

PUBLIC PROCUREMENT AND COHESION POLICY

Györgyi Nyikos and Tünde Tatrai*

ABSTRACT. Public procurement in development projects is important because operations co-funded by European Union must be in line with the applicable public procurement rules on national and EU levels.

However in its annual report the European Court of Auditors reveals that errors occur in cohesion spending, and three quarter of these errors are due to serious failure in applying procurement rules.

Given the current budgetary restrictions and economic difficulties in most Member States, public procurement policy must, more than ever, ensure the optimal use of funds in order foster growth and job creation.

What is the cause of the high error rate?

One reason for uncertainties and inefficiencies is the need for development projects to apply not only public procurement but also Cohesion Policy rules. These two sets of rules were written with quite different intentions and mind sets and can thus be contradictory. The uncertainties and incoherencies the public procurement versus Cohesion Policy rules has a significant effect as well of the number of irregularities.

It's a clear hint in the direction of EU Member States to do their homework and learn how to handle proper public procurements. On the other hand, some of the irregularities will also be an effect of the still high and often unnecessary administrative burdens for Cohesion Policy accounting - an issue perpetuated at both EU and national level.

* Györgyi Nyikos PhD is an Associate Professor, Department of Finance Law, National University of Public Service. Her teaching and research interests are in Public Finance Management, Cohesion Policy and Public Procurement. Tünde Tatrai PhD is an Assistant Professor, Department of Logistics and Supply Chain Management, Corvinus University of Budapest. Her teaching and research interests are in public procurement and electronic procurement.

INTRODUCTION

EU Cohesion Policy aims to reduce the economic development gap between the poorest regions and other regions and between the poorest communities and other communities within the EU by providing EU co-finance to projects in the Member States.

EU public procurement rules are aimed at guaranteeing that public contracts are awarded to the best bidder regardless of its nationality or place of establishment and as a consequence that public money is spent transparently and effectively.

In the EU Cohesion Policy the development projects are co-financed by the Structural Funds. The Use of the Structural Funds must be in line with the applicable public procurement rules on national and EU levels in order to ensure value for money and competition on the procurement market.

It seems that there are some obstacles in the progress of the EU co-financed project's implementation, because the European Court of Auditors report 7.7% of cohesion funding was spent in error or against EU rules.

What is behind this number, what is the cause of the high error rate?

How to avoid irregularities in public procurement procedures of EU funded projects?

OVERVIEW OF THE FUNCTIONING OF THE SYSTEM OF COHESION POLICY

Cohesion policy aims at strengthening economic and social cohesion within the European Union by reducing the gap in the level of development between different regions.

The Cohesion Policy programmes co-funded by the EU budget help to transform regional and national economies through investment in infrastructure, business development, training, innovation and the

environment; they deliver long-term sustainable growth and contribute significantly to job creation.

EU regional policy is financed by more funds: European Regional Development Fund (ERDF), European Social Fund (ESF), Cohesion Fund (CF), European Union Solidarity Fund (EUSF), Instrument for Pre-Accession Assistance (IPA). Each of them has different regulation with different objectives and eligibility rules.

The budget of the funds and the rules for its use are jointly decided by the Council and the European Parliament on the basis of a proposal from the Commission.

The proper financial management of EU funds is important to avoid fraud and illegitimate spending. Yet more important is the quality of the funded projects.

One of the key factors in the success of the policy is its decentralized delivery system. The programmes are managed at regional and local level so the projects selected respond to the priorities at those levels. But this is associated with a higher control risk because it increases the number of bodies involved and makes the control chain longer. The funds are governed by common rules and are subject to shared management by the European Commission and the Member States.

The European Commission approves multiannual (7 year) operational programmes, together with indicative financial plans which include the EU contribution, on the basis of Member States' proposals. Projects within the OPs are implemented by private individuals, associations, private or public undertakings or local, regional and national public bodies.

Cohesion policy carries an inherent risk since its programmes are delivered by numerous organizations and systems, and involve very large numbers of diverse projects.

Member States allocate responsibility for day-to-day administration. This includes the selection of individual projects, the implementation of controls to prevent, detect and correct errors within the declared expenditure and the verification that projects are actually implemented ('first level checks').

The Member States are responsible for carrying out system audits and audits of operations (i.e. projects or group of projects) in order to provide reasonable assurance on the effective functioning of the management and control systems of the programmes and on the regularity of the expenditure certified for each OP. They report on these audits to the European Commission through annual control reports and annual opinions.

The European Commission has to obtain assurance that the Member States have set up management and control systems which meet the requirements of the regulations, and that the systems function effectively.

If the European Commission finds that a Member State has failed to correct irregular expenditure or that there are serious failings in the management and control systems, it may interrupt or suspend payments[†]. If the Member State does not withdraw the irregular expenditure (which may be replaced by expenditure which is eligible) or does not remedy the detected system failures, the European Commission may apply financial corrections, leading to a net reduction in EU funding[‡].

