



TOWARDS MORE EFFECTIVE REMEDIES SYSTEMS IN THE EU: THE WAY AHEAD

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Introduction



- **Procurement Directives** set common principles and procedures across the Single Market
- Their objectives could not be entirely achieved if economic operators were unable to ensure that their rights were observed across the EU through access to clear, rapid and effective review procedures
- The Remedies Directives are at the core of public procurement legislation as they allow bidders to enforce their substantive rights

Introduction (II)



- The aim of the Remedies Directives is to allow irregularities occurred in contract award procedures to be challenged and corrected as soon as they occur.
 - To increase the **lawfulness and transparency** of contract award procedures
 - To build **confidence** among businesses and **trust** in public administration
 - To facilitate the **opening of local public contract markets** to foreign competition
 - To rapidly **identify weaknesses** in public procurement, and to take action

Remedies Directives



Directives 89/665/EEC and 92/13/EEC, as amended by Directive 2007/66/EC

- Require that decisions on contracts falling within the scope of the Procurement Directives taken by contracting authorities/entities may be reviewed effectively and as quickly as possible
- Enable economic operators to enforce the rights conferred by Public Procurement Directives everywhere in the EU
- Establish minimum EU review standards

24 January 2017:

- Report from the Commission to the European Parliament and the Council
- Commission staff working document
- http://ec.europa.eu/growth/single-market/public-procurement/rules-implementation/remedies-directives_en

Challenges



- Difficulty to analyse the effects of the Remedies Directives in isolation from the purely national rules and procedures
- Very limited availability of data

Conclusions



- The Remedies Directives largely **meet their objectives**
- Neither major nor urgent need to amend the Remedies Directives identified and therefore, **no legislative proposal from the Commission to amend the Directives**
- Despite the overall positive conclusion, **shortcomings identified:**
 - certain aspects of the Remedies Directives need further clarification
 - information on national remedies systems not collected in a structured manner and is rarely used for policy making purposes

What do we propose?



- Promotion of **cooperation** - **Network of first instance review bodies**
- Improved **data gathering** and promotion of **transparency**
- **Guidance**
- Consistent **enforcement** activities and monitoring (Art. 258 TFEU)

The Network – a success story



The Network – a success story



- The **cooperation** between national review bodies is **intensifying** and the initiative has received **strong and warm support** from Member States.
- Members have **engaged** not only in the discussions, but also in the organisation of the meetings and the promotion of the Network
- **Objective:** to help Member States **improve the efficiency** of their systems by...
 - Facilitating exchanges of information and good practice
 - Helping identifying needs and solutions
 - Boosting networking and cooperation

The Network – a success story



- Examples of topics of discussion:
 - Presentation of national systems
 - [Overview of national public procurement review systems](#)
 - Interplay between the Remedies Directives and the new Public Procurement Directives
 - Ex officio actions of the review bodies
 - How to prevent frivolous complaints
 - How to strike a balance between speed and quality
 - Digitalisation of the complaint management system
 - Role of technical experts
 - Application of ESPD
 - Etc.

First instance review bodies



- Art. 2 Directive 89/665/EEC sets out requirements on national bodies responsible for reviewing public procurement procedures
- Member States have established review bodies varying in nature:
 - judicial review body // administrative review body
 - specialised or not

Specialized bodies	Non-specialized bodies (specialized courts/judges in some cases)
Judicial: SI	Judicial: AT, BE, FR, IE, LT, LU, NL, PT, IT
Administrative: BG, HR, CY, CZ, EE, LV, MT, PO, RO, SK, ES, HE, HU	Mixed: FI, SW
Mixed: DE, DK	

Right to appeal to second instance



- Art. 2(9) Directive 89/665/EEC requires MSs to guarantee a **judicial review of first instance review decisions** (when first review body is not judicial in character)
- In 14 MSs, the appellate authority is an administrative court and 11 countries a common court

Challenges (I)



- **Specialized** first instance review bodies
- **Discrepancies in the functioning** of the remedies systems between Member States, in particular on delays and costs (including direct and indirect)
- Review bodies need to perform their duties and exercise their powers **impartially** and **independently**

Challenges (II)



- **Balance between speed and quality** of judgements impact the effectiveness of the procurement process
- **Unjustified and abusive complaints** sometimes intend to prolong or to block the procurement process, often with big investment projects

Challenges (III)



- **Data gathering** on remedies and **digitalization of the complaint management process (e-review)** to improve review body management and procurement governance

