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**Comparative analysis**  
**on monitoring the public procurement contracts executions**  
**for NALED**

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## Introduction

Institute for Public-Private Partnership, Slovenia (Inštitut za javno-zasebno partnerstvo) was contracted on 17 December 2021 by the NATIONAL ALLIANCES FOR LOCAL ECONOMIC DEVELOPMENT (hereinafter: NALED), *inter alia*, to prepare analyses on monitoring the public procurement contracts execution in selected EU Member States, with a detailed overview of each system (detailed system description, legislative framework, how it was established, how it functions, pros and cons, etc.). The objective of the assignment is to provide support in identifying products and services for which green procurement criteria would allow for high impact and draft the comparative analyses on monitoring the public procurement contracts execution in the selected EU Member States.

One of the very important parts of the public procurement process is the monitoring of the contracts executions to obtain the details of what has been executed, note whether significant discrepancies exist with what was anticipated, and make adjustments in the plans to provide a complete picture of procurement performance. The current electronic portal for public procurement in Serbia does not cover the monitoring of the contract execution. It is the obligation of the public purchaser to control the contract execution. Therefore, the public purchaser is the only one that has all the information in relation to the contract execution. The law also stipulates that the Ministry of Finance is responsible for monitoring contract execution, but it is not precisely defined which body as part of the Ministry has the jurisdiction and how it is done. Since contract executions cover not only the payments that have been made but also changes that can occur during its implementation (the number of days for completion, the volume of the contract, participation of other candidates, etc.), it is important to see how this system can be established to function properly and effectively in Serbia, as another tool for improving transparency and as a control mechanism. In this regard, the engaged expert will prepare a comparative analysis on how to monitor the implementation of the public procurement contracts in the selected EU Member States which have achieved the best results in this field. The analysis will serve as a basis for the preparation of the proposal for establishing a system suitable for Serbia.

After preliminary analysis and in agreement with NALED, the following Member States were selected for the Study: Finland, Hungary, Italy, Portugal, and Slovenia.

In the following Study, we review the organisational, IT and control practices related to the performance of public procurement contracts in five countries, highlighting the most important rules and solutions. In the first part, we focus on the transparency of the data available, and in the second part, on the responsibilities of the control and review bodies. A relevant issue in the context of the performance of public contracts is the question of contract modification, given that modification impacts the performance of the contract. The report concludes with a summary of the most typical solutions in each examined Member State.

## 1. Data, information sources

The first part of the analysis presents the available data, statistics, reports and the degree of transparency.

### 1.1. Contract registries, statistics on the execution of public procurement contracts, open data

#### Finland

There are statistics on the execution of public procurement contracts. They are based either on the published contract award notices or other information contracting entities have made available. No available template exists for the publication on the completion or execution of the contract.

According to Section 58 of the Act on Public Procurement and Concession Contracts (*Laki julkisista hankinnoista ja käyttöoikeussopimuksista 1397/2016*, hereinafter: the 'Procurement Act'), the contracting authority shall submit for publication a contract award notice of procurements (1) exceeding the European Union threshold value,<sup>1</sup> (2) concerning a social and health and other specific service procurements of services referred to in Schedule E,<sup>2</sup> (3) concerning concession contract procurements, and (4) concerning concession contracts of a social and health and other specific services referred to in Schedule E. The contracting authority is required to include in the contract award notice the information of the contracting parties, the estimated total value of the contract, and the number of received tenders. With the procurement contracts exceeding the EU threshold value, the contracting entities shall publish the contract award notices within 30 days of concluding the procurement contract. Nevertheless, the non-publishing of the contract award notice is not sanctioned. Compiled information is not available publicly on procurements for which a contract award notice has not been published.

Statistics cover public procurement contracts exceeding the national and the EU threshold values depending on whether the procurement entity has published the notice. Section 101 of the Procurement Act concerns the announcement of procurement exceeding the national threshold value and below the EU threshold value. The procurement entity is not obliged to publish a contract award notice of procurement above the national threshold value. Such publication is optional. With the procurement contracts exceeding the national threshold value, the contracting entities shall publish contract award notice within four months of the end of the calendar year in which the procurement contract has been signed. It is not yet

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<sup>1</sup> The threshold values for national and EU procurements vary according to the object of the procurement and in addition by the nature of the organisation. The EU threshold value, excluding value-added tax (VAT), is EUR 215,000 in public supply, service, and design contest contracts to other than central government authorities. For the central government authorities, the threshold value for supply, service and design contest contract is EUR 140,000 excluding VAT. The national threshold values, excluding VAT, are EUR 60,000 in procurements of goods, services, and design contests, EUR 150,000 in public work contracts, and EUR 400,000 in the social and health care services procurements (listed in points 1–4 of Schedule E of the Procurement Act).

<sup>2</sup> Schedule E lists the social and health and other specific service procurements referred to in Section 107 of the Procurement Act.

common to publish a national procurement contract award notice. The procurement procedures below the national threshold value do not include contract award notices.

The contract award notices of national procurements are published in the national Hilma portal, <[www.hankintailmoitukset.fi](http://www.hankintailmoitukset.fi)>, whereas the contract award notices exceeding the EU threshold value are published in the Hilma portal, in the Supplement to the Official Journal of the European Union (S series) and the EU Tenders Electronic Daily (TED) portal. The Hilma portal is the official public procurement notification service. It is a digital channel for the public sector to publish procurement notifications of upcoming procurements, ongoing procurements, and the concluded contracts. The contract entities are obliged by the Procurement Act to use the Hilma portal for procurement notifications. Hilma portal is owned and developed in substance by the Ministry of Employment and the Economy and, in addition, maintained and developed technically by Hansel Ltd<sup>3</sup>, the most significant central purchasing body in Finland. According to the Hilma's statistics, in 2020, 4,394 contract award notices were published, including procurement exceeding national and EU threshold values in total. Correspondingly, in 2021, the number was 4,701. Furthermore, it is possible to announce the notices of procurements below the national threshold value.

There is an Act on Hansel Ltd (*Laki Hansel Oy -nimisestä osakeyhtiöstä, 30.12.2008/1096, 'Hansel Act'*). Amendments to the Hansel Act came into effect in September 2020, and procurement data processing and analysis services were added to the tasks of Hansel, among other things. According to the Hansel Act, there is no obligation for Hansel to publish reports. Additionally, a provision to access the information relating to the procurement data was also added to the Hansel Act: Certain central government agencies and bodies must release the procurement information to Hansel. Information is published in the <[tutkihankintoja.fi](http://tutkihankintoja.fi)> or <[openprocurement.fi](http://openprocurement.fi)> website. The total value of all public sector entities' procurements, including the procurements below the national threshold value, was EUR 47 billion in 2018.<sup>4</sup> Hansel's share of all the procurements was approximately EUR 1 billion in 2018.<sup>5</sup>

The amount of the procurement data and, by a consequence, the usage have significantly increased since 2020 due to the obligation of Hansel to apply the Act on the Openness of Government Activities (*Laki viranomaisen toiminnan julkisuudesta 621/1999*), also referred to as Finnish Freedom of Information Act (FOIA), in its entirety. Previously, Hansel was not obligated to publish the information on its central purchasing functions. According to Section 1 of the FOIA, the authorities' documents shall be public unless otherwise provided by FOIA or any other Act. In terms of procurements, this typically refers to all procurement documents that do not include confidential information. Typical procurement documents include a call for tender, a procurement decision, and a contract with their attachments. Hence, everyone has the right to receive information from authorities' public documents. This refers to all

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<sup>3</sup> It must be remembered to keep separate the two different roles of Hansel: Hansel develops and provides the Hilma service and related reporting for all procurement units. As a joint procurement unit, Hansel serves its own customers, who are only part of the Finnish procurement units.

