

Special Report

**Efforts to address  
problems with public  
procurement in  
EU cohesion expenditure  
should be intensified**



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(pursuant to Article 287(4), second subparagraph, TFEU)

The ECA's special reports set out the results of its performance and compliance audits of specific budgetary areas or management topics. The ECA selects and designs these audit tasks to be of maximum impact by considering the risks to performance or compliance, the level of income or spending involved, forthcoming developments and political and public interest.

This performance audit was produced by Audit Chamber II — headed by ECA Member Henri Grethen — which specialises in structural policies, transport and energy spending areas. The audit was led by ECA Member Phil Wynn Owen, supported by the head of his private office, Gareth Roberts, and Katharina Bryan, attaché; Niels-Erik Brokopp, head of unit; Milan Smid, team leader; Remus Blidar, Anastassios Karydas, Laura Zanarini, auditors; Ildikó Preiss, attaché of Mr. Grethen's private office; and Johanne Vermer, lawyer.



*From left to right: J. Vermer, G. Roberts, I. Preiss, A. Karydas, R. Blidar, K. Bryan, M. Smid, L. Zanarini, N.-E. Brokopp, P. Wynn Owen.*

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## **Reply of the Commission**

An **audit authority** provides assurance to the Commission regarding the effective functioning of the management systems and internal controls for an operational programme (OP) (and, as a consequence, the legality and regularity of the expenditure certified). Audit authorities are generally departments within state chancelleries, at ministries of finance (or internal control bodies under ministry authority), at other ministries or within supreme audit institutions. They must be functionally independent from the bodies managing the funds. An audit authority reports the findings of its systems audits and audits of operations to the managing and certifying authorities for the OP concerned. Reports on systems audits and the annual control report are also submitted to the Commission. If the audit authority considers that the managing authority has not taken appropriate corrective action, it must draw the Commission's attention to the matter.

**Certifying authorities** carry out first-level checks on the expenditure declared by managing authorities and certify that this expenditure is legal and regular. They are generally part of the ministry of finance or internal control bodies under ministry authority.

**Corruption** is the abuse of power for private gain. Passive corruption is the deliberate action of an official who, directly or through an intermediary, requests or receives advantages, for himself or for a third party, or accepts a promise of such an advantage, to act or refrain from acting in accordance with his duty. Active corruption is the deliberate action of whosoever promises or gives such advantages to an official.

The aim of the **Cohesion Fund** is to improve economic and social cohesion within the European Union by financing environment and transport projects in Member States whose per capita GNP is less than 90 % of the EU average.

**Contracting authorities** are national, regional or local authorities or bodies governed by public law whose role involves applying the public procurement directives for public contracts and design contests.

The **Directorate-General for Employment, Social Affairs and Inclusion** is the European Commission department responsible for EU employment and social issues. In partnership with national authorities, social partners, civil society organisations and other stakeholders, the directorate-general addresses challenges linked to globalisation, the ageing of EU's population and changing social realities. This DG holds the portfolio for the European Social Fund (ESF).

The **Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs**, formerly known as DG Internal Market and Services, is the European Commission department responsible for completing the internal market for goods and services, fostering the EU economy through activities in support of industry and small and medium enterprises and delivering the EU space's policy. This also includes developing EU public procurement legislation and overseeing its implementation by Member States.

The **Directorate-General for Regional and Urban Policy** is the European Commission department responsible for promoting economic and social development of the less-favoured regions of the European Union. This DG holds the portfolio for the European Regional Development Fund (ERDF) and the Cohesion Fund (CF).

**Ex ante conditionalities** are conditions, based on pre-defined criteria established in partnership agreements. When preparing ERDF, CF and ESF OPs under the 2014-2020 programme period, Member States have to assess whether these conditions have been fulfilled. If they have not been fulfilled, action plans need to be prepared to ensure fulfilment by 31 December 2016.

The aim of the **European Regional Development Fund** is to reinforce economic and social cohesion within the European Union by redressing the main regional imbalances through financial support for the creation of infrastructure and productive job-creating investment, mainly for businesses.

The aim of the **European Social Fund** is to strengthen economic and social cohesion within the European Union by improving employment and job opportunities, mainly through training measures, encouraging a higher level of employment and the creation of more and better jobs.

The purpose of **financial corrections** is to protect the EU budget from the burden of erroneous or irregular expenditure. For expenditure subject to shared management, recovering payments incorrectly made is primarily the responsibility of Member States. Financial corrections can be made by withdrawing irregular expenditure from Member States' expenditure declarations or through recoveries from beneficiaries. Financial corrections can also be imposed by the Commission.

**Fraud** is a deliberate act of deception intended for personal gain or to cause a loss to another party.

**An irregularity** is an act which does not comply with EU rules and which has a potentially harmful impact on the EU's financial interests. It may be the result of genuine errors committed both by beneficiaries claiming funds and by the authorities responsible for making payments. If an irregularity is committed deliberately it is classed as fraud.

A **managing authority** is a national, regional or local public authority, or any other public or private body, which has been designated by a Member State to manage an OP. Its tasks include selecting projects to be funded, monitoring how projects are implemented and reporting to the Commission on financial aspects and results achieved.

An **operational programme** sets out a Member State's priorities and specific objectives and how the funding will be used during a given period, generally 7 years, to finance projects. These projects must contribute to achieving one or more of a certain number of objectives specified at the level of the OP's priority axis. Programmes have to be in place for each of the funds in the area of cohesion policy, i.e. the ERDF, the CF and the ESF. OPs are prepared by Member States and must be approved by the Commission before any payments from the EU budget can be made. They can only be modified during the period covered if both parties agree.

**Partnership agreements** are entered into between the European Commission and individual Member States. They set out the national authorities' plans on how to use funding from the European Structural and Investment Funds between 2014 and 2020. They also include, inter alia, details of any ex ante conditionalities and performance management frameworks.

**Public procurement** is the process by which national, regional and local public authorities, or bodies governed by public law, purchase products, services and public works such as roads and buildings. Private undertakings are also subject to public procurement rules and/or principles whenever they carry out procurements which are predominantly publically funded or when such requirements are included in the grant agreement.

**Supreme audit institutions** are national bodies responsible for auditing government revenue and spending.



**CF:** Cohesion Fund

**DG GROW:** Directorate General Internal Market, Industry, Entrepreneurship and SMEs

**ERDF:** European Regional Development Fund

**ESF:** European Social Fund

**ESIFs:** European Structural and Investment Funds

**OLAF:** European Anti-Fraud Office

**OP:** Operational programme

**SAI:** Supreme audit institutions

**TFEU:** Treaty on the Functioning of the European Union

**PP:** Public procurement

## I

EU public procurement policy is a key instrument in establishing the single market and ensuring the efficient use of public funds. Within the EU, public procurement is governed by the EU public procurement directives, establishing common rules and procedures which public authorities contracting works or services must follow.

## II

For the 2007-2013 programming period, 349 billion euro was allocated in the area of cohesion policy through the European Regional Development Fund (ERDF), the Cohesion Fund (CF) and the European Social Fund (ESF). A significant part of this money, particularly for the ERDF and the CF, is spent through public procurement. Almost half of all projects in relation to these three funds audited by the Court over the 2009-2013 period involved one or several tenders.

## III

Failure to comply with public procurement rules has been a perennial and significant source of error. Serious errors resulted in a lack, or complete absence, of fair competition and/or in the award of contracts to those who were not the best bidders.

## IV

This report assesses whether the Commission and Member States are taking appropriate and effective actions to address the problem of public procurement errors in the area of cohesion policy.

## V

The audit found that the Commission and Member States have started to address the problem, but there is still a long way to go in terms of analysing the problem and implementing actions.

## VI

Systematic analysis of public procurement errors by the Commission and Member States is very limited. The lack of sufficiently detailed, robust and coherent data on the nature and extent of public procurement errors has precluded a comprehensive analysis of the underlying causes. There are signs, however, that some of the Member States visited for this audit are starting to collect data in a systematic way.

## VII

The Commission has begun to put a range of actions in place since 2010. Legislative actions included the revision of the public procurement directives and the inclusion in partnership agreements of specific conditions for public procurement systems that must be fulfilled by Member States by the end of 2016 at the latest. The Commission also established, in 2013, an internal technical working group and drew up an internal action plan. However, most of the actions in the plan have not yet been fully implemented. Member States only started recently to take comprehensive actions to prevent errors from occurring.

### VIII

The Court recommends that:

- (a) (i) the Commission should develop a database on irregularities, capable of providing a basis for meaningful analysis of public procurement errors. It should analyse, in a comprehensive way, the frequency, seriousness and causes of public procurement errors in the area of cohesion policy, based on appropriate data, drawn both from its own databases and provided by Member States. The Commission should publish its analysis as part of the public procurement report required by the new directives;
- (ii) the relevant authorities in Member States should develop and analyse their own databases on irregularities in the area of cohesion policy, including those arising in public procurement, and should cooperate with the Commission to provide such data in a form and at a time that facilitates the Commission's work;
- (b) if the ex ante conditionality concerning public procurement is not fulfilled by the end of 2016, the Commission should use its powers consistently to suspend payments to Member States concerned, until such time as they have rectified the shortcomings;
- (c) the Commission should update and publish its internal action plan on public procurement. It should report on progress annually. To this end, the Commission should improve coordination across its departments dealing with related public procurement issues;
- (d) the Commission should set up a high-level group to provide leadership in tackling the problem of public procurement errors to avoid the risk that actions are not consistently implemented in all Commission services. The group should act as an advocate for improvements in public procurement, including, where necessary, for simplification in this field;
- (e) the Commission should impose financial corrections wherever it finds that Member States' first-level checks are insufficiently effective and, where necessary, pursue infringements procedures for breaches of the public procurement directives;
- (f) the Commission should exploit further the opportunities provided by developments in information technology, including promoting e-procurement and data-mining tools and good practice; and
- (g) Member States should exploit further the opportunities provided by e-procurement and data-mining tools.

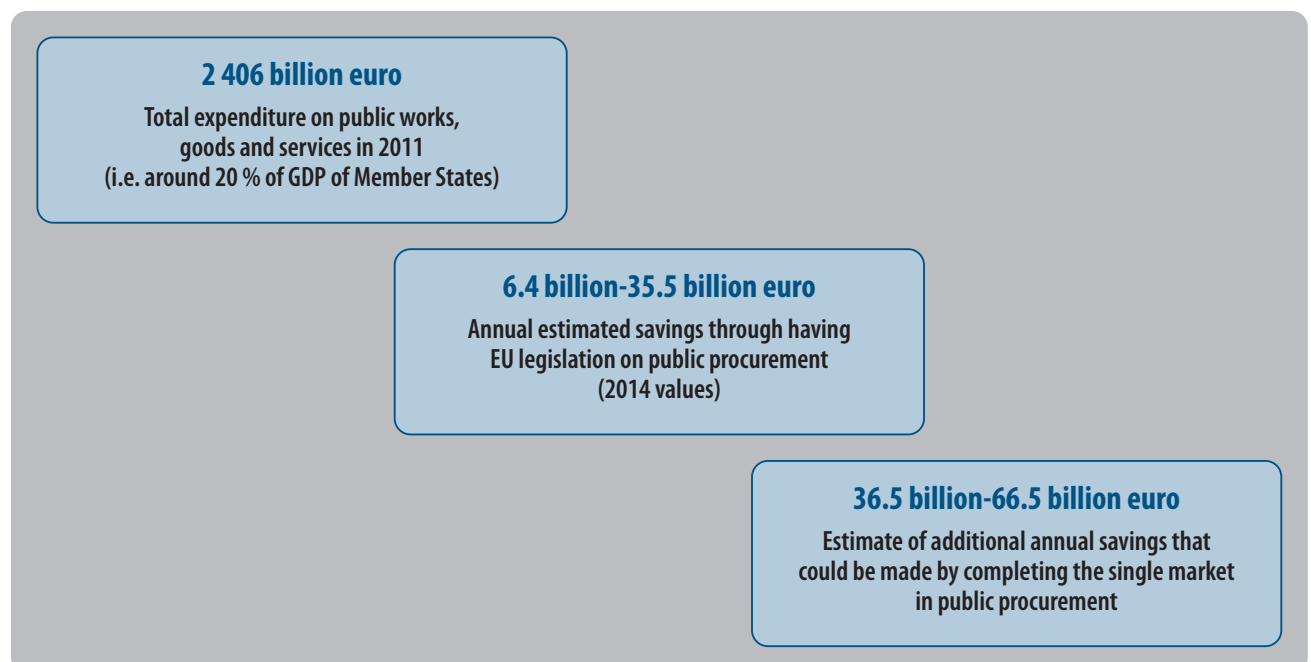
## 01

EU public procurement policy is a key instrument in establishing the single market and in achieving smart, sustainable and inclusive growth, according to the Europe 2020 strategy, while at the same time ensuring the most efficient use of public funds<sup>1</sup>. Improving the efficiency of public spending and achieving value for money are central objectives for government. Rules have been set up at various levels of government to ensure the best possible use of public funds where public purchasing takes place. **Figure 1** shows some key figures.

- 1 COM(2010) 2020 final of 3 March 2010, 'Europe 2020 — A strategy for smart, sustainable and inclusive growth'.
- 2 See the 'Annual public procurement implementation review 2013' published by DG Internal Market and Services on 1 August 2014; *SMEs' access to public procurement markets and aggregation of demand in the EU*, study prepared for the European Commission by PwC, ICF GHK and Ecorys, February 2014; and *The cost of non-Europe in the single market: IV — Public procurement and concessions*, European Parliamentary Research Service (EPRS), September 2014 — PE 536.355.

Figure 1

### Some key figures regarding the use of public procurement in the EU



Source: European Parliament and European Commission<sup>2</sup>.

02

Among other things, EU public procurement rules aim to ensure that the principles and fundamental freedoms in the Treaty on the Functioning of the European Union (TFEU) are observed (see **Figure 2**)<sup>3</sup>. This would, in turn, increase competition and cross-border trading, resulting in better value for money for public authorities, while increasing productivity in the supply industries and improving participation in and access to such markets by SMEs. In short, the rules exist to support the single market, encourage competition and promote value for money.

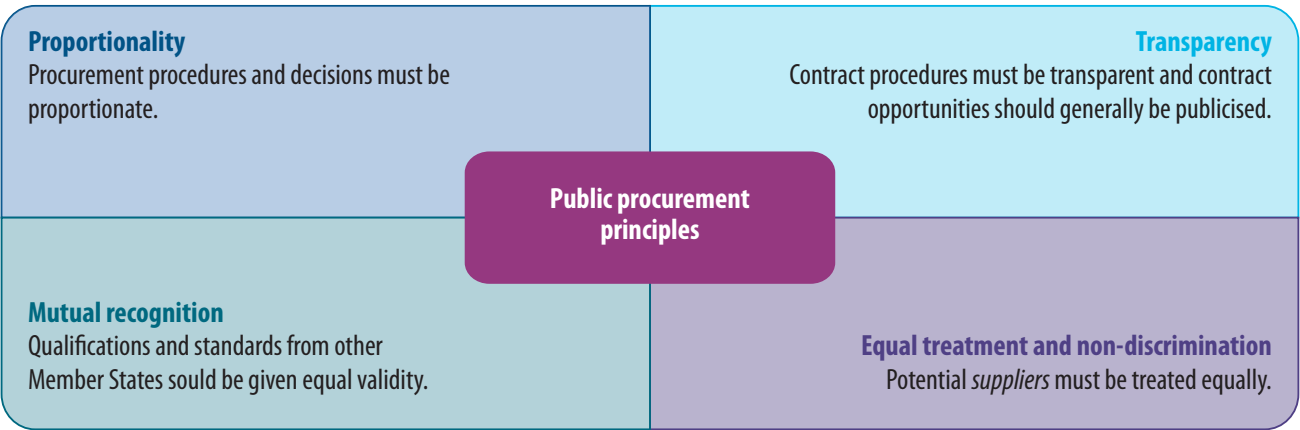
03

This report examines the consistently high level of errors concerning public procurement in EU spending within the cohesion policy area, namely where the rules have not been properly complied with. In particular, the report investigates whether the Commission and the Member States are taking appropriate and effective actions to address the problem<sup>5</sup>.

