Group (ERG) within the Cabinet Office which is now responsible for public procurement policy. The Devolved Scottish Administration carries on public procurement policy for Scotland. The UK Ministry of Defence is the government body which has jurisdiction over the procurement of military equipment.

The review of procurement decisions in the UK is ensured by the court system, meaning that a bidder should address all claims related to the government's breach of the Regulations to the High Court in England, Wales and Northern Ireland, and the Court of Session or Sheriff Court in Scotland. The remedies available to an injured bidder would depend on whether the contract award procedure is commenced before or after December 2009 because of the legislative changes to the system of remedies. For example, under the pre-December 2009 remedies regime (the old remedies) the plaintiff was entitled to injunction and damages before the contract had been entered into. However, the bidder had to apply for injunctions to the High Court at his own costs. Under the new regime, an injunction is granted automatically where the challenge is against the contract award decision. Under the old regime, once the contract was entered into the Court could only award damages. Under the new regime, the Court could award damages but also make a declaration of contract ineffectiveness (contract nullity).

3.5.2 Germany

Due to Germany's constitutional division of powers between federal government and federal states, the two levels of executive share legislative powers to regulate public procurement. The EU public procurement directives (Public Service Directive and Utilities Directive) have been transposed into German legal system in 2009 by:

1. revisions of the German Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen – GWB), and the German Ordinance on the Award of Public Contracts (Vergabeverordnung – VgV); The VgV has been revised twice in 2011 to implement into German law two EU Directives: Directive on the promotion of clean and energy-efficient road transport vehicles (Directive 2009/33) and Directive on the indication by

- labelling and standard product information of the consumption of energy and other resources by energy-related products (Directive 2010/30)
2. by the Ordinance on the Award of Public Contracts by Utilities (SektVO), and
 3. by the revised Procurement Regulations (Vergabe- und Vertragsordnungen – VOB/A, VOL/A and VOF) which provide rules and details of procurement procedures.

National legislation (mainly budget law) covers public procurement below the EU thresholds as the first sections of well as the VOB.A VOL/A. Tenders below the EU thresholds must be published in sources that have public access (daily newspapers, internet websites, professional journals) and the economically most advantageous tender shall be accepted (meaning, the price is not the only decisive criteria).

Because of the fact that public procurement is within jurisdiction of public authorities at federal, regional, and local level there are thousands of awarding authorities and there are different supervision bodies as well. At the federal level, federal ministries and agencies are the main awarding authorities. For example, the Federal Office of Defence Technology and Procurement (BWB) is the largest central purchasing body, while the Procurement Agency of the Federal Ministry of the Interior is in charge of all purchases related to the 26 federal authorities and public-law foundations. Supervision of the tendering process is institutionalized at the state level through the so-called VOB-Stellen and the State audit courts also supervise spending for public procurement on the State and local levels.

The court review system applies in Germany only to contracts above the EU thresholds and it is organized through a complex system at the federal and state level through public procurement tribunals or award chambers depending on who

is the awarding public authority. The Court of Appeal is reviewing awards of the award tribunals or award chambers. After the award of the contract, the tribunals or chambers can only find contracts to be ineffective. The tribunals or chambers have no competence to decide claims for compensation. Those have to be brought to civil court. Below the EU thresholds bidders are restricted to administrative complaints.

There are no special public procurement rules in Germany regarding the PPPs.

3.5.3. France

France incorporated the relevant EU directives (Public Service Directive and Utilities Directive) in the French legal system through the enactment of the following acts:

1. The Public Procurement Contracts Code (Code des marches publics" by the government Decree No. 2006-975 of 1 August 2006;
2. by various regulations of the Parliament as amended by Ordinance no 2005-649 of 6 June 2005 and related to public procurement contracts awarded to categories of private or public persons not covered by the Public Procurement Contracts Code; some of the public authorities affected by such legislations are public hospitals, for example.

The Defence and Security Directive is transposed into French domestic law in 2011 by the administrative Decree No. 2011-1104 of 14 September 2011 and the statute No. 2011-702 of 22 June 2011.

