



COMPARATIVE ANALYSIS

OF PUBLIC PROCUREMENT LEGISLATIONS AND PRACTICE IN EASTERN PARTNERSHIP COUNTRIES

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INTRODUCTION

The Eastern Partnership (EaP) region perfectly encompasses every type of public procurement system in just 6 countries. Some countries of the region have a decentralized electronic public procurement system, others have centralized or mixed systems. Some countries have completely electronic procurement procedures, whereas others still use paper-based procurement or try to use both mediums.

Three EaP countries (Moldova, Georgia, Ukraine) are moving towards the European Union (EU) and have an obligation to adopt its procurement rules and practices. Armenia and Belarus are a part of another union, the Eurasian Economic Union (EEU), with its own procurement regulations and shared practices. In the meantime, Azerbaijan has a path of its own in terms of reformulating the Public Procurement Legislation (PPL), as it tries to adjust to new economic realities with the oil prices plummeting.

At the same time, three EaP countries (Moldova, Ukraine and Armenia) have joined the World Trade Organization (WTO) Agreement on Government Procurement (GPA) and have to fulfill additional obligations to harmonize their PPLs with the WTO GPA rules.

This clearly illustrates that the EaP region is a microcosm of different procurement systems, procedures and visions on how to manage and develop public procurement. However, despite these significant differences, many of the 6 countries nevertheless share the same problems.

The purpose of this comparative study is to show parallel trends and shared characteristics of public procurement systems in EaP countries. First, the study will describe the PPLs of each EaP country. Then, it will discuss the common flaws of these PPLs, as well as issues related to their implementation. Finally, the study will focus on the existing best practices in EaP countries' public procurement systems.

PUBLIC PROCUREMENT SYSTEMS IN EAP COUNTRIES

All countries in the EaP region have their own specific public procurement systems and PPLs. Some systems, like those of Georgia and Ukraine, share similar characteristics, whereas others, like those of Belarus and Armenia, are completely different in terms of structure and procedures.

Georgia

Georgia's public procurement electronic platform (e-platform) is considered to be one of the most transparent in Europe and Central Asia. The process of reformation of the legislation began in 2009 and continues today, as Georgia progresses towards the EU.

Over the years, substantial changes were made to the PPL and secondary legislation. Before the reforms, procurement was paper-based, and many mechanisms, such as the Dispute Settlement Board (DRB) or white/black lists, did not exist.

PPL was amended several times to determine the rights and obligations of the State Procurement Agency (SPA), main body for regulating and coordinating the procurement processes, introduce the system of black and white listing of companies, regulate all procurement activities, introduce dispute settlement procedures and expand the number of procurement procedures. There is a single point of access to tenders and tender related information - www.spa.ge.

Currently, the Georgian procurement system employs the following procedures:

1. Electronic tender - 4 varieties:
 - Electronic Tender with Reverse Auction
 - E-tender without Auction (Sealed Bid Auction)
 - Electronic Tender with Two-Stages
 - Different Acquisition Procedure for Construction Works

2. Consolidated tender (equivalent of Framework Agreement)
3. Design contest
4. Direct procurement (equivalent of simplified procurement/single source procurement)

Other mechanisms incorporated into the System:

- Electronic procedure of procurement through donor's resources
- Grant contest

The SPA is the main authority responsible for coordinating the public procurement processes and maintenance of the e-platform. Dispute settlement mechanisms are in place and procedures for blacklisting and whitelisting suppliers exist.

Ukraine

Public procurement regulation in Ukraine has evolved from the first Government regulation in 1993 to the most recent PPL of 2016. Frequent change of PPL and its sub-legal acts was common practice to better serve the interests of certain political and elite groups. There were multiple exemptions from the law, 43 in total. Procurement was paper-based and definition of procuring entities was incompatible with the international standards (EU, WTO GPA, UNCITRAL).

After the EuroMaidan Revolution in 2013, Ukraine changed its public procurement system completely. A new electronic system (Prozorro) was created and a new PPL came into force. Currently, the system ensures electronic means for all procurement procedures/operations and secures free public access to practically all procurement information. A new definition of procuring entities was introduced, which is similar to the definition used in EU Directives. A single point of access to tenders and procurement related information exists - <https://prozorro.gov.ua/en>.

The Ministry of Economic Development and Trade (MEDT) (www.me.gov.ua) is the State regulator in public procurement, performing also consultative and monitoring roles.