- 3 Freedom of movement of goods (Article 28 TFEU) and services (Article 56), freedom of establishment (Article 49) and freedom to provide services, non-discrimination and equal treatment, proportionality, transparency and mutual recognition (Articles 18 and 53).
- 4 Commission interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the public procurement directives (OJ C 179, 1.8.2006, p. 2).
- 5 See also the Court's 2014 landscape review 'Making the best use of EU money: a landscape review of the risks to the financial management of the EU budget' (<http://eca.europa.eu>).

Figure 2

Public procurement principles



Source: European Court of Auditors, based on the European Commission document<sup>4</sup>.

The EU public procurement framework

04

The EU public procurement framework is based on the Agreement on Government Procurement (GPA), a multilateral agreement between a number of World Trade Organisation members<sup>6</sup> that regulates the procurement of goods and services by public authorities, and which is based on the principles of openness, transparency and non-discrimination. **Figure 3** shows the governance structure of public procurement.

05

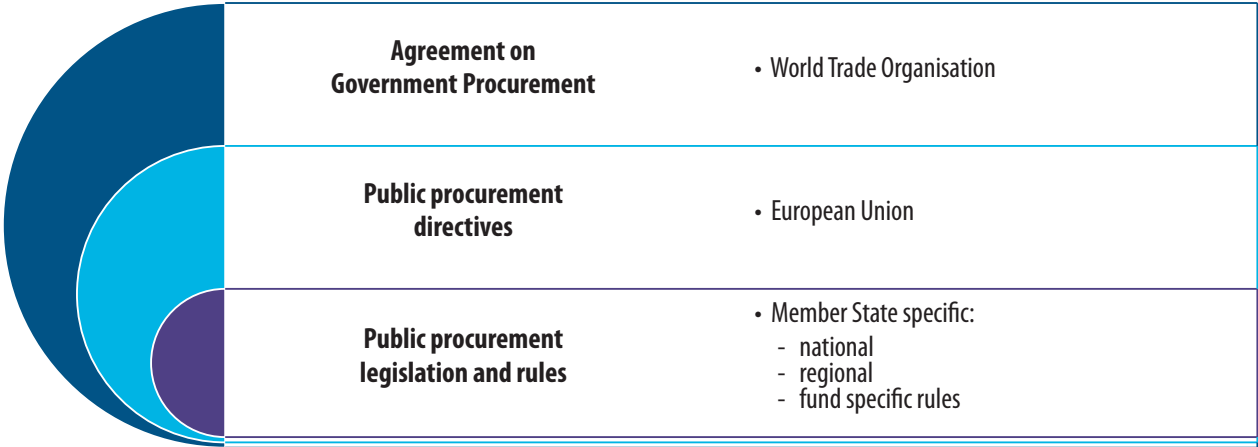
Within the EU, public procurement is governed by the EU public procurement directives which establish common rules and procedures which public authorities have to follow for high-value procurements<sup>7</sup>. The rules are intended to ensure that companies from across the single market have the opportunity to compete for public contracts. These EU-wide rules apply regardless of whether the funds are purely national or whether EU funds are involved. The EU directives also apply in the European Economic Area.

6 As of the beginning of 2015, the GPA has 15 parties comprising 43 WTO members. Another 28 WTO members participate in the GPA Committee as observers. Out of these, 10 members are in the process of acceding to the agreement.

7 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 (OJ L 134, 30.4.2004, p. 114), 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 sector (OJ L 134, 30.4.2004, p. 1). These will be replaced by revised directives and a new directive on the award of concessions, which were published on 17 April 2014 and are to be implemented by 18 April 2017 (paragraph 67). Contracts for defence and services of general interest are covered by other rules.

Figure 3

Governance of public procurement



Source: European Court of Auditors.

## Introduction

### 06

As with all directives, the EU public procurement directives have to be transposed, i.e. implemented, by the Member States into national law. These directives establish minimum standards and help create a level playing field, while also giving Member States the possibility to react to and to accommodate national particularities and needs. The Member States may choose to pass laws that are more specific or stricter in some respects. Member States also have considerable discretion regarding the administrative arrangements put in place to ensure compliance with EU rules.

### 07

Not all procurements fall under the scope of EU public procurement directives. The EU public procurement directives stipulate minimum value thresholds<sup>8</sup>, below which contracts are subject only to national rules. In all cases however, tenders must comply with the treaty principles (see **Figure 2**).

### 08

Tenders within the scope of the EU directives need to be published online in the 'Tenders Electronic Daily' database (TED). The proportion of the value of tenders published in the TED to the gross domestic product (GDP) can be used as an indicator of how widely public procurement is used across the EU. In 2012, the total value of tenders published in TED was 3.1 % of the EU's GDP<sup>9</sup>. In some Member States, tendering above the threshold is used less than this average, with rates well below 3.1 %, for example, in Germany (1.1 %), Austria (1.5 %), Ireland (1.5 %) and Luxembourg (1.6 %). The Commission is in contact with Germany to ascertain the reasons for this<sup>10</sup>.

## Cohesion policy and public procurement

### 09

For the 2007-2013 programming period, 349 billion euro was allocated in the cohesion policy area via the European Regional Development Fund (ERDF), Cohesion Fund (CF) and European Social Fund (ESF); for 2014-2020, 367 billion euro has been allocated<sup>11</sup>.

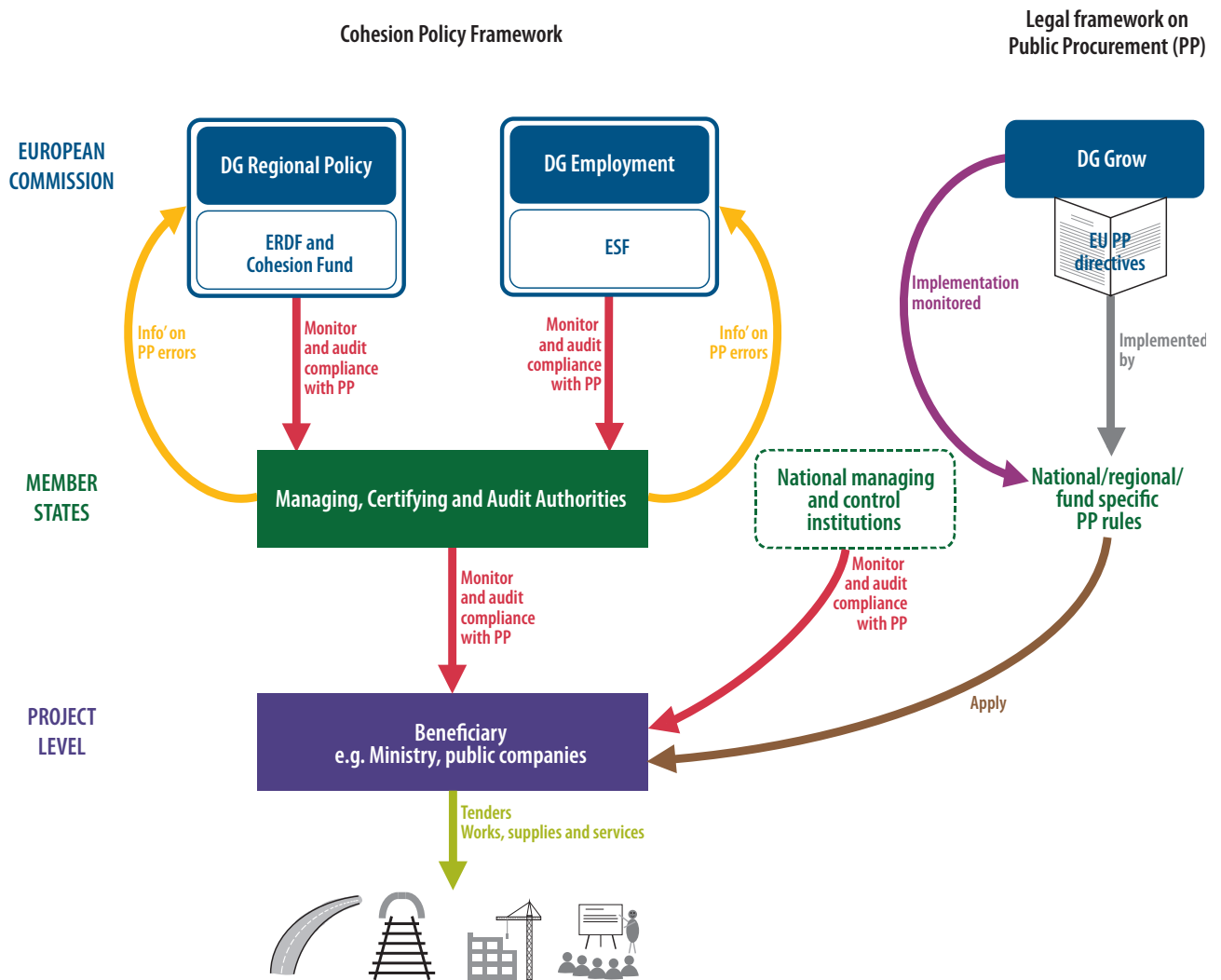
- 8 The most commonly used thresholds from 1 January 2014 until 31 December 2015 are 5 186 000 euro for works contracts and 134 000 euro for public service and supply contracts. Other thresholds are applicable to utilities and sub-central contracting authorities.
- 9 See the *Public procurement indicators 2012 — Economic analysis and e-procurement* published by DG Internal Market and Services on 12 November 2014.
- 10 Council Recommendation of 8 July 2014 on the national reform programme 2014 of Germany and delivering a Council opinion on the stability programme of Germany, 2014 (OJ C 247, 29.7.2014, p. 20).
- 11 Commitment appropriations in current prices to economic, social and territorial cohesion. Source: *Multiannual financial framework 2014-2020 and EU budget 2014 — The figures*, EU Commission<sup>1</sup>.



Source: European Court of Auditors.

Figure 4

## Bodies playing a role in cohesion policy and public procurement



Source: European Court of Auditors.



## 10

The responsibility for EU spending under cohesion policy is shared between the Commission and the Member States (see **Figure 4** and **Annex I**). A significant part of this money, in particular for the ERDF and CF, is spent through public procurement. Almost half of all transactions audited by the Court in relation to these three funds involved one or several procurements.

### Public procurement procedures: how do they work?

## 12

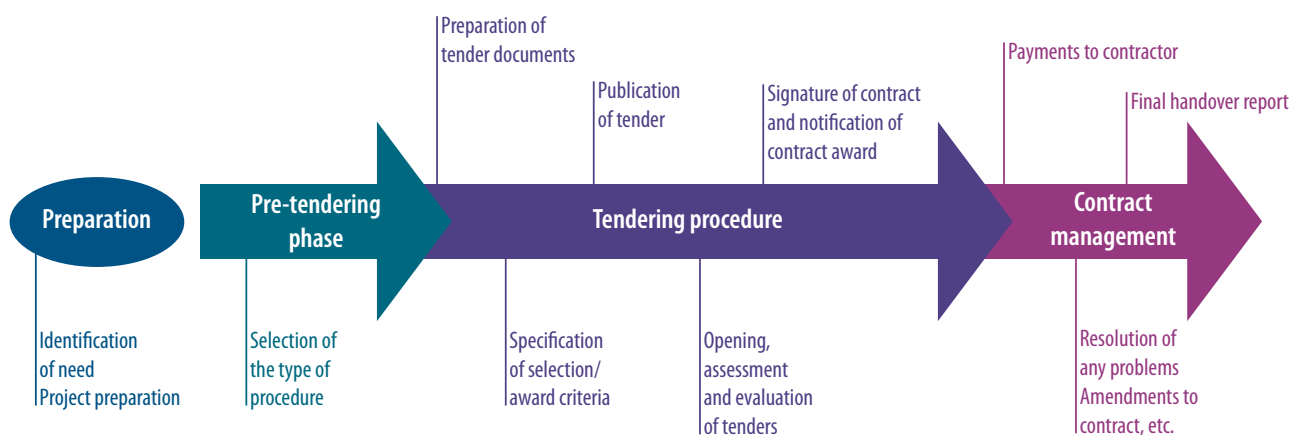
After initial preparation of the project and needs assessment, public procurement procedures entail three main phases, each with specific steps (see **Figure 5**).

## 11

Member States have their own public management and control frameworks in place to deal with both national and EU public expenditure, involving a wide range of public authorities, including supreme audit institutions (SAIs).

Figure 5

### The main phases of public procurement procedures



Source: European Court of Auditors.

**13**

The detailed stages of each phase depend on which specific public procurement procedure is applied (**Box 1** provides a description of the main types of procedure). Contracts can be awarded either based on price alone or to the bidder submitting the most economically advantageous tender. The majority of contracts (70 %) are awarded on the latter basis<sup>12</sup>.

12 *Public procurement in Europe — Cost and effectiveness*, a study on procurement regulation, prepared for the European Commission by PwC, London Economics and Ecorys, March 2011, p. 5.

**Box 1****The six main types of public procurement procedure under the 2014 directives**

**Open procedure.** The most often used, accounting for 51 % of all contracts awarded. Offers have to be submitted by a certain date and all admissible offers are evaluated<sup>13</sup>.

**Restricted procedure.** Interested suppliers are first asked to provide their qualifications, then a shortlist is drawn up and only the shortlisted suppliers are invited to tender.

**Competitive dialogue.** Used for more complex procurements. The procedure involves a dialogue between the contracting authority and potential suppliers, with the aim of identifying and defining the best legal and/or financial set-up of a project to satisfy the contracting authority's needs or objectives.

**Competitive procedure with negotiation.** After a call for tender and an initial evaluation, the contracting authority invites its chosen economic operators to submit an initial tender. It then negotiates the initial and all subsequent tenders submitted, except for the final tender, with a view to improving their content.

**Negotiated procedure** without publication can be used only in a small number of pre-determined cases. The contracting authority enters into contract negotiations with one or more suppliers.

**Innovation partnership.** The contracting authority selects suppliers following an advertisement, and uses a negotiated approach to invite them to submit ideas to develop innovative works, supplies or services aimed at meeting a need for which there is no suitable existing 'product' on the market. The contracting authority can award such partnerships to more than one supplier.

<sup>13</sup> See the Annual Public Procurement Implementation Review 2013 published by DG Internal Market and Services on 1 August 2014.

## 14

The Court examined whether the Commission and Member States are taking appropriate and effective actions to address the problem of public procurement errors in the cohesion area, and sought to address the follow questions.

- (a) Have the Commission and Member States analysed the problem of public procurement errors in cohesion policy?
- (b) Have the Commission and Member States taken appropriate action to address the problem and was this action effective?

## 15

The audit covered the results of the Court's statement of assurance audits in the period 2009 to 2013, and took account of actions taken by the Commission and Member States from 2009 to 2014 to address the problem of non-compliance with public procurement rules.

## 16

The audit results are based on:

- (a) analysis of relevant Commission documentation;
- (b) interviews with Commission officials;
- (c) a survey of 115 audit authorities in 27 Member States (not including Croatia) responsible for ERDF, ESF and CF operational programmes (OPs), 69 of which replied — the main objective of the survey was to collect information concerning the public procurement framework, the public procurement errors detected and preventive and corrective actions taken at national level;
- (d) visits to four Member States (the Czech Republic, Spain, Italy and the United Kingdom), in which high numbers of public procurement errors had been detected in the Court's statement of assurance audits in the period 2009 to 2013;
- (e) a visit to Cyprus, focusing on the use of e-procurement; and
- (f) a short survey sent to the 28 SAs in the EU, 18 of which replied.