The EU Remedies Directive 2007/66 has been transposed in France on 9 May 2009 by amended Ordinance No. 2009-515 and by amendments to the Administrative Procedure Code and the Code of Civil Procedure.

The public entities covered by the French legislation transposing the EU public procurement Directives are the State and the State's public bodies, local authorities, and their public bodies and legal persons such as water supply agencies, universities, public hospitals, etc. Private entities covered by the transposing laws are those which activities are financed or controlled by public sector entities, and operating in the utility sector. Public contracts affected by the laws are works, supply service and concession contracts at the EU threshold, although there are some special rules governing concession contracts as well, such as those related to civil engineering in Ordinance No. 2009-864.

The Public Procurement Contracts Code and the Ordinance regarding public contracts govern public procurement not covered by the EU directives and below the EU thresholds. The procedure below the EU threshold is called "adapted procedure".

PPPs are governed by the amended government Ordinance No. 2004 -559 of 17 June 2004 on partnership contracts and Decree No. 2009-24 of 2 March 2009 which supplements the provisions of the Ordinance's provisions relating to the award of certain public contracts. In addition, Decree No. 2009-243 of 2 March 2009 was introduced to regulate award procedures and to certain performance requirement for partnership contracts awarded by the State, State-run public bodies and certain persons mentioned in Articles 19 and 25 of the Ordinance 2004-559.⁸⁵

⁸⁵ Ibid, p. 60.

There are numerous supervisions bodies created by the French public procurement rules. The central comptrollers and state inspectors provide financial control of central agencies and national companies. The General Directorate for Competition Policy, Consumer Affairs and Fraud Control is ensuring fair trading of public entities. The Public Accounting General Directorate audits public procurement. There are also numerous local and regional auditing authorities controlling the local level governments.

Remedies related to public authority contracts are to be claimed before administrative courts while all disputes against non-public entities are to be brought before the civil and commercial courts. Both administrative courts and civil courts award remedies provided for in the EU Remedies Directive. They may suspend or terminate contracts violating public procurement procedure and failure to comply with competitive tendering obligations, and they can order monetary compensation. These judgments may be appealed before the relevant Appellate Court.

3.5.4. Romania

Romania only joined the EU as a full Member State in 2007 but they harmonized its national laws with the EU law in the process of candidacy in order to accept the EU standards by transposing the relevant EU directives into the Romanian legislation.

The general principles of the Treaty had become the guiding principles of the Romanian legislation even before the accession of the country to the EU and, consequently, public contracts were to be governed by laws ensuring non-discrimination, transparency, equal treatment and proportionality. Accordingly, the Government approved the G.E.O. No. 34/2006, or the Government Emergency

Ordinance on awarding public procurement contracts, public works concession contracts and services concession contracts in order to implement the EU public procurement Directives (Public Sector, Utilities and Remedies Directives).

In addition to G.E.O no. 34/2006, the Government of Romania introduced secondary legislation to facilitate application of the Ordinance and provide adequate guidelines: Government Decision no. 925/2006 for approving of the application norms of the G.E.O. no 34/2006, Government Decision no. 1660/2006 for approving the application guidelines regarding the awarding of procurement contracts by electronic means, and Government Decision no 71/2007 for approving the application norms of the provision referring to the award of the public works concession contracts and of services concession contracts. G.E.O. no. 34/2006 governs procurement contracts below the EU thresholds as well.

The EU Defence and Security Directive had to be adopted by Romania by July 2011 but it has not yet communicated to the Commission whether it has done so or not.

PPPs are governed by Law no. 178/2010. The law provides that a PPP contract is to be awarded by open awarding procedure and by competitive dialogue.

The main regulatory and monitory public procurement institution is the National Authority for regulating and monitoring public procurement NARMP established by the G.E.O no. 74/2005. It is responsible for implementation of public procurement policy, for the legal framework related to the procedures for awarding the public procurement contracts and for monitoring and supervising the awarding of the public procurement contracts.

The National Council for Solving Complaints is the main administrative jurisdictional institution of the Romanian remedy system of the basis of G.E.O. no.