FINDINGS OF THE EUROPEAN COURT OF AUDITORS

Cohesion policy accounts for €40.6 billion of EU spending in 2010, roughly one-third of the total budget of €122bn.

In their annual report on how the EU's budget was spent in 2010, auditors identified the biggest problems in money allocated under the cohesion policy. According this report of the ECA 7.7%[§] of cohesion

[†] Article 39(2) of Council Regulation (EC) No 1260/1999 (OJ L 161, 26.6.1999, p. 1); Articles 91 and 92 of Council Regulation (EC) No 1083/2006 (OJ L 210, 31.7.2006, p. 25).

[‡] Article 99 of Regulation (EC) No 1083/2006.

[§] The Court calculates its estimate of error from a representative statistical sample. The figure quoted is the best estimate (known as the MLE). The

funding was spent in error or against EU rules. This is a substantial increase on the figure for 2009, 5.5%, though it had expected the error rate to rise, as member states seek to meet funding commitments for projects for the 2007-13 spending period.

The Commission notes that the large majority of high quantifiable errors with strong impact identified by the Court are concentrated in seven ERDF operational programmes of three Member States, out of the 16 Member States included in the Court's sample

Court has 95 % confidence that the rate of error in the population lies between 4,7 % and 10,7 % (the lower and upper error limits respectively).

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2010 Summary of findings on regularity of transactions⁶

| Policy Group | Payments (million euro) | Most likely error (MLE) (%) | Confidence interval (%) | | Frequency of errors ⁽¹⁾ (%) | Assessment of super- visory and control systems ⁽²⁾ |
|--|-------------------------------|-----------------------------------|-------------------------------|-------------------------------|--|--|
| | | | Lower error limit (LEL) | Upper error limit (UEL) | | |
| Agriculture and Natural Resources | 55 990 ⁽³⁾ | 2,3 | 0,8 | 3,8 | 37 | Partially effective |
| Cohesion, Energy and Transport | 37 556 ⁽⁴⁾ | 7,7 | 4,7 | 10,7 | 49 | Partially effective |
| External Aid, Development and Enlargement | 6 543 | 1,7 | 0,1 | 3,3 | 23 | Partially effective |
| Research and other Internal Policies | 8 953 | 1,4 | 0,6 | 2,1 | 39 | Partially effective |
| Administrative and other expenditure | 9 264 | 0,4 | 0,0 | 1,1 | 7 | Effective |
| Overall audited population | 118 306 ⁽⁵⁾ | 3,7 | 2,6 | 4,8 | 36 | Partially effective |
| Revenue | 127 795 | 0,0 | N/A | N/A | N/A | Effective |

⁽¹⁾ The frequency of errors represents the proportion of the sample affected by quantifiable and non-quantifiable errors.

⁽²⁾ Systems are classified as 'partially effective' where some control arrangements have been judged to work adequately whilst others have not. Consequently, taken as a whole, they might not succeed in restricting errors in the underlying transactions to an acceptable level. For details see the section 'Audit scope and approach' in Chapters 2 to 7.

⁽³⁾ Reimbursed expenditure (see paragraph 3.16).

⁽⁴⁾ Reimbursed expenditure (see paragraph 4.23).

⁽⁵⁾ The difference between the payments in 2010 (122 231 million euro — see Table 1.1) and the total amount of the overall audited population in the context of the regularity of transactions corresponds to advances paid for the policy groups Agriculture and Natural Resources (851 million euro) and Cohesion, Energy and Transport (3 074 million euro) (see paragraphs 3.16 and 4.23).

Most of the errors, or irregular payments, were *because of non-compliance with public-procurement rules* as well as a failure to properly apply EU eligibility rules for projects. The Court found errors related to non-compliance with EU and national public procurement rules in 19 % of the 243 transactions audited. Serious failures to respect these rules were identified in 5 % of the transactions audited.

⁵ Traditionally, neither the ECA nor the Commission 'names and shames' countries. However, the Commission broke that taboo, when named Italy, Spain and the Czech Republic as the worst managers of EU cohesion funds. These three countries accounted for "two-thirds of errors identified" by the ECA in spending of cohesion funds, but the Commission not provided a breakdown of the figures.

⁶ ANNUAL REPORT ON THE IMPLEMENTATION OF THE BUDGET (2011/C 326/01)

They account for 24 % of all quantifiable errors and make up approximately 31 % of the estimated error rate for this policy group

The Court found other compliance and non-quantifiable errors related to tendering and contracting procedures in a further 14 % of the 243 transactions audited. These errors include cases of non-compliance with the information and publicity requirements (such as late publication of award notices)⁷, shortcomings in the tender specification or procedural weaknesses in the evaluation of offers. They also cover cases of incorrect transposition of EU Directives into national public procurement laws. These errors are not included in the estimation of the error rate.