## 17

The audit sought, where possible, to identify good practices which could be shared amongst Member States.

## 18

The observations are set out in two sections:

- (a) the first section presents the summary of the Court's procurement-related audit findings as regards the ERDF, CF and ESF from 2009 to 2013, and examines whether the Commission and Member States have a **robust analytical basis** for understanding the problem of public procurement errors; and
- (b) the second section describes the **actions taken** by both the Commission and Member States in recent years and evaluates, where possible, their effectiveness.

**Systematic analysis of public procurement errors by the Commission and Member States is very limited**

**Failure to comply with public procurement rules is still a significant source of error in the area of cohesion policy**

### What constitutes an error?

## 19

An error occurs when EU and/or national public procurement rules were not complied with. For the purposes of this report, three types of error are distinguished, as illustrated in **Table 1**.

Table 1

### Typology of errors used in this report, with examples<sup>1</sup>

Type of error	Description	Examples
<b>Serious</b>	A serious breach of the rules, with the result that competition was impeded and/or contracts were deemed to have been awarded to those who were not the best bidders	(a) direct award — contract awarded without recourse to a public procurement procedure where it should have been; (b) award of significant and/or foreseeable additional works or services without recourse to a public procurement procedure where it should have been; (c) unlawful selection/award criteria or incorrect application thereof, resulting in a different outcome of the tender.
<b>Significant</b>	A significant breach of the rules, but nevertheless it is deemed that the contracts were awarded to the best bidders	(a) unlawful selection/award criteria or incorrect application thereof, but not resulting in a different outcome of the tender; (b) not all selection/award criteria are published in the tender specification; (c) limited competition due to unjustified urgency.
<b>Minor</b>	Less serious, and often formal, errors, which did not have a detrimental impact on the level of competition	(a) publishing the contract award notice later than required, or not at all; (b) failure to publish such a notice in the EU's Official Journal.

<sup>1</sup> In the context of the Court's statement of assurance, errors described here as serious are referred to as 'quantifiable' errors. These errors contribute to the Court's estimated error rate. See the Court's annual report 2013, Annex 1.1 (OJ C 398, 12.11.2014).

### Errors detected by the Court in its Statement of Assurance audits 2009-2013

#### 20

Over the 2009-2013 period, as part of its annual Statement of Assurance work, the Court examined more than 1 400 transactions<sup>14</sup> co-financed from the EU budget through the ERDF, CF and ESF, including verifying public procurement procedures relating to nearly 700 projects. Errors relating to public procurement were detected in around 40 % of all of these projects. In total, nearly 590 errors were detected. **Figure 6** shows the distribution of these errors according to their seriousness.

#### 21

The serious errors accounted for 48 % of the Court's estimated error rate for the ERDF and CF and 16 % for the ESF over the 2009-2013 period. The biggest share of **serious** errors, 70 %, was detected in the ERDF. This is, in part, because ERDF and CF programmes generally involve larger infrastructure projects in which contracts are often subject to public tendering procedures<sup>15</sup>. **Annex II** gives summary details of how errors are distributed across the three funds: ERDF, CF and ESF.

- 14 Generally, one transaction relates to one project. But, in certain cases, several transactions can relate to one project.
- 15 ESF co-financed projects often include services, such as vocational education and training, that are not fully within the scope of the directive (Annex II B of Directive 2004/18/EC; amended by Annex VII of Commission Regulation (EC) No 213/2008 of 28 November 2007 amending Regulation (EC) No 2195/2002 of the European Parliament and of the Council on the common procurement vocabulary (CPV) and Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council on public procurement procedures, as regards the revision of the CPV (OJ L 74, 15.3.2008, p. 1)).

Figure 6

### Distribution of errors found in the Court's Statement of Assurance audits 2009-2013, in the area of cohesion policy, according to their seriousness



Source: European Court of Auditors.

## 22

Errors were detected throughout the procurement phases, with the biggest share of serious errors detected in the pre-tendering phase.

(a) In the **pre-tendering phase**, most errors detected, 71 (82 %) out of 87, were **serious**. Contracting authorities avoided procurement procedures altogether by awarding contracts directly where a procurement procedure should have been carried out, or split contracts into smaller tenders to avoid exceeding thresholds, or

used an inappropriate procedure. Many contracts that were directly awarded in this way involved the provision of services rather than works (see example in **Box 2**).

(b) In the **tendering phase**, most **serious** errors were detected in the specification and application of selection/award criteria. Errors relating to publication and transparency requirements accounted for the highest number of errors overall (186 out of 587 errors), a third of which were **significant** (see example in **Box 3**).

### Box 2

#### Example of a serious error where there was a complete absence of public procurement

In an ERDF project in **Poland**, whose objective was to build a bypass road for a major city, the contracting authority decided to award, via negotiated procedure with one economic operator, a contract concerning 'author supervision' by the architect<sup>16</sup>. An open or restricted procedure allowing for a competition with more than one bidder should have been used. The contracted value was around 300 000 euro.

<sup>16</sup> 'Author supervision' guarantees the exact execution of the project, adherence to architectural, technological, stylistic and construction rules and norms and preparation of the project documentation to put the project into operation.

### Box 3

#### Example of significant error where advertising and transparency requirements were not complied with



In the **Czech Republic**, for a motorway construction project that received approximately 87 million euro under the CF, the contracting authority did not specify in the tender notice the minimum requirements regarding technical competence. As a result, transparency and advertising requirements were not respected.

© Road and motorway department of the Czech Republic.

- (c) In the **contract management phase**, 31 (42 %) out of the 74 errors detected were **serious** and concerned modifications or extensions to the scope of contracts without using a procurement procedure where such a procedure was required (see example in **Box 4**).

## 23

**Annex III** provides additional information on the distribution of errors throughout the different phases of pre-tendering, tendering and contract management.

## 24

The Court's Special report on causes of errors in rural development shows a similar picture. A significant number of public procurement errors were due to unjustified direct award, misapplication of selection and award criteria and lack of equal treatment of tenderers<sup>17</sup>.

17 Special Report No 23/2014, 'Errors in rural development spending: what are the causes and how are they being addressed?' (<http://eca.europa.eu>).

### Box 4

#### Example of a serious error concerning modifications to the scope of the contract

In **Spain**, a contract for the construction of a waste water treatment installation, which received approximately 33 million euro under the ERDF, was initially tendered and awarded correctly. Subsequently, more than half of the contracted works were replaced with other works involving different technologies, materials and quantities. Although the purpose of the project and the overall price did not change, the works eventually done were substantially different from those originally tendered. Consequently, more than half of the final works had not been through the tendering procedure.

## There are various causes of public procurement errors

### Complexity, lack of administrative capacity and insufficient planning

#### 25

A certain level of complexity is inherent in any public procurement system. However, the current level of **complexity** of the legal and administrative framework is viewed as a problem. According to 90 % of 69 audit authorities who responded to the

survey carried out for this audit (see paragraph 16), the legal framework for public procurement in their country is more complex than it needs to be. Survey respondents noted that errors are mainly caused by a high volume of legislation and/or guidelines, the difficulty of applying them in practice and a lack of expertise in carrying out the public procurement procedure. Nearly half of respondents noted that the main area for improvement of public procurement practice could be the simplification of procedures. See **Box 5** for a view on the situation in one of the Member States visited for the audit.

#### Box 5

### The problem of complexity and high volume of legislation: example from a Member State

Authorities in **Italy** interviewed for this audit regarded the legislative framework of public procurement as complex due to the breadth and depth of legislation and the complexity of the procedures set out for both the contracting authorities and the tendering companies involved. In addition, the main Italian law on public procurement has been frequently amended, complicating application. According to the Italian Anti-corruption Authority, the principal changes to the main legislative acts on public procurement since 2009 are contained in 22 legislative acts. The high volume of legislation is increased by having fund-specific rules on public procurement — for example, the Ministry of Employment decision laying down additional provisions concerning public procurement for contracts below the thresholds for ESF co-financed projects. In June 2014, a working group composed of Italian and Commission representatives was set up to support simplification in the context of the transposition of the 2014 EU directives into national legislation.

#### 26

Lack of **administrative capacity** relates to a lack both of knowledge of the rules and of technical expertise concerning the specific works or services being procured. This problem relates not only to contracting authorities but also to the authorities with responsibility for monitoring these procedures.

The Court's experience when auditing public procurement errors suggests that problems of non-compliance are related to weak implementation of existing rules<sup>18</sup>. Clerical mistakes also lead to errors. See **Box 6** for an example from one of the Member States visited for the audit.

18 See the Court's Opinion No 4/2011 on the Commission's Green Paper on the modernisation of public procurement policy (OJ C 195, 2.7.2011, p. 1) and its recent landscape review 'Making the best use of EU money: a landscape review of the risks to the financial management of the EU budget', paragraph 30 and individual fact sheet therein on procurement, paragraph 16 (<http://eca.europa.eu>).



## 27

**Insufficient planning** of projects and tendering procedures is also a cause of error, particularly those occurring in the contract management phase regarding modification of or extension to contracts.

**The EU directives are not always correctly transposed by Member States**

## 28

Each Member State is required to transpose the EU public procurement directives into national legislation.

When the Commission deems that the transposition is not in line with the directives or the main principles are not followed, it may initiate an infringement procedure<sup>19</sup> and, ultimately, refer the case to the Court of Justice of the European Union. The Commission opened 74 such procedures in the 2009-2013 period, of which eight had been referred to the Court of Justice of the European Union by the end of 2014 (see **Annex IV** for an analysis of these procedures by Member State each year). Such incorrect application/transposition can also lead to errors (see **Box 7** for an example).

<sup>19</sup> Considering Article 258 TFEU defines an infringement as a failure of a Member States to fulfil an obligation under the Treaties.

### Box 6

#### Challenges regarding administrative capacity: examples from a Member State

In **Italy**, the risk that many contracting authorities lack expertise has been exacerbated by the very high number of such authorities. There are 40 000 contracting authorities, and 70 000 if all cost centres are counted. For specific categories of goods and services, recent Italian legislation provides for a significant reduction in the number of contracting authorities, thereby concentrating public procurement expertise within fewer contracting authorities.

### Box 7

#### Example of errors due to incorrect transposition of the directives into national law

In **Spain**, inadequate adaptation of the 2004 directives into Spanish legislation caused frequent errors with regard to contract amendments. The Spanish authorities decided therefore that costs of contract amendments were no longer eligible for EU co-financing. Only in 2012, following the modification of legislation, were certain contract amendments, under specific circumstances, considered to be eligible once again by the Spanish authorities.

## Interpretation of the legislation is sometimes inconsistent

### 29

Errors can also stem from differences in the interpretation of legal provisions. For example:

- (a) In the Czech Republic, authorities reported that different interpretations of the same issue between different bodies — e.g. managing authorities, audit authorities, the SAI, public procurement offices, the European Commission — led to differing audit results and legal uncertainty.
- (b) In Italy, there are differing interpretations amongst contracting authorities of the concept of what constitutes an unforeseeable event that could justify the modification of a contract without using a public procurement procedure. As a result, some national authorities consider that certain contract

modifications comply with national rules, whilst audit authorities and the Commission consider the same modifications to be irregular. Errors relating to such cases are a very important reason for financial corrections in Italy: in the years 2010 to 2012, the value of these corrections was around 8 million euro. At the time of the audit, Italy was seeking to address this problem in the framework of its national public procurement action plan (see paragraph 65).

## Member States sometimes complicate the framework with additional regulation

### 30

Some Member States put in place, at national level, rules that go beyond the EU directives regarding certain aspects of public procurement (see **Box 8**).

## Box 8

### Example of national procurement rules which go beyond the requirements of the EU Directives

In the **Czech Republic**, national law sets a 20 % limit for increasing the value of a contract due to unforeseeable circumstances, in contrast to the 50 % limit set in the EU directive. While the Czech Republic's objective was to increase transparency, some of its economic operators and contracting authorities consider this an unnecessary complication.

## Fraud can be a cause of error in the public procurement arena

### 31

According to the OECD, 'public procurement is the government activity most vulnerable to waste, fraud and corruption due to its complexity, the size of the financial flows it generates and the close interaction between the public and the private sectors'<sup>20</sup>.

### 32

There is a legal obligation for Member States to report to the Commission quarterly all irregularities exceeding 10 000 euro, indicating those where they suspect fraud to have been involved<sup>21</sup>. The European Anti-Fraud Office (OLAF) collects this information on behalf of the Commission through its Irregularity Management System (IMS). The information reported by Member States comprises all types of irregularities, including those related

to public procurement. Based on this information, the Commission prepares its annual report on the protection of the EU's financial interests and the fight against fraud<sup>22</sup>.

### 33

Concerning cohesion policy, in the period 2007 to 2013, 38 % of the approximately 12 000 irregularities reported by the Member States to OLAF related to public procurement. Of the irregularities relating to public procurement, 2 % were reported to be linked to fraud (see **Figure 7**). Some Member States report to OLAF very few irregularities which they consider as fraudulent. For example, Spain and France did not report any irregularities relating to public procurement linked to fraud between 2007 and 2013.

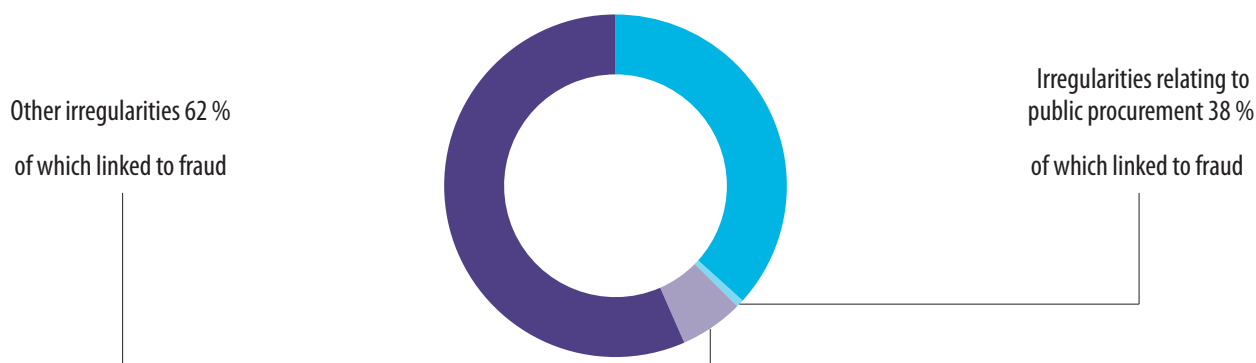
20 OECD Fighting corruption in the public sector: integrity in procurement ([www.oecd.org/gov/ethics/integrityinpublicprocurement.htm](http://www.oecd.org/gov/ethics/integrityinpublicprocurement.htm)).

21 Commission Regulation (EC) No 1828/2006 of 8 December 2006 setting out rules for the implementation of Council Regulation (EC) No 1083/2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and of Regulation (EC) No 1080/2006 of the European Parliament and of the Council on the European Regional Development Fund, Article 28.

22 See SWD(2014) 244 final of 17 July 2014, 'Statistical evaluation of irregularities reported for 2013 own resources, natural resources, cohesion policy, pre-accession and direct expenditure', p. 67, accompanying COM(2014) 474 final of 17 July 2014 'Protection of the European Union's financial interests — Fight against fraud annual report 2013'.

Figure 7

## Irregularities reported by Member States to OLAF on behalf of the Commission via IMS for 2007-2013 programming period



Source: OLAF.

