

A report to

The Chancellor of the Exchequer &  
Secretary of State for Trade & Industry

# Wood Review

Investigating UK business experiences  
of competing for public contracts in other  
EU countries

By Alan Wood  
supported by the Office of Government Commerce  
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## Foreword by Alan Wood

Dear Chancellor and Secretary of State for Trade & Industry,



My Review of UK business experiences in competing for public contracts in other EU countries has aimed to find out the difficulties UK suppliers face and the factors leading to success. Where difficulties have been identified, we have recommended action by the Government, the European Commission and other Member States to improve competition in public procurement markets. And we have endeavoured to identify how businesses themselves can improve their chances of success.

Public authorities can have a significant impact on many markets through procurement decisions. The public procurement market represents around 16 percent of the EU economy measured as gross domestic product, or €1,500bn per annum. So effective competition in public procurement is essential to ensuring a genuinely open Single Market.

The Review was announced in response to comments and anecdotal views from industry. One of the challenges we faced was to extract concrete examples of unfair or discriminatory behaviour from industry sources. The Review has been informed by a combination of documentary sources, in-depth interviews, round-table panels, and responses to a questionnaire.

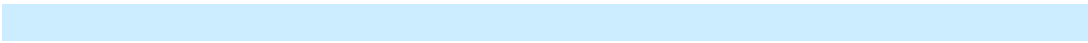
We found that while EU Member States largely respect the rules in awarding public contracts, competing for such contracts is far from easy and there are many obstacles ranging from complex procedures to cultural differences and geographic distance that can hinder the success of UK firms. Crucially, there is still evidence of a lack of commitment to international competition and market liberalisation in some key sectors such as defence, energy and transportation. And there is room to improve the way public purchasers carry out their business, to ensure more transparency and effective competition.

Despite the challenges, there are also reasons to be positive. Public procurement is moving up the political agenda across Europe with an increasing focus on the efficient delivery of public services. Business also has an opportunity to build skills and to share best practice. One of the main success factors identified was the ability of UK firms to act locally through a subsidiary based in the procuring country, through local partnerships or representatives. Another key opportunity is for UK companies to make better use of Government export support available both in the UK and internationally.

In the current economic climate, where the German and French economies in particular are beginning to come to terms with the fierce competition from countries such as China and the new EU Member States, and where all EU Member States need better value-for-money from public

procurement to improve the quality of public services and the management of their public finances, this is a very good time to be looking at the question of the fair application of EU procurement rules. I am grateful to the Government for giving me the opportunity to lead this Review and I hope that it will be of some help in shaping appropriate support for UK firms. In particular I hope that the findings of the Review demonstrate that there is no room for complacency in urging our fellow EU Member States to continue down the path of liberalisation and not to return to protectionist policies that can only damage the effectiveness of the Single Market.

I would like to express my gratitude to all those who helped me produce this Review. In particular the members of the Steering Group who assisted me: Kevin Curran, Andrew Field, Steve Radley, Andy Scott, John Stewart, Anne Turner, Clelia Uhart and Rosa Wilkinson.



# 1 .....Executive summary

## 1.1. Introduction

- 1.1.1. Opening markets and competition overseas as well as in the UK is an essential part of the Government strategy for achieving greater prosperity through increased productivity.<sup>1</sup>
- 1.1.2. Following business concerns regarding access to EU markets, the Chancellor of the Exchequer announced in the 2003 Pre-Budget Report a review of the experiences of UK-based firms in competing for public contracts in other EU countries, including concerns about unfair discrimination and different approaches to the application of Single Market public procurement rules (see the full Terms of Reference at Annex A).
- 1.1.3. This report sets out the results of the consultation carried out, identifies key findings and makes recommendations with the aim of ensuring the right competitive environment for UK businesses in accessing multi-billion pound European markets for public procurement.

## 1.2. Summary of Findings

*"The problem is not the rules, it's behavioural issues."* Manager, service provider.

- 1.2.1. Although we were asked to look in particular at the application of Single Market public procurement rules, it became clear from the consultation that 'the rules' in themselves (or their application) are not seen as the key problem. Few examples of discrimination in clear breach of Single Market public procurement law were provided for the Review. Most of these were anecdotal and difficult to substantiate; and legal remedies against breaches of Single Market public procurement rules are not generally seen as a solution to problems encountered. This does not mean that illegal discrimination never occurs, simply that it is difficult to find clear evidence of it, and that it was not the main concern amongst the respondents to this Review.

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<sup>1</sup> This approach is expressed in *Advancing long-term prosperity: Economic reform in an enlarged Europe*, HMT, February 2004, which sets out the measures the UK is taking along with other Member States and the Commission to increase economic prosperity across the EU. The DTI's Corporate Strategy - *The DTI Strategy, 2003* - states that "...our job is to create the conditions for sustainable business success - promoting competition & enterprise...playing a leading role in the drive for economic reform in Europe and being a powerful voice in negotiations to achieve free and fair trade worldwide....".

- 1.2.2. The problems are seen to be elsewhere, often described as “grey areas”, where Single Market rules are formally respected and yet national firms appear to be favoured.
- 1.2.3. Many of the concerns expressed can be related to issues of industrial policy, including different approaches to state aid, market liberalisation and commitment to open competition.
- 1.2.4. Key barriers result from deficiencies in Single Market integration, as well as cultural differences across Member States and poor purchasing skills, both in the UK and elsewhere. Quality export support is sought, including guidance, access to information and training.
- 1.2.5. Most businesses take a pragmatic approach, seeking to maximise opportunities where possible. Many are extremely successful, even in the more difficult markets, when they offer competitive products and services. Many obstacles can, to a certain extent, be circumvented through successful business strategies. A summary of key success factors for European public procurement is outlined in the report (section 4.17). For more entrenched difficulties we make recommendations for Government action.
- 1.2.6. Many of the findings set out in the report apply to export trade in general, not solely to EU or public procurement markets.

## **1.3. General & Regulatory Issues**

### **Experiences of European public procurement are diverse**

- 1.3.1. Experiences of European public procurement vary according to the sector in which firms operate, their size, and the target country-market. Smaller firms often have greater difficulties in accessing European public contracts. They are keen for practical support and help from UK authorities or from other businesses. Larger firms are more autonomous, but look to Government to provide lobbying and influencing, both within target markets (through commercial sections of diplomatic posts abroad) and at EU level, in support of greater Single Market integration. Each industry sector has its own specific concerns.

### **European public procurement is not an easy exercise**

- 1.3.2. Competing for public contracts in other EU countries is not easy. The process is time-consuming, resource-intensive, and requires a clear strategy to maximise return on investment. It combines the difficulties of public procurement - often a lengthy, costly process, requiring specific expertise - with those of exporting. The latter include linguistic and cultural differences, geographical distance, reduced access to relationship networks and lesser familiarity with institutions. The EU is by no means seen as the most difficult of export markets, however.

### **Single market rules on public procurement are not the problem**

1.3.3. The EU public procurement rules are not seen in themselves as creating problems for UK-based firms in accessing contracts in other EU countries. At worst they are not a hindrance and at best they are helpful in ensuring contract opportunities are advertised, giving UK firms the chance to bid and providing transparent procedures, aimed at reducing corruption.

### **EU public procurement rules are only part of the overall regulatory environment**

1.3.4. Although EU public procurement directives cover most of the larger value public contracts, only 16 percent of public procurement is advertised in the Official Journal, representing around 2.5 percent of EU GDP.<sup>2</sup> Certain key areas, such as many defence contracts and some public transport services contracts are exempt from the rules. Even where they do apply, EU public procurement rules are only a small part of the overall regulatory environment which affects the free movement of goods and services across the EU and which involves issues such as differing administrative rules, technical standards, rights of establishment, red tape, legal systems, contract law and employment regulations. There is still some way to go to achieve a genuinely open EU Single Market.

## **1.4. Application of Single Market Public Procurement Rules**

### **Direct discrimination is infrequent, anecdotal and difficult to prove**

1.4.1. Few respondents mentioned examples of discrimination in direct breach of EU public procurement rules. Those provided are difficult to evaluate as to the substance of the allegations, particularly as no concrete evidence was submitted to us.

### **There are “grey areas” where local suppliers appear to be favoured**

1.4.2. There was considerably more concern about “grey areas”, situations where EU public procurement rules are complied with and yet there remains a strong belief that local firms have been favoured. A number of examples were given although, as with examples of alleged illegal discrimination, it is hard to evaluate the substance of these, and difficult to prove wrong-doing.

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<sup>2</sup> *The Access of SMEs to Public Procurement Contracts*, EIM Business & Policy Research for the European Commission, December 2003.

## **1.5. Cultural preferences, political choices and industrial policy**

1.5.1. The degree to which public procurement markets are open to UK firms is strongly affected by cultural and political factors, as well as industrial policy. Cultural differences affect all export markets, but particularly so where buying locally is an integral part of the culture. Political commitment to the ideal of open markets and competitive, arms-length tendering influences the extent to which foreign competition is actively welcomed and encouraged. This in turn affects industrial policy. In some countries high volumes of state subsidies – particularly for industries identified as ‘strategic’ - are seen to create an ‘uneven playing field’ for British firms seeking to compete. An issue of particular concern to British firms is the more rapid pace of market liberalisation in the UK in comparison to many other EU countries, particularly in the public transport and energy sectors. This has resulted in foreign competition in the UK home market, but fewer corresponding opportunities for UK firms in other Member States, so long as their markets remain wholly or partially closed to competition. This is seen as particularly unfair when foreign firms competing in the UK are also state-owned or state-subsidised.

## **1.6. Other Government impacts on markets**

### **Good public procurement practice benefits open competition**

1.6.1. Good practice and better buying skills amongst procuring authorities in EU Member States are consistently seen to increase opportunities for UK firms to compete. Bad practice is said to be destructive, as it reduces confidence and willingness to enter a market.

### **Government support has a role to play**

1.6.2. The UK Government has a role to play in supporting British industry. Good access to home markets is seen to be essential, as is a joined-up approach to business support regionally, nationally, and in Brussels, together with quality export support services. Effective and appropriate regulation in the UK is seen to be crucial in maintaining a ‘level playing field’ within the EU.

## **1.7. Supplier Performance**

### **Suppliers rarely use legal and administrative remedies**

1.7.1. Even where direct discrimination is believed to have occurred, most UK firms are not interested in challenging procurement decisions. They prefer to maintain good relations with potential clients. Firms are generally more interested in informal methods for dispute settlement.

## **Local integration in target markets is essential**

1.7.2. Local integration emerged as the main success factor for firms seeking to win public procurement contracts in other EU countries. This can take a number of forms, including local subsidiaries (seen as the most successful solution), joint-ventures, local agents, distribution or partnering arrangements, sub-contracting to local firms, using local sub-contractors or advisors, bidding through local firms, or using native-born staff in sales teams. Smaller firms, which may not easily have recourse to these options, can consider using in-country export advisors from the UK Trade & Investment network,<sup>3</sup> or sub-contracting to British firms with clients in other EU countries, as a first step into these markets.

## **Niche markets and starting small are successful strategies**

1.7.3. Successful approaches include focussing on niche products, services, or expertise and starting small when entering a new market, avoiding head-on competition with well-established local firms.

# **1.8. Recommendations**

1.8.1. The Government should press at EU-level, and bilaterally where appropriate, for the application of policies and practices to make public procurement markets fair, open and competitive. There should also be effective support to UK businesses to improve their ability to access public procurement markets in other Member States.

## **Changing the approach to public procurement**

1.8.2. There needs to be a stronger emphasis throughout the EU on achieving the outcome of more openness in markets in addition to demonstrating compliance with the rules. The European Commission should be more pro-active, not only in monitoring compliance with EU procurement law, but also in promoting the benefits of effective competition and encouraging the adoption of best practice. The Commission should work with Member States to identify, evaluate and benchmark the structures, tools and techniques which contribute most effectively to these goals; and should use a scorecard approach, where appropriate, to raise Member States' performance.

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<sup>3</sup> <http://www.uktradeinvest.gov.uk>

### **Removing institutional barriers**

1.8.3. Many of the barriers to competition in public procurement which have been revealed by this Review are related to national policies on issues such as market opening (for example in defence and transport), market liberalisation, state aids and remaining barriers to the Single Market. Action is needed in each of these areas to achieve a genuine EU Single Market in public procurement. The Government should press for greater market opening in sectors which are currently not required to be fully open to competition; for faster progress in liberalising markets; and for progress to reduce state aids and refocus them on horizontal measures applicable to firms from all sectors; as well as the introduction of measures such as the Services Directive to increase the effectiveness of the Single Market.

### **Developing best practice in public procurement**

1.8.4. The UK Government has recognised the need to improve public procurement practice within the UK and is taking forward action to achieve this (including through the implementation of Kelly Report recommendations).<sup>4</sup> The Government should encourage information exchange on all aspects of best practice to support its own actions, as well as similar developments in other Member States, through international best practice networks.

### **Improving skills to compete effectively**

1.8.5. Business needs to improve its skills to compete for public procurement contracts. This should be backed up by Government support. Bodies such as the Office of Government Commerce (OGC) and UK Trade and Investment (UKTI) should improve the guidance available to business and ensure that support for exporters is well signposted and suitable for business needs, particularly for SMEs new to public procurement.

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<sup>4</sup> *Increasing Competition and Improving Long-Term Capacity Planning in the Government Market Place*, Office of Government Commerce, December 2003 (<http://www.ogc.gov.uk/index.asp?id=1000987>).



## 2 .....Methodology

### 2.1. Consultation

- 2.1.1. This report is based on a consultation consisting of in-depth interviews, round-table panels, responses to a questionnaire and documentary sources.
- 2.1.2. The consultation focussed mainly on industry sectors subject to EU public procurement rules. However responses were also received in relation to sectors which are to a large extent exempt from the rules, such as defence (see Chapter 4 and Annex G for more information on sectors subject to EU rules). Virtually all respondents had previous experience of competing for public procurement contracts in other EU countries.
- 2.1.3. Qualitative face to-face interviews were carried out with twelve firms from sectors where there is significant demand from public purchasers,<sup>5</sup> and eight organisations involved in trade. Of the firms interviewed, five are in manufacturing, five in services and two in construction.
- 2.1.4. A questionnaire was made available on a dedicated website and publicised widely (see Annex F for details of actions taken). Over 70 completed questionnaires were received from a range of industry sectors. Follow-up calls were made to some of these respondents to ensure accurate understanding of the information provided.
- 2.1.5. In all, over 100 organisations responded to the consultation, including 49 manufacturing firms, 37 services firms, 13 construction firms and 13 organisations involved in trade. There were 51 large firms, 44 small or medium firms and four micro firms.<sup>6</sup> A list of respondents is attached at Annex C.
- 2.1.6. Our findings are based on qualitative information gathered from interviews, round-tables and questionnaires. Some quantitative data gathered from the questionnaires has been used to compile graphs (see Annex E), however this was not intended as a data based report.

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<sup>5</sup> Firms were interviewed from the following sectors: services (marketing, consulting, financial, telecoms), manufacturing (transport, healthcare products), construction (building, textiles).

<sup>6</sup> The definitions used to classify firms by size are as follows: Micro = less than 10 employees; Small = 10 to 50 employees; Medium = 51 to 250 employees; Large = over 250 employees.

- 2.1.7. Two main difficulties affected the information-gathering process overall. The first is that companies operating in a commercial market place are wary of being seen to criticise their clients and will often prefer to keep quiet about perceived discrimination. We did not receive a large number of completed questionnaires in relation to the degree of publicity from which the Review benefited (see Annex F). Where firms have provided examples of difficulties in accessing markets, the information given has tended to be vague and mostly anecdotal. One respondent described the process of trying to get evidence from their subsidiaries as “getting blood out of a stone”.
- 2.1.8. Despite these difficulties, and although the sample is by no means statistically representative, the consultation has enabled us to gather soundings from UK-based firms and identify where problem areas are perceived to lie. Although there is variation across industrial sectors, there is also substantial consensus in the results obtained.
- 2.1.9. The Review has been informed by documentary sources of information including previous work on procurement (such as the Kelly Report<sup>7</sup> and relevant European Commission publications) but has aimed not to duplicate any of this work (see Annex L for details of documentary information).

## 2.2. Definitions

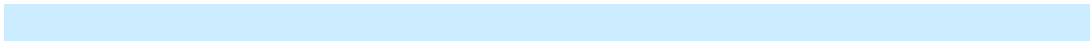
2.2.1. For the purposes of the Review:

- A UK firm was considered to be any firm with an office in the UK, whether or not its parent company originates in another country, or its headquarters are located elsewhere.
- The EU does not include the ten new Member States that joined on 1 May 2004, as the consultation pre-dates their accession.

2.2.2. The Review was led by Alan Wood, supported by an Office of Government Commerce project team and advised by a Steering Group (see Annex B for further details).

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<sup>7</sup> *Increasing Capacity and Improving Long Term Capacity Planning in the Government Marketplace*, OGC, 2003 (<http://www.ogc.gov.uk/index.asp?id=1000987>).



## 3 .... Public procurement in the Single Market

### 3.1. Introduction

3.1.1. Before we explore the experiences of UK firms in competing for public procurement contracts in other EU countries, it will be helpful to set out the framework in which this activity takes place, in terms of market size, specific procurement regulation, policy considerations and wider regulatory issues.

### 3.2. Size and shape of the public procurement market

3.2.1. Public procurement represents a significant slice of the EU economy: 16 percent of EU gross domestic product, or €1,500bn per annum. Less than 10 percent of public purchasing in the EU is accounted for by direct cross-border trade.<sup>8</sup> This is half the amount found in the private sector.<sup>9</sup> These figures suggest that public procurement in the EU has some way to go in terms of opening up fully to foreign competition.

3.2.2. Figures for cross-border trade do not tell the whole story, however. Many firms pursue a strategy of selling to purchasers from a subsidiary located within the same Member State, with their headquarters being in another Member State, or outside the EU altogether. This is defined by the European Commission as indirect cross-border trade and represents around 30 percent of European public procurement.<sup>10</sup>

3.2.3. The true extent of competition in public purchasing in the EU, whether or not cross-border, is also difficult to ascertain because purchasers do not always follow the requirement to publish notices of contract awards.

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<sup>8</sup> Defined as a firm based in one Member State selling to a buyer in another.

<sup>9</sup> *Internal Market Strategy, Priorities 2003 - 2006*, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, May 2003, COM (2003) 238.

<sup>10</sup> A Report on the Functioning of Public Procurement Markets in the EU: benefits from the application of EU Directives and challenges for the future, European Commission, February 2004.

### 3.3. EU regulatory framework for public procurement

3.3.1. Public procurement in the EU is carried out within a specific regulatory framework made up of a set of common, fairly complex rules. These apply to all public purchasers from the largest government department to the smallest local authority.

3.3.2. These rules aim to ensure that the large volumes of public procurement expenditure, as set out above, are not protected from competitive pressure:

*“The open and transparent tendering processes required under EU law mean more competition, stronger safeguards against corruption and better service and value-for-money for taxpayers”.*<sup>11</sup>

3.3.3. Utilities in sectors which still have monopoly rights to provide services are also covered - by a separate set of rules - even when they are private sector bodies.

3.3.4. The detailed procedural rules are set out in EU public procurement directives.<sup>12</sup> These include a requirement to publish calls for competition in the Official Journal of the European Union (OJEU). High-value contracts<sup>13</sup> must follow these rules in most cases.

3.3.5. The rules in the Single Market directives on procurement do not cover every possible purchase, however. The following types of contracts are either partly or wholly exempt from the directives: low value contracts,<sup>14</sup> contracts for certain types of service (known as “Part B services”), contracts in specific sectors (such as some transport services), and contracts for certain types of commercial arrangement (such as service concessions or franchises).

3.3.6. Most of the public procurements which are partly or wholly exempt from the directives, must still respect Treaty<sup>15</sup> principles of non-discrimination on grounds of nationality, equal treatment of tenderers, transparency in contract award procedures and freedom of movement for suppliers. They must be carried out in line with judgements made by the European Court of Justice (ECJ), which make up EU jurisprudence. These contracts will normally be subject to competition, using advertisements as appropriate, and the procurement process must not discriminate on grounds of nationality. But advertisements are not required to appear in the Official Journal of the European Union (OJEU). This can make it more difficult for UK firms to learn about contract opportunities.

<sup>11</sup> *Public procurement: Commission acts against six Member States*, EC / DG MARKT press release, 17/07/2003, ref. IP/03/1037.

<sup>12</sup> The EU public procurement directives are set out on <http://simap.eu.int/EN/pub/src/en>

<sup>13</sup> EU contract thresholds are shown on the following web page: <http://www.ogc.gov.uk/index.asp?id=397>

<sup>14</sup> Beneath the EU thresholds, as set out on <http://www.ogc.gov.uk/index.asp?id=397>

<sup>15</sup> The Treaty establishing the European Community sets out requirements on Member States to remove obstacles to the free movement of goods, persons, services and capital. The Treaty was issued in 1957 (Treaty of Rome) and amended most recently by the Treaty of Nice in 2001.

- 3.3.7. Some contracts are totally exempt from all EU public procurement rules, including from Treaty obligations and jurisprudence. This is the case for defence contracts for “warlike goods and services”; for some franchises (if they are not subject to a services contract, for example); for most purchases by private sector bodies;<sup>16</sup> or for “in-house” supply where a public body provides a service to itself.<sup>17</sup>
- 3.3.8. A consequence of the above is that a closed market may be permitted under EU public procurement law. Respondents to this Review have cited difficulties arising in two sectors, for example, where contracts are not always fully covered by the EU procurement rules: public transport services and defence.
- 3.3.9. A simplified guide to the sectors where coverage is partial is set out in the table overleaf. Further details are in Annex G.

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<sup>16</sup> Private sector bodies are usually exempt from EU public procurement rules unless they are a Utility (as defined in the Utilities directive 93/38/EEC as amended by Directive 98/4/EC), or a Body governed by Public Law, (as defined in the EU public procurement directives), in which case they must follow EU procurement rules. Some universities, for example, are private sector bodies which are covered by EU procurement rules by virtue of being a Body Governed by Public Law.

<sup>17</sup> Subject to the provisions set out in ECJ case ‘Teckal’: C-107/98 - Teckal v AGAC.

## Purchases by public sector bodies or utilities

(The EU rules do not usually apply to purchases by private sector bodies, unless they are utilities or 'Bodies governed by public law')

Sector	Fully covered <sup>A</sup>	Partly covered <sup>B</sup>	Exempt <sup>C</sup>	Remarks
<b>DEFENCE</b>				
"warlike"			X	
dual use	X	X	X	Interpretation varies, leading to variation in practice.
non-"warlike" supplies e.g. clothing, food	X		X	Practice varies: clothing may be interpreted by some Member States as for military use, and so exempt as "warlike".
<b>ENERGY</b>				
infrastructure	X	X		May be covered by either utilities or public sector rules depending on which body is making the investment.
supplies	X	X		As above.
services	X	X		May be covered by either utilities or public sector rules depending on which body is making the investment.
<b>HEALTH</b>				
services	X	X		Full procedural rules do not apply to specified health services (known as "part B" services).
supplies	X			
<b>TRANSPORT</b>				
services (public sector requirements)	X (buses, trams,; metro, trains, 'planes)	X (rail, ferries)		Rail franchises may be exempt from the rules if they are not considered to be 'public service contracts'; transport service concessions are partly covered.

A/ Fully Covered: Directives, Treaty and Jurisprudence apply

B/ Partly covered: Supplies, Works and Services Directives<sup>18</sup> apply partially or not at all, OR that Utilities Directive<sup>19</sup> applies; Treaty and Jurisprudence apply in all cases

C/ Exempt: Directives, Treaty & Jurisprudence do not apply

<sup>18</sup> The Public Supplies Directive 93/36/EEC, The Public Works Directive 93/37/EEC, The Public Services Directive 92/50/EEC, all as amended by Directive 97/52/EEC; all soon to be amended, following implementation by Member States into national law, of new consolidated public procurement directives adopted in 2004: 2004/17/EC and 2004/18/EC.

<sup>19</sup> The Utilities Directive 93/38/EEC as amended by Directive 98/4/EC.

### 3.4. Government policy on public procurement

- 3.4.1. It is often erroneously believed that EU rules require contracts to be awarded on the basis of lowest price. In fact public purchasers can choose under EU rules either to award a contract on the basis of lowest price or to award according to the “most economically advantageous tender” including criteria other than price, such as quality, delivery time, whole-life cost, or aesthetic appeal.
- 3.4.2. If the supplier tendering with the lowest-priced offer is not selected, the award criteria used by the procuring authority will be highly relevant when assessing whether the supplier was unfairly rejected. Tender advertisements must state which criteria are to be applied and these must not change during the procurement process. Procuring authorities are required to publish details of contract awards and to include information on the award criteria used.
- 3.4.3. Environmental or social factors may also be taken into account in public procurement, within certain constraints. Award criteria relating to environmental or social issues must be directly relevant to the subject matter of the contract and should already feature in the specification set out in the contract advertisement or the invitation to tender documentation. They must also comply with Treaty principles. Any award criterion, specification, or contract condition that confers preference to national or other “local” sources of goods, services or staff is illegal, as it is inconsistent with Treaty principles of non-discrimination and equal treatment.