34/2006. The disputes arising from public procurement procedure could also be settled in courts on the basis of the administrative dispute law. The Council and court decisions could be appealed to the Regional Appeal Courts and the Bucharest Appeal Court. The court could order ineffectiveness of the act of the contracting authority and could also order indemnities to the injured party.

3.6. Concluding remarks regarding national laws on public procurement in EU

In brief, all the Member States of the EU have transposed into national legislation EU Directives on public procurement and remedies. Although they had to ensure that all of the objectives and guiding principles of EU legislation have been incorporated into domestic regulation, they have chosen different methods of transposition that suits their own legal systems and their particular legal and institutional cultures. *Consequently, most of them have established centralized government body responsible for coordination of public procurement policies at central, regional and local level. None of the Member States has public procurement rules codified into a single statute.* Rules are spread across several pieces of national legislation which makes reference to the relevant rules complicated.

In most of the Member States the review system covers all procurement contracts but the organization of review bodies differ. All of the review bodies are of a judicial character. In some countries they are administrative tribunals, while in others civil

or commercial courts. All review procedures include pre-contractual review focusing on suspension or modification of the decisions on awarding procedure while some introduced fines. In contractual stage review, the focus is on ineffectiveness as a main remedy, while penalties are alternative remedies.

Chapter 4: Canada and the European Public Procurement Markets

4.1. New Data on Canadian firms participating in EU procurement markets

As already stressed, Canada and the EU are both signing authorities to the multilateral Government Procurement Agreement (GPA) and thus should overall obey to similar rules and follow similar practices. Accordingly, one would expect similar degrees of openness. However, according to a – restricted – meeting document of the Council of the European Union on CETA, Canada has a significantly lower nominal openness of its public procurement markets than the EU. Whereas 90 % of all public purchases are seen as eligible for outside bidders in the case of the EU the respective figure for Canada is given with only 16%⁸⁶. This value is on the very low end of all trading partners of the EU. As already outlined, the EU public procurement markets are restricted by the Defence Procurement Directive that allows member states to decide whether bids from outside parties (i.e. non-member state based companies) are accepted as well as by Utilities Directive that allows member states under certain conditions to reject bids in the water, energy, transport and postal services. Nevertheless, European officials state on a regular base that public procurement markets are wide open.

⁸⁶ Data are generated by: Commission Staff Working Document. Annual Public Procurement Implementation Review 2012, European Commission SWD (2012) 342 Final.

Such statements are contested on the base of scholarly research⁸⁷ but still were primary guidance for the proposed regulation of March 2012 called for by the European Council already in October 2011. This regulation would have consequences for Canada, even if the ongoing CETA negotiations would fail. Article 6 of this regulation allows contracting authorities of member states to reject tenders above the threshold of Euro 5 million in case the reciprocity principle is violated. In case of serious and persistent violations the European Commission, based on articles 8 to 10, can go so far to ban any tender of such a third-party in all member states of the EU.

Our report follows mainstream research findings that demonstrate an on-the-average openness of EU public procurement markets. In the light of this empirical research we were looking into successful efforts of Canadian business to enter EU public procurement markets. To our knowledge, Canadian public agencies do not collect systematically data on outward bidding of private sector companies. The Ramboll (2011) study is currently the most thorough study looking into cross-border procurement above the EU threshold⁸⁸. The study also looks into Canada's access to EU public procurement markets from WTO data. We see that the EU awarded EUR 12 billion to companies of GAP signees, which translates into a share of 4.1%. According to the same data base, Canadian companies won the third highest ranked entities in regards to awarded volume; and the fourth ranked entity in regards to number of contracts. Based on the WTO data, Canadian companies got 105 contracts in the value of EUR 866 million (EC 2011:281f.).

We went another route and tried to get raw data from the EU public procurement agency's website. Given time constraints, we looked into successful bids of

⁸⁷ Patrick A. Messerlin: Openness in public procurement markets: Time for a reality check, ECIPE Policy Briefs, No 03/2013.

⁸⁸ A team of overall eight researchers was working for one year to come up with an interesting but still restricted analysis of the cross-border aspect of public procurement markets.

