

92. Authorization and use of novel foods and food ingredients in the EC were harmonized by Regulation (EC) No. 258/97 adopted in 1997.¹²² The EC is revising its novel food legislation with the aim of, *inter alia*, establishing a centralized procedure for assessment (by the EFSA) and authorization (by the Commission).¹²³ For "traditional food" from third countries, which is considered as novel food under the current Regulation, safety assessment and management are to be introduced based on the history of safe food use in the country of origin. A number of Members have raised concerns in the SPS Committee regarding the definition and recognition of "traditional food" from third countries in the proposed regulation.¹²⁴ Developing countries in particular have complained that the proposed regulation would unreasonably hinder trade because it would impose on the suppliers the burden of proof that traditional or ethnic products or extracts are safe, and require historical evidence of safe consumption over a large area, although the products could be consumed in small localities.

93. The EC notified a total of 25 new or modified measures in 2007, and 13 in 2008 (to 10 October). Three of the notifications in 2007 concerned emergency actions, whereas only one emergency action was notified in 2008 (Table III.8). In addition, the EC submitted a large number of addenda each year, providing additional information on previously notified SPS measures.¹²⁵

94. The EC and its Member States are members of the Codex Alimentarius Commission, the International Plant Protection Convention and the OIE (Member States only).

(ix) Government procurement

95. In 2006, public procurement in the EC corresponded to 16% of EC GDP, the same as in 2004.¹²⁶ The EC public procurement regime aims to increase competition and transparency, and to create opportunities to purchase better quality and valued services. The bodies that carry out the various public procurement functions are centralized, semi-centralized or decentralized depending upon the Member State.¹²⁷ In general, the core procurement functions (e.g. policy making, drafting of legislation, and international coordination) are centralized, while other functions (e.g. capacity building, publication, and dissemination of information) are undertaken by a broad spectrum of bodies, at both central and decentralized levels of public administration.¹²⁸ ✓

96. Public procurement in the EC continues to be regulated by: Directive 2004/18/EC on the coordination of procedures for the award of public work contracts, public supply contracts, and public services contracts; and Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport, and postal services sectors (the Utilities Directive).¹²⁹

¹²² Novel food is defined as "food that has not been used for human consumption to a significant degree within the Community before 15 May 1997"; genetically modified food is no longer within the scope of novel foods.

¹²³ European Commission online information. Viewed at: http://ec.europa.eu/food/food/biotechnology/novelfood/COM872_novel_food_proposal_en.pdf.

¹²⁴ WTO document G/SPS/R/49, 18 June 2008.

¹²⁵ Some Latin American countries have complained about the EC decision to notify proposed changes to the novel foods regulation as a TBT measure, rather than as an SPS measure, stressing the underlying food safety objective of the novel foods regulation.

¹²⁶ Commission Staff Working Document SEC(2008) 2193, 25 June 2008.

¹²⁷ Centralized in Bulgaria, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, and the Slovak Republic; semi-centralized in Austria, France, Germany, Ireland, Italy, Luxembourg, Slovenia, Sweden, and the United Kingdom; and decentralized in Finland and Portugal.

¹²⁸ OECD (2007).

¹²⁹ The relevant procedures, award criteria and procurement methods under these two directives are described in detail in WTO (2007).

During the period under review, the public procurement remedies directives were revised¹³⁰, and a directive on public procurement relating to defence and security was proposed. Commission Decision 2005/15/EC sets the rules on the applicability of procedures to establish whether certain utilities activities (e.g. transport services, postal services, and exploration or extraction of coal, gas, oil or other solid fuels, and ports and airports) are exposed to competition.¹³¹

97. The directives apply to all public procurement above specified threshold values, expressed in euros and if necessary, are revised every two years (Table III.9).¹³² These thresholds are similar to those submitted by the EC under its GPA commitments.¹³³ Procurement below these thresholds is regulated by national legislation (see below), however it must follow the basic principles of the EC Treaty (transparency, non-discrimination, and equal treatment). Both Directives stipulate detailed rules/methods for estimating value of contracts¹³⁴; an artificial split-up into smaller lots represents an infringement of EC law.