Data availability



- The 2017 evaluation concluded that *information on national public procurement remedies systems are not collected in a structured manner and have rarely been used for policy making purposes*
- 1st step: **Study to explore data availability** at the national level in order to develop indicators for evaluating the performance of the Remedies Directives
 - It presents information on the collection of procedural data related to national remedies systems
 - It also proposes some indicators for evaluating the performance of the Remedies Directives

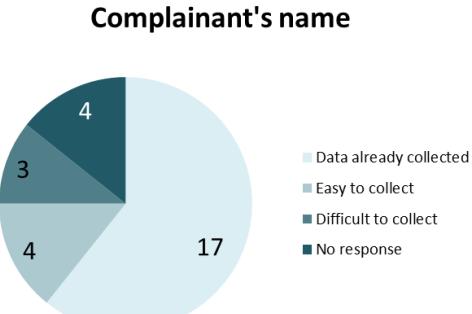
Study: <https://ec.europa.eu/docsroom/documents/33981>

Country fiches: <https://ec.europa.eu/docsroom/documents/33982>

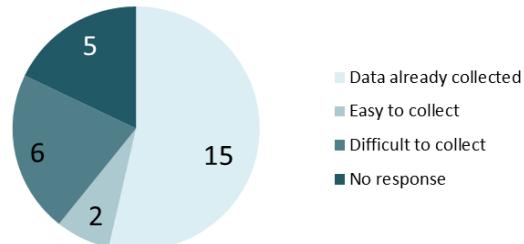
Data availability – results of the study



- **Information on complaints:** when the complaint was raised, complainant's name, type of contracts (work/services/supplies), type of procedure (open, negotiated, restricted), reason for complaint...



Suspension of the award
procedure

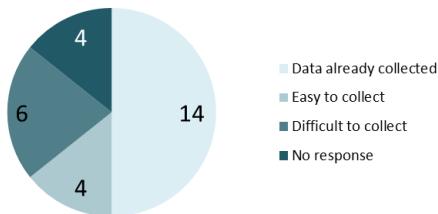


Data availability – results of the study

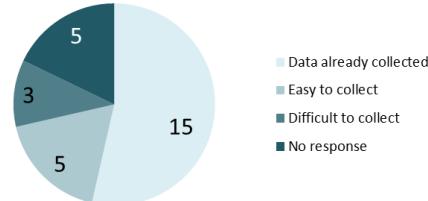


• **Information on review procedures:** first instance review decision, fee, first instance review type (pre-, post-contract), setting aside of decision of a contracting authority/entity, alternative penalties applied, contract ineffective, length of review

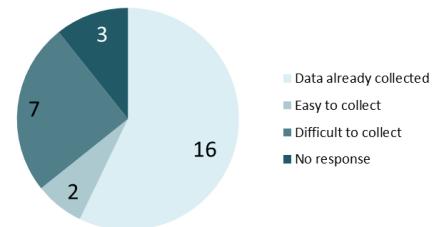
First instance review type (Pre-, Post-contract)



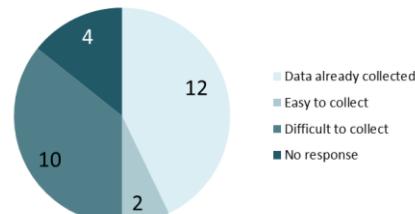
First instance review length in days



Set aside of decision



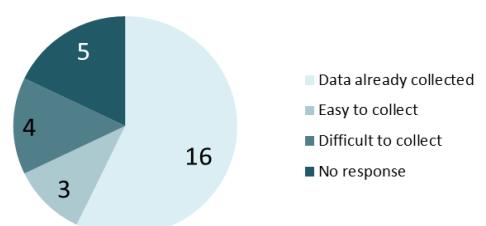
Alternative penalties applied



Contract ineffective (Y/N)



First instance review decision appealed



Data availability – results of the study



Number of first instance reviews initiated divided by the number of CFCs published, as a percentage