Canadian businesses in the short-run, from March 1, 2010, until February 28, 2013. During this time period overall 465 916 contracts (above the notification level) were offered by agencies of EU member states. Overall 65 contracts went to Canadian companies – that represents 0.014 % of all contracts awarded. The share would be higher if it calculated as contracts for Canadian firms to contracts to firms from outside the EU. If we break down the period into three sub-periods (March 1, 2010 – February 28, 2011; March 1, 2011 – February 28, 2012; March 1, 2012 – February 28, 2013) we can see a steady improvement in the number of contracts awarded to Canadian businesses, from 17 to 23 to 25 contracts. Looking at the 2011-2012 cross-section, which doesn't overlap with the results from the Ramboll (2011) study, we see 53 total contracts that sum to a value of 124 million Euro, 44 million of which was awarded to firms in our study. Again, of the 18.65 billion of 2011-2012 contract values, forecasted for only nations in our study that would have been awarded to international firms if the contract distribution found in the Ramboll (2011) study was applied, 44 million is only 0.24%. We can presume, if the 2011-2012 TED data was fully analyzed that 124 million Euro would not make up a large share of those values awarded internationally.

Table 21. 2011 – 2012 TED Data Nation Level

Country	No. of Contracts	Avg Value (Millions of Euro)	Ratio of total value (%)
Poland	8	4.56	29.5
France	9	0.425	3
UK	5	0.504	2
Italy	2	0.5	0.8
Czech Rep.	1	0.098	0.08
Rest of EEA	28	2.86	64.5

*Source: TED

Our TED-based data show a significantly lower number of contracts than the EC-commissioned 2007 study using WTO data. A more thorough analysis should be

run to verify the extent of EU/Canada pre-CETA procurement activity.⁸⁹ Prior studies show that TED data can be difficult to match at the firm level accurately. This may be the source of the differences, though there is also a strong likelihood the financial crises changed the political landscape for public procurement, as national political entities moved towards forms of protectionism and tried to insulate potential multiplier effects stemming from public purchases. A thorough pre-CETA trade and procurement analysis would greatly aid in quantifying the costs and benefits of a post-CETA international trade arena. Still, what we see across both our data and the WTO study, is that Canadian companies are already trying to make use of public procurement opportunities. CETA would add a positive moment to those efforts, as the current access restrictions due to reciprocity problems would no longer exist.

In regards to the EU contracting parties, the 9 contracts that came from France were awarded to firms located in Quebec, all of them advertising companies. The highest value of contracts awarded to Canadian companies came from Romania, mostly from the nuclear power industry. These 8 contracts, average 7.84 million and made up 48% of the 144 million total. Overall 7 contracts were awarded to BC companies, for a share of 7% of the total and averaging 1.27 million each. These ranged from laboratory, optical and precision equipment, defense software, agricultural machinery, paper products to marine technology and the hire of helicopters. Overall the sector breakdown across 2011-2012 demonstrates that civil engineering and constructions services, as well as nuclear power, account for 61% of the total value.

⁸⁹ And of course an analysis of imports and exports.

Table 22. 2011 – 2012 TED Data Sector Level

Sector	No. of Contracts	Share of total Value (%)
Advertising and Marketing Services	11	9
Air Transport Parts and Services	14	11
Technology (instruments/software)	10	5
Civil Engineering and Construction	1	27
Nuclear Power	6	34
Other	11	14

*Source: TED

These findings need to be interpreted carefully, our study covers only a brief period and TED data does not always match suppliers with nations of origin accurately. Also, the tender data bank of the EU only shows successful tender bids. This restricts efforts to identify the number of Canadian firms trying to enter the public procurement markets of the EU. Thus, we were not able to formulate a success rate. This information would aid in evaluating which kind of assistance programs would be best for firms interested in bidding in EU public procurement markets.

Another severe restriction is the lack on data of successful bids by European subsidiaries of Canadian companies. It can be assumed that Canadian companies with European affiliation networks are participating in public procurement activities by leveraging their EU location and circumventing third-party restrictions. A study commissioned by the European Commission (EC 2004) indicates that only a small number of companies without EU based subsidiaries are participating in EU bids.