The court also found problems in the accountability of special financial funds that member states have started to set up to disburse EU money. These financial instruments use EU cohesion funds as guarantees, loans and equity investments to back local projects.

WHAT IS BEHIND THESE FIGURES, WHAT IS THE CAUSE OF THE HIGH ERROR RATE?

DEFINITION PROBLEM

European legislation⁸ provides for the protection of the Union's financial interests in all areas of activity. Member States are required to notify the European Commission of evidence of *fraud* and other *irregularities*. This need is particularly evident in those sectors of the EU budget where the main responsibility for management is with the Member States, namely, in the fields of Agriculture and Cohesion Policy (on the expenditure side) and Own Resources (on the revenue side). In these areas, Member States must inform the Commission of all *irregularities* involving more than EUR 10 000 of EU finances. This

⁷ By formal errors, such as late publication of award notices, it is not necessary to impose financial corrections

⁸ for Cohesion Policy: Regulations No 1681/94 and 1831/94 for the programming periods until the 2000-2006 and by Regulation No 1828/2006 for the period 2007-2013

applies at all stages in the procedure for recovering monies unduly paid or not received.

The practices of the national administrations vary, though improvements have been achieved thanks to the efforts made to harmonize their approaches. Consequently, a certain proportion of communications does not distinguish between suspected fraud and irregularity.

The legal definitions are the following:

Irregularity: means any infringement of a provision of European law resulting from an act or omission by an economic operator which has, or would have, the effect of prejudicing the general budget of the European Union or budgets managed by it, either by reducing or losing revenue accruing from own resources collected directly on behalf of the Union, or by an unjustified item of expenditure⁹.

Fraud: affecting the European Communities' financial interests shall consist of¹⁰:

a) in respect of expenditure, any intentional act or omission relating to:

- the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds from the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities;
- non-disclosure of information in violation of a specific obligation, with the same effect;
- the misapplication of such funds for purposes other than those for which they were originally granted;

b) in respect of revenue, any intentional act or omission relating to:

⁹ Article 2 of Regulation (EC) No 2988/95.

¹⁰ Article 1(1), point (a), of the "Convention on the Protection of the European Communities' Financial Interests" (PIF Convention).

- the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the illegal diminution of the resources of the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities;
- non-disclosure of information in violation of a specific obligation, with the same effect;
- misapplication of a legally obtained benefit, with the same effect.”

The concept of irregularity is much wider than that of fraud, which explicitly refers to “intentional” act or omission. In this respect, the concept of irregularity includes that of fraud, but refers also to a whole series of infringements of rules which do not imply a deliberate intent to violate or for which such intent is not clear (for instance a breach of rules due to the misinterpretation of certain provisions because of their complexity). Therefore, the distinction between irregularities and fraud is that fraud is a criminal act that can only be determined by the outcome of judicial proceedings. As such, it is only when the judicial procedure has come to an end that the actual amount of fraud can be determined.

Errors are mainly detected and reported through audits and controls by national and Community bodies. Controls and audits take place before, during and after money is spent over a period of several years as the programmes are multi-annual. An error is any breach of rules in using the cohesion policy funds. An error does not mean that funds have disappeared, been lost or wasted. An error does not mean fraud. While *errors are in essence unintentional mistakes*, fraud implies intentional deception. Errors detected by the European Court of Auditors (ECA) are used by the ECA to establish error rates on the basis of a sample number of transactions. Error is not a term defined in antifraud¹¹.

¹¹ For the employment of the term of "error" see the European Court of Auditors' Annual Report of the European Court of Auditors on the implementation of the budget concerning the financial year 2009, OJ C 303/02, 9.11.2010. On the methodology of the Court see Annex 1.1 (Audit Approach and Methodology) OJ C 303/02, 9.11.2010, p. 34.

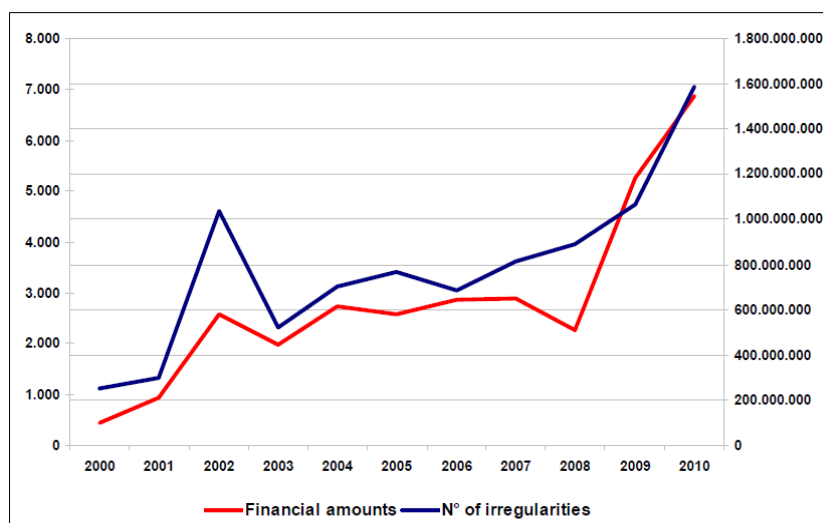
Because of the different methods to collect the data, the European Court of Auditors and the Commission agree that the figures of the European Court of Auditors on errors and of the Commission on irregularities and financial corrections cannot be compared in a meaningful way.