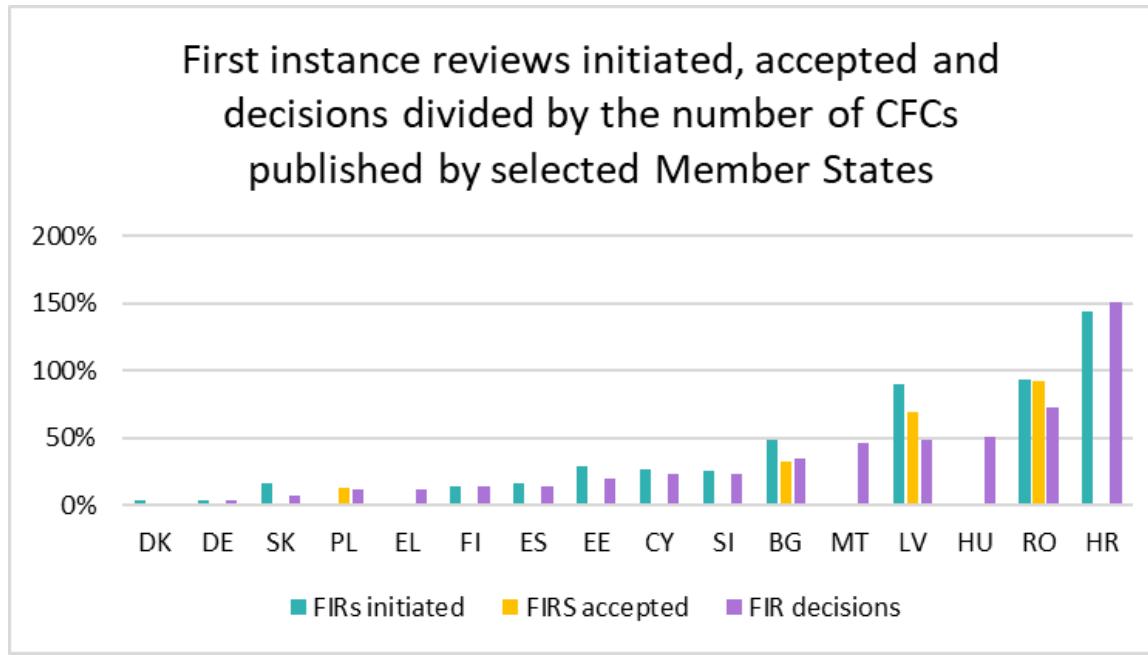


Figure 6.1: Number of first instance reviews initiated divided by the number of CFCs published, as a percentage

Source: RPA research and analysis, CFCs from Public Procurement Indicators 2015 (Available at: <http://ec.europa.eu/DocsRoom/documents/20679>), Table 6, and are the average from 2012 to 2015.
Notes: All numbers have been rounded to the nearest ten. Data for Bulgaria is pre-contractual only

Median length of first instance reviews (pre- and post-contractual)

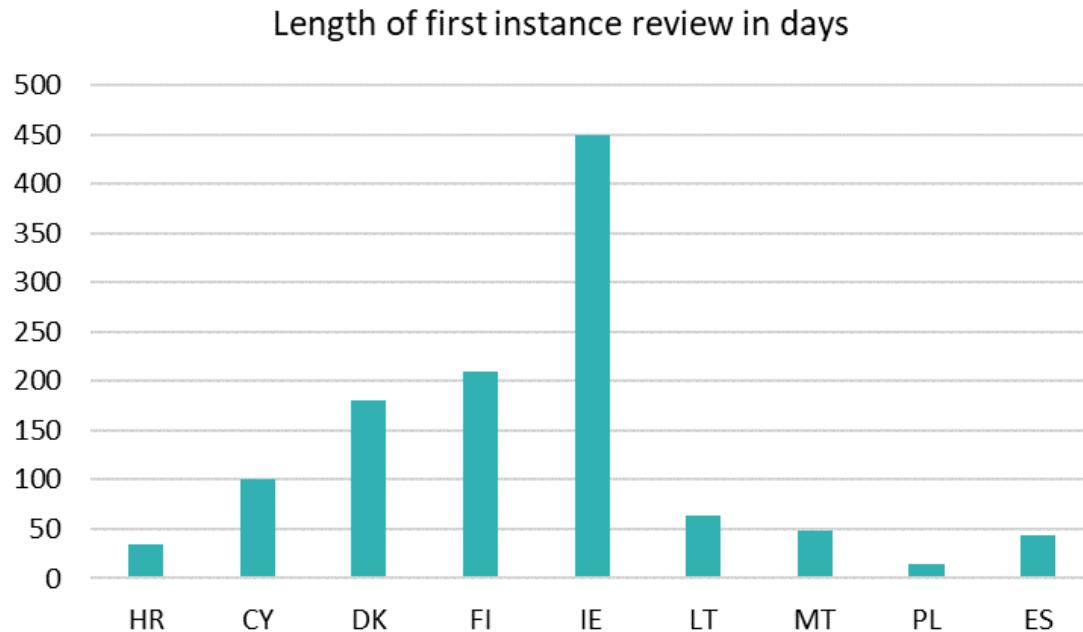


Figure 6.2: Average length of first instance reviews in days in 2016

Source: RPA research and analysis

Notes: It is assumed that these are mean rather than median values

Figures for Cyprus are an average from 2004-2016

Figures for Lithuania are for 2014

Data availability – results of the study



Number of first instance review decisions that are appealed or challenged to the next judicial level divided by the number of first instance review decisions, as a percentage.