The Ukrainian public procurement system currently has only 3 procurement procedures:

1. Open tender
2. Competitive dialogue
3. Negotiated procedure

E-auction (based on price only or multi-criteria) is the sole evaluation method for tender procedures.

Moldova

Since its independence, the Republic of Moldova has developed its own public procurement system, which has gone through several major stages of transformation. With each new development stage, the system is more closely adjusted to European standards.

Before the new version of the PPL, procurement thresholds, extension of minimum deadlines for bid submission and standstill periods were inefficient. Procurement was completely paper-based and the PPL did not cover all public entities.

The latest wave of reforms in 2016, which followed the signing of the Association Agreement (AA) between the European Union (EU) and the Republic of Moldova in 2014, imposed gradual alignment of national legal framework to EU Acquis on public procurement and implementation of institutional reforms. Concurrently, in 2015, the Republic of Moldova signed the World Trade Organization (WTO) Agreement on Government Procurement (GPA) that envisaged a list of engagements related to public procurement.

Currently, PPL covers procurement of goods, works and services by all public entities or entities governed by public law. Also, the Law stipulates a rather clear and reasonable list of exceptions (including state-owned companies), as well as an exhaustive enumeration of procurement procedures. Overall, there are seven general procurement procedures like open or closed tenders, and three special procurement procedures like framework-agreements.

The Ministry of Finance is responsible for development of public procurement policies, while the Public Procurement Agency (PPA), which is under authority of the Ministry of Finance, mostly performs monitoring and instructive functions.

The new PPL stipulates the possibility for potential suppliers to submit offers either in paper or in electronic form, if this is mentioned in the procurement notice. With the new legislation on the way and a completely modern (open-data) based electronic public procurement system (M-tender), Moldova will soon turn to 100% e-procurement.

Belarus

Prior to the adoption of the current legislation, public procurement in Belarus had been regulated by the Presidential Decree on “Public Procurement in the Republic of Belarus” and the Resolution of the Council of Ministers of the Republic of Belarus “On Some Issues on Implementation of Public Procurement”, both adopted in 2008.

The new PPL of Belarus was adopted in 2012 and entered into force on January 1, 2013, which serves as the basis of the current system. The PPL and sub-legal acts are aimed at bringing the national legislation in line with the international obligations of the Republic of Belarus, namely the “Agreement on Public (municipal) Procurement” signed in Moscow in December 2010 within the Customs Union of Belarus, Russia and Kazakhstan.

The current PPL almost repeats the provisions of the Moscow Agreement, with the exception of an additional procurement procedure - closed tender, which is applied in cases when the information on public procurement contains state secrets.

Belarus has 6 public procurement procedures:

1. Open tender
2. Closed tender
3. Electronic auction
4. Procedure for requesting price proposals

5. Procurement procedure from a single source
6. Exchange trading - public procurement of goods using exchange trades, which are carried out on commodity exchanges

A single point of access for tender related information exists - www.icetrade.by, however, most tenders are conducted on paper, only to be uploaded on the e-platform once the tenders are finished.

The Ministry of Antimonopoly Regulation and Trade of the Republic of Belarus (MART) is responsible for development of public procurement policies and monitoring of public procurement activities.