CONTROL PROCESSES BEHIND THE FIGURES

In 2010 the number of for the Commission reported *irregularities* and related financial amounts involved increased in relation to 2009 and represent the highest peak registered so far in the Cohesion Policy. 7 062 irregularities were received throughout the year, involving an overall amount of EUR 1.55 billion, the highest ever. The number of irregularities increased by 49%, while the irregular amounts increased by 31%.¹²

1994-2009 trend concerning number of reported irregularities for the Cohesion Policy

¹² Statistical Evaluation of Irregularities- Own Resources, Agriculture, Cohesion Policy, Pre-Accession Funds and Direct Expenditure-Year 2010 - Accompanying document to the Report from the Commission on the protection of the European Union's financial interests and the fight against fraud - 2010 {COM(2011) 595 final}{SEC(2011) 1107 final}{SEC(2011) 1109 final}



Since 1998, the impact of reported irregularities on the Cohesion Policy budget has showed two important increases, the first in 2002 and the second in 2009-2010. The increase could be due to a number of factors:

- the increase of the financial resources allocated to this policy;
- a better overall understanding and implementation of the reporting obligation,
- increased attention and improved controls.

The main reasons, which could explain these increases, are the closure of the programming period 2000-2006 and the advanced phase of implementation of the programming period 2007-2013.

The countries having reported the highest number of irregularities in 2010 were the United Kingdom, Italy, Portugal, Spain, Greece and Ireland (all having reported more than 600 irregularities). The highest irregular amounts were reported by the Czech Republic, Italy, Greece, the United Kingdom, Spain, Slovakia and Ireland (all above EUR 100 million).

Most frequent types of irregularities reported by Member States¹³

| CODE | DESCRIPTION | FREQUENCY | SHARE OF TOTAL | INVOLVED AMOUNTS | SHARE OF TOTAL | AVERAGE AMOUNTS |
|------------------|---|-----------|----------------|------------------|----------------|-----------------|
| | | N | % | EUR | % | EUR |
| 325 | Not eligible expenditure | 1.745 | 24,7% | 244.766.736 | 20,0% | 140.267 |
| 614 | Infringement of rules concerned with public procurement | 1.005 | 14,2% | 262.973.678 | 21,5% | 261.665 |
| 210 | Missing or incomplete supporting documents | 554 | 7,8% | 67.103.855 | 5,5% | 121.126 |
| 999 | Other irregularities | 484 | 6,9% | 266.573.504 | 21,8% | 550.772 |
| 741 | Failure to fulfill commitments entered into | 451 | 6,4% | 23.714.167 | 1,9% | 52.581 |
| 201 | Missing or incomplete documents | 446 | 6,3% | 23.963.212 | 2,0% | 53.729 |
| 612 | Failure to respect other regulations / contracts provisions | 281 | 4,0% | 25.306.377 | 2,1% | 90.058 |
| 324 | Expenditure not legitimate | 211 | 3,0% | 44.200.982 | 3,6% | 209.483 |
| 812 | Action not carried out in accordance with rules | 167 | 2,4% | 20.205.732 | 1,7% | 120.992 |
| 601 | Failure to respect deadlines | 162 | 2,3% | 20.121.055 | 1,6% | 124.204 |
| Sub-Total TOP 10 | | 5.506 | 78,0% | 998.929.297 | 81,6% | 181.426 |
| TOTAL | | 7.062 | 100,0% | 1.550.157.698 | 100,0% | 219.507 |

The vast majority of cases involve irregularities of an “administrative” nature that are normally detected in the course of the routine documentary checks which are conducted *before any payment of EU money is made*. As a result, among the most frequent types of irregularity reported by Member States are the “not eligible expenditure” and “missing or incomplete supporting documents”. However, the second most important “source” of irregularities is ‘Infringement of rules concerned with public procurement’, which is also resulting in the most “costly” typology, as it involves the highest involved irregular amounts.

Analysis of those categories of irregularity which are the most reported shows that irregularity is most frequently identified in the implementation phase of the project cycle. However, the biggest impact in terms of value (financial impact) occurs in the selection or procurement phase.