### 3.5. The UK approach

- 3.5.1. UK Government policy is that strong markets and competition are essential if public authorities are to gain the maximum value from the goods and services which they procure from the private sector. Equally, effective competition in public procurement helps to ensure that businesses have a clear incentive to develop innovative and cost-effective solutions, which enable them to compete effectively in other markets.
- 3.5.2. It is UK policy to award contracts, not on grounds of lowest cost, but on the basis of “most economically advantageous tender” (MEAT). This concept, as set out in the EU rules, fits closely with the UK concept of “value-for-money” which is defined as “*the optimum combination of whole-life cost and quality to meet the user’s requirement*”.<sup>20</sup> This means that in the UK, public procurers must select the bid that offers the best overall combination of price and quality. Quality is not assessed in absolute terms, but rather in terms of how closely the goods and services meet the requirements set out in contract specifications. Government policy is that value-for-money should normally be the basis for all public procurement, having due regard to propriety and regularity.

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<sup>20</sup> *Government Accounting*, Chapter 22, available on the following web page:

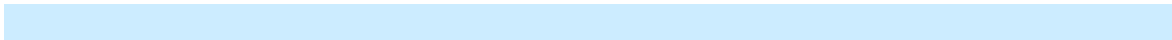
<http://www.government-accounting.gov.uk/current/frames.htm>

## 3.6. Wider issues

- 3.6.1. There are a number of factors, other than Single Market public procurement rules, which have a strong effect on the structure of EU public procurement markets. These will have a bearing on the experiences of UK-based firms in competing for public contracts in other EU countries.
- 3.6.2. Different speeds of market liberalisation, for example, mean that in some sectors, national providers may legally be granted a special or exclusive right to run a service, such as public transport or energy distribution.
- 3.6.3. The wide variety of standards across the EU is an important factor, as is the movement towards harmonisation and mutual recognition of standards and efforts to deal with remaining obstacles.
- 3.6.4. State aid can affect the extent of competition within markets. Although there are common EU rules on state aid (separate to EU procurement rules) which outlaw distortive aid, there remain significant disparities between Member States in the volumes of aid provided.
- 3.6.5. State ownership can be a concern, as many firms which are in private hands in the UK, are state-owned in other EU Member States. This can be seen to affect the 'level-playing field' for British firms.
- 3.6.6. Finally there are specific difficulties in relation to services, either due to partial exemptions from EU rules, or to the slow progress of regulatory harmonisation of the Single Market.
- 3.6.7. All of these issues are explored further in the next section, which sets out the findings of the Review.

## 3.7. Current work on public procurement

- 3.7.1. Public procurement has recently become a strong focus of interest and a number of studies have been carried out. Some of the key publications are listed in Annex L.



## 4 .... Findings

### General & regulatory issues

#### 4.1. Experiences of European public procurement are diverse

- 4.1.1. State aid can affect the extent of competition within markets. Although there are common EU rules on state aid (separate to EU procurement rules) which outlaw distortive aid, there remain significant disparities between Member States in the volumes of aid provided.
- 4.1.2. State ownership can be a concern, as many firms which are in private hands in the UK, are state-owned in other EU Member States. This can be seen to affect the 'level-playing field' for British firms.

#### SMEs have more difficulties

- 4.1.3. Small and medium firms (SMEs)<sup>21</sup> generally have greater difficulties in accessing European public contracts than larger firms. It should be noted, for example, that 90 percent of SMEs operate in services which, as a sector is notorious for encountering more cross-border difficulties than supplies. The difficulties (whether in the UK or abroad) have been well documented (see Annex L) and include lack of information on smaller value contracts (not required to be advertised under EU public procurement rules); concerns about financial viability, high risks, cost and time input required; and difficulties for smaller firms in accessing relevant competences (for example, linguistic, cultural or legal.). The SME trade associations contacted for this Review declined to participate actively on the grounds that European public procurement was not a high priority for their members. European Commission work shows that the SMEs which do win public procurement contracts in the EU are generally experienced in the process, having carried out a high number of bids: 80 percent of them have identified bidding for public procurement contracts as a key part of their strategy.<sup>22</sup>
- 4.1.4. For the SME respondents to the Review that expressed an interest in EU public procurement, the main need is seen to be for practical support and help, either from UK authorities or from other UK businesses.

<sup>21</sup> Defined by the European Commission as consisting of 250 or fewer employees in *The Access of SMEs to public procurement contracts*, EIM Business & Policy Research for the European Commission, December 2003.

<sup>22</sup> *The Access of SMEs to public procurement contracts*, EIM Business & Policy Research for the European Commission, December 2003.

- 4.1.5. Larger firms are more autonomous in terms of access to information and know-how, but look to Government to provide lobbying and influencing in support of greater Single Market integration, and strategic or tactical support on specific high value bids. They also desire good commercial relations with UK public purchasing authorities in terms of predictability of deal flow in the home market.

### **Sectors, countries and regions are diverse**

- 4.1.6. Firms encounter specific concerns and issues according to the sector in which they operate. Those working in strong markets (telecoms, IT or health supplies for example) appear less concerned about discrimination. They are able to find clients and to grow successfully - whether in the UK, the EU or other markets - by focusing their efforts where greatest profits are to be made. They either avoid difficult markets, or accept that they are sufficiently lucrative to justify the effort and resource involved in adapting to them:

*“France always has and always will have its own slant on interpretation of rules, but that is just something we have had to learn to live with. We want to be in that market and we adapt.”*  
Manager, manufacturing firm.

- 4.1.7. Respondents operating in the area of public private partnerships mentioned that although the UK market might be easier to enter for foreign suppliers than the reverse, there is so much demand in the UK – more than the home supply base has the capacity to meet – that this is not an over-riding concern.

- 4.1.8. UK suppliers encounter regional variations in public procurement policies and practices throughout the EU:

*“Whatever the central government policy, the policy in different areas can be somewhat variable; the policy in Southern Italy is going to be wildly different to that in Northern Italy.”*  
Director, Trade body.

### **Comment**

- 4.1.9. Bearing this variety in mind should help prevent simplistic generalisations on European public procurement. Although there are common factors, many barriers encountered by UK firms are more or less pronounced depending on the market sector, the size of the firm and the region or country involved.

**Related recommendation:****L and M on building supplier understanding of success factors****4.2. European public procurement is not an easy exercise**

*“Even employing native staff, it’s taken around 10 years to understand the German market. The cost of this is inestimable.”* Manager service provider.

*“Patience is a major success factor.”* Manager service provider.

**European public procurement combines public procurement difficulties with those of exporting**

*“It’s hard enough doing public procurement here in the UK. We wouldn’t even think about doing it in the EU.”* Manager SME.

- 4.2.1. European public procurement markets are not easy to succeed in. Before looking at the specific barriers encountered by UK-based firms, it is important to understand the generic constraints involved. Competing for public procurement contracts in other EU countries combines all the difficulties of competing for public procurement contracts in the UK with those inherent to exporting (and which are similar for both public and private markets).
- 4.2.2. The public procurement process in other EU countries, as well as in the UK can be a lengthy, costly process, requiring a good understanding of the public sector environment and institutional context. This is particularly true for complex services. Clients operate mostly on a local or national scale (so there is little chance of one part of a public organisation recommending the supplier to another part of the organisation located in a different country) and supplier experiences in other countries may count for little. The process must operate within the legal framework of a complex set of EU public procurement rules and within national public procurement policy as set out in Chapter 3 of this report (Public Procurement in the Single Market) and in Annex G.
- 4.2.3. Added to this, firms engaging in public procurement in other EU countries must deal with generic exporting difficulties. These include geographical distance, linguistic and cultural differences, lesser familiarity with the institutional environment, higher risks and bid costs and greater resource commitments. Firms usually have less developed relationship networks in target markets and must learn to deal with different business practices, consumer preferences and technical standards, as well as the risk of suffering from protectionism or favouritism shown towards local firms:

*“We use a disproportionate amount of management time to work the various systems in Europe when we could actually be out there attacking the market more. I suspect that 20 percent of our time is thinking about how to work through the highly customised approaches to get a reasonable chance of success.”* Chief Executive, service provider.

- 4.2.4. Most of the larger respondents with successful experience of EU public procurement have a clear country-entry strategy, often with a list of criteria (such as deal flow, market potential, and tradition of successful international competition) which must be present before they will consider investing in a market. Some belong to a multi-national network, in which case they are likely to have local subsidiaries in each of the major markets. Some large firms simply will not compete in a foreign market if they do not have a local subsidiary.

## Comment

- 4.2.5. Because European public procurement is a difficult exercise, involving many barriers common to both public procurement and export activities, it is particularly important to get the business basics right. A clear country-entry strategy is essential, based on market research, and identifying the benefits and profits to be gained in compensation for high costs and risk. Smaller firms need to have reached an appropriate stage in the company’s development, before targeting export markets. Advisors from UK Trade and Investment (UKTI)<sup>23</sup> and Euro-Info Centres (EICs)<sup>24</sup> recommend that SMEs think long and hard before engaging in European public procurement to ensure they have the capability for it. UKTI offers a self-diagnostic questionnaire to help SMEs assess whether they are ready to export.<sup>25</sup> Euro-Info Centres (EICs) will usually advise firms to think about their capability in terms of how innovative or competitive their products are and what their track record is, how long have they been in business, whether they have the necessary internal resources, time, and ability to manage cash flow. These can help companies decide whether they are geared up to succeed in competition for procurement contracts.

### Related recommendations:

**L and M on building supplier understanding of success factors**

<sup>23</sup> <http://www.tradepartners.gov.uk/>

<sup>24</sup> <http://europa.eu.int/comm/enterprise/networks/eic/eic.html>

<sup>25</sup> *Are you ready to export?* is available on <http://www.trade.uktradeinvest.gov.uk/>

### 4.3. Single Market rules on public procurement are not the problem

*“It is easy to find problems and criticisms with the EU procurement system but it’s as good if not better than many other selection processes. Working the OJEU system to maximum effect is a key priority for me in a business development role”, Director, service provider.*

*“I would say OJEU is good; it is in a way, how you guarantee you’re going to get an international procurement going, so I’m a big fan of that. I think it’s one of the clear mechanisms.” Director Service provider.*

- 4.3.1. Most people consulted felt that Single Market public procurement rules were more of a help than a hindrance. At worst, they were described as having no effect. But even if they provide no other benefit, at least they ensure that high-value public procurements are advertised in the Official Journal of the European Union (OJEU) and so are accessible to bidders across the EU. As one respondent expressed it, the OJEU does not help you win business, but it gives you the opportunity to compete.
- 4.3.2. Some firms express concern about timescales. A common complaint is that if you become aware of an opportunity for the first time when it appears in the OJEU, it is too late to compete. But others point out that timescales can be just as short, if not shorter, in private markets. One of the key messages from the Review is that business success and good practice requires continuous dialogue with clients. Firms which do not have a strong enough relationship with their client to hear about tenders in advance of publication in OJEU, would be disadvantaged anyway, regardless of the lead times announced in the tender notice.
- 4.3.3. EU markets are not seen as the most difficult to penetrate. A trade body director said that despite some difficulties, the EU is overall a good market for British firms. Others markets - Latin America for example - are felt to be far more difficult. Japan was mentioned a number of times as being more difficult than the EU from a linguistic and cultural point of view. And the US operates a “Buy America” policy, which EU Member States are precluded from doing by EU public procurement rules.

#### Comment

- 4.3.4. EU public procurement rules act as enablers. There does not appear to be much that is inherently wrong with them and firms are not clamouring for them to be changed significantly. They are not in themselves a magic solution for achieving a unified EU marketplace, but they do contribute to:
- better awareness of contract opportunities across the EU;
  - achieving some consistency in public procurement processes;
  - reducing opportunities for corruption;
  - promoting ideals of transparent, fair and open procurement.

- 4.3.5. Transparency has increased since the EU public procurement directives were adopted, with the number of invitations to tender and contract award notices published by Member States both doubling between 1995 and 2002. Progressive cross-border market integration is apparent in that intra-EU trade for a range of typical public procurement goods has been shown to have increased in comparison to extra-EU trade. Import and export prices have also converged.<sup>26</sup>

#### Related recommendations:

#### L and M on building supplier understanding of success factors

### 4.4. EU public procurement rules are only part of the regulatory environment

- 4.4.1. Public procurement rules are only part of the overall regulatory environment affecting free movement of goods and services across the EU. Regulatory barriers - such as access to markets, local price regulations and procedural rules - are seen to be more significant than public procurement barriers. Some sectors are very heterogeneous, lacking common standards, regulations and administrative procedures across borders. This is the case for architectural services for example, where even the definition of an architect varies from country to country.

- 4.4.2. Contractual procedures and contract law also vary from one country to another, so firms must adapt to different sets of terms and conditions across the EU. In some countries, national public procurement processes are very legalistic. British suppliers can find it difficult to navigate such systems:

*“A rigid legislative framework is culturally very difficult for Britain to deal with; unless you’ve spent a long time working in those sorts of jurisdictions and are astute enough to know to ask questions, you will get tripped up all over the place.”* Manager, service provider.

- 4.4.3. There are also differing interpretations of TUPE regulations on staff transfers (particularly relevant for contracts involving outsourcing to the private sector),<sup>27</sup> which can constitute barriers to access by generating large exit costs after contract delivery.

<sup>26</sup> A report on the functioning of public procurement markets in the EU: benefits from the application of EU directives and challenges for the future, European Commission, February 2004.

<sup>27</sup> TUPE regulations - The Transfer of Undertakings (Protection of Employment) Regulations 1981 - are legal provisions made in relation to rights and obligations relating to employers and employees, excluding pension provisions, when businesses or parts of businesses are transferred or merged. The Regulations were originally introduced to implement the EC Acquired Rights Directive (77/187/EEC). They have been amended a number of times and a new consolidated version is in the process of being drafted.

4.4.4. The Director of a large service provider described the Greek public procurement system as being “amongst the most difficult for foreigners to navigate”, with administrative and regulatory “roadblocks which could be interpreted as being designed to keep non-domestic suppliers out”. A trade body Director was particularly concerned about procedures involved in bidding for Athens Olympic games contracts. These were said to be “very arcane” and appeared to be designed to make it extremely difficult for foreign firms to compete. Despite being compatible with the EU public procurement rules, their practical effect would have been to reduce foreign competition. Such concerns may not be limited to public sector contracts, however. One chief executive mentioned the attempt by British ski schools to offer classes on French slopes, in competition with the Ecole du Ski Francais. To do so, they needed a seasonal licence which was re-issued every year, but in April, after the end of the ski-ing season.

### **Differences in standards are a key Single Market issue**

4.4.5. Many suppliers feel that even legitimate uses of national standards can favour local suppliers. DIN standards in Germany were mentioned a number of times as making it difficult and expensive to get into the German market,<sup>28</sup> as were requirements for TÜV certificates.<sup>29</sup> ). TÜV requirements can vary across the Länder. It can also be difficult for firms based outside Germany to get local insurance without TÜV registration. The trade team in the British embassy in Germany is often asked to help British exporters navigate the lengthy and costly accreditation process (one firm nearly went bankrupt in the process

### **Comment**

4.4.6. Clearly compliance with EU public procurement rules is not the sole factor affecting the openness to UK suppliers of public markets in other EU countries. More general barriers to trade are present which cannot be affected by changes to the public procurement regime, but rather by targeted legislation and policy.

4.4.7. Action is on-going at EU level to improve trade in services,<sup>30</sup> both through sector-specific measures (in financial services,<sup>31</sup> transport, energy) and proposals for a framework Services

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<sup>28</sup> National standards are only permitted when no harmonised European standard has been made. If a European standard has been produced the national standards body (DIN in this case) is obliged to withdraw conflicting national standards. The only situation where this does not happen, or where progress tends to be slow, is if the national standard is referenced in legislation. This is typically what happens in Germany.

<sup>29</sup> Technical Surveillance Association.

<sup>30</sup> Currently 70 percent of EU GDP is in services yet only 20 percent of this is intra-EU trade (*The State of the Internal Market for Services*, Report from the Commission to the Council and the European Parliament, 30 July 2002, COM(2002) 441 Final).

<sup>31</sup> *The EU Financial Services Action Plan* consists of a set of measures intended by 2005 to fill gaps and remove the remaining barriers to a single market in financial services across the EU.

Directive, which aims to cover around 50 percent of economic activity in the EU<sup>32</sup> and to create a genuine internal market in services by 2010. The proposal includes provisions for greater mutual recognition of national standards. It also sets out that national certification schemes, such as TÜV, should not involve an unnecessary level of bureaucracy, which could dissuade foreign firms. In the words of Frits Bolkestein, as Internal Market Commissioner:

*“We need to set our service businesses free, so that they can grow and create the sustainable jobs Europe needs. We cannot expect European businesses to set the global competitiveness standard or to give their customers the quality and choice they deserve while they still have their hands tied behind their backs by national red tape, eleven years after the 1993 deadline for creating a real Internal Market.”*<sup>33</sup>

- 4.4.8. There is an issue of consumer or buyer preferences, which is not strictly a standards issue but frequently identified as such. For example, the favourite crisp flavour for UK consumers is *ready salted*, whereas for Europe as a whole it is *paprika*.<sup>34</sup> German public procurers prefer their filing cabinets in a different shade of grey to UK public procurers, and Scandinavian health purchasers insist on blue machinery. Such differences are not just about individual preference, but also relate to wider cultural differences. Manufacturers’ surveys show that small cars in the UK are perceived as “girly” because they are almost exclusively purchased by, or for, women. In Spain they are the car of choice for small couples starting out in married life; in Germany they are chosen by lower socio-economic classes. No amount of *regulatory* harmonisation will change buyer, or cultural preferences. Such issues are inherent to exporting, and do not constitute a regulatory barrier to accessing public procurement contracts, or any other type of contract.
- 4.4.9. Standards constitute a regulatory issue when there are concerns about illegal use of national standards instead of EU-wide standards<sup>35</sup> or when lack of harmonisation or mutual recognition are a barrier to freedom of movement. In relation to DIN standards and TÜV certification requirements, German authorities are entitled to require such national standards or requirements if equivalent EU or international rules do not exist, for example if German quality requirements in a particular domain are higher than those of international standards. There would be illegal use, however, if German authorities refused to accept equivalent standards or requirements from other

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<sup>32</sup> *The State of the Internal Market for Services*, Report from the Commission to the Council and the European Parliament, 30 July 2002, COM(2002) 441 Final.

<sup>33</sup> *Services: Commission proposes Directive to cut red tape that stifles Europe's competitiveness*, EC press release, 13 January 2004.

<sup>34</sup> From <http://www.esa.org.uk/>

<sup>35</sup> The procurement rules require the best non-discriminatory approach. They require reference to be made to European standards where these exist. Where they do not, reference to national standards in tender notices and contract documentation cannot be used to discriminate against non-national suppliers, and equivalents must be accepted. Reference to brand names is not permitted.

Member States, for example where third party certification clearly demonstrated such equivalence.<sup>36</sup>

- 4.4.10. Agreeing common EU rules (e.g. directives) on technical standards, or agreeing common standards is a lengthy and multifaceted process. “Levelling down” may compromise consumer safety, and “levelling up” may create barriers. “Mutual recognition” of national standards raises the issue of how to establish equivalence, and a number of national derogations remain because of national regulatory requirements, or because of derogations from EU regulations. In the construction market, for example, only 22 percent of the 600 standards needed to create a genuine Single Market had been adopted by 2002.<sup>37</sup>
- 4.4.11. The European Commission has continually pushed for progress and is currently consulting Member States on the best way forward. National industry bodies influence national standards bodies, which in turn influence European Standards Organisations (CEN, CENELEC and ETSI). In order to reduce barriers, standards could become more outcome based, only focussing on the aspect of the product that needs standardising. Industry can and should contribute to standards improvements by participating actively in the process.
- 4.4.12. For specific countries and sectors, help can be provided to ensure UK suppliers are able to adapt successfully. There are TÜV offices in the UK, for example, to help firms in exporting to Germany, and there is a “Technical Help for Exporters” office as part of the British Standards Institution (BSI). The Commercial section of the British Consulate in Düsseldorf notes that the number of complaints regarding TÜV and DIN issues has decreased in recent years. This is possibly related to the fact that DIN and British standards have in many cases been harmonised, that it is increasingly easy to obtain translations of DIN standards, and to the fact that TÜV is now an accepted testing institution throughout Europe and Asia so acts as a one-stop shop for access to several markets.

**Related recommendations:**

**B, C, D, E and G on opening markets**

**L and M on building supplier understanding of success factors**

<sup>36</sup> See guidance on technical standards and equivalence issued by the Office of Government Commerce on the following web page: <http://www.ogc.gov.uk/index.asp?id=405>.

<sup>37</sup> *Internal Market Strategy Priorities 2003-2006*, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, May 2003.

## Application of Single Market public procurement rules

### 4.5. Direct discrimination is infrequent, anecdotal and difficult to prove

*"It's been bluntly, absolutely disgraceful - even coming publicly from Ministers, the attitude that 'it doesn't matter about all these EU regulations, our role is to ensure all these contracts go to local contractors.'" Director, trade association.*

*"I know this happened, but can I give you anything that proves it happened? Of course I can't."*  
Director, trade body.

*"It is hints and whispers and interpretations rather than explicit factors."* Director, service provider.

#### **Most people consulted claimed not to have encountered discrimination in direct breach of EU public procurement rules.**

4.5.1. Four out of the twelve firms interviewed in-depth mentioned incidents that they believed demonstrated a breach, as did one in eight of the trade bodies consulted. Of the 20 individuals consulted informally and over thirty firms consulted at round-tables, none mentioned breaches. In the questionnaires, various examples of alleged discrimination were provided, but none of these appears conclusively to demonstrate breaches of the rules.

#### **It is difficult to substantiate claims made: most examples of direct discrimination remain anecdotal**

4.5.2. An industrial firm competing for a regional contract in Spain offered the lowest cost and best technical specification, and yet lost to a firm whose local partner was contributing to the appropriate political party and had already won many bids with the authority.

4.5.3. We have not had access to the documented facts in this case. It would clearly be illegal for the procuring authority to award a contract to a firm on the basis of their contributions to a political party. It is possible, however, that the successful tenderer may have simply put in the best bid. The unsuccessful UK-based tenderer may have offered better quality, but this could have been in excess of the requirements of the specification, which could mean that a lower quality, lower priced bid would be more suitable. It is difficult to challenge in such cases, as EU public procurement rules do not govern the substance of the award decision, but rather the procedural rules to be followed, and the grounds on which the decision must be taken (lowest price, or most economically advantageous tender). This example demonstrates how, in the absence of firm evidence, it can be difficult to evaluate allegations of discrimination.

- 4.5.4. Works carried out in Italy under PFI-type contracts have sometimes been required to award 30 percent of the work to local sub-contractors. Also in the transport sector, it is said to be a pre-qualification requirement that firms must already be operating in the area where the service they are tendering for will take place.
- 4.5.5. In relation to PFI-type contracts, requirements for a certain percentage of works to be reserved to local firms it could be a breach of the Treaty and therefore open to challenge. Requiring previous operations in an area as a pre-qualification criterion for a transport tender could also be a breach of Treaty principles and could be raised as an issue with Italian purchasing authorities, in a national court, with the European Commission, or through an informal problem-solving network such as the European Public Procurement Network (PPN).<sup>38</sup> One of the firms we spoke to explained that rather than challenging such conditions, they simply acquire local firms. If they want to extend their regional reach, they operate through joint-ventures with other firms. Rather than complaining through formal channels, the firm has sought pragmatic solutions to the difficulties.
- 4.5.6. A UK firm was invited to submit a bid for an electronics contract in France. The only other bidder was a French firm. The UK firm was told they had lost on technical grounds. They believed their bid to be technically compliant, as well as being 10 percent lower on cost than that of their competitor and with better delivery terms. They strongly felt that the invitation to bid had been made solely to satisfy the need to generate apparent competition. When no information was forthcoming from the procuring authority as to how the decision was reached (as required under EU rules) and no satisfactory response was received to lobbying by the UK ambassador with the appropriate French minister, the UK firm opted to take legal action.
- 4.5.7. The example given above is fairly precise in terms of detail, and the UK firm is obviously aware of its rights under EU rules. It remains to be seen whether the legal challenge will prove successful. Even if the case is lost, however, it will demonstrate to the procuring authority that firms are in some cases prepared to defend their rights, by legal action if necessary.