98. The procedures to award contracts have not changed since the previous TPR of the EC in 2007. Under Directive 2004/18 (public work contracts, public supply contracts, and public services contracts), open, restricted, negotiated (with/without prior notice), and competitive dialogue procedures may be used. The authorities choose when to use the open and restricted methods; there are no specific criteria to choose when the different methods are to be used. However, the Directive provides for an exhaustive list of cases justifying use of the negotiated procedure with a prior public notice (e.g., in exceptional cases, when the nature of the purchase does not allow prior overall pricing), and without prior public notice (e.g. when, for technical or artistic reasons, the contract may be awarded only to a particular operator).¹³⁵ Competitive dialogue is to be used when the contract is particularly complex and cannot be awarded under the open or restricted procedures under specific circumstances.¹³⁶ Contracts for utilities (Directive 2004/17) may be awarded under the open¹³⁷, restricted¹³⁸, or negotiated procedure with prior notice. The utilities Directive allows procuring

¹³⁰ Directive 2007/66/EC amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, OJ L 335, 20 December 2007.

¹³¹ During the period under review, a number of decisions were adopted, establishing the applicability of Article 30 of Directive 2004/17/EC to the supply of electricity and gas or to certain services, or exempting services and other activities in different Member States from the application of that Directive. For further details, see Decisions 2007/422/EC, 2007/169/EC, 2007/564/EC, 2007/706/EC, and 2008/383/EC.

¹³² Corresponding values of the EC thresholds in national currencies (other than euros) are contained in a Communication from the Commission published in OJ C 301, 13 December 2007; and WTO document GPA/W/299/Add.4, 21 January 2008.

¹³³ WTO document GPA/MOD/EEC/2, 17 November 2006.

¹³⁴ Article 9 of Directive 2004/18/EC, and Article 17 of Directive 2004/17/EC.

¹³⁵ Article 40 (3) of Directive 2004/17.

¹³⁶ A contract is deemed to be "particularly complex" where the procuring entities cannot objectively define the technical means capable of satisfying their needs or are not objectively able to specify the legal and financial make-up of the project (Article 29 of the Directive 2004/18/EC).

¹³⁷ Under the open procedure, all interested bidders may submit tenders.

¹³⁸ The restricted procedure is a two-stage method where the contractors express their interest following publication of the contract notice, but only those invited by the local authority may submit tenders after a "screening" process. This procedure consists of two stages: the selection of suitable bidders and evaluation of tenders. At the first stage, the only criteria that may be used are to select prospective bidders with economic and financial standing or technical knowledge or capability. The number of providers invited to tender must be sufficient to ensure genuine competition.

entities discretion to choose amongst these procedures. The Utilities Directive provides for list of cases justifying use of the negotiated procedure without prior notice.¹³⁹

Table III.9
Minimum public procurement thresholds, mid-2008^a
(Euros)^b

	Supplies	Services	Works
Public contracts, other than for utilities			
EC GPA contracting authorities	133,000 ^c	133,000 ^c	5,150,000
Other public sector contracting authorities	206,000 ^c	206,000 ^c	5,150,000
Contracts subsidized at more than 50% by the contracting authority ^d	n.a.	206,000	5,150,000
Service designs contests			
Central government authorities	n.a.	133,000	n.a.
Other authorities	n.a.	206,000	n.a.
Specific sectors ^e	n.a.	206,000	n.a.
Utilities^f			
All sectors, except service design contests	412,000	412,000	5,150,000
Service designs contests	n.a.	412,000	n.a.

n.a. Not applicable.

a Threshold amounts do not include VAT.

b Corresponding values of the EC thresholds in national currencies other than euro are contained in a Communication from the Commission published in OJ C 301, 13 December 2007; and WTO document GPA/W/299/Add.4, 1 January 2008.

c Where the estimated total value of the contract or the framework agreements intended for award over the following 12 months is equal to or higher than €750,000, contracting authorities or the European Commission must publish a prior information notice on the buyer profile.

d Contracts that are subsidized at more than 50% by the contracting authorities involve either civil engineering to build hospitals, facilities intended for sports, recreation and leisure, school and university buildings, and buildings used for administrative purposes or the services connected to the aforementioned types of projects.

e Specific sectors refer to fields of research and development, telecommunications (CPC Reference No. 752), hotel and restaurant services, transport by rail and waterway, provision of personnel, vocational training, investigation and security, legal, health and social, recreational, cultural and sporting services.

f Utilities include water, energy, transport, postal and telecommunications services.

Source: Commission Regulation (EC) No. 1422/2007, 4 December 2007, amending Directives 2004/17/EC and 2004/18/EC.