¹³ Statistical Evaluation of Irregularities- Own Resources, Agriculture, Cohesion Policy, Pre-Accession Funds and Direct Expenditure -Year 2010 - Accompanying document to the Report from the Commission on the protection of the European Union’s financial interests and the fight against fraud – 2010 {COM(2011) 595 final}{SEC(2011) 1107 final}{SEC(2011) 1109 final}

Non-compliance with the rules or conditions attached to EU funding will normally disqualify expenditure on a project from reimbursement or render it 'irregular'. The beneficiary may then have to repay part or all of the grant received, depending on the nature and seriousness of the 'irregularity'. Such 'irregularities' are *corrected by removing the irregular expenditure from payment claims* submitted to the Commission and cancelling and recovering the grant from the beneficiary. The Member States' authorities are responsible in the first instance for making corrections and recoveries. The Commission intervenes only when it establishes that irregular expenditure has not been corrected or that the control system for a programme is not working, with a consequent risk that irregularities are not being detected.

When the national authorities detect and correct an irregularity, they can re-use the EU funding released for other projects. This is an incentive to Member States to put in place effective systems.

If the Commission has to make a correction, it involves a net reduction in the EU funding of the programme. When the Commission has evidence of significant deficiencies in the functioning of Member States' management and control systems or of irregularities in relation to particular payment claims which a Member State has failed to prevent, detect or correct, it can interrupt or formally suspend payments to the programme concerned or open a financial correction procedure. An interruption of payments for a non-renewable period of up to six months may be ordered as soon as there is evidence to suggest that there is a serious system weakness. Payments are resumed once the Member State has taken the necessary remedial measures. A suspension of payments requires a formal decision by the Commission and can continue for an indefinite period. If the Member State fails to correct the irregularity or remedy the system deficiency, the Commission may apply a financial correction by formal decision. Such decisions always entail a net reduction in the EU funding of the programme, i.e. the Member State cannot re-use the cancelled EU funding for other projects. The Commission can apply financial corrections on an extrapolated basis for systemic errors and flat-rate corrections for system failures or

irregularities whose financial impact is difficult to quantify, for example in the public procurement area¹⁴.

An interesting aspect to examine in the framework of the protection of the EU financial interests could be how effective the preventive action of national authorities is and, when not prevented, what proportion of the detected irregular amounts is effectively recovered from the beneficiaries.

Irregular amounts, prevention rate and recovery rate 2000-2006¹⁵

¹⁴ Where systemic or repeated irregularities are detected in the application of the rules on public procurement, financial corrections at flat rates or by extrapolation (within the meaning of Article 4 of Regulation No 448/2001 or Article 99 of Regulation (EC) No 1083/2006) can be made to all the operations and/or programmes affected by the irregularities.

¹⁵ Statistical Evaluation of Irregularities- Own Resources, Agriculture, Cohesion Policy, Pre-Accession Funds and Direct Expenditure -Year 2010 - Accompanying document to the Report from the Commission on the protection of the European Union's financial interests and the fight against fraud – 2010 {COM(2011) 595 final}{SEC(2011) 1107 final}{SEC(2011) 1109 final}