### 34

The Court refers any project which it suspects has been affected by fraud to OLAF. The Court referred to OLAF 17 such projects, six of which related to public procurement, as a result of its work on its Statement of Assurance on the area of cohesion policy in respect of the period from 2009 to 2013. OLAF opened an investigation for 10 of the 17 projects, of which five related to public procurement.

**Comprehensive analysis of errors in Member States is precluded by a lack of coherent data ...**

### 35

The Court also sought to determine whether the nature, seriousness and cause of public procurement errors in the cohesion area had been robustly analysed by the Commission and the Member States. Regularly carrying out such an analysis of why public procurement errors occur is necessary to allow the Commission and Member States to design and implement measures effectively to correct and prevent such errors.

### 36

Data related to public procurement errors within Member States is often scattered across several institutions. It is also not shared systematically with other institutions within the Member State which, whilst not directly involved in managing the ERDF, ESF and CF, are still relevant to their implementation, for example those involved in public procurement legislation. This increases the risk that a complete picture of the trends and problems, which could help inform the development of preventive actions, is not available in a certain Member State. Interdepartmental working groups have been created in Italy, the Czech Republic and the United Kingdom to address this risk (see paragraph 82).

### 37

Respondents to the survey of audit authorities identified similar issues to those which arose from the Court's analysis of its own data as regards the types and seriousness of public procurement errors (see paragraph 20). However, the Member States have carried out very limited systematic and comprehensive analysis of public procurement errors to inform their views. While 60 out of the 69 audit authorities which responded to the survey stated that they analyse public procurement errors, only 14 were able to provide structured data regarding public procurement errors detected in recent years. Half of these were from Italy, the others were from Belgium, Latvia, Lithuania, the Netherlands and Spain.

## Observations

### 38

The Court found the following in the four Member States visited that:

- (a) Member States' authorities implementing cohesion policy rarely investigated the underlying causes of errors;
- (b) only in Italy has there been any analysis focusing specifically on public procurement errors. The national coordination body of the audit authorities made an analysis of the main source of errors in Italy, namely modification of contracts and additional works.
- (b) two stated that public procurement procedures financed with only national funds are more prone to errors than public procedures financed with EU funds as well;
- (c) three stated that they could not comment since they have not compared the error findings, or have no reliable indication of the possibility of error since their audits mainly relate to national funding of awards of contracts.

**... but there are signs, in the Member States visited, that data are starting to be collected in a more systematic way**

### 39

The lack of sufficiently detailed and coherent data on the nature and extent of public procurement errors within the Member States has precluded a comprehensive, robust analysis of the underlying causes at national and EU level.

### 40

Eighteen of the 28 Member State SAs responded to the Court's survey (see paragraph 16) regarding the question of whether they perceive public procurement procedures financed only with national funds to be less or more error prone compared to procedures co-financed with EU funds, or whether they perceive no significant difference. Of these:

- (a) 13 stated that 'there is no significant difference' compared to procedures co-financed with EU funds;

### 41

In the four Member States visited for this audit:

- (a) Three Member States — Italy, the Czech Republic and Spain — have set up databases in recent years (see **Box 9**). Such databases could facilitate more comprehensive and regular analysis, thereby furthering the understanding of public procurement errors as a basis for designing appropriate measures to address problems (see paragraph 89);
- (b) In the United Kingdom, no such database was yet in place. The ERDF managing authority for England has foreseen the inclusion of detailed public procurement error information in its management information system for the 2014-2020 programming period.

Box 9

### Use of structured public procurement error databases in the Member States

In **Italy**, the Coordination body of the ERDF and ESF audit authorities has complemented its general audit database with details of the types of all public procurement errors. The database contains all such errors detected since 2010. For each error type and for each audit authority, the database shows the number of errors detected, together with any related financial correction. The Italian Court of Auditors also uses its database of irregularities as a tool for risk assessment in the field of public procurement.

In the **Czech Republic**, since 2013, the audit authority has recorded its public procurement findings in a structured database, which it uses to carry out analysis and shares the results with other institutions.

In **Spain**, starting with the early years of the 2007-2013 programming period, the audit authority's database contains details of the public procurement errors it detects. However, at the time of the audit, this database had not yet been used to analyse the nature of such errors in depth.

### The Commission does not yet comprehensively and systematically analyse public procurement errors

#### 42

The Court examined whether the Commission has been collecting data and building databases to facilitate the analysis of public procurement errors.

#### 43

DG Internal Market, Industry, Entrepreneurship and SMEs (DG GROW) monitors key indicators regarding the use of public procurement in Member States using the TED database, such as the proportion of GDP which is subject to tender or national public expenditures spent on public procurement according to EU rules (see paragraph 8).

#### 44

DG Regional and Urban Policy and DG Employment, Social Affairs and Inclusion receive information about public procurement errors in cohesion policy spending from the following four main sources.

- (a) The annual control reports submitted to the Commission by Member States' audit authorities<sup>23</sup>. However, the information on public procurement errors is not provided in a way which would allow the Commission to perform a comprehensive analysis on these errors.
- (b) The Commission's own audits, in which the nature, seriousness and causes of public procurement errors are analysed in projects co-financed by ERDF/CF and ESF.
- (c) Bilateral meetings with national authorities, in particular audit authorities.
- (d) Audits carried out by the Court as part of its annual Statement of Assurance work.

23 See Special Report No 16/2013 'Taking stock of "single audit" and the Commission's reliance on the work of national audit authorities in cohesion' (<http://eca.europa.eu>).

## Observations

### 45

Up to now, the Commission has carried out one horizontal analysis focusing on public procurement errors, in May 2011<sup>24</sup>. This analysis, done by DG Regional and Urban Policy, made use of the Commission's own audits and those performed by the Court, and showed general trends in errors detected in the ERDF and CF — the ESF was not included — in the period from 2007 to 2010. Neither DG Regional and Urban Policy nor DG Employment, Social Affairs and Inclusion has carried out such an analysis since.

### 46

Whilst the Commission has a certain amount of data available about public procurement errors from across the area of cohesion policy, it has not yet developed a robust, comprehensive database of all public procurement errors. DG Regional and Urban Policy had a database in place which included details of most audit findings from the ERDF and CF, including regarding public procurement, however this covered 2010 and 2011 only.

### 47

DG Employment, Social Affairs and Inclusion considers that the development of a dedicated database of public procurement errors in the ESF is not merited because of the lower impact such errors have in the ESF compared to the ERDF and CF (see also paragraph 21). Therefore, it has not performed any horizontal analysis and does not plan to establish a database of public procurement errors for the ESF.

### 48

A database of irregularities, including those arising in public procurement, would be a valuable asset to the Commission, providing insight into the nature, extent and causes of errors, so that the actions it takes can be targeted or adapted as needed. Since 2008, OLAF has had a database known as the IMS. Member States report to OLAF, through this system, information about irregularities (see paragraph 33). The information contained in the IMS about public procurement errors does not, however, allow for a meaningful analysis of the nature, extent or underlying causes of errors. When it produced its 2011 reports, the Commission did not use the IMS system to analyse public procurement errors in Member States. Since then, the data reported by Member States via the IMS have never been used by the Commission to analyse public procurement errors.

<sup>24</sup> 'Working document prepared by DG Regional Policy on the main audit findings regarding application of public procurement rules in Member States found in projects co-financed by ERDF and the Cohesion Fund under cohesion policy' (CC/2011/08 EN), not publicly available. The results of this analysis were used again in the Commission staff working paper 'Analysis of errors in cohesion policy for the years 2006-2009 — actions taken by the Commission and the way forward' (SEC(2011)1179), published on 5 October 2011.

**The Commission and Member States have started to implement actions to address the problem, but there is still a long way to go**

## 49

The Court sought to determine whether the Commission and Member States have taken appropriate actions to address the problem of public procurement errors in the area of cohesion policy. Such actions could be either generally preventive in nature — measures aimed at stopping errors occurring in the first place — or corrective in nature — aiming to limit the impact on the EU budget of any errors detected. Relevant preventive actions in this context could be legislative actions, i.e. pertaining to the establishment and enforcement of legal provisions, or management and control system-related actions, such as measures to improve administrative capacity, which do not entail a legislative element.

## 50

This part of the report identifies and, where possible, assesses the actions taken by the Commission and in the four Member States visited during the audit.

**Actions taken by the Commission since 2010 have begun to target the overall problem**

## 51

In its reports and opinions, the Court has identified specific problems with compliance with the EU and national public procurement rules in cohesion as early as 2006<sup>25</sup>. Informed by its work in preceding years<sup>26</sup>, the Commission started to develop specific actions aimed at addressing the overall problem during 2010 and 2011.

## 52

**Figure 8** shows how the Commission's actions have developed since 2010.

25 See, for example, the Court's *Annual report on the implementation of the budget concerning the financial year 2006* (OJ C 273, 15.11.2007), the Court's *Annual report on the implementation of the budget concerning the financial year 2009* (OJ C 303, 9.11.2010), Opinion No 1/2010 'Improving the financial management of the European Union budget: Risks and challenges', paragraph 6 (<http://eca.europa.eu>).

26 Commission work on the problem of public procurement errors in cohesion prior to 2010 included ad hoc corrective actions, including financial corrections, targeted at specific Member States and the issuance of guidance to Member States on the application of financial corrections in respect of public procurement errors.



Figure 8

## Commission's actions: Main developments in recent years

## 2010-2011

- Commission starts developing **revised public procurement directives**
- DG Regional and Urban Policy produces a **working document** analysing public procurement errors in Member States in ERDF and Cohesion Fund
- Commission **financial corrections and interruptions** in cohesion policy area continue
- Commission proposal for regulation for 2014-2020 period includes ex-ante conditionality relating to public procurement

## 2012-2013

- **Ex-ante conditionality** for public procurement included in adopted ESIF regulation 2014-2020
- DG Regional and Urban Policy sets up internal team to provide support on administrative capacity to Member States
- DG Internal Market and Services initiates **action-oriented approach** to Member States' public procurement systems to complement infringements procedures
- Commission internal working group **develops 12 point plan** with range of actions
- Commission **financial corrections and interruptions** in cohesion policy area continue
- Commission decision on guidelines for financial corrections to be made by the Commission to expenditure financed by the Union under shared management, for non-compliance with the rules on public procurement

## 2014

- ESIF 2014-2020 regulation comes into force, with **ex-ante conditionality** concerning public procurement, deadline end 2016
- **New public procurement directives adopted**, to be transposed into national legislation by 18 April 2016
- **DG** Regional and Urban Policy directors endorse the internal action plan drawn up by the internal working group
- **Commission** publishes **guidance** on how to avoid public procurement errors
- DG Internal Market, Industry, Entrepreneurship and SMEs focuses resources on **small number of Member States to help them improve management of public procurement**
- Commission **financial corrections and interruptions** in cohesion policy area continue
- Commission-developed Arachne **data-mining IT tool is rolled out**

Source: European Court of Auditors.

## 53

In 2010, as preparation for proposing new public procurement directives, the Commission conducted a comprehensive evaluation of the impact and effectiveness of EU public procurement<sup>27</sup> and a public consultation<sup>28</sup>. The Court published an opinion as a contribution to the debate about the revision of the directives<sup>29</sup> (see also paragraph 67).

## 54

In the area of cohesion policy specifically, in 2011, the Commission:

- (a) issued its proposal for a regulation for the European Structural and Investment Funds (ESIFs) 2014-2020, which included, inter alia, an ex ante conditionality relating to Member State public procurement frameworks (see paragraph 62)<sup>30</sup>;
- (b) completed a working document which analysed public procurement errors and identified some actions that could be carried out (see paragraph 45) — this document did not contain an action plan;
- (c) used financial corrections and payment interruptions more extensively; and
- (d) organised training seminars in four Member States.

## Public procurement action plan put in place by the Commission in 2013

## 55

At the beginning of 2013, DG Regional and Urban Policy established a dedicated internal unit described as 'competence centre — administrative capacity', whose aim was to increase the absorption of money from the EU Structural Funds by improving the administrative capacity of Member States. One aspect within the remit of this unit was to address the problems surrounding the capacity to operate public procurement procedures effectively.

## 56

At around the same time, the Commission set up an internal technical working group on 'Improving public procurement linked to the management of ESI funds', which met for the first time in September 2013<sup>31</sup>. In January 2014, during one of their regular meetings, DG Regional and Urban Policy senior management endorsed an action plan drawn up by the group including a list of 12 non-legislative actions to be implemented by the Commission, aimed at improving administrative capacity in Member States. The plan included those actions already being implemented by the Commission, together with ideas for new actions that the Commission could launch. **Table 2** lists the actions and shows the status of each by the end of 2014.

27 Covering mainly the cost and effectiveness of procurement procedures, issues of cross-border procurement, SMEs' access to public procurement markets and the strategic use of public procurement in Europe.

28 Based on COM(2011) 15 final of 27 January 2011 'Green Paper on the modernisation of EU public procurement policy — Towards a more efficient European procurement market'.

29 Opinion No 4/2011.

30 COM(2011) 615 final of 6 October 2011, 'Proposal for a regulation of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund covered by the common strategic framework and laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1083/2006'. A regulation based on this proposal was adopted by the Parliament and the Council in 2013 (Regulation (EU) No 1303/2013).

31 The technical working group was attended by officials from the three main directorates-general (DG Regional and Urban Policy, DG Employment, Social Affairs and Inclusion, DG Internal Market and Services) and also the European Investment Bank, DG Agriculture and Rural Development and DG Maritime Affairs and Fisheries, chaired by a DG Regional and Urban Policy official, usually by the head of unit responsible for the Competence Centre team. The working group has continued to meet and, at the time of writing, had met a total of 10 times.

Table 2

### Internal Commission public procurement action plan endorsed by DG Regional and Urban Policy directors in January 2014

Actions		Description	State of play as at end 2014
Short-term	1	Stocktaking/analysis of current Member State performance in capacity building, including assessment of what has worked, good examples	Procurement for expert launched
	2	Compilation and analysis of evidence and indicators on public procurement performance as input for ex ante conditionality negotiations	Information gathered during ex ante conditionality negotiations, assessment grid prepared showing compliance with ex ante conditionality by Member States
	3	Preparation and dissemination of practical guidance on 'How to avoid common errors'	Guidance note drafted
	4	Country-specific action plans for Member States with identified weaknesses	DG GROW working with four Member States
	5	Training/guidance on how to prepare and follow up action plans	To be linked with action 1
Medium-term	6	Preparation for new public procurement directives by giving training to managing authorities, including 10 workshops on anti-corruption	Ad hoc presentations by DG Internal Market and Services in Member States
	7	Transparency initiative against corruption	Contract on a first pilot phase is under signature
	8	Assessment of current practices and need for professional training and qualifications in public procurement for fund managers	Internal preparation ongoing
	9	Targeted support for specific Member States to assist by learning by doing, twinning or other expert support	In pilot phase, being launched
	10	Study on how public procurement can be used as a strategic tool, e.g. e-procurement	Not launched yet
Long-term	11	Public procurement quality management systems (review of experience and assessment of scope for developing EU-wide standards for ESIF)	Not launched yet
	12	Guide-to-guidance (evaluation why some guidance does not improve performance)	Not launched yet

Source: European Commission, European Court of Auditors.

### 57

The action plan was a first attempt to bring together the non-legislative actions in a coherent way. Of the 12 actions in the plan, eight had not yet been fully implemented by the end of 2014, being either in their preparation stages or yet to be started at all. Three of the actions had been fully implemented:

- (a) compilation and analysis of evidence and indicators on public procurement performance as input for ex ante conditionality negotiations (action 2);
- (b) guidance note on the avoidance of common errors in ESI-funded projects (action 3) providing comprehensive material for practitioners; and
- (c) training on anti-corruption for managing authorities in 10 Member States as part of preparing the new public procurement directives (action 6).