Azerbaijan

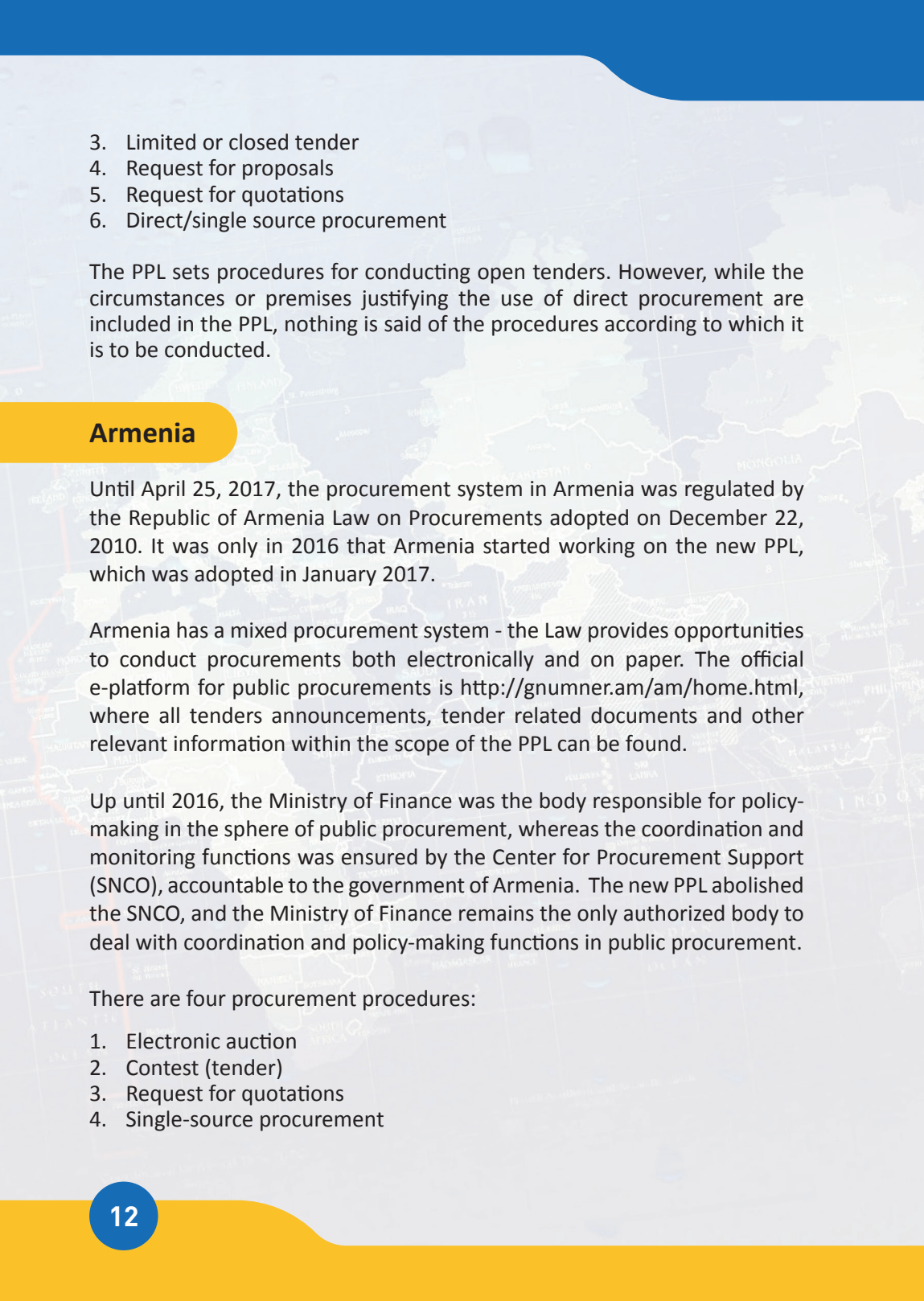
Azerbaijan had a rather tumultuous experience with public procurement legislation. The PPL was adopted in 1999, but the government's disinterest in the regulation was evidenced by the lack of legislative reforms after 2004-2005.

Azerbaijan still relies on traditional paper-based procurement methods. Although the idea of e-procurement has been on the government's agenda since at least 2007, no progress was made in this regard.

Antimonopoly and Consumer Protection Service is the body responsible for coordination of public procurement activities. A single point of access for some tender related information exists - www.tender.gov.az. The website has evolved over time to include some general information about the tenders, procurement plans, Q&A section, etc. However, in reality, the website serves as a platform for only a small amount of tender related information.

Currently, Azerbaijan's PPL identifies 6 methods of procurement of goods, services and works:

1. Open tender
2. Two-stage tender

- 
3. Limited or closed tender
 4. Request for proposals
 5. Request for quotations
 6. Direct/single source procurement

The PPL sets procedures for conducting open tenders. However, while the circumstances or premises justifying the use of direct procurement are included in the PPL, nothing is said of the procedures according to which it is to be conducted.

Armenia

Until April 25, 2017, the procurement system in Armenia was regulated by the Republic of Armenia Law on Procurements adopted on December 22, 2010. It was only in 2016 that Armenia started working on the new PPL, which was adopted in January 2017.

Armenia has a mixed procurement system - the Law provides opportunities to conduct procurements both electronically and on paper. The official e-platform for public procurements is <http://gnumner.am/am/home.html>, where all tenders announcements, tender related documents and other relevant information within the scope of the PPL can be found.