| MEMBER STATE | IRREGULAR AMOUNTS | IRREGULAR EXCLUDING DECOMMITTED | OF WHICH PAID | BALANCE TO BE RECOVERED | PREVENTION RATE | RECOVERY RATE |
|--------------|----------------------|---------------------------------|----------------------|-------------------------|-----------------|---------------|
| | A | B | C | D | E=(B-C)/A | F=(C-D)/D |
| | EUR | EUR | EUR | EUR | % | % |
| AT | 39 238 609 | 33 654 816 | 29 849 556 | 15 853 357 | 9.7% | 46.9% |
| BE | 22 425 634 | 20 653 730 | 17 804 247 | 4 509 423 | 12.7% | 74.7% |
| CY | 590 906 | 273 | 0 | 0 | 0.0% | #DIV/0! |
| CZ | 74 036 929 | 65 615 778 | 56 495 559 | 48 670 247 | 12.3% | 13.9% |
| DE | 401 807 477 | 360 154 447 | 292 696 605 | 226 522 191 | 16.8% | 22.6% |
| DK | 5 397 991 | 4 327 187 | 3 976 343 | 1 886 403 | 6.5% | 52.6% |
| EE | 6 196 520 | 6 110 724 | 4 548 310 | 2 597 571 | 25.2% | 42.9% |
| EL | 424 808 661 | 338 891 320 | 315 687 663 | 1 612 056 | 5.5% | 99.5% |
| ES | 711 303 778 | 697 764 418 | 692 642 768 | 164 922 325 | 0.7% | 76.2% |
| FI | 10 386 200 | 5 895 403 | 3 851 634 | 491 959 | 19.7% | 87.2% |
| FR | 42 398 760 | 41 423 138 | 36 715 161 | 19 094 036 | 11.1% | 48.0% |
| HU | 47 913 383 | 46 207 002 | 11 720 129 | 9 725 634 | 72.0% | 17.0% |
| IE | 112 617 456 | 109 823 633 | 103 697 166 | 2 295 445 | 5.4% | 97.8% |
| IT | 881 066 761 | 730 939 048 | 495 050 099 | 226 450 450 | 26.8% | 54.3% |
| LT | 8 078 553 | 8 066 477 | 4 102 642 | 2 205 347 | 49.1% | 46.2% |
| LU | 4 113 714 | 4 113 714 | 4 113 714 | 0 | 0.0% | 100.0% |
| LV | 9 295 705 | 9 276 007 | 7 790 564 | 3 980 640 | 16.0% | 48.9% |
| MT | 1 748 285 | 1 728 514 | 1 728 514 | 0 | 0.0% | 100.0% |
| NL | 105 495 326 | 104 459 959 | 17 669 642 | 7 580 105 | 82.3% | 57.1% |
| PL | 180 070 259 | 177 417 475 | 99 282 467 | 17 965 795 | 43.4% | 81.9% |
| PT | 315 232 297 | 312 426 748 | 264 197 470 | 48 431 984 | 15.3% | 81.7% |
| SE | 15 666 129 | 14 355 506 | 4 838 834 | 1 580 124 | 60.7% | 67.3% |
| SI | 10 206 023 | 7 637 412 | 7 630 379 | 7 454 965 | 0.1% | 2.3% |
| SK | 54 528 712 | 53 987 779 | 53 741 170 | 7 771 944 | 0.5% | 85.5% |
| UK | 541 486 308 | 440 104 839 | 405 939 449 | 140 817 187 | 6.3% | 65.3% |
| TOTAL | 4 026 110 377 | 3 595 035 349 | 2 935 770 086 | 962 419 187 | 16.4% | 67.2% |

On one hand some caution is needed on these data, because some Member States may have *not reported the irregularities they detected before payment*.

On the other hand in many Member States is a common practice to exclude projects flagged as irregular from the expenditure declaration to the Commission. This implies that EU resources can be reused to finance other eligible projects, but the full burden of recovery is shifted on national budgets. When this decision is taken, the Commission does not receive any data about recovery of those sums and therefore the picture presented here is only partial.

LEGAL ISSUES - LEGISLATION

For *cohesion policy* a general regulation¹⁶ defines common principles, rules and standards for the implementation of the three cohesion

¹⁶ Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the

instruments, the European Regional Development Fund (ERDF), the European Social Fund (ESF) and the Cohesion Fund. In addition there are different regulations¹⁷ on the different funds defines they role and fields of interventions.

The European Commission's implementing regulation¹⁸ for the Structural and Cohesion Funds 2007-2013 represents one set of detailed rules on the management of cohesion policy's financial instruments.

Based on the principle of shared management between the Union and the Member States and regions, there are national regulations on national implementation issues.

In the case of *public procurement* on the EU-level the regulation consists of the directives on public procurement, legal acts implementing the Directives and a growing body of case law. Member States are responsible for the correct transposition of the EC Directives into national law. In the worst cases the European Commission can act against a Member State with a formal infringement procedure, but often this happens only if there are quite evident cases of infringement brought to the attention of the EU

European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999

¹⁷ Regulation (EC) No 1080/2006 of the European Parliament and of the Council of 5 July 2006 on the European Regional Development Fund and repealing Regulation (EC) No 1783/1999

Regulation (EC) No 1081/2006 of the European Parliament and of the Council of 5 July 2006 on the European Social Fund and repealing Regulation (EC) No 1784/1999

Council Regulation (EC) No 1084/2006 of 11 July 2006 establishing a Cohesion Fund and repealing Regulation (EC) No 1164/94

Council Regulation (EC) No 1085/2006 of 17 July 2006 establishing an Instrument for Pre-Accession Assistance (IPA)

¹⁸ 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

Commission. In most cases national law will not evidently contradict the EC Directive, but it could give a misleading interpretation. The Commission applies EC Directives rationale, when auditing public procurement in cohesion policy programmes.

Under Article 12 of Regulation (EC) No 1260/1999, *operations financed by the Funds must be in conformity with the provisions of the Treaty, with instruments adopted under it and with Community policies, including on the award of public contracts*. The same obligations have been provided for the programming period 2007-2013 under Article 9, paragraphs 2 and 5 of the Regulation (EC) No 1083/2006.

Contracting entities from Member States have to comply with the *rules and principles of the EC Treaty* whenever they conclude public contracts falling into the scope of that Treaty. These principles include the free movement of goods, the right of establishment, the freedom to provide services, non-discrimination and equal treatment, transparency, proportionality and mutual recognition¹⁹.