<sup>4</sup> Merisalo, Naumanen, Huovari, Eskola, Toivanen, Keskinen, Hajikhani, Oksanen, and Rausmaa. *Julkiset hankinnat, Kokonaisvolyyymi ja datan hyödyntäminen*. Valtioneuvoston selvitys- ja tutkimustoiminnan julkaisusarja 2021:46. p. 67

<sup>5</sup> See: <<https://annualreport2018.hansel.fi/economic/financial-position-and-key-figures>>.

documents except documents concerning preparation or documents containing confidential information. The documents of the authorities shall be public unless otherwise provided for. In Finland, the principle of publicity prevails. The exceptions for publicity are listed exhaustively in the FOIA.

In addition to the above, organisations and citizens can find publicly available information on procurements made by the state and Finnish municipalities via <[tutkihankintoja.fi](http://tutkihankintoja.fi)> and <[avoindata.fi](http://avoindata.fi)> or <[www.avoindata.fi/en](http://www.avoindata.fi/en)> websites. All the data from the procurements conducted by state organisations are published mainly on the website. The municipalities determine whether they publish information and where it will be published. Overall, the website service aims to increase the transparency and openness of spending in the public sector. The procured products and services can be examined at the invoice level. Additionally, information on the purchases and the suppliers is published. Some of the purchases are confidential and, therefore, not included in the data. At the <[tutkihankintoja.fi](http://tutkihankintoja.fi)> website, the data for the state are obtained from the state's procurement accounts, and the data for municipalities and cities are obtained from the data they were obliged to provide to Hansel Ltd. A lot of data is available for different reports and analyses. On <[tutkihankintoja.fi](http://tutkihankintoja.fi)> website, one can find information on procurements completed in a certain period by a specific procurement category or organisation. Furthermore, information on the published notices is published annually. The statistics contain the number of published notices, the percentage of publication of the price, and the actual total value in euros for each type of the form.<sup>6</sup>

## Portugal

Data is an essential mechanism for measuring the effectiveness of any law in any legal system. However, the shortage of data and the lack of its quality undermines any significant conclusions on the effectiveness of the legal framework.<sup>7</sup>

A report is published on the BASE portal every year by *Instituto dos Mercados Públicos, do Imobiliário e da Construção* (IMPIC) – a regulatory body responsible for monitoring procurement activities in Portugal and the contact point with the European Commission, in accordance with Article 83(5) of Directive 2014/24/EU. The first report was issued by IMPIC in 2010, and the latest in 2020. 2010-20 follows almost the same structure. It covers mostly statistical information regarding the number of contracts awarded by contracting authorities; the type of procedure use; the use of electronic platforms; award criteria; abnormally low price; etc. Only a small section is dedicated to the execution of contracts.

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<sup>6</sup> Annex 1. Contract award notices and contract modification notices of procurements exceeding the EU threshold value published in Hilma in 2020 and in 2021.

<sup>7</sup> The present study only aims at analysing national provisions. However, for further consideration, it has to be stressed that the debate regarding the impact of data on measuring the effectiveness of EU law on national law should not be disconnected from this work. See, Commission Communication “Better regulation: taking stock and sustaining our commitment” Brussels, 15.4.2019 COM(2019) 178 final; and P. Cerqueira Gomes: “Commentary of Article 85”. In: R. Caranta and A. Sanchez-Graells (eds.): *European Public Procurement – Commentary on Directive 2014/24/EU* (EE, 2021), pp. 875–878.

However, IMPIC, I.P., which is a public institute responsible for monitoring public procurement activities below or above the thresholds<sup>8</sup>, issues an annual report where some data is processed and publicised.

Concerning the given data on contract execution, the given report unfortunately only mentions at point 10 price deviation and deviations from the expected time duration of the contract. Regarding both price and time duration deviations, the latter report, respectively, separates from a type of contract (works, goods or services); procedure (open or restrictive procedure); a type of contracting authority (central, local or body governed by public law).<sup>9</sup>

Furthermore, the Court of Auditors publishes annual reports on the execution of specific public contracts. So, not only the Court of Auditors validates procurement procedures from a financial perspective before the conclusion of the contract, it is also subsequential (concomitant) to supervise specific contracts from a financial perspective.<sup>10</sup> For instance, in 2022, the Court of Audits published an audit on the execution of the contract works contract of “Rehabilitation and Expansion of the Municipal Market” granted by the Municipality of Braga – Additional Contracts, where detailed data on the execution and the legality of additional works can be found.<sup>11</sup> As another example, in 2015, the Court of Auditors conducted an audit on public procurement contracts celebrated by entities operating in the health sector.<sup>12</sup>

## Italy

The monitoring and oversight of public contract execution are linked to the anti-corruption functions and laws attributed to the National Anti-Corruption Authority (ANAC). The ANAC is an independent collegiate body that exerts oversight over the entire public procurement system, both at the state and regional levels, to ensure compliance with the competition rules, the principles of legitimacy and transparency in award procedures, and the effective performance of contracts. Therefore, the ANAC, besides having significant responsibilities regarding transparency, integrity, anti-corruption plans and the development of supplemental codes of conduct for individual agencies/administrations within public administration, is also responsible for overseeing public procurement and contracts.

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<sup>8</sup> Which encompasses both the procedural execution phases (Article 454 – A Public Contracts Code). See, F. Oliveira da Silva: *Governança dos Contratos Públicos no CCP*. In: C. Amado Gomes, R. Pedro, T. Serrão and M. Caldeira: *Comentários à Revisão do Código dos Contratos Públicos*, AAFDL, 2019, p. 195.

<sup>9</sup> Relatório Anual de Contratação Pública 2020, available in <[https://www.impic.pt/impic/assets/misc/relatorios\\_dados\\_estatisticos/RelContratosPublicos\\_2020.pdf](https://www.impic.pt/impic/assets/misc/relatorios_dados_estatisticos/RelContratosPublicos_2020.pdf)>.

<sup>10</sup> In accordance with Articles 2, 5(1c) and 49 of the Organic Law of Thee Court of Auditors (Law 98/97, of 26 August). J.F.F. Tavares: *O Código dos Contratos Públicos e o Tribunal de Contas*. In: C. Amado Gomes, R. Pedro, T. Serrão and M. Caldeira: *Comentários à Revisão do Código dos Contratos Públicos*, AAFDL, 2019, pp. 201–218.