The cases of successful bids by BC companies are illuminating. At least four of the six winning companies have affiliations in Europe and thus a minimum level of familiarity with EU markets in general and European public procurement markets in particular. Data by the Commission (2009) show that through the period 2006-2009 11.4 % of awarded contracts that represented 13.4 % in value terms can be

classified as indirect cross-border procurement where firms use their EU-based subsidiaries to tender.

Still, the fact that, from 2010 to 2013, 22 out of 65 contracts awarded came from only two countries (Romania and France) and were concentrated in two sectors (advertisement and nuclear industry) indicates that Canadian companies seem not to make use of their comparative advantages. On a very general level such a finding, if confirmed by deeper empirical digging, would not come as a surprise. The few existing studies on Canadian revealed comparative advantages show that its comparative advantages are in low-tech products and in natural resources.⁹⁰ It is well known, though, that comparative advantages are highly dynamic and more recent research may indicate that the Canadian business sector has made progress in catching up.

A recent study by the Conference Board of Canada⁹¹ (2012) shows that non-US Canadian exports shifted in the last ten years or so towards professional services and products connected with natural resource exploitation. Also, comparative advantages measured on the provincial level show a much more diversified picture. A surface level survey of BC's international exports indicates that, between 2002 and 2011, the composition of its merchandise exports moved even further towards resource-based products, from a share of 76% to almost 80%⁹². Unfortunately, provincial data for the composition of services export are not available. Chances are, however, that natural resource-related *services* play a relative prominent role. Such a pattern of specialization may improve the competitiveness position of BC-based companies, in particular in European markets with mining and natural resource exploitation activities.

⁹⁰ Ram C. Acharya: Analysing International Trade Patterns: Comparative Advantage for the World's Major Economies, *Journal of Comparative International Management*, Vol. 11, No 2, 33-53.

⁹¹ The Conference Board of Canada: Walking the Silk Road: Understanding Canada's Changing Trade Patterns, Briefing December 2012.

⁹² Business Council of British Columbia: A Snapshot of British Columbia's International Exports: Commodities (still) rule, Vol. 19, Issue 4. September 2012.

Our analysis has shown that public tenders in the EU tend to be allocated in geographical proximity. Still, cross-border tendering plays, on average, a significant role – and we expect that the new generations of bilateral trade agreements will increase the openness of EU public procurement markets. We should stress, at least, one dimension of competitiveness that is usually not discussed in the context of public procurement markets: Price competitiveness of potential suppliers outside the EU and the Eurozone. Canadian companies are confronted with an exchange rate problem: The vast majority of tenders are expressed either in Euro or in a European currency that is directly or indirectly pegged with the exchange rate of the Euro. The most prominent exemption is the UK where the Pound is freely floating. In the last couple of years, the Canadian Dollar has become more and more a resource-backed currency. Any substantial appreciation of the Canadian Dollar, whose exchange rate is mainly driven by global resource prices, adds a competitive disadvantage to Canadian companies who participate in direct ways in EU public procurement markets. This is a severe problem in terms of price competitiveness. Besides currency hedging, the best way to go is outsourcing. Canadian companies who can channel their activities through European affiliations can avoid the currency problem. Not all companies have such an option, though. Medium-term it needs improvements in productivity and a well-selected portfolio of services and products that are attractive for European contractors.

4.2. Using the “Tenders Electronic Daily”

‘Tenders Electronic Daily’ (TED) is the official one-stop source on public procurement offers of all member states of the EU plus Iceland, Norway and Liechtenstein. The latter represent three of the four contracting members of the European Economic Area (EEA). In Addition, projects funded by the European Investment Bank, the European Central Bank and the European Bank for Reconstruction and development that entail public purchases of goods and services are listed on TED. All opportunities above the official thresholds are published on this web version of the ‘Supplement to the Official Journal of the European Union’ (OJS), and a surprisingly large quantity of those below the thresholds. On a daily working basis, more than 1000 contract opportunities with a value of close to EUR 1 billion are advertised via the platform.