99. Procurement above the stipulated thresholds must be advertised in the Supplement of the *Official Journal* (S series), which is published throughout the EC and is available in electronic format, freely accessible on the TED (Tenders Electronic Daily) website.¹⁴⁰ During 2004-06, procurement published in the Official Journal represented between 2.7% and 3.3% of GDP. In 2005, the value of procurement published, as a percentage of total procurement, ranged from 6.7% to 49.6% in different Member States (Table III.10).

100. The number of contract award notices published on the TED rises annually. However, not all of the results of the tenders have been posted in the TED database. The Commission has made efforts to increase the publication rate of contract award notices; from 1 January 2008 to 21 October 2008, 83% of the award notices were published.¹⁴¹

101. In 2006, public procurement in the EC was estimated at €377 billion, €83 billion were spent on supplies, €95 billion spent on services and, approximately, €200 billion on construction works. The Commission estimated that, €264 billion were awarded under open procedures (70%), €68 billion under restricted procedure (18%) and €45 billion under negotiated procedures (12%). In 2007, calls for tender were mainly under the open procedure (73%), followed by the negotiated (16%), and restricted (11%) procedures. The Commission is currently establishing a methodology to monitor

¹³⁹ A call for competition has to be made in accordance with Article 42 of Directive 2004/17.

¹⁴⁰ The Supplement to the *Official Journal* advertises over 1,000 tenders each day; supply and public works contracts worth €377 billion are published by public authorities in the EC each year. TED online information. Viewed at: <http://ted.europa.eu/> [5 July 2008].

¹⁴¹ Information provided by the authorities.

cross-border procurement, including from non-EC origins, however, it is extremely difficult to identify the exact nationality of successful suppliers/service providers, thus no data are available on the amount of procurement from non-EC origin.

Table III.10
Selected procurement indicators, 2004-06^a

	Value of procurement published in the OJ as a percentage of GDP			Value of procurement published in the OJ as a percentage of total public procurement ^b		Defence procurement expenditure in percentage of GDP ^b		Security procurement expenditure in percentage of GDP ^b	
	2004	2005	2006	2004	2005	2004	2005	2004	2005
Austria	3.28	1.98	1.67	19.58	10.75	0.3	0.4	0.4	0.4
Belgium	2.53	2.30	2.42	16.02	14.17
Czech Republic	0.36	2.67	5.14	..	13.10	0.8	1.2	0.6	0.6
Cyprus	1.26	3.51	4.40	..	31.32	0.9	0.9	0.5	0.4
Denmark	2.73	2.21	2.95	16.66	15.53	0.8	0.8	0.4	0.4
Estonia	2.71	7.05	7.33	..	37.53	1.0	1.0	0.9	1.0
Finland	2.89	3.29	3.06	17.28	20.18	1.0	1.0	0.6	0.6
France	2.76	2.98	3.44	16.25	16.93	0.8	0.8	0.3	0.4
Germany	1.17	1.61	1.65	7.46	9.95	0.5	0.5	0.5	0.5
Greece	3.73	4.78	5.52	35.22	49.59	1.6	1.4	0.1	0.1
Hungary	1.28	6.77	6.82	..	36.87	..	0.6	0.4	..
Ireland	3.34	2.59	3.31	27.72	19.61	0.1	..	0.5	..
Italy	2.35	2.67	3.03	15.61	18.71	0.5	0.6	0.4	0.4
Latvia	1.79	9.76	13.82	..	58.97	0.5	0.5	0.6	0.6
Lithuania	2.43	3.58	4.25	..	27.38	0.6	0.6	0.5	0.5
Luxembourg	3.10	2.46	1.39	18.45	17.61	0.0	0.0	0.3	0.4
Malta	0.22	1.05	1.80	..	6.50	0.4	0.3	0.3	0.3
Netherlands	1.75	1.62	2.33	7.42	6.73	0.6	0.6	0.7	0.6
Poland	2.57	7.62	5.23	..	47.81	0.4	0.4	0.6	0.6
Portugal	2.49	2.14	1.91	15.85	14.12	0.4	0.4	0.3	0.2
Slovenia	1.61	3.22	5.12	..	22.33	0.0	0.0	0.5	0.5
Slovakia	2.70	6.31	3.05	..	27.75	0.6	0.9	0.7	0.7
Spain	2.98	4.30	4.20	21.57	31.10	0.5	0.5	0.4	0.4
Sweden	3.33	3.19	3.07	18.95	17.80	1.2	..	0.5	..
United Kingdom	4.63	3.56	4.68	..	20.51	1.7	1.7	1.0	1.0
Total	2.65	2.93	3.27	..	17.74

.. Not available.

a Data on public procurement are available 12 months after the end of the reference period.

b Data are not available for 2006.