## Comment

- 4.5.8. It is sometimes difficult to distinguish between a situation that involves discrimination and the normal difficulties of doing business abroad – or doing business at all. Most of the examples of

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<sup>38</sup> The PPN is a group of senior procurement policy officials from all EU Member States including candidate countries (Turkey, Romania, Bulgaria) and EFTA countries (Norway, Switzerland, Iceland, Liechtenstein). It has two aspects: a best practice forum for exchange of information and techniques; and an informal problem-solving function for companies in one country which are experiencing difficulties in a procurement process in another country at the pre-contract award stage. UK firms who think they are being discriminated against unfairly in a public procurement procedure should contact OGC PPN contact: [ppn@ogc.gsi.gov.uk](mailto:ppn@ogc.gsi.gov.uk) or the UK SOLVIT centre based in DTI's Action Single Market Unit: [asm@dti.gsi.gov.uk](mailto:asm@dti.gsi.gov.uk) or Tel 020 7215 4481.

alleged discrimination in breach of the rules are anecdotal. We have not received any documentary evidence, nor would we have the power to request it.

- 4.5.9. This does not mean that illegal discrimination does not occur. Indeed the European Commission regularly launches procurement infringement proceedings against Member States suspected of breaching EU rules on public procurement.<sup>39</sup> But even where cases are well documented, it can be difficult to assess their substance. Whereas some allegations are clear-cut, with evidence unequivocally supporting either the aggrieved bidder, or the purchasing authority, many cases are complex and it is often difficult to pronounce in favour of either party.
- 4.5.10. It was also made clear to us that this is not the main area of concern for most firms consulted (see section 4.5.1 for more detail on suppliers' reluctance to use legal remedies).

**Related recommendations:**

**A, H and J on best practice in public procurement**

**N and O on building supplier ability to challenge unfair contract awards**

## **4.6. There are “grey areas” where local suppliers appear to be favoured**

*“The general impression comes over that the whole business is deliberately made as difficult as possible.”* Manager, service provider.

*“The only point in the country where you are authorised to bring in these goods is somewhere deeply inaccessible and you can only do it on a Wednesday afternoon at 4 o'clock!”* Policy advisor, trade body.

- 4.6.1. Interviewees were more concerned about “grey areas” where, despite the EU public procurement rules being respected, local firms appear to be favoured, without it being possible to prove this. Some examples of “grey area”-type situations are provided below.

### **Excessively close relationships between procuring authorities and national suppliers**

- 4.6.2. Two interviewees mentioned that close ‘historical’ relationships between procuring authorities and recently privatised, national suppliers appear to give incumbent suppliers an advantage in winning public contracts. Some German local authorities were said to have applied political pressure so that local firms won bids and contributed to local employment, even where they were not

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<sup>39</sup>: For details of public procurement infringement cases, known as infractions, see the following web page: [http://europa.eu.int/comm/internal\\_market/publicprocurement/infringements\\_en.htm](http://europa.eu.int/comm/internal_market/publicprocurement/infringements_en.htm).

necessarily the best supplier for the job. This is usually impossible to prove. One UK supplier won a military bid on price and performance, but the procurement was stalled (and subsequently cancelled) when it reached the stage of political approval, following high-level lobbying from the competitor. One unsuccessful bidder for a service contract in the Netherlands came very close to mounting a legal challenge on the grounds that the successful bidder's close relationship with the purchasing authority had enabled it to win the bid, and that it was 'common knowledge' that EU procedures were not being respected. They decided not to proceed so as not to damage their relationship with the purchasing authority in the hope of winning future business.

### **'False' competition**

4.6.3. Various respondents mentioned the problem of 'false tenders' where international bids are invited but there is little intention of awarding a contract to a non-national firm. Sometimes these exercises are said to be carried out on grounds of price, so as to drive down the cost of the favoured local bidder. An IT firm bid for a contract in Germany and lost to the incumbent supplier despite offering a 50 percent reduction on the price previously paid by the client. Some mentioned that a large international firm with a strong brand will be invited to tender for reasons of prestige only. To avoid wasting time and resources on such exercises some firms become practised in reading OJEU advertisements carefully, learning to detect the signs that no real competition is intended.

### **Splitting contracts into small lots to avoid detailed procurement rules**

4.6.4. The Director of a trade body explained how he had seen this practice used deliberately to keep contract values below EU thresholds requiring an international competition, so as to prevent foreign suppliers from bidding. The contract was for road surfacing and was split into surfacing of the top half of the road on the one hand, and surfacing of the bottom half on the other – an artificial split which produced no benefit other than avoiding competition and detailed procedural requirements. The contract was regularly re-awarded to the same local supplier.

### **Shaping contract specifications to suit a given product or supplier**

4.6.5. The practice of shaping specifications was mentioned as a common way of reserving contracts for preferred bidders. This occurs when the requirements set out in contract specifications are worded so as to describe the product of a particular manufacturer, or a service requirement tailored to the offering of a particular firm. This makes it much more difficult for other bidders to offer competitive pricing.

### **Price squeezing**

4.6.6. Regulatory burdens affecting market access can be combined with subsidies to national firms. This results in what has been termed *price-squeezing* to keep foreign competition out of a market - particularly where the state has a substantial stake:

*“There does seem to be a direct connection between the size of the stake of public authorities in the local supplier, and the degree of regulatory vigour and hurdles.”* Manager service provider.

### **Influencing sub-contract arrangements to favour local sourcing**

- 4.6.7. Various respondents mentioned that procuring authorities in other EU countries will sometimes seek to influence sub-contracting arrangements or the location of manufacturing for a contract. One bidder for a French public contract was asked in the margins of the procurement process to use a given French supplier, rather than the UK supplier they usually worked with. Main contractors may also be asked to use sub-contractors which have been ‘accredited’ on a supplier list – and suppliers often find such accreditation costly and time-consuming. A leading UK supplier bid as a sub-contractor for a public transport contract in Spain through a locally-based private sector main contractor. The procurement appeared to be proceeding successfully: Spanish-speaking representatives were involved and the firm was told their prices were good and competitive, and that a decision would be forthcoming on a given date. The date came and went and the suppliers’ follow-up calls went unanswered. They were finally told by a manager from a different country-office of the main contractor, that they had lost the contract due to a *“political decision”* to work with a Spanish sub-contractor.
- 4.6.8. Some purchasing authorities require bids to be submitted in a regional language which is not an official European Union language. A manufacturer explained that although the tender documentation for a bid specified that tenderers could submit bids either in English or in the official national language, or in the regional language, it was made clear in the margins of the process that all of the panel spoke the regional language and that not using it would significantly affect bidders’ chances of success.
- 4.6.9. It is illegal to require bids in languages other than official EU languages. In this case, as the request was said to have been made orally in the margins of the contract process, it would be very difficult to prove a breach of the rules.

### **Some incidents occur in procurements which are totally exempt from EU public procurement rules**

- 4.6.10. As set out in Chapter 3 above, defence contracts for “warlike” goods and services are usually exempt from EU rules. As a result, it is possible to favour local firms in this sector without breaching any EU public procurement rules.
- 4.6.11. Concerns have been raised by UK firms that most EU countries opt for a wide interpretation of “warlike”, covering an extensive range of goods and services, whereas in the UK, it is felt that the range of goods identified as “warlike” is narrow. The example most frequently quoted is that of military uniforms and clothing: the UK is said to be the only EU country not to classify military apparel as “warlike” and thus the only one to open up such procurements to competition under the EU rules. As a result, UK manufacturers face competition on their home market, without corresponding opportunities in other EU markets. [*from below*: Respondents also expressed the concern that many other countries pursue offset requirements aggressively through contract

conditions: these require a certain percentage of a contract's value to be invested in local goods and services and often include requirements for local sub-contracting or manufacturing in-country. In the UK industrial participation obligations are not included in the procurement contract, which can lead to a perception amongst suppliers of an 'unlevel playing field'.]

## Comment

- 4.6.12. Anecdotal evidence suggests that in the UK a more critical examination is made of the case for classifying a requirement as “warlike” (and thus exempt from international competition under EU rules) than that which is made in some other EU countries. The number of contracts placed under EU rules is not disproportionate, however. In 2003/04 the MOD issued around 2,500 contracts above EU thresholds, of which only 340 were placed under EU rules.
- 4.6.13. The decision to advertise contracts results from the Government's defence industrial policy of which a key objective is to maintain an environment that enhances the competitiveness of the UK defence industry. Competition in defence procurement is a key part of this policy, so the preferred method of procurement for UK defence requirements is through competitive tender, regardless of whether the goods or services purchased are “warlike”.
- 4.6.14. Contracts for “warlike” goods and services may legitimately specify offset requirements and many EU countries do pursue these through contract conditions. The UK system is different in that bidders are invited to make *industrial participation proposals* under which competitive UK firms are expected to bid for and receive work on merit. Bidders make a commitment to honour these proposals which are set out in a separate agreement to the contract.
- 4.6.15. It is often hard to distinguish how much of a local supplier's success is due to unfair favouritism and how much of it results simply from geographical proximity, shared culture and language, strong relationships, trust and mutual understanding, familiarity with the client organisation and institutional environment, scale on the home market and track record in delivering products or services to similar clients in similar conditions.
- 4.6.16. In other cases, although a British supplier may have been significantly better on price or quality, the successful national tenderer may legitimately have obtained a better score in terms of overall fitness for purpose, as in closer correspondence with the requirements as set out in the contract specifications. One of our respondents tried repeatedly to win cross-border contracts in France and Germany with no success and is now convinced the system is rigged against him. The firm was not using native sales representatives, however, and with no local presence or partnership would have been less familiar with the institutions and have less developed relationships than the competition in “relationship-rich” cultures.
- 4.6.17. Some of the examples given above can be seen either as good or bad practice, depending on the perspective of the supplier. The practice of splitting works contracts into small lots is often seen as a good way of encouraging smaller firms to compete and is enshrined in German law (procuring authorities must justify themselves if they do not split contracts). It is illegal to split

contracts artificially, however, in order to avoid advertising a contract internationally. In terms of best practice, the procuring authority should consider whether splitting a contract is efficient in terms of cost and project management.

- 4.6.18. A similar consideration arises with the issue mentioned above of shaping contract specifications to suit a particular supplier. This can be seen as an issue of systemic practice, to be addressed through better qualification of buyers – by encouraging the use of outcome rather than output specifications, for example, to maximise innovation and widen the supplier base. To an extent it is a normal and healthy commercial practice for suppliers to engage in dialogue with procuring authorities and to influence tender specifications. Service providers with experience of PFI/PPP contracts mentioned the crucial importance of dialogue with procuring authorities well in advance of tender exercises, to ensure viability of bid concepts. Inevitably, such dialogue, particularly if carried out with one main supplier in particular, is likely to result in tender specifications which will suit that supplier. Training should provide buyers with an understanding of the balance to achieve and the ability to be pro-active in this process. Dialogue should be with industry generally, not just one supplier, a principle advocated by the Kelly Report for UK public procurement.
- 4.6.19. Rather than addressing concerns individually, it would appear more helpful to focus on the issue of systemic procurement practice: working with political and procuring authorities across the EU to spread good practice and publicising the benefits of an open-market approach based on competitive tendering. A high-level commitment by national governments to genuine competition, to ensuring conditions which will attract foreign competitors and to furthering best practice and transparency in procurement is more likely to be effective in reducing “grey area”-type incidents than individual complaints.

**Related recommendations:**

**A, B, D, E, and G on increasing competition in EU public procurement markets**

**H and J on best practice in public procurement practice**

**L, M, N and O on building supplier capability (to challenge unfair contract awards and understand success factors)**

## Cultural preferences, political choices and industrial policy

### 4.7. Some cultures instinctively favour their own

*“You have a stronger natural competitive advantage as a German firm bidding in Germany, than you would have as a British firm bidding in Britain [...] there’s something in the psyche, it’s a mentality that spreads right through, a culture which underpins it.”* Director, trade body.

*“Having lived in France and knowing the way they work, I could not call it discrimination - others may!”* Manager, manufacturing firm.

- 4.7.1. There is general agreement amongst respondents to this Review that culture is one of the strongest factors affecting firms seeking to win public contracts in other EU countries. What is seen to be particularly difficult is when it is part of the culture to favour buying locally.
- 4.7.2. France is often mentioned in this context, with a variety of views expressed. Some firms are convinced that French markets, both public and private, are innately biased against foreign firms - without this necessarily being a conscious process. An example given is that of the consumer buying Renault or Citroen because it is French, a behavioural pattern not apparent in the UK, even in sectors where British firms are strong and competitive: *“There is a natural cultural bias which is built into people, about the patriotism towards France”*, Trade body Director. Or as Jonathan Fenby puts it more poetically in his Review of France: *“The authorities in Paris may pay lip service to free trade, but protectionism and state regulation lie deep in the French Soul”*.<sup>40</sup>
- 4.7.3. The French institutional environment is seen to contribute here, with senior business executives moving seamlessly into high-level civil service positions and vice-versa, maintaining strong relations throughout the national elite, exchanging favours and mutual support.
- 4.7.4. Some firms consulted refuse to engage with French public markets. Others felt that French markets could be successfully entered through a pragmatic and sympathetic approach, working with rather than against the culture, using local staff, and on the basis of a strong understanding of the institutional and business environment: *“the only way to do business in France is to go in as a French firm”*, Director, Trade body.

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<sup>40</sup> *On the Brink: the Trouble with France*, p. 149, Jonathan Fenby, 1998, Abacus

**Related recommendations:**

**A, B, D, E, F and G on increasing competition in EU public procurement markets**

**H and J on best practice in public procurement practice**

**M, N and O on building supplier capability (to challenge unfair contract awards and understand success factors)**

## **4.8. Political will is a factor in opening up markets**

*“Politics is part of it there’s no doubt.”* Director, service provider.

*“The Commission is calling for stronger political determination to deliver results for both business and consumers.”* Internal Market Strategy.<sup>41</sup>

4.8.1. In Italy the approach taken by the Prime Minister Silvio Berlusconi, is seen to have opened up markets to foreign firms by embracing private finance initiatives (PFI), for which UK firms with world-leading expertise have been welcomed in and encouraged to tender. Mr Berlusconi is seen to have brought political authority to the process, empowering reformers and giving them permission to take risks.

4.8.2. In Italy the approach taken by the Prime Minister Silvio Berlusconi, is seen to have opened up markets to foreign firms by embracing private finance initiatives (PFI), for which UK firms with world-leading expertise have been welcomed in and encouraged to tender. Mr Berlusconi is seen to have brought political authority to the process, empowering reformers and giving them permission to take risks.

*“The Portuguese, in their pursuit of healthcare, have been over here, they’ve looked around, they’ve talked to people in the industry. They’ve listened to what we’ve done, and why we’ve done it and when they’ve gone back to build their own version they have used an understanding of why we did what we did. So when it comes to bidding in Portugal to the public sector you’ve got someone on the other side of the table you’re able to have a conversation with.”* Director, service provider.

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<sup>41</sup> *Internal Market Strategy Priorities 2003 – 2006*, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, COM (2003) 238(01).

- 4.8.3. Economic pressure is clearly a strong driver in influencing political commitment to open markets, through the savings and efficiency improvements that can be obtained:

*“It’s a mixture of politics, procurement legislation and economic pressure and probably the strongest driver for competition is economic pressure.”* Chief executive, Service Provider.

**Related recommendations:**

**A, B, C, D, E, F and G on increasing competition in EU public procurement markets**

## 4.9. Different approaches to market liberalisation can cause difficulties

*“How far out in front of your troops should you get?”* Director trade body

*“We are very good at open tendering. Nobody else does it but we are very good at that.”* Chief executive, manufacturing company.

- 4.9.1. Market liberalisation in other EU markets is seen as one of the key issues affecting UK firms’ ability to compete for public procurement contracts in EU countries, particularly where the markets are already open to competition in the UK.
- 4.9.2. The perception is strong, amongst businesses consulted, that the UK has made a firm commitment to open markets, competitive tendering and international competition.<sup>42</sup> This is seen to result in a policy of actively soliciting foreign competition, potentially causing difficulties for UK-based suppliers.
- 4.9.3. The term “bending over backwards” to bring in foreign competition was mentioned more than once. A representative from a global service provider compared a UK public procurement exercise where the authorities were extremely keen to invite a Canadian firm to bid despite the fact it had no office in the UK, with the situation as they perceive it in Germany, where his firm often pulls back from bidding because they feel local firms will be given a better chance.
- 4.9.4. Concern was expressed in relation to markets which are perceived as closed to UK firms
- “It does get ridiculous when you get a Government department touting foreign entrants to come into the UK market when their own markets are closed. I’m struggling a bit with that.”* Chief Executive, services company.

- 4.9.5. This is seen as particularly unfair when foreign firms competing in the UK are state-owned or state-subsidised and so not subject to the same competitive pressures as UK firms:

*"I think there should be very clear rules about whether somebody is allowed to compete in another market if they haven't demonstrably got their own market properly opened up to competition, or if they have majority state ownership. This would be no different to the constraint put around BT to ensure it doesn't use its dominant market share to exclude competition."* Chief Executive, service provider.

- 4.9.6. The land transport market (with the exception of road freight), although opening up slowly in the EU, has nowhere liberalised as extensively as in the UK. This is perceived as creating an uneven playing field, as UK firms find themselves competing on their home market against firms benefiting from privileged access to a closed home market.

- 4.9.7. In the rail industry, *"there has been an active policy of trying to get overseas players into the UK rail market"*, Chief executive, Services firm. Deutsche Bahn is being invited to compete for rail services, and the next major contract for rolling stock is expected, within the industry, to go to a Japanese firm. When a regional rail franchise came up for tender, competitors from Holland and France were invited, despite the fact that the franchise had recently performed very highly with a UK supplier.

- 4.9.8. Similar comments were expressed in relation to PFI-type contracts:

*"The process here is probably far easier for a foreign entrant into our market than maybe the reverse is. Bouygues was the main contractor for the Home Office project in the UK and yet people have said would the reverse ever happen? There's no way that a UK company would have been allowed to build the Home Office in France."* Manager, service provider.

- 4.9.9. The UK has the highest percentage of foreign-owned firms in the EU, all sectors combined, at 19 percent, followed by France at 16 percent; the EU average is 11 percent. In the engineering sector 33 percent of UK firms have foreign ownership, compared with 20 percent in Germany and 12 percent in France.<sup>43</sup> A number of respondents expressed concern about loss of Research and development capability in the UK through buy-ups by foreign subsidised firms.

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<sup>42</sup> The 2004 Budget set out the Government's view that competition promotes efficiency, puts downward pressure on prices and creates choices for consumers. The Budget also noted that effective competition in public procurement is essential to the proper functioning of the EU.

<sup>43</sup> *Catching up with the Continent*, EEF, 2004: figures based on 2003 EEF Productivity Survey.

*“In the next 5 years one or two of these very big state players in Europe will have a more private sector face to them and will snap up British transport companies. We are creating a situation that plays into the hands of state-owned companies and are offering some very rich pickings.”* Chief Executive, service provider.

**Related recommendations:**

**A, B, C, D, E, F and G on increasing competition in EU public procurement markets**

## **4.10. Industrial policy affects competition on markets**

*“In Britain public authorities are concerned about value-for-money for the British tax payer and not about looking after the national industrial base.”* Chief Executive, manufacturing firm.

4.10.1. Regional, national, and Brussels-based trade bodies in other EU countries are perceived to be more joined-up and consistent in their messages and thus more effective than their British counterparts: “In Britain we are less bold and strategic in what we do”, Chief Executive, manufacturing firm.

4.10.2. In France, strategic industries are identified, long-term investment plans are published and extensive, continuous dialogue is held with national suppliers. The industrial policy set out by Nicole Fontaine, French Minister for Industry, includes lobbying the European Commission for more flexibility in the application of competition, financial and environmental regulations to nurture the growth of strong European industries. It also consists of plans to stimulate national industry through research and development, including through the establishment of ‘*Groupes de réflexion stratégiques*’ (committees for strategic reflection) into the medium and long term future of textile, health and automotive sectors.<sup>44</sup> The French Finance Minister, Nicolas Sarkozy, said at a press conference on 4 May 2004:

*“There are in Europe some large firms, with very advanced knowledge, which contribute to the growth of hundreds of SMEs which cluster around them. These firms must be supported. This is what I have started to do with Alstom, with EDF, with the friendly merger between Sanofi and Aventis. It is not a duty for the state to support these industries, it is an obligation. It takes years to build a large group. It only takes several months for it to disappear.”*

<sup>44</sup> *Questions-Réponses Politiques*, Le Monde Economie, 10 February 2004.

- 4.10.3. Such support is seen by some UK firms as providing a significant advantage for their foreign competitors. There is concern in UK manufacturing sectors about loss of capacity through the lack of a sustained industrial strategy to support the sector. So when public investment does increase, industrial capability may no longer exist.

*“Over a long period of time there has been an ability to service, support and purchase from indigenous suppliers, which has given continental suppliers a strong home market. We, for all sorts of reasons, which have nothing at all to do directly with procurement rules, don’t have that same degree of capacity within the UK to service the market and therefore, unsurprisingly, foreign competitors look, and indeed are, very competitive when it comes to open tender bids. You have to look at what they have done in France with Renault and the other French car manufacturers who have survived against all odds, in terms of efficiency because the decision was made that cars are a big capital market and we’re going to be there. And Thomsons is the only TV manufacturer in Europe other than Sony making TVs.”* Director, trade body.

- 4.10.4. A frequently quoted example is that of rolling stock purchase. In the heavy rail sector, 100 percent of rolling stock contracts in Germany and France are assembled locally, whereas only 72 percent of UK contracts are assembled locally. The figures are difficult to interpret, as they appear conclusive yet do not in themselves demonstrate favouritism. In the case of the French and German contracts mentioned, all the firms present in the competition had manufacturing plants in both France and Germany, so whichever firm won the contract would have had the ability to produce locally. In the UK capacity has wound down because of a reduction in investment in rolling stock over some years. This means that when new orders are placed, the UK simply does not have the capacity to manufacture its orders locally. In the words of a trade body Director:

*“In France and Germany there has been that steady order flow, there has been a relationship that has been built up with the suppliers, they have known the volume which is likely to be coming through, purchasers have stayed with them through reasonable thick and thin. We, on the other side of the Channel, have gone through feast and famine in terms of orders, there has been no clear recognition of what the implications of that will be for our capability in the UK, so that in X number of years’ time when you want competitive bids, you don’t have a competitive market place other than predominantly outside these shores.”*

### **State aid is a cause for some concern**

- 4.10.5. National policies on bid costs may affect the level playing field. Some respondents claim that French firms can have their bid costs reimbursed in certain cases, or that they can compete on a ‘no-fee’ basis because of the support they receive from their trade associations. In the UK it is considered that bid costs in most cases should not be borne by the tax-payer.

- 4.10.6. Some EU countries subsidise their industries more than others. The UK grants the lowest amount of state aid in the EU by measure of GDP.<sup>45</sup> The four largest countries in the EU15 account for over two-thirds of the total, with Germany, Italy and France outstripping the rest by a significant margin. Although France and Germany have dramatically reduced their overall volumes of aid since the mid-90s and narrowed the gap considerably with the volume of aid provided by the UK, France's aid is still three times that of the UK and Germany's is twice the size.<sup>46</sup> UK firms argue this gives their continental competitors an unfair advantage in international competitions.

*"The Danes, in terms of their industrial policy, put a lot of money into environmental support. I think they spend more on that than almost anywhere else in Europe. The result is that Danish firms have captured about half of the international market for renewable energy, a lot of which are going to be public sector orders. So, for some reason, they capture wind farms. Now, you can't help feeling there must be some sort of relationship between those two. As far as we can tell all of that is done within the industrial competition rules. I doubt very much if the Danish equivalent to the DTI sat down and thought, 'how can we flout public procurement rules?' What they sat down and thought was, 'is there a market niche that we could specialise in where giving a bit of support will give Danish firms a bit of a lead - and they've been pretty successful in that.'" Director, trade body.*

## Comment

- 4.10.7. Differences in cultural preference, politics and industrial policy across the EU undoubtedly affect opportunities for UK suppliers to win public contracts and contribute to the perception of an uneven playing field.
- 4.10.8. Cultural differences are deeply rooted, and evolve slowly, undoubtedly acting as a barrier to international trade. This can be in the generic sense that lack of familiarity with unwritten principles and practices will disadvantage foreign firms; more so if there is a specific cultural tendency to support local endeavours. Both types of barrier can be superceded to an extent, through effective local integration: see section 4.5.2 below.
- 4.10.9. There is no doubt that the UK has embraced market liberalisation more enthusiastically than some other EU states, and that the slower pace of liberalisation of certain sectors in other EU countries compared with the UK means that new opportunities for UK firms are not developing.