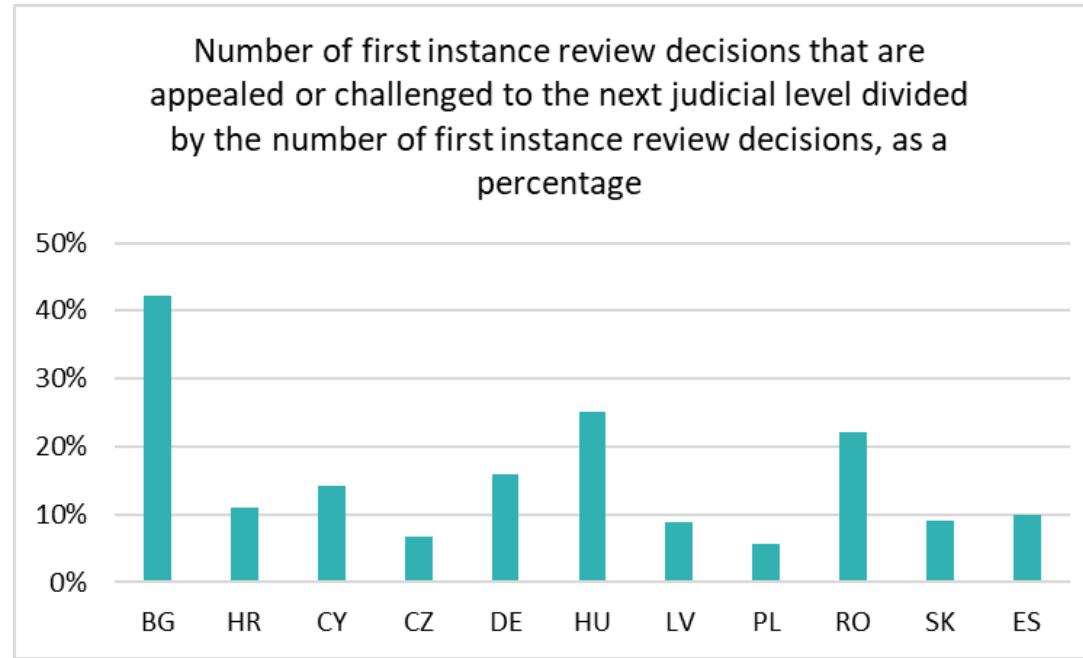


Figure 6.3: Number of first instance review decisions that are appealed or challenged to the next judicial level divided by the number of first instance review decisions, as a percentage

Source: RPA research and analysis

Notes: all numbers have been rounded to the nearest ten

Figures for Cyprus are the average number of challenges for 2004-2016

Challenges:

- **The impact on data comparability of:**
 - Different **scope** of the application of EU remedies rules in national legislation;
 - Differences in **who** performs the review in each MS;
 - **Multiple complaints** on any one tender or contract; and
 - Differences in whether both **pre- and post-contractual** reviews data is collected and whether the data can be disaggregated if necessary.
- **The data (un)availability**

- Promote the essential role of **national review procedures** for good governance of public procurement
- **Support the efficient functioning of national review bodies of first instance**, which are the core institutions in this system
- Improve governance by **better use of data and digitalisation** of the complaint management systems

Future



The screenshot shows the Twitter profile of the European Commission's Market, Industry & SMEs department (@EU_Growth). The profile picture features a stylized graphic of people at a construction site with the word "GROWTH" overlaid. The bio reads: "We're celebrating 2 years of the EU network of review bodies! 🎉 The network is committed to reinforcing national remedy systems and guaranteeing the effective enforcement of #EUpublicprocurement rules 📚. More info: ec.europa.eu/growth/content". Below the bio is a large group photo of many people in professional attire. To the right of the main profile area, there's a sidebar with a "Suivre" button, a "Nouveau sur Twitter ?" section, and a "S'inscrire" button. At the bottom, there's a "Vous aimerez peut-être aussi" section with links to other EU accounts: Enterprise Europe Network (@EEN_EU), European Commission (@EU_Commission), EU Science & Innovation (@EUScienceInnov), Horizon 2020 (@EU_H2020), and EUinmyRegion (@EUinmyRegion).

[EU network of review bodies helps guarantee effective enforcement of public procurement rules](#)



A strong remedy system at national level, in which economic operators have confidence and on which they rely, is the most important contributor to the effectiveness of EU public procurement law.



Thank you for your attention!