Source: Eurostat (undated), *Public procurement advertised in the Official Journal*. Viewed at: http://epp.eurostat.ec.europa.eu/portal/page?_pageid=1996,45323734&_dad=portal&_schema=PORTAL&screen=welcomeref&open=/economy/gov/gov_oth&language=en&product=EU_MAIN_TREE&root=EU_MAIN_TREE&scrollto=576; Commission Staff Working Document (undated), "Annex to the Proposal for a Directive of the European Parliament and of the Council on the coordination of procedures for the award of certain public works contracts, public supply contracts and public service contracts in the field of defence and security" Viewed at http://ec.europa.eu/internal_market/publicprocurement/docs/defence/impact_assessment_en.pdf; and information provided by the authorities.

102. Public procurement below the thresholds of the procurement directives, which constitutes the majority of the contracts (around 84% of total EC-27 public procurement in 2004¹⁴², and over 90% in some Member States)¹⁴³, falls under the competence of Member States. (Below the thresholds there is no obligation for procuring authorities to follow the rules stipulated in the EC directives. However, awards must comply with the basic principles of transparency and non-discrimination and equal treatment, which are inscribed in the EC Treaty.) An interpretative communication from the

¹⁴² GHK and Technopolis (2007).

¹⁴³ Europa Press Release IP/06/1053, 24 July 2006.

Commission sets out guidelines on how to comply with these principles in the areas of advertising, contract award procedures, and review procedures.¹⁴⁴

103. Review and remedies systems for public procurement (regulated at the Community level) are established as minimum requirements, on the basis of the EC remedies directives¹⁴⁵, the EC Treaty, and the case law of the European Court of Justice. The remedies directives lay down a common framework, which guarantees uniform application of the review procedures. This framework is then adapted according to the judicial and/or administrative systems of each Member State.¹⁴⁶ In addition, a national remedies and review system may cover contracts outside the scope of the directives, such as contracts below their thresholds of application, and service concessions.

104. The new Directive 2007/66/EC on remedies supplements and amends pre-existing directives on procurement remedies. It requires public authorities to observe a minimum "standstill period" of ten calendar days before concluding a public contract, thus providing the opportunity for rejected bidders to start an effective review procedure. If that period is not respected, the directive requires national review bodies to render the contract ineffective. The directive also seeks to combat illegal direct awards of public contracts, which are the most serious infringement of EC procurement law. A specific review mechanism is provided for contracts, based on framework agreements and the dynamic purchasing system¹⁴⁷, where speed is crucial; for such contracts, Member States may choose to replace the standstill obligation by a post-contractual review procedure. Member States have until 20 December 2009 to bring their laws, regulations, and administrative procedures into compliance with the directive. Its implementation may lead to a greater number of challenges to tendering procedures and award decisions.

105. Defence procurement accounts for a large share of EC public procurement, with combined defence budgets of Member States worth about €170 billion (Table III.10).¹⁴⁸ Currently, procurement in the domain of defence is covered by the EC public procurement rules, except for contracts subject to Article 296 of the EC Treaty on the right to not disclose information related to "essential security interests". Article 296 has been frequently widely interpreted by the contracting authorities, hence EC rules have not always been correctly applied¹⁴⁹, and the application of procurement rules on defence lacks uniformity.¹⁵⁰ Given that Directive 2004/18/EC, applicable to these defence contracts does not

¹⁴⁴ "Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives", OJ C 179/02, 1 August 2006.

¹⁴⁵ These directives (Directives 89/665/EEC, 92/13/EEC, 2007/66/EC) regulate the substance of the procurement review and remedies systems of Member States. However, there are no requirements as to whether the review is to be conducted through ordinary, special, or administrative courts or the type of law in which the review and remedies system is to be enshrined.

¹⁴⁶ Commonalities and differences relate to institutional frameworks, legal frameworks regulating scope and procedures, and review culture. For further details, see OECD (2007d).

¹⁴⁷ A "framework agreement" is an agreement between one or more contracting entities and one or more economic operators establishing the terms of the contracts to be awarded during a specific period, in particular with regard to price and quantities. A "dynamic purchasing system" is an electronic process for making regular purchases. Both concepts were introduced in 2004 by EC Directives 2004/17/EC and 2004/EC/18.