*"Despite their differences, Jacques Chirac and Lionel Jospin stood shoulder-to-shoulder in slowing down the opening up of France's electricity market to foreign suppliers [...] Paris worked hard to delay liberalisation of European postal services until 2009, and ensured this would affect only 10 percent of the turnover of La Poste, one of only two European services not to have been privatised."*<sup>47</sup>

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<sup>45</sup> *UK hands out lowest state aid in EU – not counting railway.*, FT, 19 April 2004,

<sup>46</sup> Statistics on state aid in EU Member States can be found on the European Commission website at the following page: [http://europa.eu.int/comm/competition/state\\_aid/scoreboard/](http://europa.eu.int/comm/competition/state_aid/scoreboard/)

<sup>47</sup> *On the Brink: the Trouble with France*, Jonathan Fenby, 1998, Abacus.

- 4.10.10. The solution to this cannot be to refuse access to the UK market for firms from countries with closed markets, however. For a start this would be illegal.<sup>48</sup> Above all, it would mark a return to a protectionist approach, which successive UK governments have clearly ruled out, given the benefits to be achieved from greater competition.
- 4.10.11. Opening up domestic markets also creates opportunities for British firms. UK experience, including lessons learnt, in the field of transport privatisation is recognised worldwide, creating opportunities for consultants and industry specialists. There is little foreign competition on regional bus routes in the UK because operators from other EU countries lack the experience of operating in a purely commercial environment.
- 4.10.12. The UK Government should continue to press at EU level for legislative change and implementation of EC law to ensure that energy and transport markets, in particular, move towards greater liberalisation.
- 4.10.13. Companies should be supported in their approach to difficult markets. Opportunities may exist despite a slow pace of liberalisation, although a carefully thought-out strategy will be particularly crucial. Some countries in the EU are opening up gradually through the sale of previously state-owned assets, creating opportunities for larger UK firms to make acquisitions and gain a foothold in these markets. This in turn can create sub-contracting opportunities for UK firms.
- 4.10.14. Different approaches to state aid result more from governments' policies than from compliance, or lack of compliance, with EU rules. The impact of state aid on markets is continuously monitored by the European Commission to ensure it is not used to protect domestic firms from competition:

*"There is no need to promote 'national champions' as proposed by France and Germany. Interventionist industrial policies do not work because bureaucrats and politicians cannot second-guess the market. They tend to pick losers, not winners. A policy of 'national champions' is not compatible with the Lisbon target of making Europe the most competitive economy in the world by 2010."*<sup>49</sup>

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<sup>48</sup> The Treaty does not allow Member States to discriminate in their purchasing on the basis of whether a firm is public or privately owned. So it would be illegal for a UK purchasing authority to exclude a firm simply on the basis that it was publicly funded, or because its home market is wholly or partially closed to competition. And public funding is not necessarily, the same as state aid. The right course of action would depend on the reasons for the closed nature of the market. If it is due to a breach of other single market legislation, action can be taken through the European Commission and/or in the national court.

<sup>49</sup>—Frits Bolkestein, then Internal Market Commissioner, in a speech on the Challenges for the Dutch Presidency delivered at The Hague on 25/06/04. The European Union set itself the aim at the Lisbon European Council in 2000 of becoming the most competitive and dynamic knowledge-based economy in the world by 2010, which will require more competitive markets, and lower volumes of state subsidies.

- 4.10.15. State aid is not mentioned to a great extent in the public procurement rules (there are specific rules for control of state aid). [Suppliers wanting to take action against illegal state aid, should complain to the Competition Directorate of the European Commission or bring an action before the relevant national court. To pursue a complaint administratively, a firm should fill out a complaint form<sup>50</sup> and send to the Commission which is legally obliged to pursue all complaints, although this can be a lengthy process. A new unit has been set up within the European Commission to ensure enforcement of aid recovery decisions.
- 4.10.16. Public purchasers cannot reject a tender simply because the price appears abnormally low or because the tenderer is benefiting from state aid. But they can reject tenders if unlawful state aid is involved. Not all state aid is illegal: if provided in accordance with the state aid rules, it is permitted.
- 4.10.17. Some of the industrial policies mentioned above, which appear supportive to business may disadvantage the economy as a whole in the medium to long term. They are more likely to lead to lower inward investment, higher levels of taxation and lower quality in public services. This will result in costly government subsidies and extra costs to the public sector if public authorities do not seek out the most competitive suppliers. This in turn is likely to result in uncompetitive industries, which do not innovate and are not able to respond readily to changing demands in global markets. UK Government policy is to promote greater productivity through measures to tackle market failures in the areas of skills, investment, innovation, enterprise and competition. This includes support, for example, to develop skills, and research and development, but equally it involves making markets work better.<sup>51</sup>

**Related recommendations:**

**A, B, C, D, E, F and G on increasing competition in EU public procurement markets**

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<sup>50</sup> As set out at Annex K of the present report.

<sup>51</sup> The Government's Manufacturing Strategy, published in 2002, seeks to narrow the productivity gap and assist UK companies to move up the value chain by encouraging investment in skills, R&D, science & innovation, best practice and increased investment. The Government Manufacturing Advisory Service is estimated to have delivered a total added value of over £53 million in its first two years by providing practical help to firms.

## Other Government impacts on markets

### 4.11. Good public procurement practice facilitates competition

*“Bad procurement practice is destructive because it breaks confidence.”* Manager large service company.

*“Better capacity planning on the back of Government contracts and more effective competition for such contracts will not just provide better value-for-money for the UK taxpayer. It ought also to put UK-based companies in a better position to win orders elsewhere.”* Kelly Report, paragraph 26.

- 4.11.1. Good procurement practice, both in the UK and in other EU countries, was mentioned frequently as being essential to guarantee a healthy competitive environment and genuine opportunities for British firms. Best practice should ensure better compliance with EU rules, fewer “grey area”-type practices, commitment to international competition and award on merit. Its characteristics have been set out in a number of recent studies<sup>52</sup> and some key elements are set out below. Bad practice in public procurement is seen to destroy supplier confidence and reduce motivation to compete.

#### Poor practice

- 4.11.2. Lack of professionalism amongst public procurers through insufficient skills was a key element of bad practice identified by the Review: this was referred to by one respondent as the “baby buyer” syndrome. Problems identified in the UK and elsewhere include insufficient knowledge of EU public procurement rules, lack of understanding of supply markets, a mechanical, ‘tick-box’ approach to purchasing (particularly inappropriate for complex services), poor specification-writing (over-specifying, for example), lack of competence in long-term investment planning, insufficient dialogue and engagement with the supplier community and a lack of clear scheduling. One Chief Executive estimated that poor scheduling could push up costs by 20-30 percent.

#### Good practice

*“For the Sydney Olympic games we had people coming to the UK at a very early stage to say ‘you’re all going to be in the competition for the Olympic games, let’s be absolutely clear, you have some tremendous skills in this country which we want to tap into; this is what we’re going to do, here are the plans for it, this is the timescale for it, we’d like to see you bidding; we know you’ve got companies in Australia too, but that is not ruling out people working from the UK. We want your help to make it work.”* Director, trade body.

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<sup>52</sup> See Annex L.

- 4.11.3. Key elements of good practice raised by respondents include skilled, qualified procurers, good specification-writing, a strategic, knowledgeable approach to supplier markets, quality dialogue, engagement, long-term investment planning with published spending plans, regular deal-flow, reliable production schedules.
- 4.11.4. Other factors mentioned include automatic and good quality feedback on bid performance and use of international rather than national standards. For complex service procurements or public private partnerships (PPP) such as private finance initiatives (PFIs), early dialogue with suppliers is particularly desirable, as are flexibility and dialogue throughout the process and solutions for reducing bid costs and risk. Italian authorities were mentioned as being good models in terms of pre-tender dialogue and reducing bid cost risk.
- 4.11.5. Transparency is seen as particularly desirable because it enables suppliers to understand the basis on which decisions are being made, and to assess more clearly the chances of winning a tender before putting the resource and investment into competing. It also increases confidence, and makes it easier to identify systemic process issues or specific examples of non-compliance with legislation.

### **Comment**

- 4.11.6. Systemic good practice in procurement creates a win-win situation. It attracts quality competition, through confidence within the supplier base in the fairness of the procedures. This enables procuring authorities to benefit from a wider supply base, which increases choice and therefore the likelihood of achieving better public services, at more competitive prices. Other benefits include more innovation, more efficiency and improved country-image for inward investment. Cost-effective outcomes are likely to improve through better specification-setting (using outcome specifications for example), the ability to capture innovation, increased dialogue, and more intelligent buying. EU figures show that professional purchasing departments generally pay a lower price than average for their purchases.<sup>53</sup> Because some public purchasers perceive public procurement as a legalistic “tick-box” discipline, high-level political and administrative support is needed to communicate the benefits of better procurement and spread best practice.
- 4.11.7. The UK Government is pursuing opportunities to improve its own purchasing and achieve better value-for-money, through better investment planning and long-term supplier engagement and dialogue (Kelly Report action plan).<sup>54</sup> This will help further improve competition within UK markets and help UK companies compete effectively in other countries.

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<sup>53</sup> A report on the functioning of public procurement markets in the EU: benefits from the application of EU directives and challenges for the future, European Commission, February 2004.

<sup>54</sup> The Kelly Report action plan can be found on the following web page:  
[http://www.ogc.gov.uk/embedded\\_object.asp?docid=1001395](http://www.ogc.gov.uk/embedded_object.asp?docid=1001395)

- 4.11.8. The Office of Government Commerce, an agency of the Treasury, was set up in 2000 to act as a catalyst for achieving best value-for-money in central and civil Government commercial activities. This is delivered through a number of initiatives including e-procurement, improved procurement skills and professional qualifications, peer-group reviews of high-risk projects (Gateway Reviews), guidance on the use of framework agreements, aggregation and encouraging minority suppliers to compete (SMEs, voluntary and community sector organisations, ethnic minority firms). The OGC maintains frequent contact with procurement policy officials in other Member States, so as to learn from the experiences of others and to promote the benefits of UK experiences.
- 4.11.9. Other Member States are also pursuing a range of initiatives to improve public procurement practice, as shown by the enthusiastic attendance at European best practice forums such as the Public Procurement Network.
- 4.11.10. As two of the largest EU Member States, France and Germany both have improvement programmes in the area of public procurement. France was mentioned a number of times in this Review as a difficult market. Although the French are keen to support their national industries, public purchasing authorities are increasingly aware of the benefits of widening the supplier base in the pursuit of better value-for-money. Representatives from UK Trade & Investment based in the British embassy in Paris find that purchasers from organisations which previously may not have been very interested in UK suppliers are now enthusiastically welcoming information about them. French national procurement law has recently been revised to make it simpler, more flexible and more efficient, whilst emphasising the key principles of transparency, free access, equal treatment and competitive tendering.<sup>55</sup> A public procurement skills programme is ongoing.<sup>56</sup> Nicolas Sarkozy, as Finance Minister, announced a partial (35 percent) sale of SNECMA (aero-engines), privatisation of two companies which run motorways and the reduction of state holdings in France Telecom to a minority share. There also is strong support for e-procurement initiatives. These are seen as a solution for significantly reducing purchasing costs and ensuring that lower value contracts (beneath EU thresholds) benefit from adequate publicity. A deadline of 1 January 2005 has been instigated, after which date, no French public procurer may refuse to accept electronic tenders. And from 2007-2010, the “100% e-procurement” project will encompass the entire procurement process including quality control, payment and archiving.
- 4.11.11. Decentralisation causes particular problems for public procurement. In France, there are 40,000 different public procurers issuing tenders in the Official Journal of the European Union (OJEU). Central German authorities encounter difficulties in co-ordinating and influencing local and regional public procurement.

<sup>55</sup> Information on the new legislation is available on [http://www.minefi.gouv.fr/minefi/publique/marches\\_publics/index.htm](http://www.minefi.gouv.fr/minefi/publique/marches_publics/index.htm) and [http://www.minefi.gouv.fr/minefi/publique/marches\\_publics/index.htm](http://www.minefi.gouv.fr/minefi/publique/marches_publics/index.htm)

<sup>56</sup> See the following website for more information on the skills programme <http://alize.alize/crp/form2004/fiches/stages.asp?dom=1&sdom=1&fil=6&sfil=0&qui=>

- 4.11.12. German public procurement operates within a very complex national legal and administrative framework. This can be difficult for foreign suppliers to navigate, as set out in a recent OECD report.<sup>57</sup> The current priority for German public procurement is to reform the national legislative framework, simplifying it and reducing its volume. Germany is advanced in developing the electronic marketplace, in supporting SMEs and in environmental purchasing. German public authorities have not made significant inroads into using framework agreements and PPPs, but have shown an interest in doing so. They are also beginning to look more closely at stimulating innovation through procurement.

**Related recommendations:**

**A, H, I and J on best practice in public procurement**

## 4.12. Government support has a role to play

*“International success is founded on home success; it is extraordinarily difficult to export from a weak home base.”* Chief Executive, manufacturing firm.

- 4.12.1. It was generally felt that success in home markets is essential to success in export markets. This is because firms that are able to build capability and profit in a familiar market will be in a stronger position to compete effectively in what are often more difficult conditions abroad.
- 4.12.2. Procurement decisions by UK authorities are seen to have a strong impact on the foreign procurers' perceptions of British suppliers:

*“People from abroad won't buy if your own country isn't buying. They say ‘well, if it's not good enough for your own country, why should we buy?’”* Director, manufacturing firm.

- 4.12.3. Support is expressed by industry for the Kelly Report action plan 58 which is seen as having an essential role in building UK supplier capability and as a result in industry readiness not only to address home market needs, but also to compete effectively abroad.

*“At a technical level the UK Government may understand our markets but at a practical level they don't. There is very little interaction with them. I suspect there are very few people in Government with a view of the structure of our markets and what the key issues are. Or who have it as one of their priorities to find out.”* Chief Executive, services firm.

<sup>57</sup> Reviews of Regulatory Reform: Germany, OECD, 2004 pp 48, 113-117, 124.

<sup>58</sup> As set out on the following web page: [http://www.ogc.gov.uk/embedded\\_object.asp?docid=1001395](http://www.ogc.gov.uk/embedded_object.asp?docid=1001395)

- 4.12.4. The Chief Executive of a manufacturing firm queried whether UK procurement officers fully understood manufacturing supply chains, including the relationship between the manufacturing base, research and development, and the maintenance of local capacity. Another Chief Executive explained that Government responsibility for his market was split between three directorates within one Government Department, none of which communicated together. He said that although his offering could deliver long-term savings to other fields of the public sector, there was no-one to whom he could put this holistic approach.
- 4.12.5. An Anglo-Italian firm said that the Italian side of their business offered better prospects because of a more co-ordinated approach between Italian Government departments and was surprised by the apparently disjointed approach of UK Government support. It felt that there was a need for more co-ordination in UK Government policy and a need to provide greater support to UK-based industry.
- 4.12.6. There is a perception that the Government needs to be more effective at lobbying in Brussels:
- “We are not leading in Brussels. We tend to react somewhat too late. We are not in the forefront in shaping the legislation and driving the change. We need to have more lobbying power over in Brussels.”* Chief Executive, service provider.
- 4.12.7. Another respondent expressed concern that although the DTI reacts effectively to specific problems, they should be engaging in the debates more systematically (*“you can’t simply parachute in with a DTI delegation and then disappear”*) and that European trade bodies should be headed more often by experienced UK officials or business representatives.
- 4.12.8. The view was put to us a number of times that the UK is not as ‘aggressive’ as its EU counterparts at defending British interests, and that the UK should more frequently follow the US and French example of sending out senior ranking officials, military personnel or senior politicians in support of British firms. It was said it should be *“higher on the agenda to help British companies succeed in mainland Europe.”*
- 4.12.9. UK Trade and Investment (UKTI) has a role to play here, through desk officers and commercial staff in local-based consulates and embassies. Businesses reported difficulty in accessing and understanding the support available to them. There was some confusion about the respective roles of Business Links, the Regional Development Agencies and UKTI and respondents reported that it was not easy to find the most appropriate entry point. Businesses desired a ‘one-stop shop’ for Government support to business. SMEs wanted simple, concise, practical information, with references to further information if necessary, rather than being overwhelmed with more information than they needed. UKTI and the services it provides were not well known. Nor was the target business audience for UKTI clearly understood, with some businesses believing it was for SMEs only. The expertise of the UKTI network was also questioned in some areas such as EU public procurement and PFI. The quality of commercial sections in the UK’s diplomatic posts

overseas was reported as being variable, with some very good and others less helpful. One respondent explained that he needed UK officials on the ground to “*tell it as it is*” (for example to advise if necessary on partnership with a firm with links to the appropriate political party) as this would save him wasting time in bids which had little chance of being won.

4.12.10. Effective and proportionate regulation of businesses within the UK is seen as important in ensuring that UK firms do not suffer ‘gold-plating’ in the transposition of EU rules. This would result in UK firms being constrained by a higher degree of regulation than EU competitors, with ensuing cost and resource burdens. Health and safety, self-certification and train-testing regulation in the transport industry was mentioned in this context, as were environmental legislation and planning regulations in the construction industry.

4.12.11. If UK regulation must be high for legitimate reasons, it is felt that other EU countries should regulate to equally high standards. Respondents expressed the view that higher regulation across the EU was preferable to lowering standards in the UK, because it entails transparency and confidence, and because they believe that on a genuinely level playing field UK firms are in a strong position to compete effectively.

*“Politicians always seem to think that British industry needs a short sharp shock. Then they are incredibly surprised when they see British industry performing extremely well in Hong Kong or Asia. They perform well because they are very good. They don’t perform so well in the UK because so many barriers are put in their way.”* Chief Executive, manufacturing firm.

## Comment

4.12.12. The Kelly report action plan<sup>59</sup> will not address problems arising from the approach of purchasers in *other* EU countries towards the supply market, nor remove other substantive barriers to trade. It may be an indirect support to UK firms seeking public contracts in countries where longer-term planning and early engagement of the supply base is more the norm, however. The recommendations in *this* report are thus intended to be complementary, but not add, to actions arising from Kelly and other reports relating to domestic UK public procurement.

4.12.13. In addition to strategic support to industry provided by DTI or by relevant departments, UK Trade and Investment (UKTI)<sup>60</sup> aims to develop the competitiveness of UK companies through overseas sales and investment. This is achieved by ensuring firms are sufficiently well prepared and have the necessary capability to tackle export markets. UKTI has an international network of staff with knowledge of commercial, political and social issues, who maintain awareness of contracts and opportunities sought by UK businesses and overseas investors. UKTI works increasingly closely

<sup>59</sup> As set out on [http://www.ogc.gov.uk/embedded\\_object.asp?docid=1001395](http://www.ogc.gov.uk/embedded_object.asp?docid=1001395)

<sup>60</sup> <http://www.uktradeinvest.gov.uk/>

with the Regional Development Agencies (RDAs) and has completed agreements with all but two to operate as their international trade arm. UKTI helps SMEs that are new to export, or that want to access new markets, through its dedicated International Trade Teams, which currently operate within the Business Link network. UKTI has recently made a number of changes to its strategic approach to trade services, offering fewer services, but tailoring them more to the individual needs of its customers. Although SMEs continue to be the main beneficiaries of UKTI's expertise and financial support, large and "middle-market" companies also benefit from the identification of opportunities, market intelligence and access to senior decision-makers in public authorities and the private sector. An example of the new sector-specific approach is the rail sector strategy attached at Annex J.

- 4.12.14. Euro Info Centres (EICs)<sup>61</sup> are a network of 300 support agencies located throughout Europe, partially funded by the European Commission, which provide advice on Single Market issues, including on access to public procurement contracts in EU countries. There are 19 EICs in the UK, often co-located with Business Links (or with their equivalents in the devolved regions). They offer telephone assistance and advice, training (workshops designed to advise and assist SMEs in how to find tenders and then to win them, for example) and can act as intermediaries together with their counterparts in other EU countries, to set up meetings, or investigate problems. They also advise on form-filling, procedural difficulties, the jargon and other aspects of the tendering process.
- 4.12.15. Although there are a number of business support initiatives, there appears to be a lack of awareness of these amongst UK firms. More effective communication and promotion of the initiatives already in place would ensure better take-up and buy-in from the supplier community.

**Related recommendations:**

**A, B, C, D, E, F and G on Government action to increase competition on EU markets**

**K, L, M, N, O on support for business**

<sup>61</sup> <http://europa.eu.int/comm/enterprise/networks/eic/eic.html>

## Supplier performance

### 4.13. Suppliers rarely use legal & administrative remedies

*“Shrug your shoulders, that’s what happens, move on”,* Director trade body.

- 4.13.1. Respondents demonstrated a general lack of interest in legal remedies enabling them to challenge the contract award decisions of public authorities in court:

*“I’m not interested in the review of the remedies directive. I suspect no-one in the industry has bothered to go and look it up: why would you fight with your customer unless it really, really matters because you have other things to do.”* Director, Services Provider.

- 4.13.2. The consequences of challenging the award decisions of potential clients are seen by nearly all respondents to be extremely negative, likely to disrupt the commercial relationship and significantly damage any chance of winning future contracts:

*“I have to deal with these sorts of bodies all the time and if I get a reputation for being too aggressive they (and others) will avoid even asking me again in future.”* Manager, small manufacturing firm.

- 4.13.3. Proving wrong-doing is seen, in any case, as very difficult to do. As one respondent expressed it, even if you have good quality evidence such as diary notes, the consequences of pushing a source into court can be extremely severe. Many firms mentioned the drain on resources such action would represent, for an uncertain outcome. The favoured response is to recognise that in business *‘you win some, you lose some’* and to move on to other business.

- 4.13.4. Three examples were provided where a court challenge was being seriously considered. In one of these, the idea was abandoned when the firm decided to maintain the relationship so as to be able to compete for future business. In the other two cases, the aggrieved bidder had not reached a decision as to whether to proceed when this report was completed.

- 4.13.5. One respondent mentioned that it was particularly difficult to mount a substantial challenge on grounds of public procurement law and that it was often more effective to use competition law, as courts have more experience in the area and it is easier to obtain concrete evidence.

- 4.13.6. On the whole, informal systems of redress and conflict resolution are felt by business to be a more attractive solution than formal challenges, particularly where a firm’s anonymity can be strictly maintained.

## Comment

- 4.13.7. It is understandable that firms are reticent to complain about their clients. But legal challenges *can*, in some cases, have a far-reaching effect by influencing purchasing authorities. The ‘*Alcatel*’ and ‘*Telaustria*’ cases for example, are currently affecting national public procurement rules and practice.<sup>62</sup> For this reason it is important that information on the channels for redress are readily available to suppliers.
- 4.13.8. Informal problem-solving networks may also constitute a partial solution, by providing a less confrontational channel for pursuing complaints.

### Related recommendations:

**L, M, N and O on informing business of remedies available**

## 4.14. Local integration in target markets is essential

*“If you have no local presence you are dead in the water.”* Manager manufacturing firm.

*“The French play petanque and we play cricket. We need to learn how to play petanque.”*  
Manager, manufacturing firm.

- 4.14.1. Many UK firms are extremely successful in EU markets, even in some of the more difficult countries or sectors. A number of success factors are apparent, of which a pragmatic approach to difficulties, and an ability to work within different cultures by becoming an integral part of the local fabric, are particularly important. Nearly all those consulted explained that successful local integration through understanding the culture, business practices, and language, and “being part of the establishment” or “embedded” in the culture was key to success in EU public procurement:

*“You cannot expect to work in another country without a local partner. I think there is a certain naivety about this.”* Director trade body.

- 4.14.2. Local presence can take various forms, of which the most effective is seen to be having a local subsidiary:

*“It is actually common sense that you need local faces who understand the culture of the country, because they will pick up nuances and sentiment and views that will pass straight over my head, even if we are speaking in English”,* Chief Executive, manufacturing firm.

4.14.3. One service provider said that without “*cultural familiarity*” they would not enter a market. One firm consulted had reasonable success in Italy, where they had distribution agreements but no local subsidiary, and good success in Spain where they had a local subsidiary. They had not sold once into France but were expecting their market share to leap to 60 percent of the French market following the acquisition of a local subsidiary. There was general consensus that a local firm with a foreign owner does not usually suffer discrimination on the basis of its ownership:

*“The general rule in Europe is it can be owned by an overseas entity but you have to work with local people through a local company.”* Chief Executive, manufacturing firm.

4.14.4. This is confirmed by an EU report<sup>63</sup> which shows that local firms win on average 35 percent of tenders bid for in their home market if they are under foreign ownership, ; against 30 percent for nationally-owned firms. Firms bidding for tenders from a different country win on average 25 percent of their bids.