<sup>11</sup> Court of Auditors, Relatório n.º 1/2022 – Audit, <<https://www.tcontas.pt/pt-pt/ProdutosTC/Relatorios/RelatoriosAuditoria/Documents/2022/rel001-2022-1s.pdf>>.

<sup>12</sup> Tribunal de Contas: Auditoria orientada a procedimentos de contratação pública das unidades de saúde do setor empresarial do Estado, Relatório n.º 18/2016 – 2.ª Secção Processo, n.º 23/2015-Audit, Volume I, see: <<https://www.tcontas.pt/pt-pt/ProdutosTC/Relatorios/RelatoriosAuditoria/Documents/2016/rel018-2016-2s.pdf>>.

To perform its supervisory functions effectively, since 1999, the ANAC (the former AVCP) has collected, analysed, and published all relevant procurement information. The ANAC has the power of requiring that the contracting authorities and economic operators provide data and information about contracts in execution, design and public contracts awards. Under the Italian Digital Code (Article 62 bis of Legislative Decree n. 82/2005, as amended by Leg. Dec. n. 235/2010), such data is collected in a National Database of Public Contracts, which has been established at the ANAC and managed by the Observatory. The Observatory, hosted within the ANAC, acquires data and information electronically in a public contracts database (BDNCP) and formulates standardised costs and provides statistical and economic analyses.

The BDNCP is the Italian contract register through which the contracting authorities can verify the documentation of economic operators attesting that they meet the general, technical-organisational and economic-financial requirements for participation in public tenders for works, supplies and services, and contains the entire set of data related to public procurement, unifying and crossing information from different sources (criminal records, Tax register, Single National Anti-Mafia Database, Chambers of Commerce, etc.).

According to the public procurement legislation, tenders and notices are sent to the Observatory and are registered in the Database, which can be consulted by anyone having an interest in protecting. The Database provides different records for tenders, notices, and programmes that have expired and not yet expired. The length of the storage of expired documents should be proportional to the need for their disclosure for the exercise of the right to access administrative records and legal claims. The Company Database (*Casellario Informatico*) and the data on the declarations filed by the economic operators are, *inter alia*, part of the National Database of Public Contracts.

The BDNCP collects the history of over 20 million public contracts published in Italy since 2007. In addition to the contracts, 40,000 contracting authorities are also registered, organised in about 185,000 shopping centres and 200,000 economic operators active in the procurement sector.

The New Code (Legislative decree n. 50/2016) provides a strengthening of the ANAC functions through the BDNCP: on transparency, it requires the rationalisation of the existing the ANAC database, providing measures to promote transparency through digital platforms, and strengthened requirements for the publication of the whole public tendering process, from the design to the financial management of the contracts (meaning tranches of payments).

The BDNCP is also used by other state administrations: law enforcement entities (*Guardia di Finanza, Carabinieri, Public Prosecutor Offices, etc.*), the Ministry of Economy and Finances, the General State Accounting Department, the Court of Auditors, the Ministry of Infrastructure, the Italian Statistics Office, the Antitrust Authority and the Parliamentary Budget Office, with which the ANAC has stipulated specific memoranda of understanding.

In terms of the public contract value, the Italian Code of Public Contracts applies to all awarding procedures, for both above the EU threshold and below the threshold procurement, and provides different procedural rules for contracts above the EU threshold aiming at allowing any EU entity to participate in the procedure, whereas below such thresholds, the



regime is tailored on domestic competition. The key difference pertains to the advertising means of the tender notices and calls for tender, which are published, in the first case, in the Official Journal of the European Union and, in the second case, on the ANAC specific website and on the contracting authority profile. As far as contracts at the national level are concerned, it is also worth mentioning that below a certain threshold (EUR 40,000), the Italian Code does not provide for any specific rules concerning awarding procedure, provided that the general principles are complied with.

In terms of process, the public contract data flow involves the decentralised contracting authorities filing data to the Regional Observatory and central government contracting authorities filing data in the Public Procurement Authority web portal. Then data are combined in the National Database on Public Contracts (BDNCP) managed by the ANAC.

Data collection involves 4 steps. The first step is done at the awarding phase, where data concerning the contract subject-matter, contract amount, awarding procedure, contract notice deadline and Common Procurement Vocabulary classification (CPV) are collected. When the contract is awarded, data about the contracting authority, contract subject-matter, design, economic and financial data, awarding procedure, awarding amount, qualitative selection requirements, contract advertisement and abnormally low tenders are collected. During contract execution, collected data refers firstly to awarding contract notices, execution conditions and architects/engineers involved; secondly to work, supply and service contract progress; thirdly to early resolution of contract and contract conclusion. The fourth and final step is at the conclusion stage of the contract when data about works, services and supply, final internal audit check, and claims and remedies are collected.

In the contract execution phase, the data available on the National Database allow the ANAC to have details on:

- Name of the manager of the contract;
- Date of the starting execution of the contract;
- Duration of the contract;
- Duration of the time delay;
- Variant justification variant refers to contract modifications (in terms of money, duration and related justifications);
- Variant amount;
- Date of the approved variant;
- Extension of the contract relating to the variant;
- End of the contract;
- Verifications of the executed contract date;
- Name of the employee that carried out the verifications.

The data available in the BNCDP allow the ANAC to perform its monitoring function at all procurement stages: (1) decision of the contracting authority to activate a new contract; (2) tender documents/project preparation – tender notice; (3) awarding procedure; (4) signature of the contract; (5) contract execution. The specific aspects monitored by the ANAC in the BNCDP are:

- Variations of the contract;
- Litigations during the execution of the contract;

- Time delay during the execution of the contract;
- Contract termination;
- Verification of the executed contract;
- Payments: the law against organised crime (law 136/2010) establishes the payment control of all contractors and subcontractors through the Contract Code (CIG) given by the ANAC. Each bank payment must outline the contract code.

Therefore, all the collected data are processed to:

- Verify the gap between actual and planned costs;
- Verify the gap between actual and scheduled times;
- Verify dysfunctions;
- Compute reference prices and standard costs of works, services, and supplies;
- Produce statistical reports for the European Commission.

The ANAC publishes this data for citizens on its website to allow broad and open access to the following types of data:

- Tender and contract notices;
- Awarded contracts;
- List of qualified contractors;
- Guidelines and reference documents for the contracting authorities;
- 3-years anti-corruption plans and annual programmes.

The anticorruption legislation provides that full transparency of public contracts must be ensured, as follows: (1) the contracting authorities shall publish on their respective websites the most relevant information regarding public contracts; (2) the contracting authorities shall transmit such information in digital format to the ANAC which publishes them on its website<sup>13</sup>, in a section freely available to all citizens.

Through the quality of data made available by the BDNCP, the ANAC improved its activities, notably its supervision and regulatory functions: to provide guidelines on measures that need to be considered to promote transparency, simplification and competition in the entire procurement process and, particularly, in the pre-bidding and post-bidding phases.