Summaries of all contract notices are in English and also in each of the official EU languages. The full tender opportunities texts are usually only available in the contracting party’s country language. The platform offers a machine translation service for registered users.

Interested parties should register on TED in order to make full use of the platform. Registration is free. Registered parties can custom-design the platform by creating tailor-made RDD feeds, based on prior search and save results. The customized profile is then used for the RSS feed that provides regular updates with new content.

Given the enormous numbers of tenders above the thresholds, it is quite challenging for private businesses to navigate through potential opportunities. Investigation costs would be relatively higher for smaller economic units. This holds despite the fact that the access to public tender opportunities via TED is free.

PwC, London Economics and Ecorys (2011) document bidding costs, but neither sourcing nor sunk costs are adequately covered in the research. Information is, as we so often forget, not synonymous with knowledge, and the latter is certainly relevant for companies that want to successfully enter tender competition.

About 74 % of EU advertised tenders are open procedures and thus completely open (EC 2009:26). Unlike so-called accelerated and negotiated procedures that give the contractor the flexibility to restrict the number of bidders, the open procedures are very competitive. Between 2006 and 2008, the average number of bids per published tender decreased from 6.9 to 5.3. From the perspective of a potential bidder the probability to succeed is about 20%. Depending on tendering cost/benefit analysis, firms may decide not to compete at all. As already mentioned, *parts of private tendering costs could be reduced if governmental agencies directly or indirectly provide infrastructures that help in particular small and medium sized companies to effectively enter those markets.*

Offers to assist private companies in their bidding efforts are ubiquitous. Legal experts and specialized agencies offer their services to interested private firms, and it is to be expected that CETA will generate respective offers for Canadian companies. Market research that details not only sector level activities, but also pricing points, probability estimations and market entry strategies is highly relevant to firms that seek efficient and on-target bidding. These services constitute, with others⁹³, sunk costs that are not always cheap, but can greatly reduce learning curve time frames and increase success rates.

Our overview, though not detailed at the sector level and without coverage of those EU nations where Canadian firms are perhaps the most active, clearly indicates that offering *systematic public assistance* to Canadian companies, in their efforts

⁹³ Business registrations, tax and municipal regulation investigations, entry and exit planning, legal costs.

to enter EU-wide public procurement markets, is probably mandatory if Canadian political regimes are serious about protecting trade surpluses in a post-CETA environment. Such assistance can range from regular bid information, helping to create national and international bidding consortia, to logistical support for SMEs in accessing EU public procurement markets. Also, provincial governments may offer *regular training sessions for SMEs* that introduce them to the workings of EU public procurement markets. Those recommendations reflect our overall suggestion that Canadian governments, at all levels, need to invest in systemic training of private and public actors, as well as in the launch of a databank so private actors can interact with each other, at the national and international levels, to form the necessary alliances, consortiums and information networks.

Appendix:

Table 23. Contract Euro Values, Avg.: (2005-2010), Median: (2007-2009)

Country	Average, in Millions	Median Value <
Italy	4.06	795,000
United Kingdom	7.29	660,000
Netherlands	2.83	500,000
Czech Republic	2.39	360,000
Germany	1.78	320,000
Hungary	2.28	310,000
Poland	1.61	305,000
France	2.14	285,000

*Sources: Eurostat Procurement Indicators (2010), PwC, London Economics, Ecorys (2011)

Table 24. Cross-Border Contract Values

Average Value of Cross-Border Awards Millions of Euro		
Country	Direct	Indirect
United Kingdom	14.58	6.10
Poland	7.85	3.79
Hungary	7.79	3.13
Italy	5.00	2.90
France	3.57	2.79
Czech Republic	3.06	3.12
Germany	2.02	2.11
Netherlands	1.76	3.18

*Source: Ramboll (2011), Eurostat

Table 25. Ratio of Total Awards Distributed Across Borders (2007-2009)