4.14.5. Other ways of ‘*going local*’ include joint-ventures or distribution arrangements with local firms or agents:

*“In the UK we are no longer dictating things to Europe, but more inclusive and European in our approach; we’re prepared to deal through local distributors rather than say we’ve got the stuff, if you’re stupid enough not to buy.”* Chief Executive, Manufacturing firm.

4.14.6. One firm tried repeatedly to win contracts in France and Germany with no success and then won a deal in Italy by partnering with a local firm. Using natives from the culture of the client is a strong tactic.

*“In Italy if you’re dealing with the public sector you have to deal with their local language and it has helped to have someone out there who passes for an Italian.”* Manager, service provider.

4.14.7. Regional particularities should also be accounted for:

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<sup>62</sup> Alcatel Austria v Bundesministerium für Wissenschaft und Verkehr (Case C-81/98) and Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG (C-324/98).

<sup>63</sup> *A report on the functioning of public procurement markets in the EU: benefits from the application of EU directives and challenges for the future*, European Commission, February 2004.

*“If we take a Turin native to a Turin project meeting, even without understanding the language you can just see that things are going along better than if it had been a person from Rome.”*  
Manager Services firm.

4.14.8. Other approaches to local integration include sub-contracting to a larger firm established within the market: *“We have a number of clients who work on a global basis, so we are used to going into different countries with them”*, Manager, service provider. Using local sub-contractors and staff can also be effective: *“I’m sure that the fact we were prepared to embrace the local suppliers played a large part in our success.”* Manager, service provider.

4.14.9. Whatever the form of integration selected, one of the strongest benefits is an improved capacity to build and nurture relationships on the ground, particularly in cultures where relationships are key to establishing trust: *“What it does come down to is it’s the people in whom you’ve got confidence, to whom you are going to let a contract”*, *Director trade body*. As one senior manager put it: *“Companies need to employ local senior people who are well trusted by the local authorities and have a strong relationship with them”*.

4.14.10. This is particularly relevant for complex service provision and PPP / PFI-type contracts. A large service provider mentioned the importance for their Spanish operation of having a senior member of staff with wide-ranging connections within the local public sector. But the same principles apply to supplies contracts:

*“The work that is done upfront influences the ultimate outcome: relationship building, having a good business presence. I’m not aware of an incidence where we have won a tender purely off the paperwork documents - your chance of winning purely off the paperwork is very, very slim.”*  
Manager, manufacturing company.

4.14.11. Better relationships lead to better understanding of client needs: *“One huge success factor is access to the customer thinking”*, Manager, services company. Firms are in a position to know about upcoming tenders long before they appear in the OJEU, and may have the opportunity to shape specifications or bid concepts:

*“We have a sort of unofficial rule that if you haven’t identified an opportunity well before the OJEU notice and been talking to the customer, you shouldn’t be turning up expecting to be resourced for a bid.”* Director, service provider.

4.14.12. Through better understanding of clients needs, suppliers are able to adapt their offer for greater suitability: *“Our willingness to customise products has been a major positive factor with the French Army, Finnish defence forces and others.”* Manager, manufacturing firm. Once a tender notice has been issued, suppliers are in a stronger position to understand what the clients’ real needs are and whether or not these are adequately expressed in the paper documents.

*“In the UK we are very much reliant on a notice going out and that leading to a competition. Looking at Italy, it’s a cultural thing and it relies on getting on the ground and getting to know the client. The results are generally good because of that, as it forces the discipline of getting to know each other, getting to know the need, getting to know whether we can work together. On the other hand, it makes it more difficult to enter some of these markets for UK based organisations because the investment of time is far greater and you need the local presence, the Italian speaker and to be ready to invest in sending someone out there for a few years to make it work. That’s a hurdle worth getting over. But the culture you are working within does make it more difficult in some areas”,* Manager, Service provider.

4.14.13. In addition to good relationships and better client knowledge, locally integrated suppliers also gain a keener understanding of the institutional, social and political environment, *“how to pull the levers”* and a track record within the country.

4.14.14. Through local presence, good relationships, and an understanding of how local cultures work, firms are able in many cases to circumvent access difficulties.

*“It’s fine to take new construction methods, techniques and skills in there, but if you don’t respect the culture you are going to fail at day one. I think often UK companies complain they don’t get through because they just try and do it their way, which is not always right. Respect the culture and you have much more chance.”* Manager, service provider.

## Comment

4.14.15. There is a very clear consensus that *‘going local’* is the key success factor in EU public procurement. This solution is not always suitable, of course. It can be more difficult in markets which have not been fully liberalised. And smaller firms may lack the resources to buy-in staff with high-level linguistic and cultural skills, or to acquire or to set up a local office. But less resource-intensive solutions exist, including sub-contracting to a larger firm, using UK Trade & Investment to arrange meetings, or building distribution networks. Pragmatism would suggest that cultural differences will not change overnight, so *‘going local’* would appear despite some of its limitations, to provide a fruitful approach to problems encountered.

### Related recommendations:

**M on building supplier understanding of success factors and capability**

## 4.15. Niche markets and starting small are successful strategies

- 4.15.1. Some of the most successful firms in European procurement are those offering niche products or services, which offer customers benefits they would not find easily elsewhere:

*“If we don’t have a niche product or services we don’t go in solo, we go with a partner.”* Manager, service provider.

- 4.15.2. One UK manufacturer with experience of the French market as being totally closed to their product, through a combination of preference for local firms and lack of liberalisation, nonetheless secured a contract with a regional authority for an innovative product which *“we were the only ones to have at that time”*. Unbeaten quality can also offer a competitive advantage.

- 4.15.3. Avoiding head-on confrontation with well-established local suppliers lies behind the ‘starting small’ approach, whereby UK firms gain an initial foothold in a market, build a track record in the country, forge relationships, improve cultural and institutional understanding, hopefully acquire a reputation for reliable delivery, thus benefiting from local recommendations and progressively strengthen their capability to take on more significant bids.

*“We might not win a big tender, but we might win a small one. Then we win two and three and four and the next thing you know we’ve actually become a player and we win a big one.”* Manager, manufacturing company.

### Comment

- 4.15.4. Even difficult markets can be penetrated in some cases through an offer of products and services which buyers simply cannot obtain locally. Alternatively, if the product and service are not niche, it can be helpful to seek to win bids where there is less competition, or at least out of the ‘firing line’ of local giants. In any market businesses need to position themselves astutely. But as we have seen the variety of difficulties facing British firms seeking to win public procurement contracts in other EU countries makes a smart business strategy all the more crucial.

#### Related recommendations:

**M on building supplier understanding of success factors and capability**

## 4.16. Success stories

### Worcester Company Puts New Roof On Portuguese Stadium

Rigidal Systems Ltd, a Worcester company specialising in manufacturing metal cladding systems for roofs and walls, won a Euro 270,000 order to supply materials for a new Portuguese stadium, owned by the city council, where matches in the Euro 2004 Football championships were to be held.

In July 2002, the company benefited from UK Trade and Investment support to obtain market research on Portugal including an overview of the construction market, and highlighting nine potential business partners.

After approaching these companies, Rigidal was invited by one of them - Blocotelha - to Portugal for further discussions. After several meetings and visits between the two companies, Blocotelha ordered the 'Ziplok' aluminium standing seam-cladding product from Rigidal for the roof of a new football stadium at Leiria. In this way, the UK company was able to access a Portuguese public procurement through sub-contracting.

Rigidal has also shown interest in nominating Blocotelha as its sole agent in Portugal.

David Page, Rigidal's International Development Director said: *"We started exporting two to three years ago and since then we have been involved in a large number of projects around the world which include the curved roof of the Hong Kong Convention and Exhibition Centre and the new roof for Real Madrid's Stadium. Portugal is new to us so we're delighted to have participated in one of the projects for the 2004 Football Championships. The commercial team at the British Consulate-General in Oporto has given us invaluable information and support in developing our business in Portugal. With the help and support of the team at Business Link Herefordshire & Worcester, we have grown our exports year-on-year for the last three years. For 2004, we have set ourselves a target of £4 million, which we hope to achieve by focusing on Beijing and Shanghai in China where there is tremendous scope for our expertise in stadium roofs."*

Source: Nick Corley, International Trade Adviser, Business Link Herefordshire & Worcestershire, Cristina Abreu, Marketing and Trade Press Officer, British Embassy in Lisbon.

### **Analysis of key success factors**

- \* Using Government export support agencies
- \* Identifying market with strong demand for the expertise
- \* Gaining market information
- \* Finding a local partner as an agent

### **Selling to France**

A UK supplier sought to sell to a large public company in France, in a market which is generally perceived to be closed to foreign firms. The supplier sought the help of the Commercial section of the British embassy in Paris to set up a meeting with the Chairman and Chief Executive of the potential client. This was at a time when extreme weather conditions had led to increased demand for the supplier's product. A meeting was set up by the commercial post and attended by representatives of the supplier's French subsidiary. After much negotiation a formal quote was submitted by the French subsidiary with various options for the use of their equipment. The contract, worth Euro 1.3 million was awarded to the supplier in May 2004.

### **Analysis of key success factors**

- \* Using Government export support agencies
- \* Identifying circumstances leading to strong demand for the expertise
- \* Using a local subsidiary
- \* Maintaining ongoing dialogue with the purchasing authority

### **Sub-contracting to Siemens in Germany**

A number of rail contracts were successfully concluded between UK SMEs and Siemens Germany, which acts as a main contractor to public authorities in the transport sector. UK Trade & Investment (UKTI) representatives from the rail sector team invited the Siemens buyer to a UKTI-sponsored networking day in the UK, aimed at showcasing UK capability. Siemens produced a product /and capability wish list and UKTI matched these requirements to UK company capability and products. UKTI also supported subsequent UK company offers. UK SMEs were able to pitch their offers to Siemens in the knowledge they were responding directly to the client's needs. As a result, Euro 4.5 million worth of orders were achieved.

### **Analysis of key success factors**

- Using Govt support agencies
- Identifying clear demand
- Offering niche products
- Sub-contracting as a way in for smaller firms

## 4.17. Success factors for UK firms

The consultation has enabled us to identify some key success factors for UK firms in competing for public procurement contracts in other EU countries. It is not essential for all these factors to be present, of course, but the list provides a good point of reference for UK firms thinking of entering European public procurement markets.

### Success factors for UK firms carrying out European public procurement

- Good products and services with reliable delivery and customer support services
- Clear commitment to public procurement markets and the resource investment required
- Structural readiness for export <sup>64</sup>
- Relevant export support services have been investigated and used <sup>65</sup>
- Market research has been carried out and issues such as country-specific regulation, customer preferences and standards have been explored
- Niche or best-in-class product or service is offered
- Internationally recognised brand
- Clear and robust country-entry strategy in place
- A strategy of starting small has been considered, to avoid head-on competition with firms already well established in the market
- Familiarity with relevant EU public procurement rules
- Familiarity with informal problem-solving mechanisms in case problems occur
- Some form of local presence is in place (e.g. distribution agreement, joint-venture, local subsidiary, sub-contracting arrangements)
- Linguistic skills and cultural understanding of the target country
- Sales representatives are natives of the country, or at least fluent in the language, and well-integrated within the local culture and business environment.
- Good relationships and dialogue are in place with potential and actual clients
- Competitive bid
- Good fit with client requirements
- Pragmatic approach to difficulties and cultural differences, and adaptability to customer requirements.

<sup>64</sup> As assessed by support services such as UKTI or Euro Info Centres for example.

<sup>65</sup> Such as UKTI (Business Link, Regional Development Agency or overseas consulate) or Euro Info Centre.

## 5 Conclusions & Recommendations

### 5.1. Overall

- 5.1.1. The findings from this Review indicate that European public procurement is not straightforward and that barriers arise in a number of forms other than direct illegal discrimination.
- 5.1.2. The EU public procurement rules are not generally seen as a hindrance and they do enable companies to be aware of potential opportunities. Breaches of the rules appear infrequent and, in the few cases where they are believed to have occurred, it is often difficult to substantiate a legal case. In sectors where the rules do not always apply or only partially apply (as for some military contracts), Member States may avoid competition without this constituting a breach of the rules. This does not mean that illegal discrimination never occurs. However it is clearly not the key concern among firms consulted.
- 5.1.3. The approach taken by Member States to industrial policy and business support is also important. Where firms in other Member States are in receipt of state aid or where they have protected home markets, it may be harder for UK firms to compete.
- 5.1.4. Similarly, poor procurement practice, such as lack of transparency and inadequate skills make firms reluctant to enter markets. On the other hand, good procurement practice makes a market more attractive, making it easier for UK firms to identify opportunities and to compete successfully for contracts.
- 5.1.5. In many respects, the issues involved in competing for public procurement contracts in other EU countries are similar to those which apply to exporting more generally. It is important for firms to understand their markets, to develop effective entry strategies, to build their delivery capability and adapt to customer needs. The Review has identified a variety of means by which companies can seek to achieve this in the public procurement market.
- 5.1.6. To tackle the barriers identified by this Review, action is needed in the following areas to:
- Achieve a change in the approach of the Commission and Member States so that they move beyond mainly focusing on compliance with the rules and towards much greater emphasis on implementing best practice and on the outcome of achieving a competitive public procurement market;
  - Encourage the application of best practice amongst public procurement authorities in Member States;
  - Remove institutional barriers to competition in public procurement in EU Member States;
  - Improve industry's skills to compete effectively for public contracts in other Member States.

## 5.2. Action at EU level

### Achieving a change in approach to public procurement

- 5.2.1. The overall conclusion of this Review is that, while the EU procurement rules are helpful in making public procurement more transparent, they do not of themselves lead to completely effective competition in public procurement in Member States. The rules put in place a framework for fair and open public procurement markets but do not guarantee it will occur. As a result, there needs to be a stronger emphasis throughout the EU on achieving best practice in public procurement, in addition to demonstrating compliance with the rules.
- 5.2.2. The European Commission should therefore encourage Member States to stimulate competitive markets in procurement and it should promote the benefits of effective competition. To help achieve this, the European Commission's Internal Market Directorate should make it a higher priority to assess how procurement structures and practices affect the outcomes they are intended to achieve and the openness of the EU procurement market.
- 5.2.3. This should be supported by increased reporting by Member States, including on publication of contract award notices and on practice issues (such as e-auctions and framework agreements) on the competitiveness of procurement markets. These actions will help to identify those procurement structures and practices which most effectively improve competition and deliver value-for-money outcomes. This will assist Member States in recognising the benefits of adopting the most effective approaches and encourage them to put these approaches into practice.

***Recommendation A: The European Commission should actively promote best practice in public procurement by Member States, not only by monitoring compliance with the directives but also by encouraging the adoption of best practice structures, tools and techniques. To build a more competitive EU public procurement market, the Commission should work with Member States to identify, evaluate and benchmark the structures, tools and techniques which contribute most effectively to this outcome; and should use a scorecard approach, where appropriate, to raise Member States' performance.***

- 5.2.4. The Government should also emphasise the benefits of greater competition in bilateral contacts with other Member States.

## Removing institutional barriers to competition

- 5.2.5. The UK Government has recognised the benefits of competition within the UK and the responses from business reflect the fact that the UK's approach seeks to optimise competition as a means of achieving higher quality public service outcomes.
- 5.2.6. Effective competition enhances the benefits from the Single Market, leading to lower costs for taxpayers and better quality public services.
- 5.2.7. Both Member States and the Commission could take a more pro-active role in promoting more effective competition in public procurement markets by considering carrying out competition assessments in markets with a strong public procurement dimension.
- 5.2.8. The Review has identified a range of barriers which make markets in some other Member States less open to competition than the UK. These include lower market access in sectors such as public transport services and defence goods; incomplete liberalisation of markets such as energy; greater use of state aids; and remaining regulatory barriers to the Single Market. Faster rates of progress by the UK in some areas has led to greater competition in many UK markets than in some other Member States.
- 5.2.9. In sectors such as energy, timetables to complete market liberalisation have been agreed and the Government should encourage all Member States to complete the process as quickly as possible.
- 5.2.10. Progress in some other sectors, such as public transport services and defence procurement, remains subject to agreement by Member States. For these sectors, the Government should emphasise the benefits of greater competition for the delivery of cost-effective public services in other EU countries. UK businesses could be well-placed to win business if such markets open up in other EU countries, due to their expertise in operating in an open-market environment.
- 5.2.11. The Government should also continue to press for reductions in the levels of state aid paid in some other Member States. The European Council has repeatedly called for reductions in the levels of state aid and a redirection of aid to horizontal objectives (i.e. that are applicable to firms from all sectors).<sup>66</sup> This needs to be followed up with further action by the European Commission to introduce tighter controls on large, distortive aids, and by Member States by reorienting state aid to provide support for horizontal objectives such as training and research and development.
- 5.2.12. Some of the other barriers revealed by this Review relate to the relative lack of progress in achieving a single EU market in services. The draft Services Directive is intended to tackle many of these barriers. The Government should work with other Member States and the Commission to ensure rapid agreement and implementation of the Directive.
- 5.2.13. The Government should therefore push for the following actions:

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<sup>66</sup> Conclusions of the Lisbon, Stockholm, Barcelona and 2003 Brussels Spring Councils.

**Recommendation B: The European Commission and Member States should use competition policy tools to open markets in sectors relevant to public procurement.**

**Recommendation C: Member States should comply with new energy liberalisation directives.**

**Recommendation D: Other Member States should agree market-opening in the field of public transport services.**

**Recommendation E: Member States should make a concerted effort at EU-level to agree market-opening in defence procurement, subject to Article 296 of the Treaty.**

**Recommendation F: The European Commission should apply tighter controls to large-value state aid which is more likely to distort competition in markets; and Member States should re-orient their state aid to measures which apply to firms in all sectors (e.g. support for research and development, or environmental protection).**

**Recommendation G: Member States should remove barriers to trade in services, principally through negotiating agreement to and implementation of an acceptable Services Directive.**

## 5.3. Action by all Member States

### Delivering best practice in public procurement

- 5.3.1. The UK continues to develop its expertise in this area, through reforms instigated by the Office of Government Commerce (OGC) since its creation in 2000, and more recently with the implementation of the action plan following the Kelly Report.<sup>67</sup> This calls for better planning, effective, early two-way communications between the public sector and industry, and a joined-up, systematic and strategic approach by the public sector to the markets within which it operates.
- 5.3.2. Other Member States are also engaging in a variety of initiatives to improve public procurement practice ranging from legislative reform to e-procurement. These must be encouraged and

<sup>67</sup>[http://www.ogc.gov.uk/embedded\\_object.asp?docid=1001395](http://www.ogc.gov.uk/embedded_object.asp?docid=1001395)

welcomed, and the UK should be prepared both to learn from EU neighbours (on e-procurement for example) and to share experience, lessons learnt and expertise (in areas such as PPP / PFI, professionalism of procurement staff and use of framework agreements). Appropriate use of procurement tools and techniques and better planning lead to more value-for-money outcomes through, for example, encouraging more SMEs to participate in public procurement, capturing innovation, reducing actual procurement timescales, and cost savings.

5.3.3. This should be achieved through European forums, such as the Public Procurement Network (PPN).<sup>68</sup>

5.3.4. **The Government should promote the following actions with other Member States:**

**Recommendation H: All Member States should eliminate systemic failings in practice, including unfair national preference.**

**Recommendation I: All Member States should use tools and techniques which make purchasing quicker and more cost-effective (such as e-tendering and framework agreements).**

**Recommendation J: All Member States should develop their participation in Best Practice forums, such as the Public Procurement Network, to develop and share good practice and to identify bad practice**

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<sup>68</sup> More information on the PPN can be obtained by contacting [ppn@ogc.gsi.gov.uk](mailto:ppn@ogc.gsi.gov.uk) or the UK SOLVIT centre based in DTI's Action Single Market Unit: [asm@dti.gsi.gov.uk](mailto:asm@dti.gsi.gov.uk) or Tel 020 7215 4481.

## 5.4. Action by UK Government

### Improving skills to compete effectively

- 5.4.1. One of the key findings of this Review is that European public procurement is complex. SMEs in particular often have difficulties in identifying opportunities and understanding how to navigate the EU rules.
- 5.4.2. In the light of this complexity, the Review has identified the importance of good market understanding, effective entry strategies, delivery capability and adapting to customer requirements, for businesses seeking to participate in public procurement markets in other Member States. This will require help and support from Government as well as businesses developing their own skills.
- 5.4.3. There is also a reluctance by business to raise problems through formal channels at the early stages of the public procurement process and to use remedies available for challenging breaches of public procurement rules.
- 5.4.4. Action to help raise the skills of businesses should be complemented by implementation of the Kelly Review Action Plan<sup>69</sup> which should provide better conditions for UK firms to compete for public contracts in the UK, and should thereby strengthen their ability to compete elsewhere in the EU.
- 5.4.5. UK Trade & Investment has an important role to play in assisting business to build the capability to compete successfully in EU public procurement. It is important that export services be widely promoted, easy-to-use and of practical use in obtaining improved export performance. Currently businesses are not always aware of the available services or how to access them. Business is also unclear about the relative roles of the relevant agencies. The Review has also revealed some concerns that advice to exporters is not always available in appropriate formats, particularly for SMEs, and in some instances the quality of advice needs to be improved so it is more relevant to the needs of business, particularly given the many complexities involved in EU public procurement markets.
- 5.4.6. Action is therefore needed by Government bodies in the following areas:

**Recommendation K: OGC should press ahead with implementation of the Kelly Report Action Plan, to increase competition and improve long-term capacity planning for UK public procurement across all key markets, as a complementary initiative to this Review.**

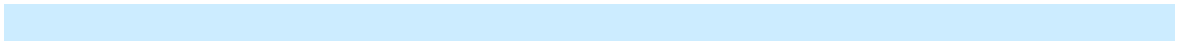
<sup>69</sup> As set out on the web page [http://www.ogc.gov.uk/embedded\\_object.asp?docid=1001395](http://www.ogc.gov.uk/embedded_object.asp?docid=1001395)

**Recommendation L:** DTI, supported by OGC, should work to improve the clarity and accessibility, especially to SMEs, of relevant practical advice on public procurement markets and opportunities within the EU, links to tender notices and local rules and regulations. This work should be carried out in co-ordination with existing work on SME training as recommended by the Better Regulation Task Force and owned by OGC / Small Business Service.

**Recommendation M:** Business Links and UKTI should promote the services available to exporters more effectively, with better guidance for SMEs, and UKTI should ensure that it delivers relevant and appropriate advice which enables exporters to understand and successfully address the challenges involved in competing in EU public procurement markets.]

**Recommendation N:** OGC should provide guidance for business on the specific remedies available for breaches of the public procurement rules, and the available channels for pursuing a complaint.

**Recommendation O:** OGC and DTI should press for further publicising, by Business Links, of informal problem-solving systems, namely the Public Procurement Network and the European SOLVIT network.



## 6 .... Summary of Recommendations

The Government should press at EU level, and bilaterally where appropriate, for the application of policies and practices which ensure that public procurement markets are fair, open and competitive. The recommendations of this Review are summarised here.