Up until 2016, the Ministry of Finance was the body responsible for policy-making in the sphere of public procurement, whereas the coordination and monitoring functions was ensured by the Center for Procurement Support (SNCO), accountable to the government of Armenia. The new PPL abolished the SNCO, and the Ministry of Finance remains the only authorized body to deal with coordination and policy-making functions in public procurement.

There are four procurement procedures:

1. Electronic auction
2. Contest (tender)
3. Request for quotations
4. Single-source procurement

A contest can be open or closed. A closed contest can be targeted or regular. Contest is the preferable procurement method. Only in cases stipulated in the law can other methods of procurement be used.

COMMON PROBLEMS IN THE LEGISLATION

The study found that the most pressing problems in public procurement are shared by EaP countries, despite the fact that their public procurement legislations and systems have significant differences. This points to the need to analyze these similarities in order to possibly identify common ways of solving these problems.

1. Electronic vs. Paper-Based Procurement

There is a significant difference in levels of transparency and use of e-tender as a default procedure between countries that have e-procurement systems, compared to ones that do not. Good examples of e-procurement in the region are Ukraine and Georgia, as public procurement is completely electronic. Both countries have e-platforms that ensure high levels of transparency of procurement activities. Information on tenders, direct procurement contracts, procuring authorities and suppliers, bids, contract performance and payments are readily available on the e-platforms.

Ukraine is even one step ahead in terms of transparency, as the procurement database is stored in open data format. An Application Programming Interface (API) is in place that makes it possible to connect with the public procurement database, export information and use it accordingly. Due to the API, Ukraine also has an analytical BI module of Prozorro - bi.prozorro.org, which serves as a practical tool to analyze procurement information graphically. Moldova is moving towards the same direction, as a new e-platform M-tender is supposed to be an analog of the Ukrainian Prozorro. Georgia also has plans to fully implement the Open Contracting Data Standard (OCDS) and cooperates with the World Bank to convert information to open data format.

The situation in the rest of the EaP countries is different and less optimistic. Azerbaijan still relies on traditional paper-based procurement methods. Although the idea of e-procurement has been discussed since early 2007, the government had not made significant advancements in this regard. The e-platform evolved over time to include basic information about the tenders and procurement plans, but even by conservative standards the platform does not contain key data, not to mention the lack of machine-readability of the published data.

Armenia officially has a mixed system, implying that it uses both electronic and paper-based procurement. The PPL ensures that the annual plans, notices of intended procurement, tender documentation and its amendments are made public. However, due to the information being both electronic and in certain cases on paper, aggregating information is difficult and the quality of this information is doubtful. For example, procurement information of 27 municipalities' subordinate bodies were not included in the report of the SNCO in 2015, as information could not be gathered efficiently.

As for Belarus, it also has a mixed system. Although the PPL provides for the publication of all of the most important documents accompanying the bidding in electronic form, the process itself is not electronic. This is due to the fact that the preparation of tender documents, as well as the procedure for opening and reviewing tender proposals is conducted internally and by using paper medium.

2. Coverage and Exemptions

Exemptions from the PPL are problematic for all EaP countries. Georgia has a long list of exemptions from the coverage of the law. This issue has been raised by different international organizations such as the OECD and its Anti-Corruption Network (OECD-ACN).¹ For example, public procurement which is done through financial resources allocated from the contingency funds of

1 "Anti-Corruption Reforms in GEORGIA: Fourth Round of Monitoring of the Istanbul Anti-Corruption Action Plan" Organization for Economic Co-operation and Development Anti-Corruption Network for Eastern Europe and Central Asia, 15 September 2016, pp. 85-86, <http://www.oecd.org/corruption/anti-bribery/Georgia-Round-4-MonitoringReport-ENG.pdf>.

the President of Georgia, the Government of Georgia and the Tbilisi City Hall are listed as exemptions. Ukraine has 18 exemptions from the PPL. Belarus has a complex situation, as the construction sector (one of the largest sectors of public procurement) is completely exempt from the scope of the PPL. In Moldova, one of the main problems in this regard is that the existing PPL does not cover state-owned enterprises. According to the data of the State Registry Office, there are more than 1,500 state and municipal enterprises, which spend state resources outside the e-procurement system.

3. Post-Tendering Phase

Post-tendering, or the contract performance stage of the public procurement process is problematic for a part of EaP countries. Most issues arise in case of Armenia and Azerbaijan, as no information on contracts, contract amendments, contract performance (milestone reports), payments and their proof is available or accessible in any format. Moldova's PPL does not ensure access to public procurement contracts or its amendments, and just like in Belarus, there is no access to payment information once the contracts are executed.