Country	Total Award No.		Total Award Values	
	Direct Cross-Border %	Indirect Cross-Border %	Direct Cross-Border %	Indirect Cross-Border %
Czech Republic	1.8	19.2	2.3	25
Germany	3.9	8.1	1.7	9.6
France	0.9	14.8	1.5	19.3
Italy	1.3	28.6	1.9	20.4
Hungary	1.7	10.3	5.8	14.1
Netherlands	2.9	9.8	1.8	11
Poland	0.8	1.7	3.9	4
United Kingdom	1.5	16.5	3	13.8

*Source: Ramboll (2011)

Table 26. Extra-EU/Intra-EU Distribution of Cross-Border Awards (2007-2009)

Country	Total Direct Cross-Border		Total Indirect Cross-Border	
	Extra-EU %	Intra-EU %	Extra-EU %	Intra-EU %
Czech Republic	29	71	1	99
Germany	5	95	39	61
France	25	75	50	50
Italy	33	77	42	58
Hungary	16	84	10	90
Netherlands	11	89	49	51
Poland	3	97	28	32
United Kingdom	12	88	63	37

*Source: Ramboll (2011)

Table 27. International (Non-EU) Directly Awarded Contracts, 2014

Country	Internationally Direct No.	Billions	Millions
		Internationally direct total value	Internationally direct value/contract
Czech Republic	17	0.125	7.17
Germany	20	0.031	1.56
France	107	0.593	5.54
Italy	31	0.226	7.20
Hungary	9	0.082	8.69
Netherlands	17	0.026	1.52
Poland	5	0.063	12.22
United Kingdom	22	0.412	18.84

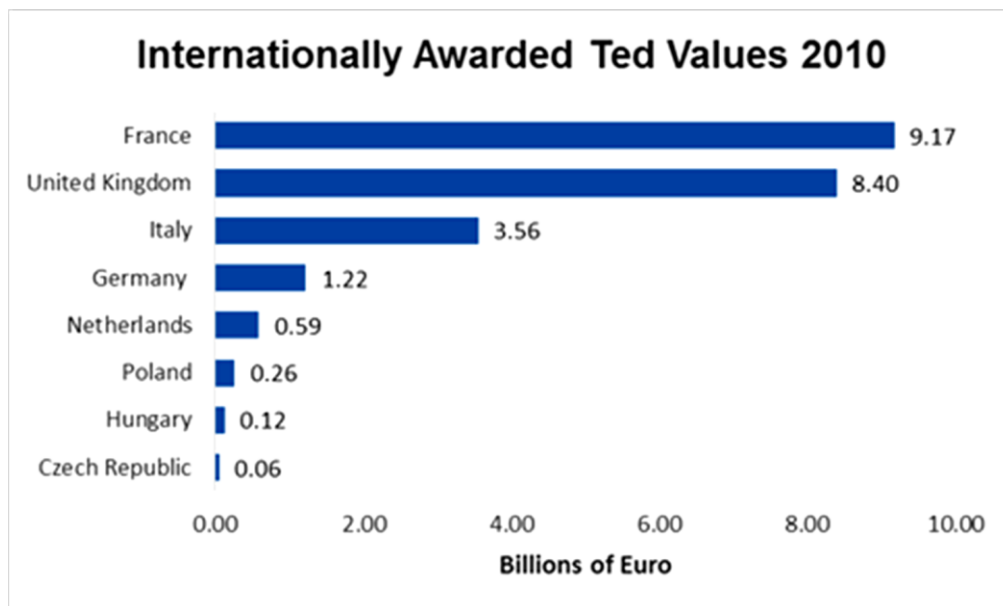
*Source: Forecasted Values, Ramboll (2011) Distributions

Table 28. International (Non-EU) Indirectly Awarded Contracts, 2014

Country	Internationally InDirect No.	Billions	Millions
		Internationally Indirect total value	Internationally Indirect value/contract
Czech Republic	6	0.047	7.30
Germany	834	1.361	1.63
France	3526	15.270	4.33
Italy	1074	4.481	4.17
Hungary	36	0.124	3.49
Netherlands	260	0.713	2.74
Poland	103	0.605	5.90
United Kingdom	1262	9.942	7.88