### Action at EU level

#### Achieving a change in approach to public procurement

- A) The European Commission should actively promote best practice in public procurement by Member States, not only by monitoring compliance with the directives but also by encouraging the adoption of best practice structures, tools and techniques. To build a more competitive EU public procurement market, the Commission should work with Member States to identify, evaluate and benchmark the structures, tools and techniques which contribute most effectively to this outcome; and should use a scorecard approach, where appropriate, to raise Member States' performance.**

*Relates to Findings 4.5 / 4.6 / 4.7 / 4.8 / 4.9 / 4.10 / 4.11 / 4.12*

#### Removing institutional barriers to competition

- B) The European Commission and Member States should use competition policy tools to open markets in sectors relevant to public procurement.**

*Relates to Findings 4.4 / 4.6 / 4.7 / 4.8 / 4.9 / 4.10 / 4.12*

- C) Member States should comply with new energy liberalisation directives.**

*Relates to Findings 4.4 / 4.8 / 4.9 / 4.10 / 4.12*

- D) Other Member States should agree market-opening in the field of public transport services.**

*Relates to Findings 4.4 / 4.6 / 4.7 / 4.8 / 4.9 / 4.10 / 4.12*

- E) Member States should make a concerted effort at EU level to agree market-opening in defence procurement, subject to Article 296 of the Treaty.**

*Relates to Findings 4.4 / 4.6 / 4.7 / 4.8 / 4.9 / 4.10 / 4.12*

- F) The European Commission should apply tighter controls to large-value state aid which is more likely to distort competition in markets; and Member States should re-orient their State aid to measures which apply to firms in all sectors (e.g. support for research and development, or environmental protection).**

*Relates to Findings 4.7 / 4.8 / 4.9 / 4.10*

- G) Member States should remove barriers to trade in services, principally through negotiating agreement to and implementation of an acceptable Services Directive.**

*Relates to Findings 4.4 / 4.6 / 4.7 / 4.8 / 4.9 / 4.10 / 4.12*

## **Action by all Member States**

### **Delivering best practice in procurement**

- H) All Member States should eliminate systemic failings in practice, including unfair national preference.**

*Relates to Findings 4.5 / 4.6 / 4.7 / 4.11*

- I) All Member States should use tools and techniques which make purchasing quicker and more cost-effective (such as e-tendering and framework agreements).**

*Relates to Findings 4.11*

- J) All Member States should develop their participation in Best Practice forums, such as the Public Procurement Network, to develop and share good practice and to identify bad practice.**

*Relates to Findings 4.5 / 4.6 / 4.7 / 4.11*

## **Action by UK Government**

### **Improving business skills to compete effectively**

- K) OGC should press ahead with implementation of the Kelly Report Action Plan<sup>70</sup> to increase competition and improve long-term capacity planning for UK public procurement across all key markets, as a complementary initiative to this Review.**

*Relates to Finding 4.12*

- L) DTI, supported by OGC should work to improve the clarity and accessibility, especially to SMEs of relevant practical advice on public procurement markets and opportunities within the EU, links to tender notices, and local rules and regulations. This work should be carried out in co-ordination with existing work on SME training as recommended by the Better Regulation Task Force and owned by OGC/SBS.**

*Relates to Findings 4.1 / 4.2 / 4.3 / 4.4 / 4.6 / 4.7 / 4.12 / 4.13 / 4.14 / 4.15*

- M) Business Links and UKTI should promote the services available to exporters more effectively, with better guidance for SMEs, and UKTI should ensure that it delivers relevant and appropriate advice which enables exporters to understand and successfully address the challenges involved in competing in EU public procurement markets.**

*Relates to Findings 4.1 / 4.2 / 4.3 / 4.4 / 4.6 / 4.7 / 4.12 / 4.13 / 4.14 / 4.15*

- N) OGC should provide guidance for business on the specific remedies available for breaches of the public procurement rules, and the available channels for pursuing a complaint.**

*Relates to Findings 4.5 / 4.6 / 4.7 / 4.12 / 4.13*

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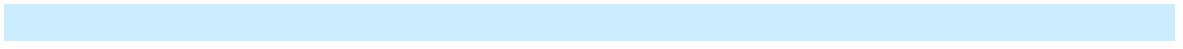
<sup>70</sup>[http://www.ogc.gov.uk/embedded\\_object.asp?docid=1001395](http://www.ogc.gov.uk/embedded_object.asp?docid=1001395)

- O) OGC and DTI should press for further publicising, by Business Links, of informal problem-solving systems, namely the Public Procurement Network and the European SOLVIT network.**

*Relates to Findings 4.5 / 4.6 / 4.7 / 4.12 / 4.13*

UK Government departments with lead responsibility for taking forward actions on behalf of the UK in the areas identified above should be:

<b>Recommendation A</b>	<b>OGC</b>
<b>Recommendation B</b>	<b>OGC</b>
<b>Recommendation C</b>	<b>OGC</b>
<b>Recommendation D</b>	<b>OGC</b>
<b>Recommendation E</b>	<b>DTI/HM Treasury</b>
<b>Recommendation F</b>	<b>DTI</b>
<b>Recommendation G</b>	<b>DfT</b>
<b>Recommendation H</b>	<b>MOD</b>
<b>Recommendation I</b>	<b>DTI/HM Treasury</b>
<b>Recommendation J</b>	<b>DTI</b>
<b>Recommendation K</b>	<b>OGC</b>
<b>Recommendation L</b>	<b>DTI/OGC</b>
<b>Recommendation M</b>	<b>UKTI</b>
<b>Recommendation N</b>	<b>OGC</b>
<b>Recommendation O</b>	<b>OGC/DTI</b>



## 7 .... Annexes

### Annex A / Terms of reference

In consultation with interested parties including UK business, CBI, TUC and other representative bodies, to develop a view, based on analysis and interviews, on UK business' experiences of competing for public procurement contracts in other EU countries - including their concerns about unfair discrimination - and on different approaches to the application of the Single Market rules on public procurement and the impact they have on contract opportunities for British suppliers and their workers.

Based on evidence gathered, produce a final report, which recommends areas for raising capabilities, spreading best practice, and tackling non-compliance that the Government can raise at a European level to make procurement markets more competitive across the EU, and issues UK firms should be aware of to improve their ability to compete effectively for public procurement contracts across the EU.

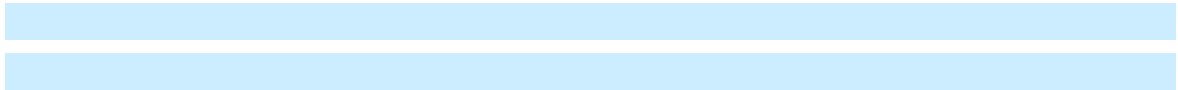
### Annex B / Steering Group

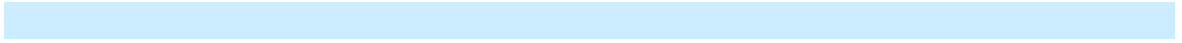
Alan Wood Leader of Review Chair of Steering Group	Siemens plc / Chief Executive Officer EEF / Chair of Economic Policy Committee
John Stewart	OGC / Director, Government Market and e-Commerce
Anne Turner Senior Responsible Officer	OGC / Director of Procurement Policy
Clelia Uhart Project Manager	OGC / Procurement Policy Unit
Andrew Field	HMT / Policy Advisor, European Economic Reform
Rosa Wilkinson	DTI / Director, Business Relations Policy
Andy Scott	CBI / Director, International Competitiveness
Kevin Curran	TUC / General Secretary of GMB
Steve Radley	EEF / Chief Economist

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Additional project team members:

Emma Ward	DTI / Assistant Director
Abigail Andersen	OGC / Project Support





## Annex B / Respondents to the consultation

Companies		
Firm	Sector	Size*
A & P Holdings Ltd	Manufacturing (ship building)	Large
Accenture	Services (management consultancy)	Large
Aegis Media Gruppe	Services (marketing)	Large
Aish Technologies Ltd	Manufacturing (electrical & mechanical engineering)	Medium
Alstom Transport	Manufacturing (transport)	Large
Alvis Vickers Ltd	Manufacturing (defence)	Large
Amphenol Ltd	Manufacturing (electronics)	Large
Andrew Nesbitt Architects	Construction	Micro
Ardenta Ltd	Services (IT consultancy)	Small
Arriva	Manufacturing (transport)	Large
Arup GmbH	Services	Small
Balfour Beatty Rail GmbH	Manufacturing (transport)	Large
BMI Trailers Ltd	Manufacturing (transport)	Small
Bombardier Transportation	Manufacturing (transport)	Large
Bovis Lend Lease	Services	Large
BT	Services (telecommunications)	Large
Caledonian Plywood	Construction	Small
Calumet Photographic	Services	Small
Canon (UK) Ltd	Manufacturing (electronics)	Large
Carillion plc	Manufacturing (engineering)	Large
CEM Systems	Manufacturing (security systems)	Small
Charles Tennant & Co. Ltd	Manufacturing (chemicals)	Medium
Cornwell Management Consultants plc	Services (management consultancy)	Medium
Creative Lynx	Construction	Small
Domino plc	Manufacturing (electronics)	Large
EDS	Services (IT)	Large
Eurotek Office Furniture	Construction	Medium
Exemplas Ltd	Services (consultancy)	Medium
Foster and Partners	Construction	Large
Fujifilm Electronic Imaging Ltd	Manufacturing (electronics)	Large
GKN Aerospace Services	Manufacturing (aerospace)	Large
Gravatom Engineering Systems Ltd	Manufacturing (engineering)	Medium
Griffiths Waite	Services (IT)	Large
Hayter Ltd	Manufacturing (mechanical engineering)	Medium
Holliday Pigments Ltd	Manufacturing (chemicals)	Medium
Howden Industrial	Manufacturing (engineering)	Medium
HT Cimatic GmbH	Manufacturing	Small
Huntleigh Healthcare	Manufacturing (healthcare products)	Large
Hypertac GmbH	Manufacturing (electronics)	Medium
IBM UK Ltd	Manufacturing (IT products)	Large
INSYS plc	Manufacturing (defence)	Large
Intertek Testing Services Int. GmbH	Services	Small
ION Technologies Ltd	Manufacturing (IT products)	Small
IR Security & Safety Ltd	Construction	Large
ISA Trading Ltd	Services	Large
Kable Ltd	Services (IT)	Small

\*Micro [less than 10 employees]; Small [10 to 50 employees]; Medium [51 to 250 employees]; Large [over 250 employees]

<b>Firm</b>	<b>Sector</b>	<b>Size*</b>
Kemble & Co. Ltd	Manufacturing (Pianos)	<i>Medium</i>
Kone Escalators	Manufacturing (mechanical engineering)	<i>Large</i>
KPMG	Services (financial)	<i>Large</i>
Landmark	Services (environmental)	<i>Medium</i>
Large Design Ltd	Services (IT)	<i>Micro</i>
Lastminute.com	Services (travel & entertainment)	<i>Large</i>
LogicaCMG	Services (IT & telecommunications)	<i>Large</i>
MacKenzie Ward Research Ltd	Services (e-learning)	<i>Small</i>
Megger Ltd	Manufacturing (electronics)	<i>Large</i>
MG Rover Group Ltd	Manufacturing (automotive)	<i>Large</i>
Mice Meissner Expo GmbH	Services (events management)	<i>Small</i>
Millstream Associates	Services (online tenders)	<i>Small</i>
Mott MacDonald	Services (consultancy)	<i>Large</i>
Northrop Grumman Sperry Marine, UK	Manufacturing (defence)	<i>Large</i>
Objectflor Art und Design Belags GmbH	Construction	<i>Medium</i>
Octel Corp.	Manufacturing (chemicals)	<i>Large</i>
Orbis Information Systems	Services (manufacturing)	<i>Small</i>
Oxford ArchDigital	Services (IT)	<i>Micro</i>
Oxford Danfysik	Manufacturing (engineering)	<i>Small</i>
PDR Electrical Engineers Ltd	Manufacturing (electrical engineering)	<i>Small</i>
Price Waterhouse Coopers	Services (financial)	<i>Large</i>
Product Support Electronics Ltd	Manufacturing (electronics)	<i>Small</i>
Prowse & Co Ltd	Services (marketing)	<i>Small</i>
Rainey Kelly Campbell Roalfe (Young & Rubicam group)	Services (marketing)	<i>Large</i>
Readymix AG	Construction	<i>Large</i>
Rolls-Royce plc	Manufacturing (automotive, aerospace, marine)	<i>Large</i>
RSM Robson Rhodes LLP	Services (financial & management consultancy)	<i>Large</i>
Sealed Air Ltd	Construction (packaging)	<i>Large</i>
Securicor Cash Services Ltd	Services (security)	<i>Medium</i>
Serco	Services (consulting)	<i>Large</i>
Siemens	Manufacturing (electronics & electrical engineering)	<i>Large</i>
Sonatest plc	Manufacturing (defence)	<i>Medium</i>
Strand Lighting Ltd	Manufacturing (electrical engineering)	<i>Medium</i>
Tarmac Central Europe GmbH	Construction	<i>Large</i>
Telectronics plc	Manufacturing (electronics)	<i>Large</i>
Telemeter Engineering	Manufacturing (engineering)	<i>Small</i>
TFC Niederlassung	Services (trading)	<i>Micro</i>
Thales E Security	Services (IT security)	<i>Large</i>
The Phone House Deutschland GmbH	Services (telecommunications)	<i>Large</i>

\*Micro [less than 10 employees]; Small [10 to 50 employees]; Medium [51 to 250 employees]; Large [over 250 employees]

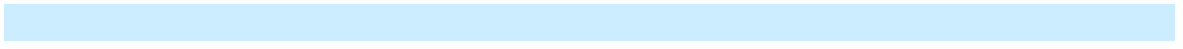
<b>Firm</b>	<b>Sector</b>	<b>Size*</b>
Travelex Deutschland GmbH	Services (financial)	<i>Medium</i>
Trend Communications Ltd	Manufacturing (electronics)	<i>Medium</i>
Tunstall	Manufacturing (healthcare products)	<i>Large</i>
Tunstall GmbH	Manufacturing (healthcare products)	<i>Medium</i>
VA Tech Peebles	Manufacturing (electronics)	<i>Large</i>
Varian Medical Systems UK Ltd	Manufacturing (healthcare products)	<i>Large</i>
W H Rowe & Son Ltd	Manufacturing (engineering)	<i>Medium</i>
Weddel Swift Distribution	Services (catering)	<i>Large</i>
Wessex Translations	Services (translation)	<i>Small</i>
Westinghouse Brakes	Manufacturing (transport)	<i>Large</i>
Wilford Schupp Architekten	Construction	<i>Small</i>
William Reed Weaving	Construction (textiles)	<i>Medium</i>
Yuasa Battery Sales (UK) Ltd	Manufacturing (electrical engineering)	<i>Large</i>
Zoefitig	Construction	<i>Small</i>

<b>Other organisations</b>
Aircraft Research Association (independent non-profit research & development organisation)
British Consultants & Construction Bureau (BCCB)
Business Services Association (BSA)
Confederation of British Industry (CBI)
Engineering Employers' Federation (EEF)
Euro-Info Centre, Business Link Bristol
European Construction Institute (ECI)
German-British Chamber of Commerce
Intellect
Major Contractors Group (MCG)
Mission Economique pour l'Ambassade de France
Office Furniture and Filing Manufacturer's Association (OFFMA)
Trades Union Congress (TUC)

\*Micro [less than 10 employees]; Small [10 to 50 employees]; Medium [51 to 250 employees]; Large [over 250 employees]

### Breakdown by sector and size

<b>Sector</b>	<b>Micro</b>	<b>Small</b>	<b>Medium</b>	<b>Large</b>	<b>Total</b>
<b>Construction</b>	1	4	3	5	<b>13</b>
<b>Manufacturing</b>	0	8	13	28	<b>49</b>
<b>Services</b>	3	11	5	18	<b>37</b>
<b>Total</b>	<b>4</b>	<b>23</b>	<b>21</b>	<b>51</b>	<b>99</b>

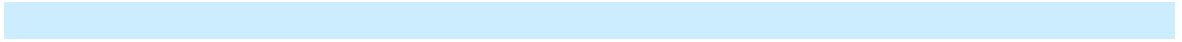




**Additional expertise & assistance provided by:**

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Anne Keogh / Siemens plc	John O'Hara / Denton Wilde Sapte
Tina Jünger / Siemens plc	Paul Uhart / Euro RSCG Wnek Gosper
Colin Walton / Bombardier	Roger Sharp / DTI Special Advisor
Paul Johnson / Westinghouse Brakes	Richard Winsone / DTI
Gary Sturgess / Serco	Jo Durning / DTI
Irina von Wiese / BT	Julian Farrel / DTI
Patricia Barlow / BT	Clive Fleming / DTI
Tim Stone / KPMG	Chris Alexander / DTI
Tony Rice / Tunstall	Celia Kissoon / DTI
Marcus Brown / Rainey Kelly Campbell Roalfe/Y&R	Robert Howe / DTI
Carillion plc	Heinz Kessel / DTI
Foster & Partners	David Hingley / DTI
Bovis Lendlease	Sue Harrison / DTI
Hunleigh Healthcare	Nick Trowell / DTI
Ian Brinkley / TUC	Edith Templeton / DTI
Tim Page / TUC	Bridget Butt / DTI
Paul Barnsley / GMB	Tony Sims / DTI
Jonie McDougall / GMB	Paul Pennell-Buck / DTI
Amanda McIntyre / CBI	David Willmets / DTI
Christine Batchelor / CBI	Malcolm Hynd / DTI
Ulrich Hoppe / German-British Chamber of Industry & Commerce	Martin Berry / DTI
Pierre Grandjouan / Mission Economique de l'Ambassade de France	Max Holden / DTI
Stephane Bossavit / French Chamber of Commerce in Great Britain	Barbara Morton / DTI
Elizabeth Start / Federation of Small Businesses	Philip Hicken / DTI Small Business Service
David Seall / EEF South	Karen Wilshaw / DTI Small Business Service
Christine Wyles / EEF South	John Reynolds / UKTI
Bob Watson / EEF East Midlands	John Duncan / UKTI
Terry Slater / EEF Western	Phil Shaw / UKTI
Anne Bennett / EEF Western	Richard Folland / UKTI
Peter Galsworthy / Consultant	Peter Foster / UKTI
Nick Kalisperas / Intellect	Adrian Hockney / UKTI
Bill Tallis / Major Contractors Group	Annette Jones / UKTI
Sally Gibbons / Construction Confederation	Kate Shannon / UKTI
Rebekah Smith / Small Business Europe	Denise Harris / UKTI
Ian Barber / European Commission	Mike Evenson / UKTI
Robert Wakeling / European Commission	Mike Eccleshall / UKTI
Sara Piller / European Commission	Chris Dearden / UKTI
Sarah Harris / Euro-Info Centre Bristol	Andrew van der Lem. UKRep
Deepa Patel / New Local Government Network	Lisa Rhodes / UKRep
Patricia Godfrey / Nabarro	Colin Poole / DfT
	Ben Smith / DfT
	John Carr / DfT
	Barry Sharp / MOD
	David Ellis / MOD

Paul McNulty / Scottish Executive  
Iain Moore / Scottish Executive  
Jo Malone / Scottish Executive  
John Mcmillen / Northern Ireland Executive  
Julia Douch / National Assembly for Wales  
Simon Renault / National Assembly for Wales  
Boris Pennaneac'h / French Finance Ministry  
Olivier Moreau / French Finance Ministry  
Kirsten Puckall / Ministry of Economics and Labor,  
Germany  
Carlo Presente / Permanent Representation of Italy  
to the European Union  
Shriti Vadera / HMT Special Advisor  
Jay Seera / HMT  
Richard Price / HMT  
Paul Rankin / HMT  
Jonathan Mills / HMT  
Kevin Williamson / HMT  
Neil Warsop / HMT  
Catherine Worsley / HMT  
Geoff Spence / HMT  
Harriet Wallace / HMT  
Paul Kissack / HMT  
John Oughton / OGC  
Bob Assirati / OGC  
David Prior / OGC  
Martin Day / OGC  
Paula Harrington / OGC  
Peter Bennett / OGC  
Mike Davis / OGC  
Linda O'Connor / OGC  
Kevin Harrison / OGC  
Jonathan Denison-Cross / OGC  
Stephane Reynolds / OGC  
Eleanor Kinchen / OGC  
Kate Nutt / OGC  
Dan Ford / OGC  
Sukhi Grewal / OGC  
Martin Sykes / OGC  
Vanessa Carpenter / OGC  
Justin Slater / OGC  
Ian Tough / OGC  
Alan Cross / OGC  
Nick Streets / OGC  
Hilary Gillies / OGC  
Stephen Squires / OGC  
Ben Walsingham / OGC  
Sally Fryer / OGC  
Mike Cuthbert / OGC  
Rob Hodd / OGC  
Neil Pawley / OGC  
Omar Raja / OGC  
Veya Aghoghogbe / OGC  
Orietta Barbari / OGC  
Mike Blyth / OGC  
John Harvey / OGC  
Marcus Bennett / OGC  
Mike Gunston / OGC  
Stephen Tokley / OGC  
Richard Graham / OGC  
Stuart Northrop / OGC  
Feroza Patel / OGC  
Jo Furze / OGC  
Jenny Beck / OGC  
Joanna Bates / OGC  
Lyndsey Sherlock / OGC  
Robin Burns / OGC  
Steve Mumby / OGC  
Nic Hopkins / OGC  
Roger Goss / OGC



## Annex D / Questionnaire

### A: ABOUT YOUR BUSINESS / ORGANISATION

#### 1. Contact details:

Name of respondent .....

Name of business / organisation .....

Address .....

e-mail .....

Tel .....

Website .....

#### 2. Are you responding as: (please circle one)

- a business
- an organisation (eg. trade body or other representative organisation)
- an individual

#### Businesses only

#### 3. What size is your business within the UK? (please circle one)

- Micro [less than 10 employees]
- Small [10 to 50 employees]
- Medium [51 to 250 employees]
- Large [over 250 employees]

#### 4. What are your main products or services? (please enter brief details)

.....

.....

### EXPERIENCES OF COMPETING FOR PUBLIC PROCUREMENT CONTRACTS IN OTHER EU COUNTRIES

#### 5. EU market presence

- In which other EU countries has your business, actively sought EU public procurement contracts in the last three years <sup>71</sup>?

.....

.....

- In which other EU countries has your business been engaged to deliver such contracts, in the last three years?

.....

.....

<sup>71</sup> Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxemburg, The Netherlands, Portugal, Spain, Sweden.

- In which other EU countries has your business traded in the last three years:

i) through a subsidiary

Countries:.....  
 .....

ii) through a joint-venture

Countries:.....  
 .....

iii) through a local agent or distributor

Countries:.....  
 .....

iv) as a sub-contractor

Countries:.....  
 .....

6. Where your business (or members) have been awarded (a) public contract(s) in other EU countries, please score from 1 to 3 the impact of each of the following factors in your success (1=low impact; 3 = high impact).

<b>Factors of success in being awarded public contracts elsewhere in the EU</b>	<b>Score (1 – 3)</b>
1. Competitive bid (on price or quality or price/quality grounds)	
2. Local presence	
3. Best fit with requirement	
4. Niche product/service	
5. British brand and/or identity	
6. Good relations with purchasing authority	
7. Experience in bidding for public procurement contracts in (an)other EU country/ies.	
8. Good linguistic skills and/or understanding of the business environment of the country	

Please add any further factors of success or comments on the above?

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7. Where your (or members) have submitted expressions of interest, or a bid, but NOT been awarded a public contract in another EU country, please score from 1 to 3 the impact of each of the following reasons (1=low impact; 3 = high impact).

<b>Reasons for not being awarded public contracts in the EU</b>	<b>Score (1 – 3)</b>
1. Uncompetitive bid (on price or quality or price/quality grounds)	
2. Deficient relationship with purchasing authority	
3. Not meeting specification	
4. Not meeting pre-qualification or selection criteria	
5. Not enough lead time on seeing OJEU advertisement	
6. Lack of experience of the bidding process for public contracts or of doing business in the EU country concerned	
7. British brand and/or identity	
8. Language difficulties and/or lack of familiarity with the business environment of the EU country/ies	

Please add any further reasons or comments on the above

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8. Do you consider that your business (or members) have ever been unfairly discriminated against, in bidding for a public contract in another EU country, on grounds of nationality?

(please circle one)

- Yes
- No

If Yes, please provide brief and specific details below

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Did you challenge the decision of the procuring authority?

(please circle one)

- Yes
- No

9. Please give examples of public purchasing practices in other EU countries which have proved helpful to your business (or members) in competing for public procurement contracts.

.....  
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10. Please give specific examples of public purchasing practices in other EU countries which have proved unhelpful to your business (or members) in competing for public procurement contracts

.....  
.....  
.....  
.....

11. Debriefing by purchasing authorities in other EU countries

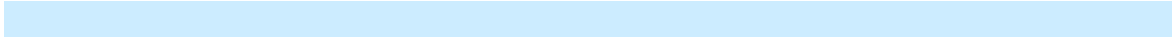


13. Would you like to any further comments on any issues relating to your experiences of competing for public contracts in the EU?

.....  
.....  
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.....  
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14. May we contact you to discuss any of these replies?  
*(please circle one)*

- Yes
- No



## Annex E / Aggregated responses to consultation with firms

The following charts / tables should not be taken as statistically significant but rather as an indications of trends identified within a small and non-representative sample.

### I/ Success factors and barriers to accessing public procurement contracts in other EU Member States (information from questions 6 & 7 of the questionnaire)

Factors of success in winning public procurement contracts in other EU countries	Impact of these factors (as rated by firms)
Competitive bid (on price or quality or price/quality grounds)*	HIGH
Best fit with requirement	HIGH
Local presence*	MEDIUM
Good relations with purchasing authority*	MEDIUM
Good linguistic skills and/or understanding of the business environment of the country*	MEDIUM
Niche product/service*	MEDIUM
Experience in bidding for public procurement contracts in (an)other EU country(ies) *	MEDIUM
British brand and/or identity	LOW

Perceived barriers to winning public procurement contracts in other EU countries	Impact of these barriers (as rated by firms)
Uncompetitive bid (on price or quality or price/quality grounds)	HIGH
Deficient relationship with purchasing authority	MEDIUM
Not meeting specification	MEDIUM
Not meeting pre-qualification or selection criteria	LOW
Not enough lead time on seeing OJEU advertisement	LOW
Lack of experience of the bidding process for public contracts or of doing business in the EU country concerned	LOW
British brand and/or identity	LOW
Language difficulties and/or lack of familiarity with the business environment of the EU country / countries*	LOW

\*These success factors and barriers were also frequently and spontaneously mentioned by firms on questionnaire responses, in formal and informal interviews and during round-tables.