¹⁴⁸ COM (2006) 1555, Brussels, 7 December 2006

¹⁴⁹ The case law of the Court of Justice has developed a restrictive interpretation of the possibility of using this derogation; however, many Member States tend to use Article 296 to exempt almost all defence and sensitive procurement from internal market rules.

¹⁵⁰ Differences relate to the publication of contract notices, the potential for non-publication, the criteria for selecting suppliers, tendering procedures, and the basis on which contracts are awarded. For further details, see Green Paper, Defence Procurement, COM(2004) 608 final, Brussels, 23 September 2004. In some Member

take into account some special features of defence contracts, and in order to reduce the misuse of Article 296¹⁵¹, the EC adopted: (i) an Interpretative communication in 2006, to clarify the conditions for the use of Article 296 and to provide guidance to national awarding authorities as to whether procurement contracts can be exempted from EC rules¹⁵²; and (ii) a proposal in 2007 for a new procurement directive adapted to the specificities of defence.¹⁵³

106. Member States must comply with the provisions of the EC procurement directives, which should be transposed into national legislation. The Commission may open infringement proceedings for non-compliance with the Community law. In the domain of public procurement, the Commission referred (in March 2007) seven Member States to the European Court of Justice over their continued non-communication of national measures implementing Directives 2004/17/EC and 2004/18/EC.¹⁵⁴ The Commission has also started infringement proceedings concerning the implementation of remedies directives in three Member States.¹⁵⁵ Misapplication and/or incorrect transposition of public procurement rules account for 7% of total infringements in the EC. As at 30 April 2008, there were 92 infringement cases, down from 96 in July 2007 and 113 in 31 October 2006. Public procurement directives were transposed in all but one Member State as at 13 May 2008.¹⁵⁶

✓ 107. (The EC is a signatory to the plurilateral Government Procurement Agreement (GPA) concluded under the WTO; all the EC Member States provide national treatment for goods or suppliers from the GPA signatory countries.) Pursuant to the accession of Bulgaria and Romania to the EC, modifications were introduced into the EC's Appendices to the GPA, effective 1 January 2007¹⁵⁷, and amendments were made to the respective EC directives.¹⁵⁸ During the period under review, the EC submitted one notification to the Committee on Government Procurement concerning its new thresholds.¹⁵⁹ (The EC plays an active role in the work on the GPA; in February 2008, the EC tabled its revised offer.) Through bilateral negotiations, the EC seeks access to non-EC procurement markets, in particular those of fast-growing economies.)

States (like the United Kingdom), defence procurement is not regulated at all and is handled on a case-by-case basis.

¹⁵¹ The case law of the Court of Justice has developed a restrictive interpretation of the possibility of using this derogation; however, many Member States use Article 296 to exempt almost all defence and sensitive procurement from internal market rules.

¹⁵² COM (2006) 779 final, Brussels, 7 December 2006, "Interpretative Communication on the application of Article 296 of the Treaty in the field of defence procurement". The communication is a non-legislative measure and does not modify the existing legal framework; it only concerns defence procurement by national authorities in the EC and does not deal with defence contracts with third countries (which continue to be governed by the WTO Government Procurement Agreement).

¹⁵³ COM (2007) 766 final, Brussels, 5 December 2007, "Proposal for a Directive of the European Parliament and of the Council on the coordination of procedures for the award of certain public works contracts, public supply contracts and public service contracts in the fields of defence and security". Viewed at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0766:FIN:EN:PDF>.

¹⁵⁴ The deadline for complying with the provisions of both directives expired on 31 January 2006. Europa Press Release IP/07/361, 21 March 2007.

¹⁵⁵ Infringement proceedings may be opened against a Member State where the European Commission considers that internal market rules are not properly applied; such procedures provide for a dialogue between the Commission and the Member State concerned. Only the Court of Justice can rule definitively that a breach of Community law has occurred (Europa Press Release IP/08/1038, 26 June 2008).

¹⁵⁶ European Commission online information, "Internal Market Scoreboards", No. 1 bis (December 2006), No. 16 (July 2007), and No. 17 (July 2008). Viewed at: http://ec.europa.eu/internal_market/score/docs/score15bis/score15bis_en.pdf; http://ec.europa.eu/internal_market/score/docs/score16_en.pdf; and http://ec.europa.eu/internal_market/score/docs/score17/score17_en.pdf.

¹⁵⁷ WTO document GPA/90, 11 December 2006.

¹⁵⁸ Council Directive 2006/97/EC, 20 December 2006.

¹⁵⁹ WTO document GPA/W/299/Add.4, 29 January 2008.