In conclusion, the monitoring and management by the ANAC of the BDNCP allow the ANAC to perform all its functions and, in particular, to report annually to the Government and Italian Parliament about public contract execution. It also allows transparency and the preservation of free competition by making publicly available info on a number of contracts, the value of contracts, the critical aspects of the management of the contracts with respect to the law provisions, contracts variation during a contract execution, and provide evidence-based advice on amendments required by the secondary legislation.

In March 2022, the ANAC made available on its website the new portal, which publishes data on public contracts in Open Contracting Data Standard (OCDS) format. The OCDS portal completes and integrates the BDNCP providing an international dimension to the ANAC project for public contract data monitoring. The OCDS standard is conceived to facilitate the

<sup>13</sup> See: <<https://dati.anticorruzione.it>>.

involvement of civil society organisations, citizens and academia as it allows to compare the Italian public administration contracts with those published by other similar countries, using the tools made available by the Open Contracting Partnership.

Other relevant data on public contract execution can be found in other open data initiatives carried out by the Italian Government, such as:

- [www.dati.gov.it](http://www.dati.gov.it) – an online portal for the publication of open data from public entities. It is a sort of taxonomy with metadata describing every class of information;
- [www.soldipubblici.gov.it](http://www.soldipubblici.gov.it) provides information about the expenses incurred by the main public entities, both at the central and local levels;
- [www.opencoesione.gov.it](http://www.opencoesione.gov.it) monitors in detail projects funded by Italian cohesion policies.

These initiatives are managed by the Presidency of the Council of Ministers, as well as the involved Ministries and the Agency for Digital Italy.

## Slovenia

The Statistical Report on awarded public contracts in Slovenia is available for each year. It is prepared by the Public Procurement Directorate, Ministry for Public Administration. Reports have been made public and accessible since 2012. The last report available on 25 March 2022 is for the year 2021.<sup>14</sup>

The statistics on the execution of public procurement contracts is not available. Although the report on the execution of public procurement contracts is not available, the following is a summary of the scope of reporting available from the 2020 Statistical Report on Public Procurement to show the indicative scope of data available.

Based on public procurement notices published on the public procurement portal or in the EU Official Journal and from the reported statistical data on registered procurement, information is given on how many contracting authorities awarded public contracts in a given year. The report also contains information on the share of public procurement in the gross domestic product for each respective year.

Public contracts that need to be published on the public procurement portal or in the EU Official Journal are analysed separately – the number of contracting authorities, contracts, and their contractual value. Framework agreements and the number of contracts awarded based on concluded framework agreements – the number of value contracts – are analysed separately. Direct awards (i.e. below EUR 40,000) are analysed in the same manner, as well as their average value. Public procurement (co)financed with the EU funds from various funds and programmes (number, value) is also analysed separately. Special attention is paid to the analysis of the type of procedures used and the type of procurement (supplies, services, works).

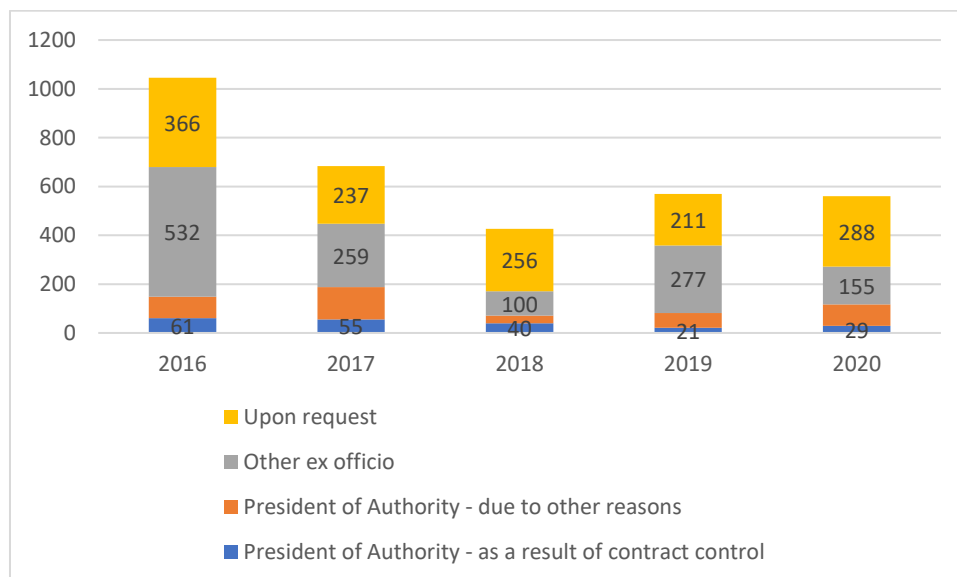
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<sup>14</sup> See: <https://ejn.gov.si/direktorat/porocila-in-analize.html>.

## Hungary

The Public Procurement Authority is responsible for compiling official statistics on public procurement. Data on public contracts are uploaded to the Electronic Public Procurement System and are searchable in the Public Procurement Contract Repository (Core) available to all interested parties. The Public Procurement Authority is also responsible for maintaining a control system of public procurement contracts. It carries out random checks on invoices and documents relating to the performance of contracts and decides on the basis of these checks whether to initiate legal proceedings. If an appeal is launched, a fine is typically imposed. Both procedures below and above the EU threshold are affected. The audit plan is permanently available on the Public Procurement Authority website, but it may deviate from it and carry out additional audits. The remedies resulting from the audits are published in its annual report.

Figure 1: The number of review procedures (pcs) at the Public Procurement Arbitration Board according to applicants (2016–2020)



The Public Procurement Authority started the control of public contracts on 1 January 2016, which covers the control of the performance and amendment of public contracts, furthermore, the control of breaches of contracts reported by the contracting authorities. The control of public contracts is always launched *ex officio* by the President of the Authority.

Figure 2: The number of the control of contracts conducted by the Public Procurement Authority (2018–2020)