HIGH	High impact
MEDIUM	Medium impact
LOW	Low impact

## II/ Points mentioned spontaneously: success factors and barriers to accessing public procurement contracts in other EU Member States

(information from questionnaires, round-tables and interviews)

<b>Factors of success in winning public procurement contracts in other EU countries</b>	<b>No. of times mentioned by firms</b>
<b>Local presence</b>	31
<b>Good procurement practice by purchasing authority</b> (includes: strategic thinking; dialogue with suppliers; long term planning; flexibility; outcome specifications; proper use of OJEU; clearly written tender documents; transparency of bidding process, requirements and evaluation criteria; compliance with EU rules)	26
<b>Supplier capability</b> (includes: good delivery; starting small; maintaining a good track record and reputation; networking with other UK firms; identifying strong demand)	14
<b>Good linguistic skills and/or understanding of the business environment of the country</b>	13
<b>Good relations with purchasing authority</b> (long-term and personal)	13
<b>Niche product / service</b>	13
<b>Good public export support services</b> (including help from local consulates on the ground; intermediation by embassy posts)	10
<b>High success rate in winning public procurement contracts in domestic market</b>	8
<b>Clear commitment (political &amp; /or administrative) by other EU governments to international competition in public procurement (this can include tender documents provided in English if supply base predominantly international)</b>	8
<b>Competitive bid</b>	7
<b>Using local sub-contractors</b>	5
<b>Experience</b>	4
<b>Good lobbying in Brussels by trade associations</b>	3
<b>Decentralisation of procurement decisions to the level where procurers have responsibility for delivery reduced protectionism (including regional)</b>	2
<b>Best fit with requirement</b>	2
<b>British brand and identity</b>	1
<b>Joint purchasing for Member States</b>	1

<b>Barriers to winning public procurement contracts in other EU countries</b>	<b>No. of times mentioned by firms</b>
<b>Cultural bias in favour of buying local</b> (includes: if sub-contracting, main contractors may choose to source locally; influence of local industry partnership with a competitor; local supplier with strong historical relationship with purchaser)	30
<b>Bad procurement practice</b> (includes: fragmentation - lack of single co-ordinated procuring body for products or services offered; bureaucracy & waste; unnecessary or excessive paperwork; detail surplus to requirement given in ITT; ambiguous or complex ITTs; narrow, legalistic replies & delay in replying to questions; high turnover of staff; lack of compliance with rules; lack of transparency; misleading product categories; difficulties in understanding or seeing assumptions behind contract requirements)	22
<b>Lack of strong commitment to competitive tendering and open markets in other EU markets</b> (includes: industrial policies in some countries giving local firms an advantage over British firms; political influence used to support local industry; state-subsidised competitors; spec written to suit a particular supplier)	16
<b>Specifying local regulations in addition to existing harmonised European standards</b> (some countries have not adopted harmonised European standards for our products)	14
<b>Cost, risk &amp; length of process</b> (a large amount of senior management time required)	12
<b>Lack of contract information</b>	11
<b>Language difficulties and / or lack of familiarity with business environment of country</b>	9
<b>Over-zealous regulation in the UK</b>	9
<b>Markets tend to be very open in the UK</b> (British firms often face more competition in their home market than competitors from other EU markets)	9
<b>Difficulties inherent to public procurement process</b> (whether in UK or elsewhere)	8
<b>Market not liberalised or not subject to procurement rules</b>	7
<b>Different legislative approaches to procurement</b> (including differing interpretations of TUPE ; different legal systems for contract law; regulatory barriers; different interpretations of EU procurement guidelines)	7
<b>Lack of strong or efficient home market in the UK</b> (Stop -start approach to procurement in the UK with poor deal-flow)	7
<b>Lack of strategic understanding of markets by UK Government</b>	5
<b>Need different knowledge for each EU public procurement market</b> (Procurement "machine" of the EU is a challenge; understanding the procedures and how to submit a winning bid)	5
<b>Lack of local presence</b>	4
<b>Lack of export support</b> (from DTI and embassy posts; lack of joined-up approach amongst UK authorities (local / national / in Brussels))	3
<b>Deficient relationship with purchasing authority</b>	3
<b>Uncompetitive bid</b>	2
<b>Lack of effective British lobbying in Brussels</b>	1

**III/ Comparing difficulties: competing for public and private contracts in the UK and in other EU countries**

(information from question 12 of the questionnaire)

Difficulties in competing for contracts	Private contracts in the UK	Private contracts in other EU countries	Public contracts in the UK	Public contracts in other EU countries
1. Lack of information on contract opportunities	HIGH	HIGH	HIGH	HIGH
2. Lack of understanding of client requirements	LOW	MEDIUM	LOW	LOW
3. Difficult to build relationships with clients	MEDIUM	MEDIUM	MEDIUM	LOW
4. Too much paperwork	LOW	LOW	LOW	LOW
5. Lengthy process	LOW	LOW	LOW	LOW
6. Bid costs high or unpredictable	LOW	LOW	LOW	LOW
7. Language or cultural barriers	LOW	LOW	LOW	LOW
8. Market not receptive to new suppliers	LOW	MEDIUM	LOW	LOW

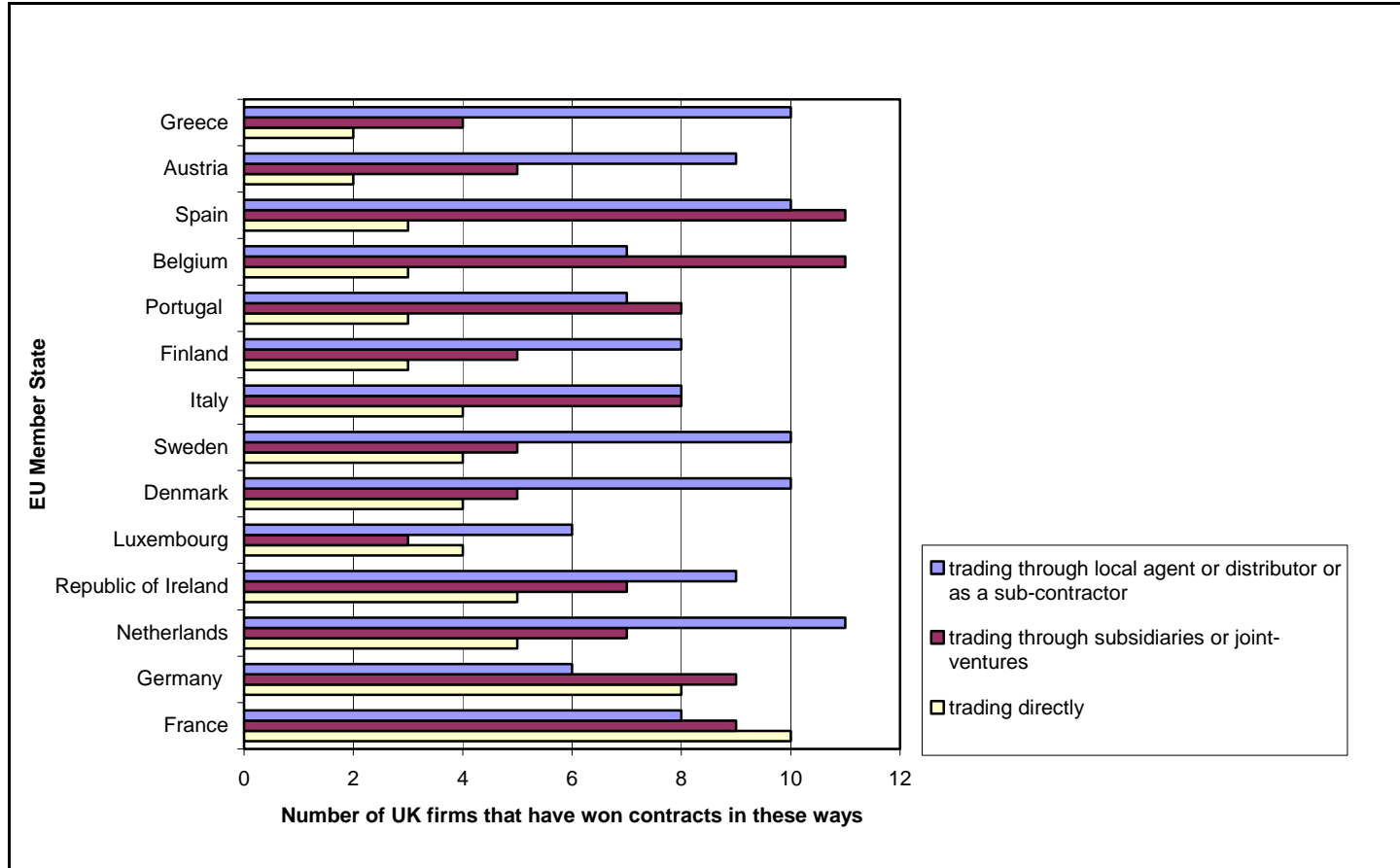
**German subsidiaries of British firms** (information from question 12 of the questionnaire)

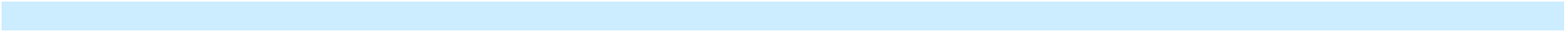
Difficulties in competing for contracts	Private contracts in Germany	Private contracts in other EU countries	Public contracts in Germany	Public contracts in other EU countries
1. Lack of information on contract opportunities	HIGH	VERY	HIGH	VERY
2. Lack of understanding of client requirements	LOW	HIGH	MEDIUM	VERY
3. Difficult to build relationships with clients	MEDIUM	HIGH	HIGH	VERY
4. Too much paperwork	LOW	MEDIUM	MEDIUM	MEDIUM
5. Lengthy process	LOW	LOW	MEDIUM	LOW
6. Bid costs high or unpredictable	LOW	LOW	LOW	LOW
7. Language or cultural barriers	LOW	MEDIUM	LOW	MEDIUM
8. Market not receptive to new suppliers	LOW	HIGH	MEDIUM	HIGH

<b>VERY</b>	Very high impact
<b>HIGH</b>	High impact
<b>MEDIUM</b>	Medium impact
<b>LOW</b>	Low impact

**IV/ UK firms' penetration of public procurement markets in other EU Member States in the last three years**

(information from question 5 of the questionnaire)





## Annex F / Publicity for Wood Review & Questionnaire

Information about the Review, and the questionnaire, were available on a dedicated website ([www.woodreview.org](http://www.woodreview.org))

### Featured on the following websites with a link to the questionnaire:

OGC: highlight in *Latest News* section  
Supplying Government: highlight in *What's new* section  
Treasury  
DTI  
Scottish Executive  
Opportunity Wales  
EEF  
UK Online  
Siemens plc  
BBC  
GMB  
German-British Chamber of Commerce  
Tenders Direct (Millstream Associates)  
Gloucester City Council

### Media reporting:

Today programme (20 February)  
Sunday Times (23 February)  
Government Opportunities magazine (March 04)  
Pinsents (law firm)  
Newsbusiness  
Connectingindustry  
Bizhot on-line news (Small business news)  
Alliance and Leicester business news

### Other publicity:

Presentation by Alan Wood at CBI South East Regional Council

OGC Chief Executive speech to CBI Public Service Industries Forum, 8 March, and inclusion of questionnaire in delegate pack.

Presentation at seminar on public procurement issues hosted by law firm Denton Wilde Sapte to business audience.

Presentation of Review and questionnaire at Strategic Supply Chain Group

### Mail-shot with questionnaire sent to:

Euro Info Centre (EIC) Bristol: forwarded to 16 subscribers to EU tender alert system

Euro Info Centre (EIC) UK network: forwarded to 300 members (non-targeted)

TUC members

Amicus members

Achilles supplier management consultancy

British Chamber of Commerce

DTI Business Relations

DTI Innovation team: forwarded to contacts in the environmental technologies sector

Small Business Service: forwarded to small business contacts

Construction Confederation: forwarded to members

CBI: forwarded to members

Engineering Construction Industry Association: forwarded to members

EEF: forwarded to members

German-British Chamber of Commerce: forwarded to 500 members

Intellect: forwarded to members

Small Business Europe: forwarded to small business trade associations in the UK

New Local Government Network: corporate partners

## Annex G / Coverage of EU public procurement directives

EU directives<sup>72</sup> set out common rules for the purchasing of goods, services and works by public authorities and for purchasing by utilities. Rules applying to utilities cover purchasing in specified activities by entities in sectors where there is still some degree of state monopoly. These sectors are transport, energy, water and telecommunications. (Telecommunications will be removed from coverage under revisions just agreed; postal services will be able to transfer the lighter “utilities” regime).

The EU rules, including the requirement to publish calls for competition, cover many, but not all, public contracts. Aspects which restrict coverage are: contract value thresholds; specific excluded sectors; specific excluded forms of contract.

### Thresholds

Contracts below specified values are not covered by the detailed EU rules.

The main thresholds are in the table below. (There are some minor variations not listed here, for simplicity).

PURCHASING BODY/ENTITY	SERVICES and SUPPLIES	WORKS
	Euro	Euro
Central Government departments	154,014	5,923,624
Local Authorities	236,945	
Utilities		
water, electricity, trams, railway, trolleybus, bus, airports, ports	473,890	5,923,624
Oil, gas, coal, railway	400,000	5,000,000
Telecommunications	600,000	5,000,000

<sup>72</sup> 92/50/EEC (services); 93/36/EEC (supplies); 93/37/EEC (works); 93/38/EEC (utilities). These rules have all been recently updated, and are currently undergoing transposition into national law. The changes do not in the main affect coverage except in respect of utilities for the removal of telecoms entities and the transfer of postal services.

**Specific excluded sectors / activities:**

- Defence ('warlike' goods only)
- Secret contracts relating to national security
- Land and buildings acquisition or rental
- Provision of voice telephony services to public sector bodies (will no longer be excluded under new EU public procurement legislation)
- Broadcasting programme material (not for utilities)
- Arbitration and conciliation services
- Services provided on the basis of a special or exclusive right e.g. universal postal services
- Employment contracts
- R&D (except where exclusively for use of contracting authority)
- Service concessions (e.g. motorways)

**Contracts where a competition is not required under the directives**

**Supplies:**

- exclusive rights in artistic fields; goods manufactured solely for R&D.

**Works:**

- where the works can only be carried out by one particular person;
- concessions (advertising is required, but not a competition).

**Services:**

- in specified areas (includes rail services, ferry services, provision of healthcare services, Legal, Catering & Cultural services) for which there is no requirement under the Directive for these to be advertised in the OJEU;
- contracts awarded to the winner(s) following a (competed) design contest.

**Utilities:**

- in certain sectors where the market is deregulated, there is exclusion from the rules e.g. bus operators in the UK (outside London & Belfast);
- the oil and gas exploration sector in its entirety is subject to a lighter regime, which does not require contracts to be advertised in OJEU.

## Annex H / Market case study: public bus services

The market structure of local public transport services in EU countries has traditionally been characterised by regional or local monopolies. The public procurement rules reflect this (see box below). The market was generally closed to competition in the UK until 1986 when the government of the day took action to deregulate the market outside London (and Northern Ireland): 83 percent of local bus services outside London are now operated on a commercial basis. The routes run are determined by the operator and are open to competition; entry to the market is not controlled except through the need to meet operator licensing ("entry to the profession") requirements. The remaining 17 percent of the network is subsidised by local authorities. These are routes which are socially necessary but not commercially viable, with the services provided by private companies under contract to the local authority. Public bus services in London are provided by operators under contract to Transport for London who control and specify the routes to be provided.

### How do the public procurement rules apply?

#### Monopoly supply

Where there is a special or exclusive right in law to provide and operate a service, there is no requirement under the public procurement rules to advertise *that* service (i.e. it is reserved). However the very fact that the operator has a monopoly brings it within the rules for the purposes of its own purchasing. Therefore purchases of buses by that entity are open to competition.

#### Limited competition

The full advertising and other procedural rules apply to public purchasing of both bus operating companies and vehicles.

For example, in London TfL owns the network but tenders the running of buses to private operators. Those service opportunities are advertised in OJEU and the bus operators are subject to the rules for their vehicle purchases

#### Wholly deregulated

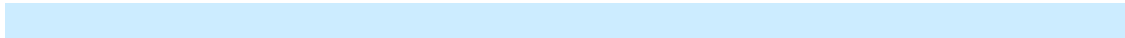
The rules do not apply – the market operates just as any other competitive market.

Liberalisation has been slow to take place in other EU countries, although some are moving ahead faster than others. Proposed EU market-opening legislation aims to force the pace by requiring all public service contracts for bus services with an annual value of €1 million or more (€3 million or more if an authority incorporates all its public service requirements in a single contract) to be awarded by competitive tender at intervals of no more than 8 years.

In some cases, existing competition law can be used both to guard against possible abuse of a dominant position and to create market opening. The German cartel office recently approved a merger of two public transport operators on the condition that new contracts in the greater Hanover area are awarded through competitive procedures.

Even in the absence of a fully competitive market across the EU, it is not impossible for UK operators and manufacturers to gain access to public contracts. One UK operator has achieved a significant presence in seven EU countries through a strategy of acquiring local bus companies.

Monopoly bus operators will also tend to purchase locally manufactured vehicles, where available, despite the requirement to tender competitively. Where bus services are deregulated, there is no such requirement – an operator is free of the rules just as any other firm operating in a free market. This does not necessarily mean that UK manufacturers lose out. Several large bus operators have renewed contracts with a leading UK supplier of low-floor buses.



## **Annex I / Progress on EU market liberalisation**

### **Liberalisation of energy markets has been steady but slow**

The first EU energy liberalisation directives were adopted in 1996 and 1998 for electricity and gas respectively, with implementation scheduled for 1999 and 2000.<sup>73</sup> These set out fundamental goals of transparency and non-discrimination, and introduced market-opening measures to abolish exclusive rights and unbundle network activities from generation and supply.

Subsequent monitoring by the European Commission to identify obstacles and shortcomings to market liberalisation resulted in new legislation being adopted in 2003.<sup>74</sup> This requires electricity and gas markets to be open to all non-household customers by July 2004, and to all customers by July 2007, as well as further progress on unbundling, a regulator in each Member State, published network tariffs and national monitoring of security of supply. A new regulation<sup>75</sup> set out common rules on cross-border trade, requiring a regulatory committee to agree guidelines on compensation of transit flows, harmonisation of national transmission tariffs and allocation of cross-border interconnection capacity. Although national legislation is currently being hurried through, most Member States are expected to miss the July 2004 deadline.

In addition to the legislative package, the Florence Forum and Madrid Forum were set up for electricity and gas markets respectively to discuss harmonisation issues not addressed in the legislation such as cross border trade and tariffication, and access to interconnection capacity. These convene twice a year and consist of representatives from national regulatory authorities; Member States; the European Commission; transmission system operators; gas and electricity suppliers and traders; consumers; network users and power and gas exchanges.

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<sup>73</sup> Electricity directive 96/92/EC and Gas directive 98/30/EC.

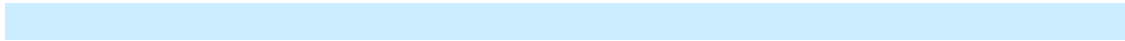
<sup>74</sup> Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 and Directive 2003/55/EC of the European Parliament and of the Council Concerning common Rules for the Internal Market in Natural Gas and Repealing Directive 98/30/EC.

<sup>75</sup> Regulation (EEC) No 1228/2003 of the European Parliament and of the Council on Conditions for Access to the Network for Cross-Border Exchanges in Electricity, 26.6.2003.

A recent EU benchmarking report <sup>76</sup> concludes that progress in developing a unified electricity and gas market has been steady but disappointingly slow. Key obstacles include the dominance of certain suppliers on national markets and inadequate interconnection between Member States.

To address remaining barriers, the Commission presented a new package of measures on 10 December 2003 <sup>77</sup> to address electricity and gas infrastructure issues and ensure that voluntary rules agreed in the Madrid forum are implemented in all Member States.

In summary, considerable progress has been made on the legislative front, but British firms still face practical obstacles to a unified market. It also remains to be seen how effectively the legislation will be implemented by Member States and how strictly the Commission will enforce requirements.



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<sup>76</sup> *Third Benchmarking Report on the Implementation of the Internal Electricity and Gas Market*, Commission Draft Staff Working Paper, 01/03/2004.

<sup>77</sup> [http://europa.eu.int/comm/energy/electricity/infrastructure/com\\_proposal\\_2003\\_en.htm](http://europa.eu.int/comm/energy/electricity/infrastructure/com_proposal_2003_en.htm)

## **Annex J / Railway sector: UKTI export strategy 2004-2005**

### **Overview**

Internationally, railways is a vast industry. UK companies in the railway sector are active worldwide winning substantial export business both in goods and, increasingly, in services. In the UK alone annual operator income amounted to approximately £7 billion in 2001, estimated capital expenditure is around £4.5 billion a year, and employment is estimated at over 150,000. It is difficult to quantify UK exports as no SIC code fits the entire industry, projects have a high local content and railway opportunities can involve investing overseas for benefits later. For parts and for some categories of equipment, exports run at around £200 million a year.

### **Objectives are set given that:**

- Railways is a growth industry.
- The UK railway industry has been transformed in the past decade.
- The overseas image of the UK railway industry is that we are at the forefront with privatisation and willing to learn from early experience.
- The current buoyancy of the UK market means that UKTI should support cautiously international business development with synergies from a strong home market.
- The thrust of the strategy in the short term is therefore to concentrate on markets undergoing active reform, or those that have project / significant business opportunities that are clearly attractive to UK companies.

### **Objectives**

- Help UK companies in the railway sector win overseas business through: identification of opportunities, gathering and disseminating information, and support for business development in target markets.
- Provide a forum for cross-industry planning and co-operation through: the Railway Sector Advisory Group, co-ordinating marketing efforts with other stakeholders, and to facilitate company access to different branches of UK Government and investigate budgets for railways development.

- Encourage open markets, competition, and where appropriate the provision of UK private finance; through fostering commercialisation and regulatory reform.
- Publicise UK export successes, promote best practice, highlighting capabilities and support the use of emerging technologies.
- Maximise the influence of UK Government support for companies and projects by developing political links and MOUs with foreign governmental organisations.
- Back prime contractors to enter new markets and have active relations with multinational railway firms to encourage them to source from the UK.
- Assist SMEs to win business arising from major projects by providing web based information on over 20 countries, seminars, and through “Meet the Buyer” workshops. Offer a degree of help to individual companies to assist them to respond to sales opportunities overseas. Maximise knowledge of how to obtain Government information and assistance via the web.
- Prepare a Buyers Guide and other literature to cite what UK companies can provide to overseas clients.

## **Delivery Mechanisms**

### i) Early stage investigations:

- undertake market research to produce railway sector reports, accounts of market developments and project lists.
- analyse restructuring and project opportunities
- offer basic railways market information via the Web on 25 countries
- publish a few detailed market overviews
- create electronic sales leads
- build relationships with International Financial Institutions
- assess the implications of EU directives on railway Interoperability
- evaluate proposals for SESA missions

ii) Developing specific business opportunities:

- provide a programme arranging service for inward missions
- publicise leasing capability, infrastructure maintenance and advisory services
- promote export successes
- focus on supporting prime contractors bidding for major overseas projects where political support is valuable in difficult markets
- organise Meet the Buyer events and workshops to help SMEs tender for business
- issue electronic sales leads on railway opportunities

iii) Bidding and Contract Negotiations:

- facilitate the formation of consortia
- provide political endorsement for reputable firms sourcing from the UK, and appropriate lobbying of key decision makers overseas

iv) General:

- Gateway sector and country pages publications (including on-line), Support for Exhibitions and Seminars Abroad (SESA)-supported events and Outward Mission Scheme events. Encouraging smaller firms in the sector to use the Passport to Export scheme.

## **Partners/Stakeholders**

- UKTI Railway Sector Advisory Group
- Government: DfT, SRA, DTI, FCO, ECGD
- Industry associations: RIA, BCCB, ATOC, Railway Forum, Regional organisations
- Companies: Advisors (Engineering Consultants, Lawyers, Accountants), Contractors, Infrastructure Maintenance Companies, Equipment Suppliers, Train Operators, Banks and Rollingstock Leasing Companies.