### 58

The establishment of the working group and the action plan suggests improved coordination within the Commission. However,

- (a) the action plan has only been endorsed by one Commission department (DG Regional and Urban Policy) and not by other directorates-general involved in the working group. It has not been published by the Commission, so transparency, ownership and accountability for the plan has been limited.
- (b) the working group was established at a technical staff working level within the Commission.

### 59

Because most of the actions have not yet been fully implemented, the impact of the action plan cannot be assessed at this stage.

### 60

The above indicates some identification of non-legislative issues, and potential progress on them. But it also indicates that the Commission has not yet shown high-level, coordinated leadership on this issue.

**If correctly applied, new legislation has the potential to help address the problem of public procurement errors**

**The 2014-2020 ESIF regulation and ex ante conditionality**

**61**

The new legal framework for the ESIFs 2014-2020 introduces ex ante conditionalities. These are conditions, based on pre-defined criteria, which are regarded as necessary prerequisites for the effective and efficient use of EU support covered by the partnership

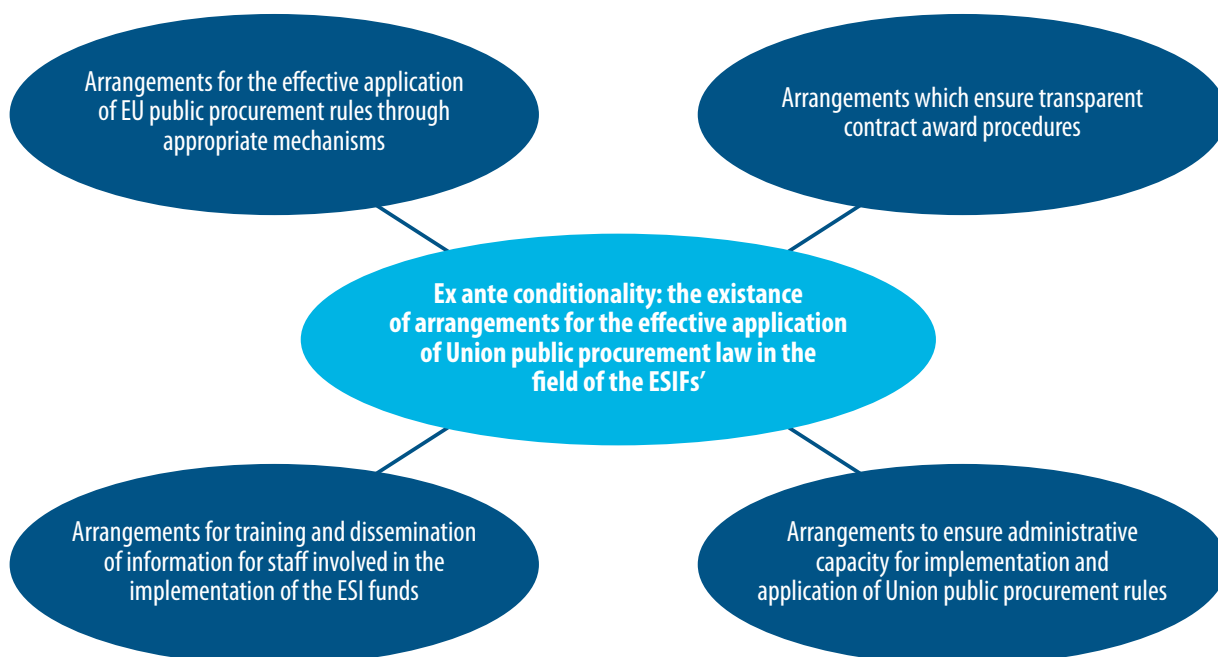
agreements. A Member State's public procurement system is one area for which such conditions are included (see **Figure 9**). Member States were required to carry out a self-assessment on how and whether they meet the conditions<sup>32</sup>, and to include a summary thereof in the partnership agreements which they submitted in 2014. If the Commission deems that a Member State has not, by 31 December 2016, met the stipulated conditions, the Commission can suspend payments to the Member State<sup>33</sup>.

32 Article 2(33), Article 19 and Annex XI of Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 (OJ L 347, 20.12.2013, p. 320).

33 Article 19 of Regulation (EU) No 1303/2013.

**Figure 9**

**Ex ante conditionality criteria regarding public procurement**



Source: Annex XI of Regulation (EU) No 1303/2013.

## 62

According to the Commission, the introduction of ex ante conditionality has the potential to reduce errors and to improve public procurement, because it provides an incentive for Member States to put in place a robust legal and administrative framework for public procurement. However, the effectiveness of this potentially powerful tool depends on whether Member States meet the conditions by the end of 2016 and, where this is not the case, whether the Commission identifies and assesses the non-compliance and suspends payments accordingly.

## 63

When considering whether to suspend payments to Member States, the Commission may face tensions in Member States between two objectives: on the one hand, improving public procurement systems, and on the other, promoting the absorption of EU funds by Member States<sup>34</sup>.

## 64

At the beginning of 2015, 12<sup>35</sup> of the 28 Member States had not yet fulfilled the public procurement conditions. This includes two out of the four Member States visited for this audit — Italy and the Czech Republic — which have both drawn up action plans.

## 65

The introduction of ex ante conditionality relating to public procurement has facilitated DG GROW's attempts to work with Member States with particular public procurement problems. This is because Member States realise that they need to meet the ex ante conditionality, and they have been open to receiving DG GROW's support. DG GROW has selected Member States — four at the time of the audit<sup>36</sup> — using a risk-based, targeted approach, based on a series of criteria and taking account of the Commission's staff resources (see **Box 10**). The Commission has indicated that, for Member States which have not fulfilled the ex ante conditionality, the priority until the end of 2016 is to seek to implement effectively the agreed action plans rather than resorting to corrective actions and possibly to infringement procedures.

## 66

DG Internal Market, Industry, Entrepreneurship and SMEs then provides support through a range of measures, for example working groups to develop a comprehensive public procurement strategy. Coordinating such actions taken by the different departments of the Commission is important given the potential tension referred to above (paragraph 63).

34 Such tensions have been previously highlighted by the Court. See the Court's annual report 2011, paragraph 5.23 (OJ C 344, 12.11.2012), and 'Making the best use of EU money: a landscape review of the risks to the financial management of the EU budget', p. 54, paragraph 5(a), published on 25 November 2014 (<http://eca.europa.eu>).

35 Bulgaria, Czech Republic, Greece, Croatia, Italy, Latvia, Hungary, Malta, Poland, Romania, Slovenia and Slovakia.

36 Bulgaria, Greece, Italy and Romania.

## Box 10

### DG GROW's criteria for targeting Member States

- High rate of public procurement errors in the expenditure of EU funds.
- Non-fulfilment of the public procurement ex ante conditionality.
- Systemic public procurement inefficiencies.
- Complaints received by the Commission on alleged infringements of EU law.
- Infringements procedures or pre-infringement processes.
- Litigation rate.
- Member States' willingness to establish a partnership with the Commission.

### The new public procurement directives have to be implemented by April 2016

#### 67

The new legislative package was published on 28 March 2014 and comprises three directives: 2014/24/EU<sup>37</sup> and 2014/25/EU<sup>38</sup>, which repeal or amend the previous directives; and 2014/23/EU<sup>39</sup>, which introduces comprehensive rules for concessions. The deadline for implementation by Member States, apart from a few exceptions, is 18 April 2016. Nevertheless, the directives are already relevant for interpretation of provisions.

#### 68

The new public procurement directives aim to ensure the effective functioning of the internal market, increase the efficiency of public spending, facilitate the participation of small and medium-sized enterprises and enable better support of common, societal goals through public procurement.

- 37 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.3.2014, p. 65).
- 38 Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94, 28.3.2014, p. 243).
- 39 Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ L 94, 28.3.2014, p. 1).

## 69

The Commission has indicated that, in particular, the new reporting and monitoring requirements from the Member States to the Commission 'should help reduce errors caused by the incorrect application of public procurement rules'<sup>40</sup>. By codifying existing case law, the new public procurement directives provide more legal certainty and make public procurement more accessible for practitioners. Thus, they have the potential to help

prevent certain errors, for example regarding the use of experience and staff qualification as award criteria, as well as the definition of conflict of interest. The changes to the legal framework may, in some cases, also lead to new types of error. An analysis of selected changes regarding public works and service contracts and their potential to address the problem of public procurement errors in the area of cohesion policy is set out in **Box 11**<sup>41</sup>.

40 European Commission press memo ([http://europa.eu/rapid/press-release\\_MEMO-14-20\\_fr.htm?locale=fr](http://europa.eu/rapid/press-release_MEMO-14-20_fr.htm?locale=fr)).

41 Court's Opinion No 4/2011.

## Box 11

### Analysis of selected changes introduced in the new public procurement directive for public works and services

**Introduction of the new procedure, the innovation partnership**, in addition to the existing competitive procedure with negotiation (see **Box 1**). The new approach, with more flexibility for the contracting authorities, could lead to fewer procedural errors from cases where the open and restricted procedures were not appropriate. However, applying and auditing transparency, non-discrimination and equal treatment may become more difficult.

**Possibility of using social and environmental aspects as award criteria**. Authorities in the Member States visited for this audit expressed concern about the risk that the new legislation will introduce certain new elements of complexity, with the possibility of including award criteria and contract performance conditions linked to social and environmental matters. Procurement based on these aspects may prove challenging for contracting authorities with regard to ensuring a transparent and non-discriminatory process. It may take some time to build up experience in finding legal and appropriate award criteria and contract performance conditions within the systems in the Member States.

**New legal toolkit targeted at modification of the contracts**. More flexibility is introduced, allowing, in specific circumstances, modification of contracts without the use of a new procurement procedure. It is likely that the occurrence of errors related to contract modification will decrease. However, these changes will not address errors caused by poor project preparation resulting in the need for modifications later.

**Precise definition of the maximum value of referential works**. By stating that the minimum yearly turnover may not be more than twice the estimated contract value, except in duly justified cases, the contracting authorities may commit fewer errors in the form of specifying unlawful selection criteria.

**Introduction of a new regime for certain services, such as health, education and social services**, where the contract value is over 750 000 euro. Member States will be free to define the national rules under this regime, provided they comply with the general EU treaty principles and provisions in the directive, in particular regarding transparency. Depending on the rules defined by Member States and their complexity, errors regarding training and education services co-financed from the ESF could increase.



## 70

Only 40 % of the audit authorities which responded to the survey expressed the view that the new directives could help to reduce errors, in particular with regard to choosing a public procurement procedure, publication of the call for tenders, definition of selection criteria or assessment of bids (see analysis of errors in paragraph 22).

## 71

DG GROW has already provided advice on how to transpose the new directives into national legislation. This has mainly been through participation in meetings, but also through the organisation of specific thematic sessions for national experts.

## 72

Overall, the effects of these features in the new legislative package, in terms of reducing the incidence of irregularity, will depend on how they are implemented in Member States.

### New reporting obligations

## 73

The new directives introduce new monitoring and reporting requirements. These new obligations include the following<sup>42</sup>.

- (a) Member States have each to submit to the Commission, first in April 2017 and then every 3 years<sup>43</sup>, a monitoring report including:
  - (i) information on the most frequent sources of wrong application or of legal uncertainty; and
  - (ii) prevention, detection and adequate reporting of cases of procurement fraud, corruption, conflict of interest and other serious irregularities.
- (b) The Commission, based on Member States' reports, shall regularly issue a report on the implementation and best practices of national procurement policies in the internal market.

## 74

If correctly implemented, these new reporting and monitoring requirements for Member States could provide much better information to the Commission on how the EU public procurement rules are implemented in practice.

42 Articles 83 to 85 of Directive 2014/24/EU.

43 The first of these reports is due by April 2017.

## Member States focus on first-level checks and have only recently started to take preventive actions

### Corrective actions taken by Member States and/or the Commission

#### 75

Public procurement errors occurring at the beneficiary level could and should be detected and corrected by Member State authorities before they submit claims for payment to the Commission. These are the so-called 'first-level checks', and entail:

- (a) verifications carried out by Member State managing authorities on beneficiaries' payment claims; and
- (b) checks done by the Member State certifying authorities, including on the information reported by the managing authorities.

#### 76

As previously noted by the Court<sup>44</sup> and the Commission in its own audits, Member States' first-level checks are still insufficiently effective. This results in expenditure on projects affected by public procurement errors being submitted to the Commission by Member States for reimbursement from the EU budget.

#### 77

If the Commission detects public procurement errors after a payment claim has already been submitted to it, the Commission can then:

- (a) impose financial corrections in respect of the individual projects concerned; or
- (b) if the Commission deems that it would be impossible to check all the contracts involved, impose a flat rate correction at the level of the OP (or one or several priority axes).

#### 78

To ensure a consistent approach to such financial corrections, the Commission has developed guidelines which determine the amount of financial corrections to be applied in cases of non-compliance with public procurement rules<sup>45</sup>. Since 2013 this has been codified as a Commission decision and is thus binding on all Commission services responsible for shared management.

#### 79

Where it deems that Member States' management and control systems are weak, and with a view to ensuring that Member States take the required remedial actions to improve them, the Commission interrupts payment deadlines. During these interruptions, no payments from the EU budget to the OP take place. Public procurement management and control system can fall within this scope (see examples in **Box 12** and **Box 13**).

44 Court's annual reports on the implementation of the budget concerning the financial years 2012 and 2013

45 COCOF 07/0037/03, 'Guidelines for determining financial corrections to be made to expenditure co-financed by the Structural Funds or the Cohesion Fund for non-compliance with the rules on public procurement', 29.11.2007; Commission Decision C(2013) 9527 final of 19.12.2013 on the setting out and approval of the guidelines for determining financial corrections to be made by the Commission to expenditure financed by the Union under shared management, for non-compliance with the rules on public procurement.

## Box 12

**Example of a payment interruption**

An audit carried out by the audit authority in **Spain** in 2011 detected that contracting procedures at the company managing airports and heliports did not comply with public procurement rules. The Commission therefore interrupted payments in respect of projects run by this organisation. In 2014, the audit authority in Spain, following an audit of the effective implementation of the improved procedures, certified that public procurement procedures at the organisation had improved and were used effectively. The Commission ended the interruption. A flat-rate financial correction was applied to all expenditure incurred by that organisation deemed to have been affected by the problems over time.

## Box 13

**Example of an action plan**

In the **Czech Republic**, due to serious deficiencies in the management and control systems, an action plan required by the Commission was drawn up and improvements have been implemented. For example, systems have been updated so that expenditure which was identified by the audit authority, the Commission or the Court to be irregular due to public procurement errors is automatically not submitted to the Commission for payment.

**80**

Financial corrections, unless imposed by Commission decision, may have a limited dissuasive effect during the period up to the closure of the 2007-2013 programming period in 2017. This is because, according to the regulations, Member States are entitled to replace expenditure for which corrections were imposed with other eligible expenditure. In this way, the total funds received by Member States were, in effect, only rarely reduced. For the period from 2014 to 2020, the rules have been changed: Member States could face a loss of funding if expenditure which has been declared as legal and regular by the managing, certifying and audit authorities is subsequently found to be affected by error<sup>46</sup>.

**Preventive action in Member States has begun, but only recently****81**

In the four Member States visited for this audit, most preventive actions started to be implemented only towards the end of the 2007-2013 programming period, mostly in 2013 and 2014.

46 See Article 143 of Regulation (EU) No 1303/2013.

## Observations

### 82

In three of the Member States — the United Kingdom, Italy and the Czech Republic — interdepartmental working groups have recently been set up concerning the issue of public procurement in cohesion policy. Such working groups bring together managing authorities,

audit authorities, implementing bodies, legal services or other departments concerned with public procurement, and are useful for exchanging experience, seeking consistency in dealing public procurement and identifying appropriate actions. **Box 14** shows details of a network set up in the United Kingdom.