Availability of contract performance information is crucially important for public monitoring of procurement activities. Without this information it is impossible to ascertain whether certain contract was performed, how much was actually paid for the service performed and whether changes occurred to the contract's price or dates, as well as content.

4. Accountability and Integrity

Accountability and integrity are two of the main values in public procurement. In this regard, several EaP countries face severe issues. For Belarus, Armenia and Azerbaijan, lack of explicit incorporation of provisions concerning the conflict of interest, corruption and fraud in the legislation leave leeway for corrupt practices in public procurement. Additionally, no obligation in the legislation to consult with civil society or with the business community (public-private dialogue) on the functioning of the public procurement system diminishes the level of accountability in public procurement and hinders healthy discussions on how to improve the system.

One of the most important drawbacks in terms of accountability in these countries is that PPL does not provide the public with justification for why single source procurement was used. Single source procurement is a fertile ground for corruption and clientelism in public procurement. Therefore, maximum transparency is necessary to reduce the level of corruption when dealing with this procedure. Additionally, one common drawback of PPLs in these three countries is that they allow procurement before sources of funding are identified.

5. Independence of the Dispute Resolution Board (DRB)

Dispute settlement procedures are a crucial part of the public procurement system. Potential suppliers, as well as other interested parties, should be able to seek justice if they think that their rights have been violated or the PPL is not being abided by.

In this regard, the dispute settlement mechanisms vary dramatically across countries, and so do the issues related to them. For instance, Georgia has a Dispute Settlement Board (DRB) that deals with procurement disputes. The DRB comprises 3 representatives of the SPA and 3 representatives of CSOs (elected for a one year term by CSOs themselves). The problem with the DRB is that it does not have an odd number of members and when the votes are split the chairperson of the SPA decides on the final verdict.

In Moldova, following the provisions of the new PPL (in force since May 2016), the dispute settling function was transferred from the Public Procurement Agency to the National Dispute Settlement Agency (NDSA), subordinated directly to the Parliament. The problem is that, after one year of implementation of the new PPL, the complaint mechanism still does not operate and access to dispute settlement records are limited.

In Belarus, any person has the right to file a complaint with the authorized state body for public procurement, however, the dispute settlement commission does not involve representatives of the civil society. Azerbaijan has the most severe conditions among EaP countries, as it does not have an independent review body with the authority to review complaints and grant remedies.

6. Subcontractors

One of the areas where all countries face similar problem is subcontractors. Publicity of information on subcontractors is not ensured by EaP PPLs. Neither does information appear in any proactive way on the existing e-platforms of these countries. Subcontractors can be a solid ground for corruption, means of avoiding conflict of interest and other corrupt practices, therefore, this particular issue is a definite loophole of the PPLs of the EaP countries.

COMMON PROBLEMS OF PPL IMPLEMENTATION

Common problems exist outside the legislative framework, which are related to the process of implementation of the PPLs in the EaP Region. As e-procurement is still a relatively new development in the post-soviet space, issues that are similar among countries relate to expertise of procuring authorities, technical deficiencies of the e-platforms and the large share of direct contracting/single source procurement in the total value of procurements conducting in these countries.

1. Lack of Skills and Experience of Users

Expertise of public procurement specialists, who technically conduct the procurement, as well as tender committees that take decisions, is in need of improvement practically in all countries. The problem is most visible in countries with decentralized systems, where municipal procuring authorities have extensive authority and financial resources at their disposal. However, due to lack of skills, technically flawed tenders may occur, which can lead to failed tenders.

For instance, according to the WB's latest public procurement performance assessment, tenders of Georgian municipalities have a 32% likelihood to fail, especially when goods are being procured. Failure to conduct market research, or lack of experience-sharing among procuring entities, leads

to unrealistic or bloated estimated prices in tenders, a problem which is recurrent in Belarus and Ukraine.

To solve the problem, certain countries have training programs for the procurement specialists. Georgia and Ukraine are good examples of such efforts. Georgia's SPA conducts training sessions annually for the procurement specialists, in addition to trainings for representatives of business sector and journalists. Ukraine has recently launched a ToT program for its public procurement specialists, which covers the entire country.