## Strengths

Comprehensive UK railway industry covering all significant railway products and services with proven successes both at home and abroad. We are particularly strong in railway restructuring and Public Private Partnership (PPP) projects, with over 260 projects completed. This expertise is recognised worldwide. In addition to tradition railway equipment and project skills services such as legal, financial and regulation are now increasingly sought by foreign clients.

There are two major Trade Associations in the sector with several others covering parts of it. The Railway Industry Association (RIA) represents the supply side of the industry, while the British Consultants and Construction Bureau (BCCB) supports consultants across all sectors.

## Weaknesses

Our main competitors (e.g. French, Germans, Japanese) have a more stable home market, which may afford them a competitive advantage. It is also often suggested that they benefit from advantageous government-backed loans. We have limited scope in freight vehicles and operations. Some UK companies put insufficient resources into marketing.

## Priority Markets

*Proactive work by UKTI:*

Bulgaria, China, Czech Republic, Germany, Hong Kong, Hungary, Italy, Poland, Romania, Singapore, South Korea, Spain and Taiwan.

Sector Summaries will be provided on these markets via the UK Trade & Investment web site ([www.uktradeinvest.gov.uk](http://www.uktradeinvest.gov.uk)).

## Niche Markets

These are markets with major projects that offer clear export opportunities for UK firms.

MARKET	PROJECT
Austria	Brenner Tunnel
Dubai	Dubai LRT
France	Lyon – Turin
Switzerland	AlpTransit Bahn 2000

## Other Markets

Reactive work on niche opportunities as they arise, by agreement with RSAG.

NB: The priority markets reflect the views of UK industry and have been endorsed by the UKTI Railway Sector Advisory Group.



## Targets

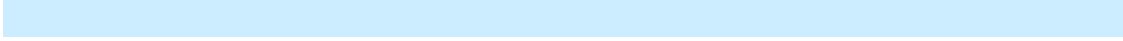
- Assist 15 new exporters to enter profitable export markets.
- Assist 25 existing exporters into rewarding markets that they have not previously entered.
- Assist 20 companies to pursue business in major railway projects.
- That 68 percent of firms assisted by TPUK report a significant impact on their business.
- Publish a Rail Supplement for Overseas Trade magazine to highlight "UK wins" stories and UK capability.

## Evaluation

On-going liaison with companies to monitor the results of our assistance. Missions to be assessed individually with mission sponsors. These self-assessments to be reviewed quarterly with the Chairman of the TPUK Railway Sector Advisory Group in order to seek his endorsement and identify any areas needing remedial action. Independent review each year of all TPUK work on infrastructure projects.

NB: This independent review will feed into the TPUK resource allocation process for future years.

 <p>Michael Welton Chairman TPUK Railway Sector Advisory Group 2004</p>	 <p>Denise Harris Head, Railways Unit Trade Partners UK 2004</p>
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## Annex K / EU Commission form for state aid complaints

### Form for the submission of complaints concerning alleged unlawful state aid

(2003/C 116/03)

Article 88(3) of the EC Treaty provides that the Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. Member States shall, not put its proposed measures into effect until this procedure has resulted in a final decision.

Aid that has been put into effect in contravention of Article 88(3) of the Treaty constitutes 'unlawful aid'.

In accordance with Article 10(1) of Council Regulation (EC) No 659/1999,<sup>78</sup> where the Commission has in its possession information from whatever source regarding alleged unlawful aid, it shall examine that information without delay.

Furthermore, according to Article 20(2) of the abovementioned Regulation, any interested party may inform the Commission of any alleged unlawful aid and any alleged misuse of aid (hereinafter referred to as a complaint).

Any person or company may submit a complaint to the Commission. The procedure is free. However, when investigating complaints the Commission is obliged to respect the procedural rules set out in Regulation (EC) No 659/1999, and in particular the rights of defence of the Member State.

Moreover, as an alternative, or as well as submitting a complaint to the Commission, it is usually possible for third parties whose interests have been adversely affected by the grant of an unlawful aid to pursue the matter before the national courts. A report on the application of State aid rules by the national courts is available on

[http://europa.eu.int/comm/competition/state\\_aid/legislation/app\\_by\\_member\\_states/](http://europa.eu.int/comm/competition/state_aid/legislation/app_by_member_states/)

However, the Commission cannot offer advice about the national procedures available in individual cases.

The annexed form sets out the information the Commission needs in order to be able to follow-up a complaint about alleged unlawful aid. If you are not able to complete all the sections of the form, please give the reasons.

The form is accessible in all Community languages on the Internet server of the European Commission at the following addresses: [http://europa.eu.int/comm/competition/index\\_en.html](http://europa.eu.int/comm/competition/index_en.html) and [http://europa.eu.int/comm/secretariat\\_general/index\\_en.htm](http://europa.eu.int/comm/secretariat_general/index_en.htm). The Europa website also contains much useful information about the Community's State aid rules which may help you or your adviser to complete the form.

You can send this form to the following addresses:

For complaints relating to possible unlawful State aid in the sector of the production, processing and marketing of Annex I agricultural products:

European Commission

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<sup>78</sup> OJ L 83, 27.3.1999, p. 1.

Directorate-General for Agriculture  
Directorate H  
Office: Loi 130 5-128  
B-1049 Brussels  
Fax (32-2) 296 76 72  
e-mail: Agri-State-Aids@cec.eu.int

For complaints relating to possible unlawful State aid in the sector of the production, processing and marketing of fisheries and aquaculture products:

European Commission  
Directorate-General for Fisheries  
Directorate D  
Rue Joseph II 99  
B-1049 Brussels  
Fax (32-2) 295 19 42  
e-mail: fish-aidesdetat@cec.eu.int

For complaints relating to possible unlawful State aid in the transport sector or the coal sector:

European Commission  
Directorate-General for Energy and Transport  
Directorate A  
Unit 4 — Internal Market, Public Service, Competition and Users' Rights  
B-1049 Brussels  
Fax (32-2) 296 41 04  
e-mail: stateaid.transport@cec.eu.int

For complaints relating to possible unlawful State aid in other sectors:  
European Commission

Directorate General for Competition  
State aid Greffe  
J-70, (4/136)  
B-1049 Brussels  
Fax (32-2) 295 36 10  
e-mail: Stateaidgreffe@cec.eu.int

If you are not sure which department is responsible, you may address your complaint to the

Secretary General  
European Commission  
B-1049 Brussels  
e-mail: Aidesdetat@cec.eu.int

**I.A. Information regarding the complainant**

- I.1. Surname and forename of complainant, or corporate name:
- I.2. Address or Registered Office:
- I.3. Telephone, fax, e-mail address:
- I.4. Name, address, telephone, fax, e-mail address of a contact person:
- I.5. If the complainant is an enterprise, a brief description of the complainant and its field(s) and place(s) of activity:
- I.6. Please summarise briefly how the award of the alleged aid affects the complainant's interests.

**I.B. Information regarding the representative of the complainant**

I.7. If the complaint is submitted on behalf of someone else (a person or a firm), please also provide the name, address, fax, e-mail address of the representative and attach written proof that the representative is authorized to act.

**II. Information regarding the Member State**

II.1. Member State:

II.2. Level at which the alleged unlawful State aid has been granted:

- central government
- region (please specify)
- other (please specify)

**III. Information regarding the alleged aid measures complained of**

III.1. Are you complaining about an alleged aid scheme, or an alleged individual aid?

III.2. When was the alleged aid given or the alleged aid scheme implemented? What is the duration of the alleged aid scheme (if known)?

III.3. In which economic sector(s) does this alleged aid apply?

III.4. What is the amount of the alleged aid? In what form is it given (loans, grants, guarantees, tax incentives or exemptions etc)?

III.5. Who is the beneficiary? In the case of a scheme, who is eligible for the alleged aid?

Please give as much information as possible, including a description of the main activities of the firm(s) concerned.

III.6. For what purpose was the alleged aid given (if known)?

**IV. Grounds of complaint**

Please explain in detail the grounds for your complaint, including the reasons why you have complained, what rules of community law you think have been infringed by the granting of the alleged aid in question and how this has affected conditions of competition in the common market and trade between Member States.

If the alleged aid has damaged your own commercial interests, please explain how.

**V. Information on other procedures**

V.1. Details of any approaches already made to the Commission's services (if possible, attach copies of correspondence):

V.2. Approaches already made to national authorities (e.g. central, regional or local government bodies, ombudsman, etc.; if possible, attach copies of correspondence):

V.3. Recourse to national courts or other procedures (e.g. arbitration or conciliation). (Indicate whether there has already been a decision or award and attach a copy if appropriate):

**VI. Supporting documents**

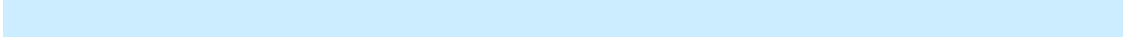
List any documents or evidence which is submitted in support of the complaint, and attach copies.

Whenever possible, a copy of the national law or other measure which provides the legal basis for the payment of the alleged aid should be provided.

**VII. Confidentiality**

You should be aware that in order to protect the rights of defence of the Member State concerned, the Commission may have to disclose your identity and any supporting documents, or their contents, to the Member State. If you do not wish your identity or certain documents or information to be disclosed, please indicate this clearly, clearly identify the confidential parts of any documents and give your reasons.

Place, date and signature of complainant



## Annex L / Documentary sources

*Germany, Consolidating Economic and Social Renewal*, pp 48, 113-117 and 124, OECD, June 2004, [www.oecd.org](http://www.oecd.org)

*Improving Procurement - Progress by the Office of Government Commerce in Improving Departments' Capability to Procure Cost-effectively*, National Audit Office, March 2004, [www.nao.org](http://www.nao.org)

*Third Benchmarking Report on the Implementation of the Internal Electricity and Gas Market*, Commission Draft Staff Working Paper, 01 March 2004, [www.europe.eu.int](http://www.europe.eu.int)

*A report on the functioning of public procurement markets in the EU: benefits from the application of EU directives and challenges for the future*, European Commission, February 2004, [www.europe.eu.int](http://www.europe.eu.int)

*Advancing long-term prosperity: Economic reform in an enlarged Europe*, HMT, February 2004, [www.hm-treasury.gov.uk](http://www.hm-treasury.gov.uk)

*Report on the implementation of the Internal Market Strategy (2003-2006)*, European Commission, January 2004, [www.europe.eu.int](http://www.europe.eu.int)

*Internal Market Strategy Priorities 2003-2006*, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, May 2003, [www.europa.eu.int](http://www.europa.eu.int)

*Proposal for Services Directive*, European Commission, January 2004. [www.europe.eu.int](http://www.europe.eu.int)

*Increasing Competition and Improving Long-Term Capacity Planning in the Government Market Place (The Kelly Report & Action Plan)*, OGC, December 2003, [www.ogc.gov.uk](http://www.ogc.gov.uk)

*The Access of SMEs to public procurement contracts*, EIM Business & Policy Research for the Commission, December 2003.

*Diversity in public sector procurement survey*, DTI Small Business Service, October 2003, [www.sbs.gov.uk](http://www.sbs.gov.uk)

*Government: Supporter & Customer? Better Regulation Task Force / Small Business Council*, May 2003, [www.brtf.gov.uk](http://www.brtf.gov.uk)

*Government Response to the Better Regulation Task Force / Small Business Council Report*, HMG, September 2003, [www.brtf.gov.uk](http://www.brtf.gov.uk)

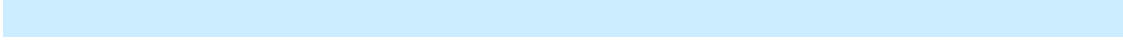
*DTI – The Strategy*, DTI, 2003, [www.dti.gov.uk](http://www.dti.gov.uk)

*The State of the Internal Market for Services*, Report from the Commission to the Council and the European Parliament, 30 July 2002, COM(2002) 441 Final, [www.europe.eu.int](http://www.europe.eu.int)

*The Government's Manufacturing Strategy*, DTI, May 2002, [www.dti.gov.uk](http://www.dti.gov.uk)

*Government Accounting*, Chapter 22, HM Treasury, 2000, <http://www.government-accounting.gov.uk/current/frames.htm>

*Public Procurement Review*, DTI Single Market Unit, Summer 1994.



## Annex M / Glossary

Term	Definition
Aggregation	Aggregation of demand means collaboration with other business units within an organisation, or with other organisations, in presenting requirements for common or similar good and services to the market in a co-ordinated way.
Aggrieved bidder	Someone who considers that they have been treated unfairly in a procurement process. The EU compliance and remedies directives require Member States to set in place review procedures in respect of procurements made under the EU procurement rules (see also Remedies).
Bid costs	Costs incurred by bidders in preparing a bid for a public procurement contract.
Business Links	Business Links provide practical advice to UK businesses through a nationwide network of regional offices. A web portal is also available at <a href="http://www.businesslink.co.uk">http://www.businesslink.co.uk</a> . The service is managed by the Department of Trade and Industry.
Cartel	An agreement between businesses not to compete with each other. This may involve bid-rigging, which is an agreement by cartel members on who should win a contract.
Contract notice	Under the procurement directives a contract notice is required in most cases to be published in the Official Journal (OJEU). This is the formal advertisement of a contract opportunity.
Contract specifications	Specific requirements for a contract are set out by the procuring authority in the specifications, either through detailed technical descriptions including the use of technical standards or through output / outcome descriptions, or both.
Contracting authority / Procuring authority / Purchasing authority	Body engaging in public procurement by virtue of being subject to the public procurement directives. The technical term is <i>contracting authority</i> (or <i>contracting entity</i> for utilities – see definition below).

Deal-flow	The flow of deals made – i.e. contracts signed - over time, viewed from a supplier's perspective. This depends on the number of opportunities presented by procurers (in this case, in the public sector).
DIN standards	Standards issued by the <i>Deutsches Institut für Normung</i> (German national standards body).
Equal treatment of tenderers	One of the principal aspects of the Treaty, which required that there should be equality of treatment. This obligation is reinforced by the specific procedures set out in the EU public procurement directives.
EU public procurement directives	The EU procurement directives set out the detailed rules to be followed by contracting authorities and entities. There are currently 3 public sector directives covering works, supplies and works. A new consolidated directive will come into force by 2006. A separate directive covers procurements by utilities (see Utilities).
EU Rules / EU public procurement rules / public procurement rules	These include the EU public procurement directives, Treaty obligations, and relevant European Court of Justice jurisprudence.
EU public procurement rules	See EU rules.
Euro-Info Centre	Euro Info Centres are a network of three hundred support agencies located throughout Europe, partially funded by the European Commission to provide advice on Single Market issues, including access to public procurement contracts in EU countries. More information is available on <a href="http://europa.eu.int/comm/enterprise/networks/eic/eic.html">http://europa.eu.int/comm/enterprise/networks/eic/eic.html</a>
Foreign-owned subsidiary	A subsidiary is a company (X), of which another company (Y) - often known as <i>parent company</i> , or <i>headquarters</i> – is a member/shareholder with the right to appoint or remove the majority of X's board of directors OR of which Y holds or controls a majority of voting rights. The term <i>foreign-owned</i> subsidiary is used to refer to a subsidiary of which the parent company is located in another country.

Framework agreements	A general term for an agreement with one or more suppliers which sets out the terms and conditions under which specific purchases (call-offs) can be made during the period of the agreement. The agreement itself is not normally a contract as defined by the EU public procurement directives, as there is no obligation on the purchaser to buy anything. The contract, in EU terms, is formed at the call-off stage.
Franchise	An arrangement under which a body earns profits or income by exploiting a right conferred to it.
Free movement of goods & services	The Treaty requires that there should be no obstacles to the free movement of goods (Part 3 Title 1) and the free movement of services (Part 3 Title 3) across Member States.
Heavy rail	A railway with capacity for a heavy volume of traffic, and characterised by exclusive rights-of-way and high speed. Heavy rail is different from metro rail and light rail such as London Underground or Nottingham Tram system.
Inward investment	Investment that adds to, deducts from or acquires a lasting interest in an enterprise, which emanates from an investor located in a country other than that of the enterprise, and where the investor's purpose is to have an effective voice in the management of the enterprise (an 'effective voice' being defined as a holding of 10% or more of the share capital of the enterprise).
Joint-venture	A joint-venture can be a loose association between firms through collaborative working. It is also used to refer to a joint bid submission where a number of organisations bid to do different aspects of a contract, and if they are successful, may set up a new organisation to deliver the contract. Legally, the term joint-venture has a specific definition as being an organisation which is jointly managed by two or more other organisations, all of which carry out a trade or business (whether or not these have a profit motive). Each of the managing organisations makes a contribution (e.g. financial, intellectual property, staff resources). Such joint-ventures are usually project specific and time limited.

Kelly Report	OGC report on Increasing Competition and Improving Long-Term Capacity Planning in the Government Marketplace, published with accompanying Action Plan in December 2003, available on the OGC website: <a href="http://www.ogc.gov.uk/index.asp?id=1000987">http://www.ogc.gov.uk/index.asp?id=1000987</a>
Level playing field	Situation where firms compete for business on an equal and fair basis.
Local agent	A local agent is an individual or firm located within the country where a supplier is trying to win contracts, and which markets the goods and services of the supplier to potential customers. Agents may gain a percentage of any sale completed between the supplier and purchaser through the agent's intermediation. Or agents may act as distributors, purchasing goods from a supplier and then selling them on to a final purchaser, without the supplier being involved in the final transaction.
Local subsidiary	A subsidiary is a company (X), of which another company (Y) - often known as <i>parent company</i> , or <i>headquarters</i> – is a member/shareholder with the right to appoint or remove the majority of X's board of directors OR of which Y holds or controls a majority of voting rights. The term <i>local subsidiary</i> is used to refer to a subsidiary located within the country in which the parent company seeks to win contracts.
Main contractor	Person awarded a contract. May also sub-contract in order to meet the terms of his contract.
Market liberalisation	Removal of barriers to international trade and investment, including by opening up markets to competition, removing state-regulated monopolies, e.g. in telecomms, or reducing Government involvement in markets, e.g. removing price controls.
Member States	Countries that are members of the European Union. The consultation for the Review was carried out prior to 1 May 2004, when there were 15 Member States (Austria, Belgium, Denmark, Germany, Greece, Finland, France, Ireland, Italy, Luxembourg, Portugal, Spain, Sweden, The Netherlands, United Kingdom). From 1 May 2004, with the accession of 10 new Member States, there are 25 members of the EU. New Member States are Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia.
Mutual recognition	Under Mutual Recognition, Member States are obliged to accept on their territory products which are legally produced and marketed in another Community Member State in sectors which have not been subject to harmonisation measures at Community level or which are covered by minimal or optional harmonisation measures.
Non-discrimination on grounds of nationality	The Treaty sets out that discrimination on grounds of nationality is prohibited. Non-discrimination on grounds of nationality is seen as a fundamental Treaty right.
Office of Government Commerce	The Office of Government Commerce is an agency of the Treasury set up in 2000 to act as a catalyst for achieving best value-for-money in central and civil Government commercial activities.

Official Journal of the European Union (OJEU)	Official publication in which Commission directives and other information is published. Public procurement tenders are advertised in the Supplement to the Official Journal of the European Union which is available online at <a href="http://ted.publications.eu.int/official/">http://ted.publications.eu.int/official/</a>
PPP / PFI	Public private partnerships (PPPs) bring the public and private sector together in long-term partnerships for mutual benefit. Private Finance Initiative (PFI) is the most common form of PPP in the UK and usually involves an arrangement where the private sector provides an asset-based service to the public sector under contract.
Predatory pricing	Strategic behaviour where a firm deliberately incurs short-term losses in order to eliminate a competitor so as to be able to charge excessive prices in the future.
Procurement infringement proceedings	A procurement infringement proceeding, known as <i>infraction</i> , is opened against Member States by the European Commission on receipt of a complaint by a tenderer or another Member State about a public procurement exercise, or a generic public procurement behaviour, which the Commission believes may be in breach of the EU rules. The complaint is addressed to the Member State in which the procuring authority operates, and the identity of the complainant is not usually revealed.
Procuring authority / Purchasing authority /	See Contracting authority.
Public contracts / Public procurement	Contracts awarded by public authorities - including government departments and local authorities, who are subject to EU procurement directives.
Public procurement	See Public contracts.
Public Procurement Network (PPN)	The Public Procurement Network (PPN) is a group of senior procurement policy officials from all EU Member States including candidate countries (Turkey, Romania, Bulgaria) and European Free Trade Agreement (EFTA) countries Norway, Switzerland, Iceland, Liechtenstein. It has two arms: a best practice forum for exchange of information and techniques; and an informal problem-solving function for companies in one country which are experiencing difficulties in a procurement process in another country at the pre-contract award stage.
Public procurement practice	Process and procedure by which public authorities award contracts and apply the EU rules on public procurement.
Public procurement rules	See EU Rules.
Purchasing authority	See Contracting authority.
Rail franchise	A regional subdivision or specific train path of a national rail network operated by one rail company. Franchises in the UK include Wales and Borders, Scotrail and the Greater Anglia Railway (see also Franchise).
Remedies	Mechanisms available to suppliers for challenging alleged breaches of EU public procurement rules. These are set out in directives 89/665/EEC and 92/13/EEC as set out on <a href="http://simap.eu.int/EN/pub/src/directiv.htm">http://simap.eu.int/EN/pub/src/directiv.htm</a> - en
Rolling stock	Anything with wheels that can run on railway track including locomotives, carriages, goods wagons, and maintenance vehicles.

Service concession	A services contract under which the terms of the contract consists of, or includes, rights for the provider to exploit the provision of those services. For example a contract to run a car park in a hospital could be a concession if the provider obtained part or all of its income from the users of the car park. Services concessions are excluded from the Public procurement directives.
Services Directive	An EU legislative proposal put forward by the European Commission to reduce barriers to trade in services across the EU. This sets out requirements aimed at achieving an optimal degree of freedom to establish a business in another Member State and to provide services in other Member States, without necessarily being established there.
SME	Small and medium-sized enterprises.
Standards	Document established by consensus and approved by a recognised body that provides for common and repeated use: rules, guidelines or characteristics for activities or their results; these are aimed at the achievement of the optimum degree of order in a given context.
State aid	Aid provided through state resources (including allocations from approved Structural Funds programmes). State aid may include grants to firms for investment, training or research; cash injections to public enterprises; loans and guarantees; consultancy advice; infrastructure projects benefiting identifiable end-users. State aid is illegal if it distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods and which affects trade between Member States.
Sub-contractor	A contract awarded by a prime contractor, which has won a tender for a public procurement contract. A sub contract is not subject to the EU public procurement directives.
Successful bidder	Individual or firm to which a public procurement contract is awarded.
Transparency in contract award procedures	The principle of transparency in contract award procedures is based on the requirement that decisions be taken as openly as possible and as closely as possible to the citizen, as set out in the Treaty on European Union of 2002 at Article 1. The practical application of the principle of transparency in public contract award procedures is the obligation to advertise opportunities across the EU.
Treaty	The Treaty establishing the European Community sets out requirements on Member States to remove obstacles to the free movement of goods, persons, services and capital. The Treaty was issued in 1957 (Treaty of Rome) and amended most recently by the Treaty of Nice in 2001.
TUPE regulations	The TUPE Regulations - The Transfer of Undertakings (Protection of Employment) Regulations 1981 - are legal provisions made in relation to rights and obligations relating to employers and employees, excluding pension provisions, when businesses or parts of businesses are transferred or merged. These Regulations were originally introduced to implement the Acquired Rights Directive (77/187/EEC). They have been amended a number of times and a new consolidated version is in the process of being drafted.

TUV certification	Certification by <i>Technischen Überwachungsvereine</i> (Technical Inspections Organisations)
UK Trade & Investment	UK Trade & Investment is the Government organisation that supports both companies in the UK trading internationally and overseas enterprises seeking to locate in the UK. For more information, visit <a href="http://www.uktradeandinvestment.org.uk/">http://www.uktradeandinvestment.org.uk/</a>
Utility	Body operating in the water, energy, transport and postal services sectors and covered by the revised Utilities Directive (2004/17/EC, adopted on 31 March 2004) in its procurement for relevant activities above certain thresholds.
Value-for-money	UK Government policy defines value-for-money in procurement as the optimum combination of whole life cost and quality (or fitness for purpose) to meet the user's requirement. The user's requirement must be tested critically for need, cost-effectiveness and affordability under whatever arrangements are in place for financial approval and separation of functions.
Warlike goods or services	Goods or services intended for specifically military purposes and which are included in a list, originally drawn up in 1958, or are otherwise clearly military in nature. Where there are essential national security interests, Article 296.1(b) of the Treaty enables Member States to purchase such goods without applying the EU public procurement directives or Treaty principles - such as transparency, non-discrimination.