*Source: Forecasted Values, Ramboll (2011) Distributions

Table 29. International Award Values, By Nation, 2010



*Table 29, Table 30, Sources: Eurostat Values, Ramboll (2011) Distributions

Table 30. International Award Values, By Nation, 2014

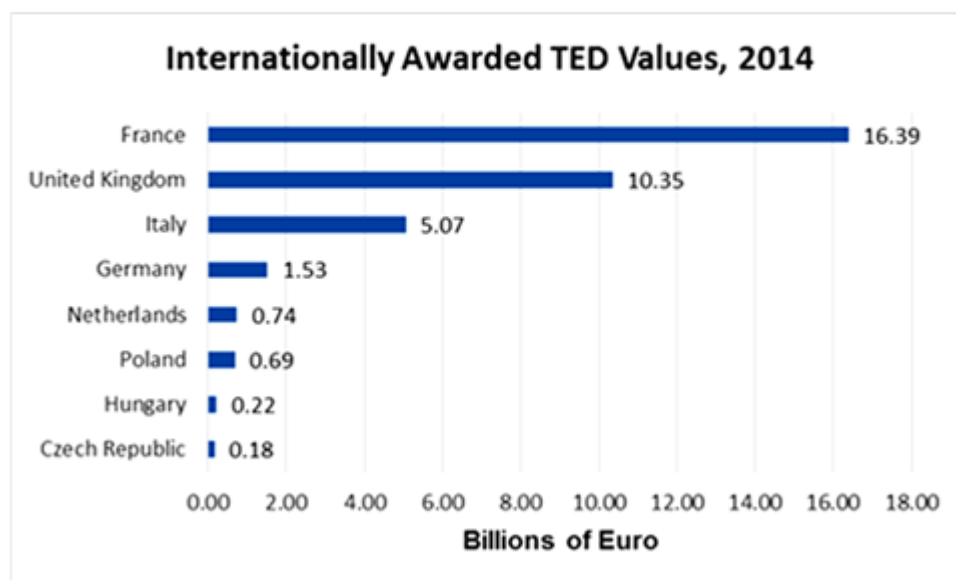
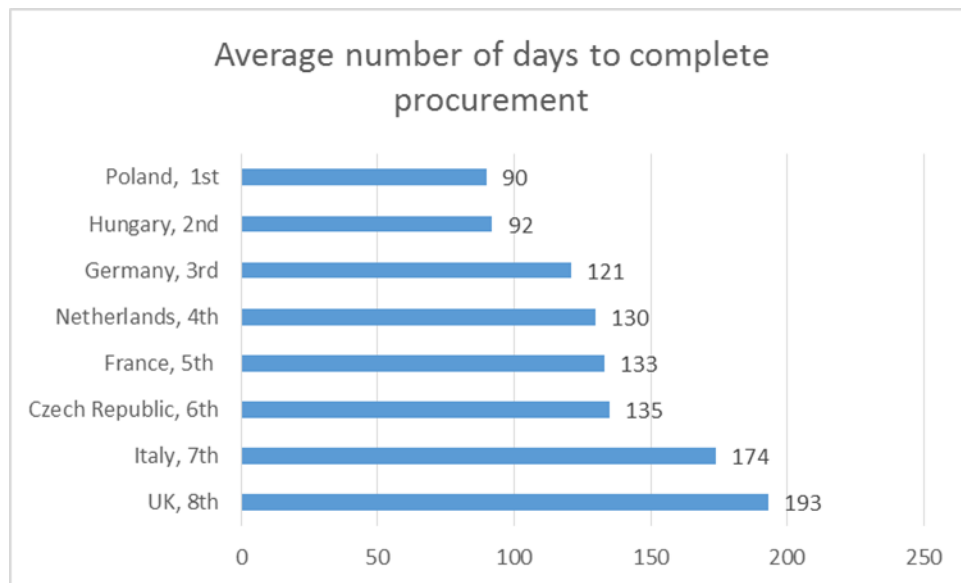


Table 31. Days to Complete Procurement



*Source: PwC, London Economics, Ecorys (2011)

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