2. Large Share of Direct Procurement

Large volume of direct procurement is a substantial issue for the EaP region, as direct contracting is a fertile ground for inefficient spending, corruption and clientelism in public procurement. Almost every EaP country faces this predicament and the severity of the problem varies from country to country. Since 2011, on average, more than 35% of all public procurement (in terms of value) in Georgia was conducted through direct procurement procedures. In Belarus, the share of direct procurement (value) was 67.64% according to statistics from 2014. Azerbaijan had a staggering 77.8% share of direct procurement in the total value of public procurement in 2016.

There are exceptions to this problem as well. Moldova has been performing relatively well in terms of share of the value of direct procurement. For instance, in 2016, the share of the value of direct contracting was only 5.8% in Moldova.

3. Problems of the E-System

Another important problem for several countries is technical deficiencies of their e-platforms. In Ukraine, technical reliability and functionality of the IT system is a constant problem, as the e-platform is new (developed in 2015) and may encounter glitches. Additionally, functions of the e-platform and provisions of the PPL may lack cohesion and result in discrepancies between the law and practice.

In Georgia, performance related information, such as act of delivery and acceptance, milestone reports or payments, are not available to guest users of the e-platform, unlike the registered users, even though the PPL ensures that all users have access to this information.

Due to technical imperfections of the official procurement website in Belarus, unscrupulous tender participants have the opportunity to hide, publish incomplete or partially unreliable information about public procurement.

BEST PRACTICES

The EaP countries also represent best practice in certain areas of public procurement. These practices may be related to the functions of e-platforms, the capacity of public procurement authorities to control single source procurement activities, or certain innovations in terms of transparency of procurement activities.

Ukraine - Prozorro

Ukraine's e-platform, Prozorro, is considered to be one of the most innovative and transparent e-platforms in the world. Prozorro is based on the OCDS, has an API, which ensures that all procurement related information and databases are machine-readable and free to re-use.

Once the platform was created with the help of international donors, its ownership was first transferred to Transparency International Ukraine and then, at the end of 2015, to the Ministry of Economic Development and Trade, which currently manages the central database and monitors the implementation of tenders through the system.

Additional useful analytical and monitoring tools of the system are - the BI module <http://bi.prozorro.org/> and a new forum for issues/disputes - DoZorro <http://dozorro.org/>. The analytical module provides the possibility to graphically visualize and compare procurement statistics according to procuring authorities, municipalities and regions.

Georgia - Approving Direct Procurements

In 2015, Georgia introduced mandatory approval for direct procurement by procuring entities. The SPA created a special questionnaire to ensure that the questions are standardized and everyone has to provide the same type of information. The SPA makes a decision to grant the right to conduct direct procurement after it reviews the application. Additionally, any interested user of the e-platform can express their opinion about the plausibility of the request, after which the SPA has to deliberate on the comment and consider it while making its decision.

With the new approval system, in 2016, cases of direct procurement due to urgent necessity decreased by 61%, and overall, direct procurement contracts decreased by 35% in cases of most prominent grounds for direct procurement: Exclusive right (of a supplier on certain goods, works, or services); Urgent necessity; Prevention of deterioration (of the quality of a previously procured object); Holding of an event of state and public importance without hindrance and within limited time frames.

Armenia - Broadcasting of DRB Sessions

Armenia's PPL ensures the existence of a review body with the authority to review complaints and grant remedies. The DRB consists of up to 3 members, who are appointed for five years by the President upon nomination of the Prime Minister.

Even though the independence of the DRB can be questioned, the transparency of its sessions is undoubtedly high, as since 2015, sessions of the DRB are broadcast online and any interested person has access to the sessions' livestream.

CONCLUSION

Studying the public procurement systems of the six Eastern Partnership countries reveals that despite considerable differences in their legislations and practice, some of the major problems and challenges are in fact shared. Some of these countries have moved on to fully electronic procurement with a single point of access, while others have remained paper-based or mixed. Some have a centralized system where an independent institution is responsible for managing the procurements of all other state entities, while others have a decentralized arrangement.

However, despite such core differences, almost all of these countries struggle with the same problems of unjustifiably high levels of direct procurement, lack of skills and experience of users, unjustified exemptions from the legislation, corruption and conflict of interest, weak follow up in contract execution, and lack of free and easy public access to all procurement information.

Such commonality of problems suggests that more active cooperation between countries may help them tackle these challenges more easily by sharing best practices and learning from each other's mistakes.

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