#### Box 14

### Example of an interdepartmental working group dealing with public procurement in a Member State

In the **United Kingdom**, in 2013, the ERDF managing authority for England set up an internal network which reviews public procurement irregularities encountered and deals with public procurement-related queries. Included in the network are the managing authority's lawyers, officials responsible for programme implementation, an intermediary body and, in an advisory capacity, the audit authority.

The network carries out:

- reviews and reissues of national procurement requirements and related guidance;
- regular video conferencing to discuss cases studies, guidance, etc.;
- reviews of systems and projects audits and other checks relating to public procurement.

### IT tools could help address public procurement problems but will need to be fully implemented

### 83

The transformational potential of information technology can help to prevent and detect errors in public procurement. Both the Commission and Member States are developing IT solutions, such as:

- (a) e-procurement,
- (b) collecting data and building databases to facilitate the analysis of errors; and
- (c) data-mining tools for identifying fraudulent patterns and irregularities.

## Observations

### E-procurement

#### 84

E-procurement in this context refers to the use of electronic communications and transaction processing by public sector organisations when buying supplies, services and public works<sup>47</sup>. E-procurement involves the introduction of electronic processes to support the different phases of a procurement process — publication of tender notices, provision of tender documents, submission of tenders, evaluation, award<sup>48</sup>, ordering, invoicing and payment<sup>49</sup>. In 2014, the Commission estimated that, on average, around 10 % of EU public procurement is conducted electronically<sup>50</sup>.

#### 85

E-procurement has the potential to

- (a) enhance competition and value for money by broadening access to tenders within the single market including for SMEs;

- (b) improve the efficiency of the management of public procurement by widening access to tenders and automating key procedures, which could lead to cost savings for both tenderers and contracting authorities; and
- (c) help detect and prevent irregularities, corruption and fraud<sup>51</sup>.

#### 86

**Box 15** shows information about the implementation of e-procurement in Member States visited for the audit.

#### 87

The Commission, having supported several pilot projects on e-procurement, included an action to increase the use of e-procurement in its 2013 action plan (see **Table 2**). However, at the time of the audit, this had not started yet.

47 COM(2010) 571 final of 18 October 2010, 'Green paper on expanding the use of e-procurement in the EU'.

48 For the purposes of the new public procurement directives, 'no elements of the public procurement process after the award of the contract should be covered by the obligation to use electronic means of communication, nor should internal communication within the contracting authority'.

49 Directives 2014/24/EU and 2014/25/EU require Member States to ensure that all communications and information exchange covered by these directives are performed using electronic means of communication. This includes publication of notices, availability of procurement documents and electronic submission. These requirements are to come into effect between 2016 and 2018.

50 SWD(2014) 262 final of 1 August 2014, 'Annual public procurement implementation review 2013'.

51 See, for example, *Identifying and reducing corruption in public procurement in the EU*, study prepared for the European Commission (OLAF) by PwC and Ecorys, with the support of Utrecht University, 30 June 2013 ([http://ec.europa.eu/anti\\_fraud/documents/anti-fraud-policy/research-and-studies/identifying\\_reducing\\_corruption\\_in\\_public\\_procurement\\_en.pdf](http://ec.europa.eu/anti_fraud/documents/anti-fraud-policy/research-and-studies/identifying_reducing_corruption_in_public_procurement_en.pdf)).

### Box 15

#### Examples of implementation of e-procurement

- o In **Italy**, the system includes a virtual catalogue with products inserted by registered companies.
- o In the **Czech Republic**, a unit cost database is being developed as a benchmark for bidders to enhance transparency and fair pricing.
- o In **Spain**, in certain circumstances, offers can be submitted electronically.

## 88

Cyprus was also visited during the audit to review the e-procurement system in place there (see **Box 16**).

### Box 16

#### E-procurement in Cyprus

Launched in 2010, e-procurement in **Cyprus** is a web-based tool whose use is growing in public administration. By the end of 2014, 501 out of approximately 700 contracting authorities had registered to use e-procurement. Use of some of the facilities remains optional for contracting authorities and economic operators. Most contracting authorities use the system for advertising tenders. Of those registered by the end 2014, 21 % are foreign companies. In 2014, a bilingual help desk was set up for all users of the system. The Cypriot authorities' e-procurement strategy envisages full implementation by 30 June 2016, with training being provided starting in March 2015.

#### IT only recently started to be used for databases on public procurement errors

## 89

As described above, a full understanding of trends in public procurement problems requires comprehensive data to be available in a form that allows its analysis. Member States' use of existing or new databases to analyse public procurement errors is a recent development (see paragraph 41), and the Commission has yet to develop a database of irregularities, including those arising in public procurement.

#### Data mining tools — the example of the Arachne fraud alert tool

## 90

In 2009, the Commission began developing an IT-based fraud alert tool, which it calls Arachne. It became operational in 2013. It is owned and maintained by the Commission.

## 91

It has been designed to hold key data about projects funded under the ERDF, CF and ESF, for example about companies and projects, so that, relationships and connections between different economic actors participating in such projects can be analysed. This web-based tool also provides links to other external public databases. Users of the tool are provided with indicators of potential risks of fraud as regards specific undertakings.

92

The Commission is inviting managing and audit authorities in all 28 Member States to enter their data and use the tool, free of charge.

93

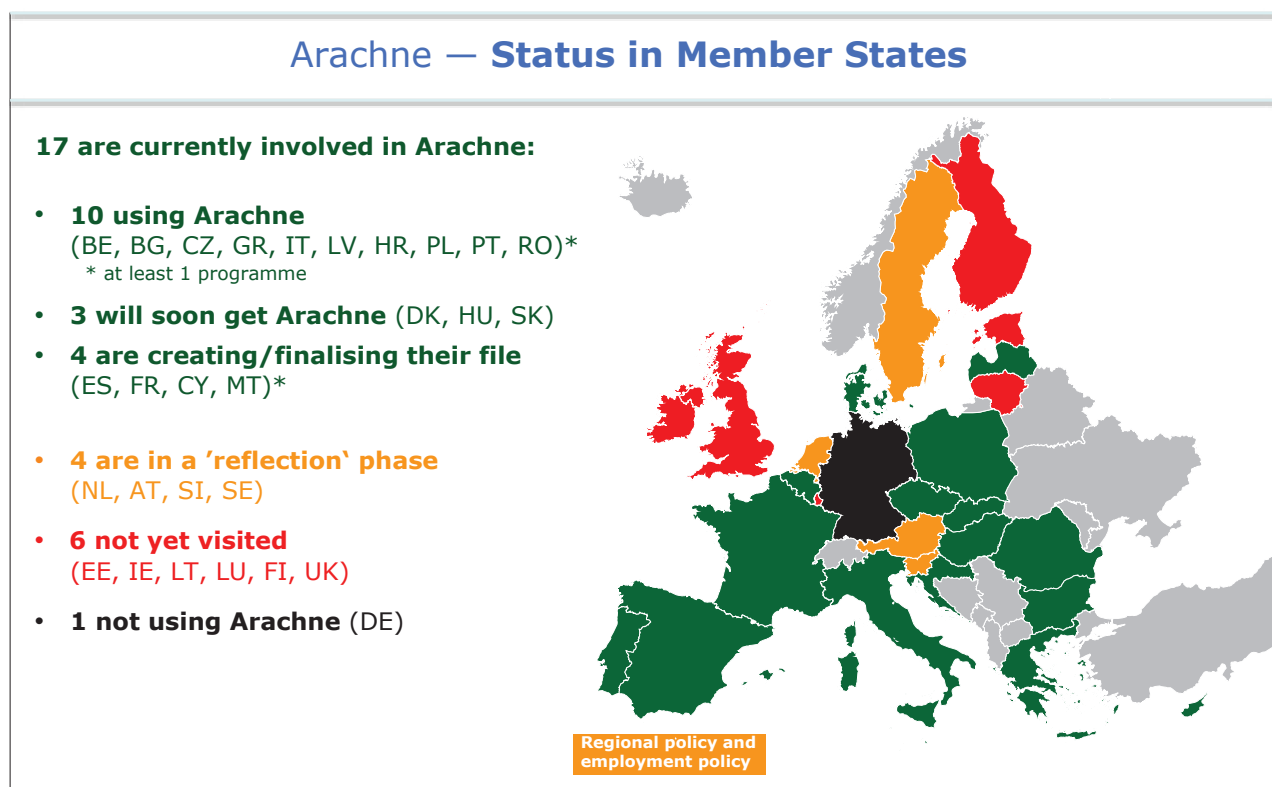
In February 2015, 17 out of the 28 Member States were either using the tool or had expressed their intention to do so (see also **Figure 10**).“

94

Such a system can, however, only work properly if comprehensive and good-quality data are encoded by a sufficiently large number of Member State authorities. By the end of 2014, 14 Member States had provided such data for at least one OP. For the tool to be an effective EU-wide fraud alert system, the other Member States would also have to provide data.

Figure 10

Arachne: status of implementation in Member States, February 2015



Source: European Commission.

## 95

EU public procurement policy is a key instrument in establishing the single market and in achieving smart, sustainable and inclusive growth, according to the Europe 2020 strategy, while at the same time ensuring the most efficient use of public funds.

## 96

During the period 2009-2013, errors relating to public procurement contributed significantly to the Court's overall estimated error rate in this policy area, primarily to the error rates for the ERDF and the CF. Serious errors led to a lack, or complete absence, of fair competition and/or to the award of contracts to those who were not the best bidders.

## 97

There is a range of causes of errors. The complexity of the legal and administrative framework is viewed as a problem, including a high volume of legislation and/or guidelines and the difficulty of applying them in practice. Lack of administrative capacity, relating to both knowledge of the rules and of technical expertise concerning the specific works or services being procured, causes errors. Insufficient project planning by contracting authorities and clerical mistakes are also problems.

## 98

This report assessed whether the Commission and Member States are taking appropriate and effective actions to address the problem of public procurement errors in the area of cohesion policy. The Court found that the Commission and the Member States have started to address the problem, but there is still a long way to go in terms of analysing the problem and implementing actions.

**Systematic analysis of public procurement errors by the Commission and Member States is very limited.**

## 99

Comprehensive analysis at both Member State level and Commission level has been precluded by a lack of coherent data. There are signs, however, in the four Member States visited for this audit, that data on public procurement errors are starting to be collected, or are planned to be collected, in a systematic way (see paragraph 41). However, analysis of errors is still limited (see paragraphs 35 to 39). The Commission has not yet developed a robust, comprehensive database of all irregularities, including those arising in public procurement. It undertook one analysis of ERDF and CF public procurement errors, namely in 2011 (see paragraph 45).



## Conclusions and recommendations

### Recommendation 1

- (a) The Commission should develop a database on irregularities, capable of providing a basis for a meaningful analysis of public procurement errors. It should analyse, in a comprehensive way, the frequency, seriousness and causes of public procurement errors in the area of cohesion policy, based on appropriate data, drawn both from its own databases and provided by Member States. The Commission should publish its analysis as part of the public procurement report required by the new directives.
- (b) The relevant authorities in Member States should develop and analyse their own databases on irregularities in the area of cohesion policy, including those arising in public procurement, and should cooperate with the Commission to provide such data in a form and at a time that facilitates the Commission's work.

**The Commission and the Member States have started to implement actions to address the problem, but there is still a long way to go**

### 100

Despite the lack of comprehensive analysis of the problem, the Commission and Member States have started to implement actions to address it.

Actions taken by the Commission since 2010, both legislative and non-legislative, have begun to target the overall problem. A new package of legislation on public procurement was put in place in 2014, which has to be implemented by the Member States by April 2016 (see paragraphs 67 to 74). This also introduces new reporting requirements for the Commission and Member States. Overall, the effects of the new legislative package, in terms of reducing the incidence of irregularity, will depend on how it is implemented in Member States. The new legal framework for ESIFs 2014-2020 introduces ex ante conditionalities regarding Member States' public procurement systems. Such preconditions have the potential to help address the problems (see paragraphs 61 to 65). Member States were required to carry out a self-assessment on how and whether they meet the conditions, and to include a summary thereof in the partnership agreements which they submitted in 2014. A significant number of Member States had not yet fulfilled these conditions by the beginning of 2015 (see paragraphs 61 to 65).

### Recommendation 2

If the ex ante conditionality concerning public procurement is not fulfilled by the end of 2016, the Commission should use its powers consistently to suspend payments to Member States concerned until they have rectified the shortcomings.

## Conclusions and recommendations

### 101

In 2013, the Commission established an internal technical working group and drew up an internal action plan. This points towards improved coordination within the Commission. Most actions have not yet been fully implemented. In addition, the action plan has only been endorsed by part of the Commission services and has not been published (see paragraphs 56 to 60).

### Recommendation 3

The Commission should update and publish its internal action plan on public procurement. It should report on progress annually. To this end, the Commission should improve coordination across its departments dealing with related public procurement issues.

### 102

Public procurement is still a significant source of errors and there is a long way to go in terms of analysing the problem and implementing actions. Effective implementation of actions is now needed. However, whilst the internal technical working group is a positive development, it was established at a low level within the Commission services, and the Commission has not shown high-level, coordinated leadership (see paragraphs 55 to 60).

### Recommendation 4

The Commission should set up a high-level group to provide leadership in tackling the problem of public procurement errors, to avoid the risk that actions are not consistently implemented in all Commission services. The group should act as an advocate for improvements in public procurement, including, where necessary, for simplification in this field.

### 103

Public procurement errors occurring at the beneficiary level could and should be detected and corrected by Member State authorities before they submit claims for payment to the Commission. As previously noted by the Court and the Commission in its own audits, Member States' first-level checks are still insufficiently effective. This results in expenditure on projects affected by public procurement errors being submitted to the Commission by Member States for reimbursement from the EU budget (see paragraph 76).

### 104

During the 2007-2013 programming period, the Commission used financial corrections more extensively than previously. However, financial corrections, unless imposed by Commission decision, may have a limited dissuasive effect during the period up to the

## Conclusions and recommendations

closure of the 2007-2013 programming period in 2017. This is because, according to the regulations, Member States are entitled to replace expenditure for which corrections were imposed with other eligible expenditure. In this way, the total funds received by Member States were, in effect, only rarely reduced. For the spending period from 2014 to 2020, the rules have been changed: Member States could face net corrections if expenditure which has been declared as legal and regular by the managing, certifying and audit authorities, is subsequently found to be affected by error (see paragraphs 75 to 80).

### Recommendation 5

The Commission should impose financial corrections wherever it finds that Member States' first-level checks are insufficiently effective and, where necessary, pursue infringement procedures for breaches of the public procurement directives.

### 105

In addition to the need for a Commission database to facilitate the analysis of public procurement errors (see Recommendation 1), IT tools such as e-procurement and data mining could further the benefits of public procurement and help to address the problems. At the time of the audit, the implementation of such tools varied across the Member States, thus holding back the possibility to take full advantage of such potential benefits (see paragraphs 83 to 94).

### Recommendation 6

- (a) The Commission should exploit further the opportunities provided by developments in information technology, including promoting e-procurement and data-mining tools and good practice.
- (b) Member States should exploit further the opportunities provided by e-procurement and data-mining tools.

This Report was adopted by the Court of Auditors in Luxembourg at its meeting of 16 July 2015.