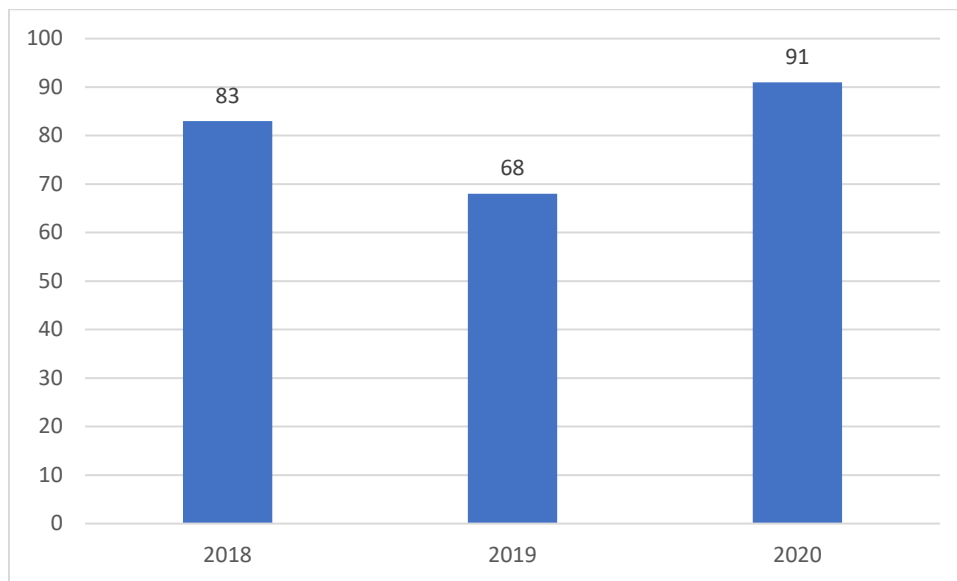
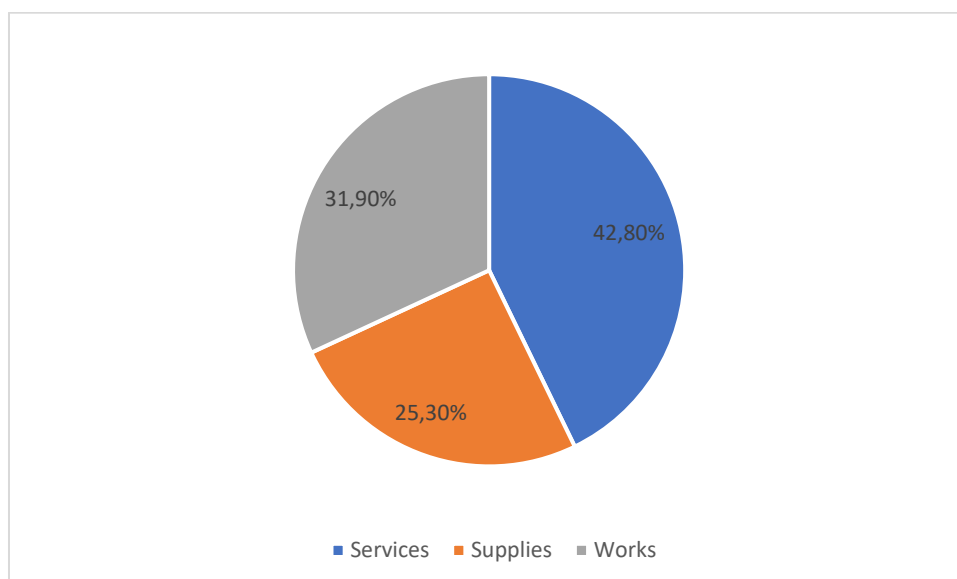


Figure 3: Controls conducted in 2020 by the subject-matter of public procurement contracts

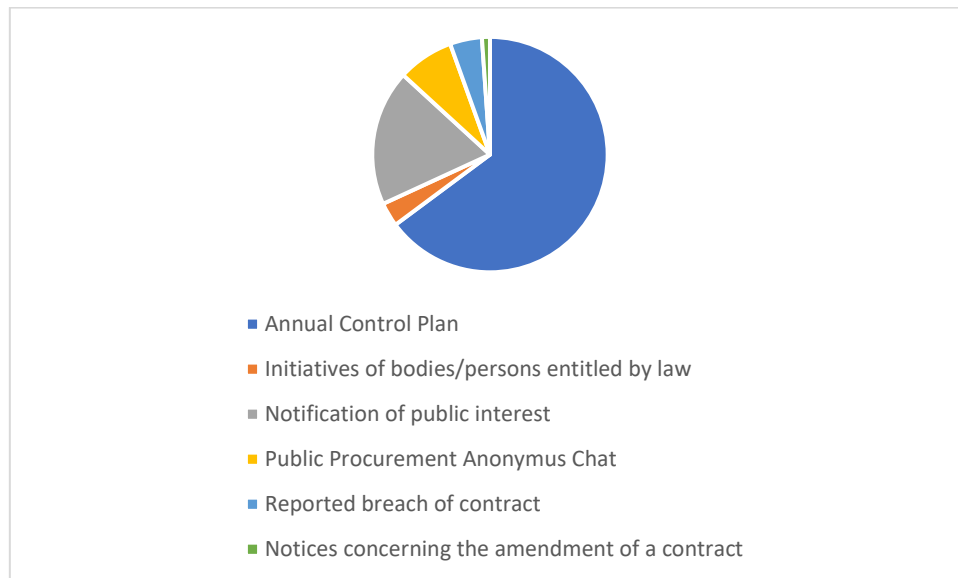


As of 1 January 2019, the Authority's competence was extended with controlling the contracts concluded based on concession award procedures and the result of design contest procedures.

The substantive and procedural rules of the control (*ratione personae*, the scope of application, *ratione temporis*, means of proof available during the control etc.) are laid down by the Public Procurement Act (PPA), by Act. CL of 2016 on the General Public Administration Procedures and by implementation decrees – especially the Government Decree No. 308/2015 (27 October) on the control activities of the Public Procurement Authority concerning the amendment and performance of public contracts. During the public procurement procedures, the rules of electronic administration are applicable pursuant to Act

CCXXII of 2015 on the General Rules of Electronic Administration and Trust Services. In 2020, 91 controls were ordered, while the number of breaches of contracts reviewed was 41. Based on these, a total of 29 redress procedures were launched, all of which resulted in the stopping of the infringement, with a total fine of HUF 142,850,000 in 2020.

Figure 4: The number of controls launched by the grounds for control in 2020



The control of the contract performance by the Public Procurement Authority is based on legal, technical and professional aspects, considering whether the performance of the contract (and any amendment thereto) complies with the PPA and the relevant implementation decrees. The control extends to the examination of the quality of contract performance and also aims to reveal other infringements (for example, competition law – cartel) and criminal acts as well.

After the Public Procurement Authority verified that the public contract intended to be controlled falls under the PPA and Government Decree No. 308/2015, the President of the Authority issues an order to launch the control and requests the contracting authority or other controlled entities to provide declaration to clarify the matters of the case, to make available the documents of the procedure in the electronic public procurement system (EPPS), or to submit all the relevant documents not available in EPPS.

During the controls, the Public Procurement Authority requests data primarily from the parties concluding the contract, typically the contracting authority and the winning tenderer, subcontractors, sub-subcontractors and other organisations involved, including their legal successors.

Controls are document-based, but besides the request for data, the Public Procurement Authority carries out on-the-spot checks (inspections). In cases requiring special expertise, it involves a forensic expert of a forensic organisation to clarify the situation.