In operational programs it is necessary to ensure that certain public procurements are transparent and accessible to bidders in other Member States as this is required by some principles outlined in the EU Treaty. The European Commission *Interpretative Communication* on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives²⁰ outlines the opinion of the European Commission on the application of internal market principles of the EU Treaty to all planned contracts potentially relevant to the Internal Market (including contracts below EU thresholds). The Interpretative Communication is not directly legally binding to Member States, but it provides guidance and

¹⁹ Commission interpretative communication n° 2006/C 179/02 on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives

²⁰ European Commission Interpretative Communication 2006/C 179/02 on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives

interpretation on the application of legally binding principles of the EU Treaty.²¹

The Commission set out *guidelines*²² even for the financial corrections to be applied for irregularities in the application of the Community regulations on public procurement to contracts co-financed by the Structural Funds or the Cohesion Fund during the programming periods 2000-2006 and 2007- 2013. When the Commission services detect such irregularities during audits, they must determine the amount of the financial correction applicable. If, when the Commission proposes a correction, the Member State does not agree to make the correction itself in accordance with Article 39(1) of Regulation (EC) No 1260/1999 or the Article 98 of Regulation (EC) No 1083/2006, the correction is made by Commission decision under Article 39 paragraph 3 of Regulation (EC) No 1260/1999 or the Article 99 of Regulation (EC) No 1083/2006.

The control authorities of the Member States may also detect irregularities of the same type during their controls. In this case, they are required to make the necessary corrections in accordance with Article 39 paragraph 1 of Regulation (EC) No 1260/1999 or the Article 98 of Regulation (EC) No 1083/2006. The competent authorities in the Member States are recommended to apply the same criteria and rates when correcting irregularities detected by their own services during the checks and audits under Articles 4 and 10 of Regulation (EC) 438/2001 and Articles 60 (b) and 62(1) (a) and (b) of Regulation (EC) No 1083/2006 and other checks, unless they apply yet stricter standards.

²¹ As stated in the introduction of the Interpretative Communication: "... The Commission sheds light on its understanding of the European Court of Justice Case Law and suggests best practices in order to help the Member States to reap the full benefit of the Internal Market. This communication does not create any new legislative rules. It should be noted that, in any event, interpretation of Community law is ultimately the role of the European Court of Justice."

²² Guidelines for determining financial corrections to be made to expenditure cofinanced by the structural funds or the cohesion fund for non-compliance with the rules on public procurement, COCOF 07/0037/03-en, European Commission

The guidelines give amounts and rates of financial corrections where irregular applications for payment are presented. The more serious the non-compliance, the higher the % cut applied. These are reasoned not only with public procurement regulations, but confirmed by the *European Court of Justice (ECJ) case-law* too, that the rules and the principles of the EC Treaty apply also to contracts outside the scope of the Public Procurement Directives.

To summarize it: this document is used by the European Commission to determine financial corrections and is an information source on Commission expectations related to procurement processes. This document is not binding to Member States but Commission Auditors use it as a basis to apply financial correction. It is thus recommended for Member States to apply similar correction rates, unless stricter national rules apply. The European Commission might apply additional cuts, in cases where cuts made by the Member States are considered too low.

LEGAL ISSUES - PRACTICE

In the *implementation of cohesion policy* the central problem is that there are three levels of administration dealing with funds and contributing match funding: the EU, the national governments and the regional administrations. Each level has its own views on how things should be done and this adds to the complexity. In addition to the central problem described above, there are a number of specific problems, for examples: unclear and vague regulations, complex approval systems for programmes and projects, inconsistency with other major EU policies such as state aids and environment policy or public procurement and too many administrative requirements, too many checks by too many bodies.

The existing *public procurement legislation and practice* needs to be revised and modernized too. The principles of equal treatment and non-discrimination on grounds of nationality imply an obligation of transparency which, according to the ECJ case-law, "consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of the procedures to be reviewed".

But the savings generated by the EU procurement process far outweighed the costs of the procedures themselves, because of these complexity. However, there is wide diversity between member states in the time taken and costs of procurement procedures. Many national and regional public procurement regulations allow direct awarding of contracts (i.e. without any public procurement procedure) below a certain contract value. At the same time the principles of transparency outlined in the Interpretative Communication have to be observed, leading to an inherent contradiction between national (regional) public procurement laws (allowing for direct contract awards) and the procurement rules of the European Community (emphasizing the need to advertise planned awards in case of relevance to the internal market).

European Commission auditors will apply the transparency rules and undertake financial corrections at the cohesion projects if the principle was not applied. National procurement experts will apply national laws. For small contracts the proportionality principle applies as it is hard to justify administrative efforts associated with the publication of small economic values. The principle of value for money applies in any case (also for direct awards of small economic value) and measures should be taken to ensure that money is not wasted.