*For the Court of Auditors*



Vítor Manuel da SILVA CALDEIRA  
*President*

## The Commission's and Member States' roles in public procurement and cohesion policy

### At the European Commission

- (a) **DG Regional and Urban Policy** oversees the implementation of the ERDF and CF, including negotiating and approving OPs. It monitors and audits the implementation of the OPs, including compliance with public procurement. DG Regional and Urban Policy and DG Employment, Social Affairs and Inclusion also issue guidance, some of it developed together with Member States. For example, they issue guidance on financial corrections in the case of non-compliance with public procurement rules<sup>1</sup>.
- (b) **DG Employment, Social Affairs and Inclusion** oversees the implementation of the ESF in similar ways to DG Regional and Urban Policy for the ERDF and CF (see above).
- (c) **DG Internal Market, Industry, Entrepreneurship and SMEs** (previously DG Internal Market and Services) is responsible for developing public procurement legislation and for overseeing its implementation. It monitors and assists Member States in such implementation, taking enforcement measures where necessary.
- (d) **DG Budget** is responsible for managing the budgetary regulatory framework, and puts forward proposals and implements the regulatory framework for the establishment, the implementation and the control of the EU budget.

### In the Member States

- (a) **Managing authorities** are responsible for managing and implementing OPs. They can delegate programme implementation to implementing bodies. The managing authority or its implementing bodies carry out checks on public procurement procedures as part of their management checks.
- (b) **Certifying authorities** carry out final checks on payment claims before they are submitted to the Commission.
- (c) **Audit authorities** carry out ex post audits of the systems and samples of individual projects before submitting reports to the Commission. Their audits cover issues relating to public procurement management systems and individual compliance checks on projects.

<sup>1</sup> COCOF guidelines (a committee set up for the coordination of the funds) (COCOF 07/0037/03 guidelines for determining financial corrections to be made to expenditure co-financed by the Structural Funds or the cohesion fund for non-compliance with the rules on public procurement, 29.11.2007). Commission Decision C(2013) 9527 final of 19.12.2013 on the setting out and approval of the guidelines for determining financial corrections to be made by the Commission to expenditure financed by the Union under shared management, for non-compliance with the rules on public procurement.

## Analysis of errors by fund detected by the Court, 2009-2013

	Transactions tested	Projects with- in which public procurement procedures were checked	Projects with at least one public procure- ment error	Total errors		Serious	Significant	Minor
				Number	%			
ERDF	657	378	170	382	60	117	185	80
CF	156	145	68	125	21	26	74	25
ESF	607	171	42	80	19	25	29	26
<b>Total</b>	<b>1 420</b>	<b>694</b>	<b>280</b>	<b>587</b>	<b>100 %</b>	<b>168</b>	<b>288</b>	<b>131</b>

## Description and analysis of errors in the different phases of tendering procedures

	Description of the error	Number of errors detected by the Court, 2009-2013			
		<i>Serious</i>	<i>Significant</i>	<i>Minor</i>	<b>Total</b>
<b>Pre-tendering</b>	Splitting of works or services, artificially, into smaller tenders to avoid thresholds	23	3	0	26
	Award of a contract directly without justification	21	2	0	23
	Use of inappropriate tendering procedure	27	10	1	38
	<b>Pre-tendering phase: subtotal</b>	<b>71</b>	<b>15</b>	<b>1</b>	<b>87</b>
<b>Tendering</b>	Problems with publication and transparency requirements and in tender specification	11	64	111	186
	Specification of unlawful, and incorrect application of, selection and award criteria	33	128	6	167
	Procedural weaknesses, including lack of appropriate documentation	22	39	12	73
	<b>Tendering phase: subtotal</b>	<b>66</b>	<b>230</b>	<b>130</b>	<b>426</b>
<b>Contract management</b>	Modifying or extending the scope of contracts without using procurement procedure	31	42	1	74
<b>TOTAL</b>		<b>168</b>	<b>288</b>	<b>131</b>	<b>587</b>
		<b>29 %</b>	<b>49 %</b>	<b>22 %</b>	<b>100 %</b>

### Public procurement infringement procedures initiated by the Commission, 2009-2013

	2009	2010	2011	2012	2013	Total	Referred to the Court of Justice of the European Union <sup>1</sup>
Belgium	1					1	
Bulgaria	2					2	
Czech Republic							
Denmark							
Germany	4	1	1		1	7	1
Estonia							
Ireland							
Greece	8	6	4			18	3
Spain	2			1		3	
France							
Italy	1	1	5	2		9	
Cyprus	1					1	
Latvia		1		1		2	
Lithuania							
Luxembourg							
Hungary	2	2			1	5	2
Malta	2		1			3	
Netherlands	1	3				4	1
Austria			1	1		2	
Poland			2	1		3	1
Portugal	1	1				2	
Romania	2	1		1		4	
Slovenia		1				1	
Slovakia	1					1	
Finland							
Sweden	1				1	2	
United Kingdom	3	1				4	
<b>Total</b>	<b>32</b>	<b>18</b>	<b>14</b>	<b>7</b>	<b>3</b>	<b>74</b>	<b>8</b>

<sup>1</sup> Judgements in the German and Dutch cases were delivered in 2012. The two Hungarian and two of the Spanish cases were withdrawn from the Court of Justice. One of the Greek cases and the Polish case are pending.

## Executive summary

### V

The Commission has been addressing the problem of public procurement errors in the area of cohesion policy since a long time but now addresses it in a more coordinated way under the umbrella of the public procurement action plan (see Court's observation in paragraph 56).

Errors in public procurement have been addressed since previous programming periods. Audit findings helped draft the first guidelines on financial corrections issued in 2007. The Commission is also already analysing, in a comprehensive way, public procurement errors in the area of cohesion policy. This analysis is done every year through the thorough assessment of the annual control reports submitted by national audit authorities and through its own audit findings (in the context of the audit enquiry 'Bridging the assurance gap', half of the audit findings are linked to public procurement). This assessment is reported in the annual activity reports of the DGs concerned.

### Common Commission reply to paragraphs VI and VII

Actions to address public procurement issues were being undertaken by the Commission earlier than 2010. Action plans to follow up public procurement findings detected during Commission audits started as early as 2006 in various Member States. In addition to the horizontal analysis carried out on public procurement errors and presented in May 2011 to the Advisory Committee for Public Contracts<sup>1</sup>, the Commission also published, in October 2011, a staff working paper on 'Analysis of errors in cohesion policy for the years 2006-2009 — actions taken by the Commission and the way forward'<sup>2</sup>.

1 Working document prepared by DG Regional Policy on the main audit findings regarding application of public procurement rules in Member States found in projects co-financed by ERDF and the Cohesion Fund under cohesion policy (CC/2011/08 EN).

2 Commission staff working document, 'Analysis of errors in the cohesion policy for the years 2006-2009' (SEC(2011) 1179 of 5 October 2011) and

The Commission's analysis of public procurement errors is also reflected in the Commission Decision of 19 December 2013 (C(2013) 9527 final) setting out the guidelines for determining financial corrections to be made for non-compliance with the rules on public procurement. These guidelines are an update of guidance that has existed since November 2007<sup>3</sup>.

For the 2014-2020 programming period, the Commission is taking a proactive approach in supporting the Member States, through guidance, monitoring and support (e.g. via technical assistance) to implement their national action plans for non-fulfilled ex ante conditionalities until the end of 2016. With this preventive approach the Commission wants to reduce the risk of possible suspension of payments to operational programmes (OPs) after 2016, but will not refrain from using this tool of suspension if the targets and milestones of the action plan are clearly not met.

### VIII (a) (i)

The Commission accepts the recommendation.

The Commission will look into the possibility to improve the functionalities of its Irregularity Management System (IMS) in order to accommodate the Court's functional requests. The possibility of interoperability between the IMS and CED/ABAC and other Commission databases is currently being explored.

Moreover, with regard to errors detected by its own audits, the Commission services are starting to use a common IT audit tool for the ERDF, the CF and the ESF called MAPAR (Management of Audit Processes, Activities and Resources).

3 Ref. COCOF 07/0037/03-EN of 29/11/2007 applicable to the European Regional Development Fund, Cohesion Fund and European Social Fund; Ref. EFFC/24/2008 of 1/4/2008, applicable to European Fisheries Fund; and SOLID/2011/31 REV of 11.1.2012, i.e. the guidelines for the financial corrections to be applied for irregularities in the application of the Union regulations on public procurement to contracts co-financed by the four funds of the general programme 'Solidarity and management of migration flows' during the 2007-2013 programming period.



## Reply of the Commission

Finally, the Commission envisages further steps to improve the analysis of procurement data, in particular fostering the collection of such data and developing a data analytics tool for the early detection of actual and prospective procurement anomalies and a better understanding of their causes (beyond the field of cohesion).

### VIII (a) (ii)

The Commission accepts the recommendation and notes that it is addressed to the Member States.

The IMS already provides Member States with a database that can not only be used to comply with the irregularity reporting obligations as defined in the different sectorial regulations but also for performing analyses to be used for national purposes.

### VIII (b)

The Commission accepts this recommendation. The directors-general of the four European Structural and Investment Fund directorates-general (ESIF DGs) already meet regularly in the so-called Ex ante Conditionality Suspension Committee, with which DG Internal Market, Industry, Entrepreneurship and SMEs is associated<sup>4</sup>. An approach, both preventive (with implementation of national action plans for non-fulfilment of ex ante conditionality) and corrective (with suspension of payments), will continue to be applied strictly and consistently.

<sup>4</sup> The committee shall coordinate and prepare recommendations for suspension decisions, including the preparation of draft suspension decisions, implementing Article 19(5) and Article 142(1)(e) of Regulation (EU) No 1303/2013 of the European Parliament and of the Council laying down common provisions on the ERDF, the ESF, the CF, the EARDF and the EMFF, and general provisions on the ERDF, ESF, CF and EMFF and Article 41 of Regulation (EU) No 1306/2013 (the CAP horizontal regulation), and shall provide the directors-general in the four ESIF DGs with advice on issues related to this matter.

### VIII (c)

The Commission accepts this recommendation and is already implementing it with improved coordination across its departments at director level since summer 2014.

The Commission intends to have the public procurement action plan endorsed more broadly within the Commission services. It is also envisaged to have it endorsed at a higher level.

### VIII (d)

The Commission accepts this recommendation, which is partially implemented, and supports initiatives leading to enhancements in public procurement.

It is envisaged to have regular contact between the relevant Commissioners responsible for ESIFs and the internal market in a format to be decided. This group could invite experienced external stakeholders, whenever judged useful. The Commission also supports the idea of providing leadership at a high level and notes that the directors of DG Regional and Urban policy (DG REGIO) and DG GROW have been meeting regularly since July 2014. Experienced external stakeholders have already been invited at this level.

### VIII (e)

The Commission accepts the recommendation and considers it is already taking the recommended action. See also the Commission's reply to VIII (b) above.

The Commission will continue to impose financial corrections wherever it finds that Member States' first-level checks are insufficiently effective. When serious deficiencies are detected, preventive and corrective measures such as action plans, interruptions and financial corrections are implemented ensuring the legality and regularity of past and future expenditure declared to the Commission. Payments are not resumed until systems are improved and close supervision is carried out after the implementation of the remedial actions to ensure that the management and control systems of programmes do not deteriorate again.

For persistent legal breaches of the public procurement directives the Commission will continue to pursue infringement procedures where necessary.

### VIII (f)

The Commission accepts the recommendation.

As e-procurement, in particular, improves transparency, facilitates cross-border tenders and access by SMEs and streamlines administrative procedures, the 2014 directives lay down a number of e-procurement obligations. The correct and quick transposition of these provisions is a priority for the Commission.

As regards data-mining tools, the Commission is taking the recommended action. It is actively promoting the use by responsible national authorities of Arachne, a preventive risk-scoring tool it has developed. This tool may bring significant improvements in the prevention and detection of various risks related, for example, to public procurement procedures, conflicts of interest and the concentration of grants under particular operators. It can also help identifying red flags of fraud suspicion. The Commission is aware and supportive of the use of other comparable data-mining tools.

### VIII (g)

The Commission accepts the recommendation and notes that it is addressed to the Member States.

## Introduction

### 10

The Commission underlines that, under shared management, the implementation of the public procurement-related regulatory framework falls under the competence of the Member States. They are also responsible for the way the public procurement directives are transposed into the national legal order.

## Observations

### 24

The Commission refers to its replies in the special report mentioned by the Court.

### 25

A certain level of complexity is needed in any public procurement system to minimise arbitrary behaviour by the contracting authorities and uphold the principles of equal treatment, non-discrimination and transparency.

The Commission also notes instances in which national law goes beyond the obligations laid down in the directives.

### Common Commission reply to paragraphs 26 and 27

The Commission has developed a series of actions to address the lack of administrative capacity. Two examples of actions of the public procurement action plan (mentioned in paragraph 56 of the report) address this problem concretely. In 2015, the Commission has finalised guidance on the avoidance of most common errors in public procurement, which emphasises the need for good planning. It has also carried out a stocktaking study in 2015 on administrative capacity, systems and practices across the EU to ensure the compliance and quality of public procurement involving ESIFs. This study provides specific recommendations to improve administrative capacity in each Member State.

### 29 (a)

The Commission notes that there is a working group at national level in the Czech Republic comprising the Public Procurement Office, the Ministry of Regional Development (in their coordination capacity) and other relevant bodies with the aim of harmonising the interpretation of public procurement rules.

## Reply of the Commission

### 32

Irregularities reported by Member States to the Commission via the IMS are not used exclusively for the preparation of the annual report on the protection of the EU's financial interests and the fight against fraud, but are also analysed for the closure of the 2000-2006 programming period and in the framework of the annual coordination meetings with audit authorities.

The reported data are also used for risk analysis purposes, and namely: by Commission auditors to prepare missions and by the European Anti-Fraud Office (OLAF). They are also provided to the Court's auditors upon request.

### 33

OLAF receives the irregularities reported by Member States on behalf of the Commission via the IMS. The Commission highlights that the classification of a reported irregularity is not a static and definitive event. The moment at which Member States classify cases varies due to national legislation and practices and national policy. In certain cases, a certain reluctance has been identified to classify a case too early as 'fraud', because of possible liability consequences foreseen by national legislation.

It may therefore happen that a certain irregularity initially not classified as 'suspected fraud' changes its status thanks to following updates concerning the case and the development of the relevant proceedings. Similarly, a case which was initially classified as 'suspected fraud' can be updated to a simple 'irregularity' following, for instance, a decision by a court or by an investigative body or authority.

### 35

See Commission common reply to paragraphs 26 and 27.

### 38 (b)

Public procurement issues are indeed high on the agenda in Italy, because it is the predominant source of financial corrections for the ERDF.

The necessary starting point to address the related weaknesses is the inventory and analysis of public procurement errors.

### 39

Based on its 2011 analysis<sup>5</sup>, the Commission has taken specific actions in its undertaking to mitigate these risks and to help the Member States; in particular, additional guidance and training were provided to managing authorities on the identified risks and measures concerning timely implementation of financial corrections, interruption and suspension procedures, and audits targeted at the most risky areas were continued. These actions were brought together under a public procurement action plan set up in 2013 between all ESIF DGs, DG GROW and the European Investment Bank (EIB) to improve the implementation of public procurement rules.

### 44 (a)

The purpose of the information provided in annual control reports is to be used for the assurance process for each OP, not to perform an analysis of public procurement errors.

See also Commission reply to paragraph 39.

### 44 (c)

Public procurement issues are discussed in the framework of the bilateral meetings with audit authorities when they are of significance for the Member State/programmes concerned.

<sup>5</sup> Commission staff working document 'Analysis of errors in the cohesion policy for the years 2006-2009' (SEC(2011) 1179 of 5 October 2011) and the 'Working document prepared by DG Regional Policy on the main audit findings regarding application of public procurement rules in Member States found in projects co-financed by ERDF and the Cohesion Fund under cohesion policy' (CC/2011/08 EN).

### 46

The Commission services have developed an IT tool called MAPAR (Management of Audit Processes, Activities and Resources), which is now in use. One of the functionalities of this common tool for the ERDF, CF and ESF is the introduction and classification of findings by typology of error and within one category (e.g. public procurement) by finding subcategory (absence of incentive effect, scheme not notified, etc.).