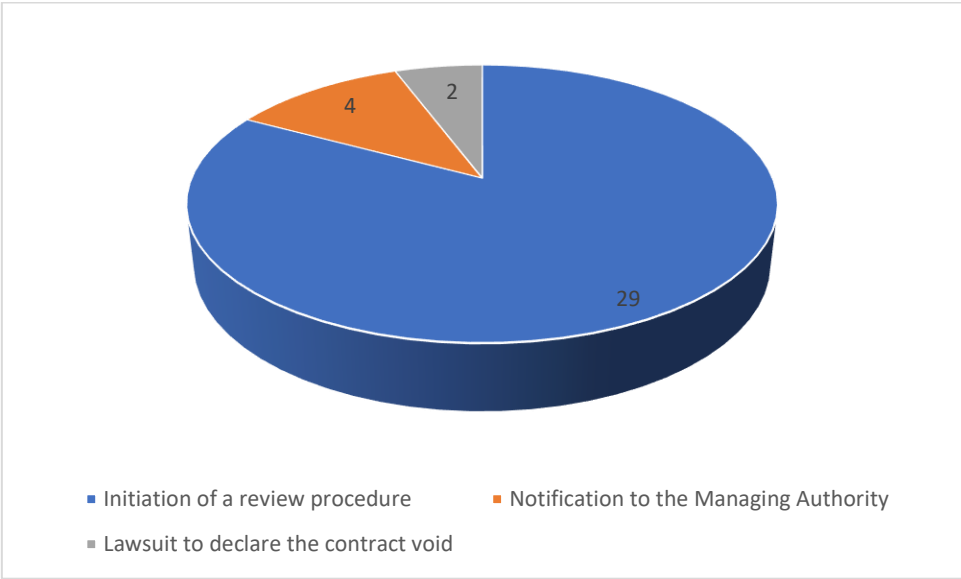
Legal consequences of the public contract control:

The control is concluded with the drawing-up of minutes. The control may result in four types of legal consequences:

1. No further action is taken due to a lack of infringement;
2. In public procurement, infringement is revealed, and the President of the Public Procurement Authority initiates the legal review proceeding at the Public Procurement Arbitration Board;
3. In terms of not public procurement related infringements, the President of the Public Procurement Authority notifies the competent/responsible body;
4. If a contract amendment is considered to be null and void under Article 142(3) of the PPA, the President of the Authority shall file a lawsuit to establish the nullity of the amendment and for the application of its legal consequences.

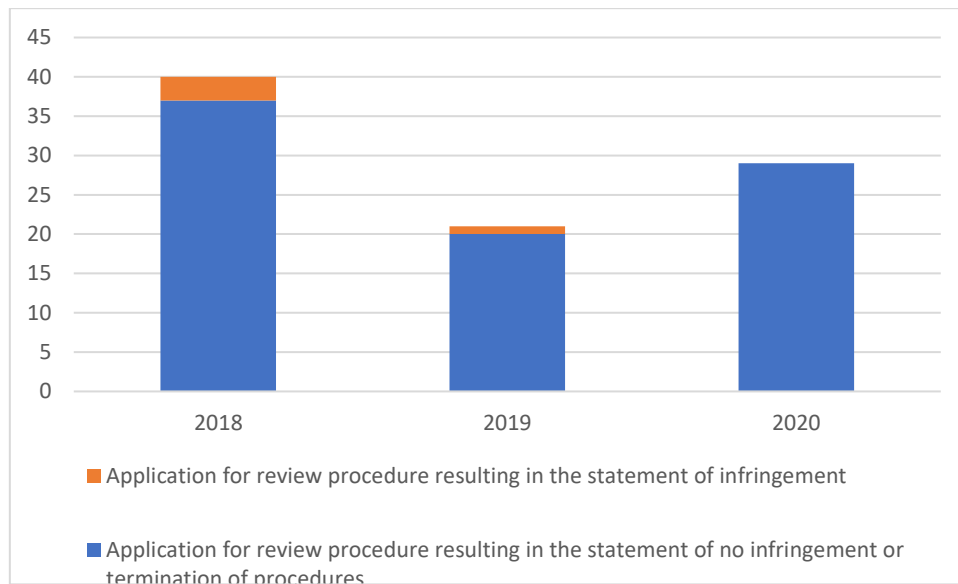
The breakdown of the bodies notified and the measures taken as a result of the controls launched in 2020 is illustrated by the chart below:

Figure 5: The breakdown of the measures taken as a result of controls



Due to public procurement infringement in 29 cases, the review procedure of the Public Procurement Arbitration Board was initiated, as a result of which every decision stated that infringement occurred.

Figure 6: Effectiveness of review procedures (2018–2020)



In 2020, most controlled entities were condemned due to unlawful amendments to the public contract, unlawful involvement of subcontractors, infringement of the payment order and improper preparation of the public procurement procedure. The distribution of established infringements by contracting authorities/tenderers and the fines imposed are shown in the following figures:

Figure 7: Distribution of condemning decisions

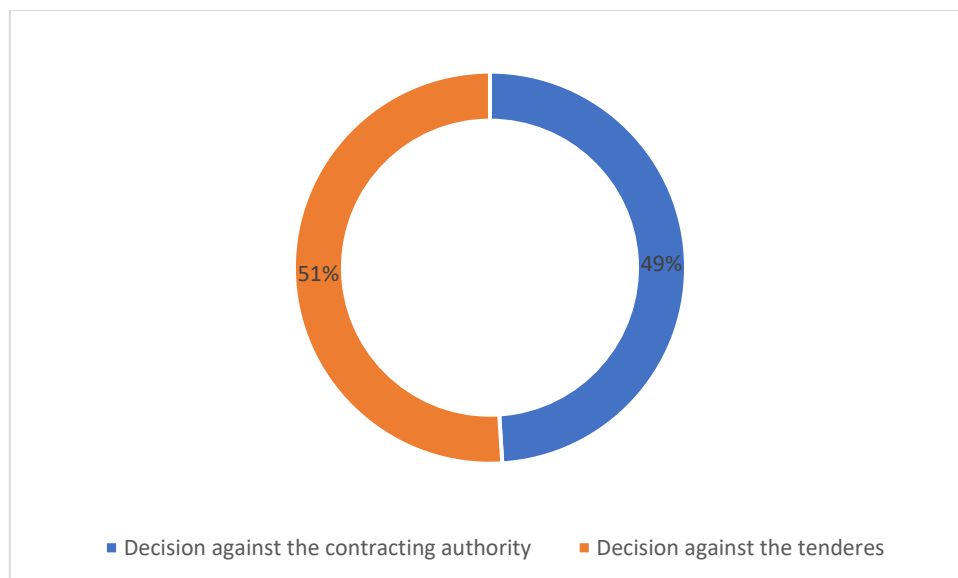
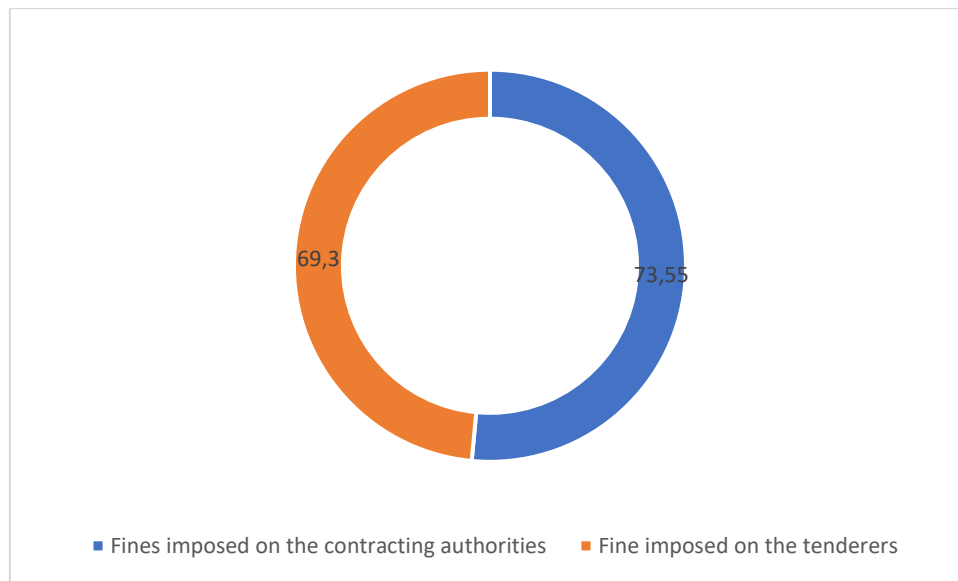