But the main reason for uncertainties and inefficiencies is the need for development projects to apply not only public procurement but also Cohesion Policy rules. These two sets of rules are each very complicated and hard to implement and were written with quite different intentions and mind sets and can thus be contradictory. Often straightforward solutions offering 100% certainty are simply not available. It is important to keep in mind that gold plating of public procurement or Cohesion Policy rules is often no solution at all. Instead, *understanding the intentions behind the two sets of rules* and making informed decisions tends to be the way. But in this situation it is really difficult applying the law correctly. It is good practice to take decisions carefully and state reasoning in writing. Unfortunately other people might arrive at different conclusions and documentation of your reasoning can be very useful.

One other special problem: many cooperation projects and programmes (ETC) currently struggle with the fact that public procurement rules do not foresee joint procurement by several contracting authorities from different Member States with different public procurement rules. More specifically, there is presently no procurement procedure available that would allow project partners to procure a service jointly across national borders (e.g. *one joint procurement* of project partners for the management of the entire cooperation project). Therefore, in the framework of the current legal situation, it requires creativity and the application of professional judgment to deal with public procurement in ETC programmes and projects. In ETC most purchases of goods, works and services are carried out for contract values below the EU thresholds. As the Public Procurement Directives do not apply to these procurements, national rules apply in the individual Member States, which differ from country to country. Harmonization of the national rules below the EU threshold would be highly desirable in the context of ETC, but this is unlikely to happen in the near future.

Some European development programmes – typically in which are involved not-EU-Member States countries as well - established *specific public procurement rules* for beneficiaries participating in projects. These rules are always stricter than national rules. Experience has shown that some of these rules are more useful than others. One may also raise the question why cohesion policy programmes should be stricter than procurement law itself. Furthermore, requiring private companies to apply the rules can discourage privates from participating even though they are eligible in many programmes. On a programme level, it could be more effective to ensure that general principles are obeyed. Other examples of potentially useful programme rules relate to the application of Commission guidelines in programmes and projects. In that sense, it could be useful to establish rules that require applying the guidelines for determining financial corrections. It could also be useful to require project partners to apply the transparency principles to procurements below a certain threshold.

PROPOSALS FOR THE FUTURE

The issue of simplification has been a concern for a long time, and will remain so during the next programming period as for cohesion policy as for public procurement.

The Europe 2020 strategy²³ stresses the importance to improve public procurement rules. The public authorities spend 18% of GDP on goods, services and works²⁴. Given the current budgetary restrictions and economic difficulties in most Member States, public procurement policy must, more than ever, ensure the optimal use of funds in order foster growth and job creation and thereby help to achieve the objectives of the Europe 2020 Strategy.

The Single Market Act for a highly competitive social market economy committing: "Revised and modernized public procurement legislative framework, with a view to underpinning a balanced policy which fosters demand for environmentally sustainable, socially responsible and innovative goods, services and works. This revision should also result in simpler and more flexible procurement procedures for contracting authorities and provide easier access for companies, especially SMEs."

The proper financial management of EU funds is important to avoid fraud and illegitimate spending.

On the one hand, it's a clear hint in the direction of EU Member States to do their homework and learn how to handle proper public procurements. Many EU funded projects are not exactly transparent in the selection of contractors, which raises legitimate concerns about the effective use of these huge amounts of public money.

²³ Europe 2020 is the EU's growth strategy for the coming decade, about how the EU should become a smart, sustainable and inclusive economy. Concretely, the Union has set five ambitious objectives - on employment, innovation, education, social inclusion and climate/energy - to be reached by 2020. Each Member State has adopted its own national targets in each of these areas. Concrete actions at EU and national levels underpin the strategy.

²⁴ European Commission

On the other hand, some of the irregularities will also be an effect of the still high and often unnecessary administrative burdens for cohesion policy accounting - an issue perpetuated at both EU and national level. Adding this, the uncertainties and incoherencies the public procurement versus cohesion policy rules has a significant effect as well of the number of irregularities.

If we want a more effective system with fewer irregularities, then for the stakeholders it is necessary to move from the legal level of understanding and trying to implement the intentions behind the two sets of rules (cohesion - public procurement) to the higher level of legal certainties with clear and simple legislation.

The revision of the public procurement directives announced by the Commission 20 December 2011 is part of an overall programme to thoroughly modernize public tendering in the European Union. The proposed reform aims to thoroughly modernize the existing tools and instruments. In its legislative proposal for the future cohesion policy the European Commission proposed to simplify the procedures in order to lessen some of the burden of the implementing authorities.

The answer of the question if the new regulation will fit their stated wish for “radical simplification”, “effective and efficient system” and “reduce costs for business” can be the topic for further research.

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