Both DGs REGIO and EMPL will use MAPAR to monitor all audit findings in a horizontal manner and regularly update a risk score table for an improved sound management of the Funds. This applies as well to any public procurement audit issues detected by the Commission.

Moreover, the IMS database is in place as a tool for Member States to report the irregularities detected, including those related to public procurement. This database is accessible to all relevant Commission services.

### 47

In 2012, in the context of a thematic audit on management verifications, DG EMPL identified specific cases of breaches of public procurement rules which were not detected by the national controls. The report and its conclusion were discussed with national authorities on several occasions.

See also Commission reply to paragraph 46.

### 48

The IMS was designed for the reporting of irregularities (both fraudulent and non-fraudulent, including irregularities related to public procurement) by Member States to the Commission.

In relation to public procurement irregularities, in addition to structured fields, further information is available via free-text fields in the IMS system. However, the data's exploitability depends upon the quality of the information and level of detail submitted by national authorities.

The system was not designed to provide, through entirely structured fields, the information referred to by the Court.

See Commission reply to paragraphs 32 and 46.

### 49

The Commission has been addressing this issue since a long time, but now addresses it in a more coordinated way under the umbrella of the public procurement action plan.

The Commission recalls the documents referred to under paragraph 39 (guidance on avoidance of errors and stocktaking study on administrative capacity).

### 51

The Commission's analysis of public procurement errors is reflected in the Commission Decision of 19 December 2013 (C(2013) 9527 final) on the setting out and approval of the guidelines for determining financial corrections to be made by the Commission to expenditure financed by the Union under shared management, for non-compliance with the rules on public procurement. These guidelines are an update of the guidance that has existed since 2007.

### 57

By the end of June 2015, the implementation of the public procurement action plan had further progressed. Out of 12 actions, three have been completed (as stated by the Court in points (a)-(c) below), seven are under implementation and two were planned for the long term and have not yet been started.

Those not yet started are long-term actions numbers 11 (Public procurement quality management systems) and 12 (Guide-to-guidance) in **Table 2**.

## Reply of the Commission

### 58 (a)

The Commission intends to endorse the public procurement action plan on a wider and possibly higher stakeholder level than before.

### 58 (b)

The working group was established as a subgroup of the interservice group on reinforcing the funds' capacity in the weaker Member States set up at director-general level. That interservice group reports to the Secretariat-General.

The Commission considers that a technical issue needs a technical follow-up under the supervision of the management, which is actively involved in the Public Procurement Working Group where appropriate.

The directors of DG REGIO and DG GROW meet regularly since July 2014 and have discussed the option of regular meetings at very high level (directors-general and commissioners).

### 60

In recent years, each Commissioner has referred to public procurement issues and calls for Member States to improve their systems. This has been echoed for the last 6 years by the Commissioners in charge of regional policy during their hearings for the discharge. Also, each directorate general in its respective annual activity reports reported the actions taken to tackle problems linked to public procurement and, similarly, calls on the Member States to improve their system.

The Commission considers that all public procurement activities are initiated and supervised closely by the senior management of the Commission services concerned (ESIF DGs and DG GROW).

### 61

Within the context of ex ante conditionalities and the partnership agreements adopted in 2014, 12 action plans have been adopted for the 2014-2020 programming period<sup>6</sup>, to be assessed by 2016.

The Commission is taking a proactive approach in supporting the Member States, through guidance, monitoring and support (e.g. via technical assistance) to implement their national action plans for non-fulfilled ex ante conditionalities until the end of 2016. With this preventive approach the Commission wants to reduce the risk of possible suspension of payments to OPs after 2016, but will not refrain from using this tool of suspension if the targets and milestones of the action plan are clearly not met.

### 63

The Commission refers to the reply to paragraphs 60 and 61, and highlights that the sound implementation of the applicable common and/or specific legislative and programming framework enjoys priority over absorption.

### 71

DG GROW has also replied to specific questions asked by national authorities and created an IT tool, WIKI, where questions and replies are uploaded and made available to all national authorities.

### 74

The Commission plans to provide guidance for the drafting of the monitoring report to the Member States according to the Commission's information needs.

### 76

Insufficient effectiveness of management verification on first-level checks is a cause of serious concern for the Commission (see DG REGIO 2014 AAR, page 50).

<sup>6</sup> For BG, CZ, EL, IT, MT, LV, PL, HU, HR, SI, SK and RO.

A document called 'Guidance on management verifications' was discussed with Member States in 2014 and 2015, and will be published in July 2015. It includes a section dedicated to verifications of public procurement. This is not part of the public procurement action plan since it covers management verifications of all types.

### 80

Following the legal provisions of the 2007-2013 programming period, the regulation allows the replacement of irregular expenditure by eligible expenditure if this new expenditure has been subject to checks by managing and audit authorities. Nevertheless, such financial corrections can result in losses of funds to the Member State at closure when the replacement of expenditure is no longer possible in the absence of a subsequent payment claim.

For the period 2014-2020, and according to Article 145 of Regulation (EU) No 1303/2013, the financial correction will imply net reduction of assistance also when there is a serious deficiency in the effective functioning of the systems not detected and reported by the audit authority prior to the date of detection by the Commission or by the Court of Auditors.

### 87

As a follow up to its communication on end-to-end e-procurement to modernise public administration (COM(2013) 453) the Commission has initiated a number of actions to support the uptake of e-procurement.

- On a political level, targets for the uptake of e-procurement are featured in the comprehensive political package aimed at completing the digital single market (COM(2015) 192).
- The Commission has started the work of the multistakeholder forum on e-procurement (EXEP), which works on sharing, disseminating and clarifying best practices in the areas of governance, regulation and interoperability.

- The Commission supports the eTendering pilot of eSens, which allows cross-border interoperability. An economic operator will be able to use one single software to communicate with several eTendering solutions Europe wide. On top of that, the Commission has started to use the Connecting Europe Facility (CEF) to cover other aspects of digitisation of public procurement, including e-invoicing and simplification.
- EU funds are being deployed either through the ERDF/CF or the ESF to help Member States to develop the administrative capacities and infrastructure (including the development of an e-procurement platform) needed for a full move to e-procurement.

### 89

See Commission replies to paragraphs 26, 27 and 46.

### 91

Arachne has been designed to help Member States in management verifications and as a fraud alert tool. It includes a number of risk indicators linked to public procurement, such as: lead time between publication of the tender notice and contract signature date; number of disqualified tenders/number of tenders received; number of valid tenderers; amount of contracts procured via negotiated, restricted procedure or via direct award/total project cost; number of contract addenda compared to the average per sector; financial correction to procurement procedure applied in the past in relation to the beneficiary.

Secondly, Arachne identifies the involvement of beneficiaries, contractors and subcontractors in different projects and programmes but also identifies the links between entities involved in the implementation of a project.

## Reply of the Commission

**94**

It should be noted that the 2007-2013 regulation did not contain any obligation for Member States to implement, for example, anti-fraud strategies. For the 2007-2013 programming period, the users have mainly agreed to use Arachne to test the system. Hence, many Member States decided to send data for only part of the OPs falling under their responsibility. By mid 2015, another four Member States had sent data for at least one OP.

The Commission anticipates further growth in the number of users for the 2014-2020 period. For this period, Arachne can be an effective element to mitigate fraud risk.

### Conclusions and recommendations

**97**

See common Commission reply to paragraphs 26 and 27.

**98**

Since previous programming periods, errors on public procurement have been addressed by the Commission. Audit findings helped drafting the first guidelines on financial corrections issued in 2007.

The Commission now addresses this issue in a more coordinated and exhaustive way under the umbrella of the public procurement action plan.

**99**

The Commission has taken appropriate measures and remedial action plans in individual Member States when problems were detected by audits. Its analysis contributed to the update in 2013 of the guidelines for determining the financial corrections to be made for non-compliance with the rules on public procurement.

As regards the development of a robust, comprehensive database of all irregularities, the Commission refers to the reply given under paragraphs 32, 46 and 48, as well as, on the documents prepared, to the common Commission reply for paragraphs 26 and 27.

### Recommendation 1 (a)

The Commission accepts the recommendation.

The Commission will look into the possibility of improving the functionalities of its IMS in order to accommodate the Court's functional requests. The possibility of interoperability between the IMS and CED/ABAC and other Commission databases is currently being explored.

Moreover, with regard to errors detected by its own audits, the Commission services are starting to use a common IT audit tool for the ERDF, the CF and the ESF called MAPAR (Management of Audit Processes, Activities and Resources).

Finally, the Commission envisages further steps to improve the analysis of procurement data, in particular fostering the collection of such data and developing a data analytics tool for the early detection of actual and prospective procurement anomalies and a better understanding of their causes (beyond the field of cohesion).

### Recommendation 1 (b)

The Commission accepts the recommendation and notes that it is addressed to the Member States.

The IMS already provides Member States with a database that can not only be used to comply with the irregularity reporting obligations as defined in the different sectorial regulations but also for performing analyses to be used for national purposes.



## 100

Actions to address public procurement issues were being undertaken by the Commission earlier than 2010. Action plans to follow up public procurement findings started as early as 2006 in various Member States. In addition to the horizontal analysis carried out on public procurement errors and presented in May 2011 to the Advisory Committee for Public Contracts, the Commission also published, in October 2011, a staff working paper on 'Analysis of errors in cohesion policy for the years 2006-2009 — actions taken by the Commission and the way forward'.

The Commission's analysis of public procurement errors is also reflected in the Commission Decision of 19 December 2013 (C(2013) 9527 final) setting out the guidelines for determining financial corrections to be for non-compliance with the rules on public procurement. These guidelines were an update of guidance that has existed since November 2007.

For the 2014-2020 programming period, the Commission is taking a proactive approach in supporting the Member States, through guidance, monitoring and support (e.g. via technical assistance) to implement their national action plans for non-fulfilled ex ante conditionalities until the end of 2016. With this preventive approach the Commission wants to reduce the risk of possible suspension of payments to OPs after 2016, but will not refrain from using this tool of suspension if the targets and milestones of the action plan are clearly not met.

## Recommendation 2

The Commission accepts this recommendation. The Directors General of the four European Structural and Investment Fund Directorates General meet already regularly in the ex ante conditionality suspension committee to which DG GROW is associated<sup>7</sup>. An approach, both preventive (with the implementation of national action plans for non-fulfilment of ex ante conditionality) and corrective (with suspension of payments), will continue to be applied strictly and consistently.

## 101

The actions of the public procurement action plan have been largely discussed, amended and agreed by representatives of all ESIF DGs, DG GROW and the EIB. They were cooperatively developed within the working group on improving public procurement. This working group was established as a subgroup of the interservice group on reinforcing the funds' capacity in Member States set up at director-general level. That interservice group reports to the Secretariat-General.

The implementation of the public procurement action plan has progressed (see Commission reply to paragraph 57). The Commission also intends to endorse the public procurement action plan on a wider and possibly higher level than before.

## Recommendation 3

The Commission accepts this recommendation and is already implementing it with improved coordination across its departments at director level since summer 2014.

The Commission also intends to have the public procurement action plan endorsed more broadly within the Commission services. It is also envisaged to have it endorsed at a higher level as outlined in the Commission's reply to recommendation 2.

## 102

See Commission replies to paragraphs 100 and 101.

<sup>7</sup> The committee shall coordinate and prepare recommendations for suspension decisions, including the preparation of draft suspension decisions, implementing Article 19(5) and Article 142(1)(e) of Regulation (EU) No 1303/2013 of the European Parliament and of the Council laying down common provisions on the ERDF, the ESF, the CF, the EARDF and the EMFF, and general provisions on the ERDF, ESF, CF and EMFF and Article 41 of Regulation (EU) No 1306/2013 (the CAP horizontal regulation), and shall provide the directors-general in the four ESIF DGs with advice on issues related to this matter.



## Reply of the Commission

### Recommendation 4

The Commission accepts this recommendation, which is partially implemented, and supports initiatives leading to enhancements in public procurement.

It is envisaged to have regular contact between the relevant Commissioners responsible for ESIFs and the internal market in a format to be decided. This group could invite external stakeholders, whenever judged useful. The Commission also supports the idea of providing leadership at a high level and notes that the directors of DGs REGIO and GROW have been meeting regularly since July 2014. Experienced external stakeholders have already been invited at this level.

### 103

Insufficient effectiveness of management verification on first-level checks is a cause of serious concern for the Commission. In the framework of its supervisory role, the Commission is carrying out since 2010 targeted audits on management verifications of high-risk programmes where it has identified that important level of errors resulting from such risks could remain undetected or not detected in a timely manner by the programme audit authority. Such audits lead, where necessary, to action plans to remedy the identified deficiencies. These audits contribute to improvements in the management and control systems for programmes put under reservation, ensuring that past and future expenditure declared to the Commission is legal and regular.

A document called 'Guidance on management verifications' was discussed with Member States in 2014 and 2015, and will be published in July 2015. It includes a section dedicated to verifications of public procurement. This is not part of the public procurement action plan since it covers management verifications of all types.

### 104

Following the legal provisions of the 2007-2013 programming period, the regulation allows the replacement of irregular expenditure by eligible expenditure if this new expenditure has been subject to checks by managing and audit authorities. Nevertheless, such financial corrections can result in losses of funds to the Member State at closure when the replacement of expenditure is no longer possible in the absence of a subsequent payment claim.

For the period 2014-2020, and according to Article 145 of Regulation (EU) No 1303/2013, the financial correction will imply a net reduction of assistance also when there is a serious deficiency in the effective functioning of the systems not detected and reported by the audit authority prior to the date of detection by the Commission or by the Court of Auditors.

### Recommendation 5

The Commission accepts the recommendation and considers it is already taking the recommended action. See also the Commission's reply to recommendation 2.

The Commission will continue to impose financial corrections wherever it finds that Member States' first-level checks are insufficiently effective. When serious deficiencies are detected, preventive and corrective measures such as actions plans, interruptions and financial corrections are implemented ensuring the legality and regularity of past and future expenditure declared to the Commission. Payments are not resumed until systems are improved and close supervision is carried out after the implementation of the remedial actions to ensure that the management and control systems of programmes do not deteriorate again.

For persistent legal breaches of the public procurement directives the Commission will continue to pursue infringement procedures where necessary.

## Reply of the Commission

### 105

The Commission supports e-procurement, for example the eTendering pilot of eSens on cross-border interoperability.

For the 2007-2013 programming period, there was no obligation for Member States to implement anti-fraud strategies via data-mining tools, such as Arachne (see Commission's reply to paragraph 94). The Commission anticipates further growth in the number of users for the 2014-2020 period. For this period, Arachne can be an effective element to mitigate fraud risk.

### Recommendation 6 (a)

The Commission accepts the recommendation. As e-procurement, in particular, improves transparency, facilitates cross-border tenders and access by SMEs and streamlines administrative procedures, the 2014 directives lay down a number of e-procurement obligations and their correct and quick transposition is a priority for the Commission.

As regards data-mining tools, the Commission is taking the recommended action. It is actively promoting the use by responsible national authorities of Arachne, a preventive risk-scoring tool it has developed. This tool may bring significant improvements in management verifications, but also in the prevention and detection of various risks related, for example, to public procurement procedures, conflicts of interest and the concentration of grants under particular operators. It can also help identifying red flags of fraud suspicion. The Commission is aware and supportive of the use of other comparable data-mining tools.

### Recommendation 6 (b)

The Commission accepts the recommendation and notes that it is addressed to the Member States.

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Failure to comply with public procurement rules has been a perennial and significant source of error in EU cohesion expenditure. Serious errors resulted in a lack, or complete absence, of fair competition and/or in the award of contracts to those who were not the best bidders. The Court of Auditors found that the Commission and Member States have started to address the problem, but there is still a long way to go and efforts need to be intensified.



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