Figure 8: Distribution of fines (HUF million) by the Public Procurement Arbitration Board



### The reporting and the legal consequence of the breach of the contract

The Public Procurement Authority examines the reports on a breach of the contract without launching a contract control proceeding because the primary goal of this activity is to establish the obligation of publishing under Article 187(2) (ae) of the PPA. However, contract control may also be launched if – according to the report – a suspicion is raised of a public procurement infringement as well. If the breach and its seriousness were not debated by the tenderer or the breach of contract was established by a legally-binding court judgement, the public procurement legal consequence of the breach of contract is that the fact of the breach and non-complying tenderers are listed on the Public Procurement Authority’s website. Tenderers listed on the website for such reason might be excluded from future public procurement procedures if the contracting authority had set out the application of the relevant optional exclusion ground. Due to the strict legal conditions for the publication, 6 tenderers were listed on the Public Procurement Authority’s website out of 41 reported breaches of contract. Furthermore, in 4 cases, the report of the breach of contract resulted in launching an official contract control proceeding.

### 1.2. Contracts excluded from public procurement regulation (defence procurement contracts, in-house contracts)

#### Finland

Some information is available on the contracts excluded from public procurement regulation.

The information about the defence procurement contracts is primarily obtained from the published contract award notices. The procurement of the defence administration follows the current national procurement legislation and the regulations of public procurement in the European Union. In the defence and security procurements, the Act on Public Procurement in the Fields of Defence and Security (*Laki julkisista puolustus- ja turvallisuushankinnoista 1531/2011*) is applied. It is based on Directive 2009/81/EC and, in civil procurements, the

Procurement Act. Furthermore, the regulations and instructions of the defence administration and the general terms in public procurements in both service and supplies contracts are followed. Defence material procurement notices are published on the national Hilma website and the EU's TED website. According to Section 28 of the Act on Public Procurement in the Fields of Defence and Security, the procurement entity must publish a contract award notice within 48 days of concluding the procurement contract exceeding the EU threshold value.<sup>15</sup> The Act does not direct the notification of the contract award notices in national procurements. The information on the defence and security procurement contracts is based on the published contract award notices. There is no public register for contracts. According to Section 170 of the Procurement Act and the Act on Archives (*Arkistolaki 1994/831*), the contracting entities are required to archive their contracts. No additional information on the contracts is available publicly. Furthermore, <*tutkihankintoja.fi*> website does not contain information on classified procurements. The data from defence and security authorities are excluded from the online service.

The Procurement Act shall not apply to a procurement by a contracting authority from its in-house entity according to Section 15 of the Procurement Act. Thus, no information is available on the in-house contracts based on the Procurement Act. However, the FOAI is applied: documents are available if an individual petitioner knows what and from where to ask. However, some municipalities publish information about their in-house procurements alongside the other procurements.

## **Portugal**

No systemised data regarding the exclusion of contracts exists, such as in-house contracts (vertical or horizontal) or other contracts also excluded from public procurement (Articles 4.º; 5; or 5.º-A of the Public Procurement Code). However, some casuistic data may be available under the national courts case-law, mainly in the Court of Auditors case-law, which goes beyond the objective scope of this study. The principle of transparency should also demand the publicity of these types of contracts, namely on the Portal base.

Regarding defence contracts, the only information that can be found is the one published on the Portal Base, which is not much since most of the time those contracts are covered by confidentiality clauses. Defence public contracts are not regulated by the Public Contracts Code, but instead by the Law-Decree n.º 104/2011 of 6 October. Articles 69 and 70 of the latter Law-Decree state that both the Defence Ministry and the Ministry of Internal Administration must issue a statistic report every year regarding the public contracts awarded in the defence sector to send to the European Commission. This report is not public. However, Article 70 of the Law-Decree n.º 104/2011 establishes that the report should separate the type of contract, value, country of origin of the supplier and the procurement procedures used.

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<sup>15</sup> The EU threshold values are, excluding VAT, EUR 431,000 in supply and service contracts, and EUR 5,382,000 in public work contracts.

## Italy

The richness of data collected in the BDNCP depends on the contract value, as for contracts lower than EUR 40,000, only essential information is collected. As for contracts whose regulation is excluded from the Italian Public Procurement Code, here we report information about the defence and security sectors.

Public procurements in the defence and security sectors are governed by the Code and Legislative Decree n. 208/2011, implementing Directive 2009/81/EU (“Defence Decree”). The Defence Decree sets forth special rules with regard to contracts falling in its scope of application.

The defence procurement is governed according to the type of procurement to be done. In the case of military procurement, Legislative Decree 208/2011 — in implementation of Directive 2009/81/EC — and its implementing regulation Decree of the President of the Republic 49/2013 are applied. In the case of civil procurement for the Ministry of Defence, the public procurement code of 2016 and law n.55 of 14 June 2019 apply. Nonetheless, if not differently specified, the legislation regarding civil procurement applies also to military procurement. According to Articles 6 and 7 of the Legislative Decree 208/2011, some items can be exempted from the current legislation if compliance with the law endangers the security interests of the state.

The defence procurement procedures are publicly available. The public becomes aware of the procurement planning when the Minister of Defence presents the Multiannual programmatic document to the Parliament and can access more detailed information on specific purchases subject to parliamentary consultations, including information on the assessment of needs, contract form, award procedure and implementation, planned timeline and budget. Nonetheless, such extensive information is not available for all contracts of the Ministry of Defence. On the Ministry of Defence website,<sup>16</sup> it is possible to access information also on the civilian defence procurement.

Information on actual defence purchases is made public on the Ministry website and, most of the time, includes the item, winning bidder, beneficial owner, price, cost of the lifecycle, servicing, parts and completion date.<sup>17</sup> For major programmes, it is also possible to access the opinions of the relevant Parliamentary Committees.<sup>18</sup> The provisions that regulate every aspect of purchases are those of the national code for contracts, including the release of information. Nonetheless, given the specificities of defence procurement, the Ministry of Defence agreed with the National Agency for Anti-Corruption, the exemption for those items

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<sup>16</sup> See: <<https://www.difesa.it/Amministrazionetrasparente/Pagine/Publicprocurement.aspx>>.

<sup>17</sup> Information can be accessed on the webpages of the different national armament directorates: NAVARM, <<https://www.difesa.it/SGD-DNA/Staff/DT/NAVARM/Pagine/AvvisiAA.aspx>>; TERRARM, <<https://www.difesa.it/SGD-DNA/Staff/DT/TERRARM/Pagine/AvvisiAvvenutaAggiudicazione.aspx>>; ARMAEREO, <<https://www.difesa.it/SGD-DNA/Staff/DT/ARMAEREO/Bandi/Pagine/InfoProcedAffidamServiziForniture.aspx>>; TELEDIFE, <[https://www.difesa.it/SGD-DNA/Staff/DT/TELEDIFE/Bandi\\_esperiti/Pagine/elenco.aspx](https://www.difesa.it/SGD-DNA/Staff/DT/TELEDIFE/Bandi_esperiti/Pagine/elenco.aspx)>

<sup>18</sup> Parlamento Italiano, Atti del governo sottoposti al parere della commissione, <[https://www.camera.it/leg18/1107?shadow\\_organoparlamentare=2804&id\\_tipografico=04](https://www.camera.it/leg18/1107?shadow_organoparlamentare=2804&id_tipografico=04)>.

or programmes that serve secret purposes or that are especially sensitive to proceed with a confidential procedure, thus not publishing objects and outcome of the procedure, to safeguard the security of the country.

Procurement oversight mechanisms are regulated by the Legislative Decree 123/2011 and Law 20/1994. They are performed by the department of general accountancy of the State. Being the department composed of magistrates and being part of the Ministry of Economy and Finance ensures the independence of the oversight mechanism. In addition, the fact that there are reports against the public administration suggests the absence of undue influence on oversight mechanisms.

According to the Law 244/2012, the Ministry of Defence has to annually present a Multiannual Programmatic Document<sup>19</sup> (*Documento Programmatico Pluriennale – DPP*), in which all necessary acquisitions, developments and strategic considerations regarding equipment and related resources are identified. Each identified programme must have forward planning of at least three years. Looking at the information available in the DPP, in addition to the financial aspects related to the next three years, it is possible to receive information in aggregated terms on the foreseeable economic effort for the subsequent three years. Further information could be found in the annual budget of the Ministry. In the estimated budget, there is an indication of all planned expenses, including potential defence purchases. In addition, all public administrations need to publish bi-annual planning of procurement of goods and services with a value exceeding EUR 40,000 and a triennial plan of public works with a value exceeding EUR 100,000. Comprehensive forward planning with a longer timeframe does not occur frequently. An example in this sense is the Naval Programme that goes from 2014 to 2034. For such programmes, detailed descriptions, as well as external audit reports, can be found online.

The department of general accountancy of the State can collect information and request clarifications when necessary. It can also reject putting contracts in place and provide recommendations or conclusions on the procedures followed by the Ministry of Defence. One can find evidence of the effectiveness of its powers in its Resolution of 4 June 2020, where information on the summoned documents is also available. In addition, while their recommendations are not binding, it is relevant to recall that the relevant parliamentary committees have the right to oversee acquisitions of armaments.

The activities of the oversight organs are published on the respective websites through reports. Reports can be on specific procurements – in this case, besides financial information, one can find legal and factual considerations – or on the entire management of the procurement mechanisms, where it is possible to access an overall evaluation of the procedures. In case of recusal of the authorisation to proceed with the procurement, public notice is given on the website of the oversight body.

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<sup>19</sup> See:

<[https://www.difesa.it/Content/Documents/Documento\\_Programmatico\\_Pluriennale\\_\(DPP\)\\_2019\\_2021\\_digit.pdf](https://www.difesa.it/Content/Documents/Documento_Programmatico_Pluriennale_(DPP)_2019_2021_digit.pdf)>.

On the Ministry website and those of each armed force, one can access a webpage with information on the biannual and triannual plans, as well as on-call for tenders. Nonetheless, in 2018, Italy was among the EU countries against which an infringement procedure on the application of EU Directive 2009/81 was initiated. The aspects of the Directive object of the procedure were related to missing publications on online tenders on the EU dedicated platform.

## **Slovenia**

Limited data is available on contracts excluded from public procurement regulation pursuant to Article 346 TFEU and intelligence and counterintelligence contracts for 2020 (only a two-page report).<sup>20</sup> After the introductory section (presentation of the Commission and legal bases), the second section of the report describes the operation of the interdepartmental commission in a given year. Among other things, the number of sessions held by the Commission in a given year and when any of them took place is stated. It also states how many applications it received and who submitted each application. One can find information on the total estimated value of all procurements considered by the interdepartmental commission in a given year (excluding VAT).

Data on in-house contracts is not available.

## **Hungary**

In Hungary, the publication of public procurement contracts is mandatory. Contracting authorities are required to upload their contracts to the Electronic Public Procurement System (EPC), from which they are entered into the Contract Repository maintained by the Public Procurement Authority. The Contract Repository is searchable and accessible for contracts concluded as a result of a public procurement and for contracts concluded in-house by way of exception.

Defence procurements are not subject to the publication obligation and are not accessible.

### **1.3. Annual report about public procurement execution**

## **Finland**

There is no annual reporting or detailed analysis of public procurement execution. The reports and analysis are primarily occasional.

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<sup>20</sup> Report on the work of the Interdepartmental Commission for Procurement Pursuant to Article 346 TFEU and Procurement for Intelligence and Counterintelligence Activities for 2020, <<https://ejn.gov.si/direktorat/porocila-in-analize.html>>.

## Portugal

IMPIC, I.P. issues an annual report on public procurement activities, which includes a section on contract execution regarding both price and time duration deviations.<sup>21</sup> Despite the fact that the latter report separates the data concerning price and time duration deviations, depending on the type of contract, procedure, or the contracting authority, it lacks quality since no relevant conclusion can be extracted from it. Broadly, the report includes:

Price deviation – by comparing the total effective value of each of these contracts with the initial contractual price, the report remarks that in the case of goods and services, only in 0.21% situations, the total final price was higher than the initial contractual value. Moreover, in the case of public works, the variation is slightly higher since it occurs in 1.76% of situations. Furthermore, price deviations occur more in contracts preceded by an open tenderer than in a restrictive procedure. With regard to the type of contracting entities that entered into contracts with price variations, bodies governed by public law and local entities have shown a higher percentage of price variation, in 41% and 29% per cent of the contracts, respectively. Lastly, the most affected sectors are construction, medical services and equipment, legal services, consultancy, security, IT and architecture.

Time delivery deviation – in 79% of contracts concluded in 2019 had an indication of the effective duration of the contract (76.9% in the case of contracts relating to goods and services and 100% for contracts related to public works). With regard to the compliance with contractually defined deadlines, the report mentions that in the case of goods and services, the contractual deadline was not respected in 48.6% of the contracts. Even so, only 15.8% of contracts exceeded this deadline by more than 60 days.

## Italy

The reporting function is part of the duties assigned to the ANAC, among them:

1. Supervision of public contracts, including those of regional interest, of works, services and supplies in the classical sector and the utilities sector;
2. Assurance that the performance of public contracts is guaranteed economically and ensures that there is no prejudice to the public finance;
3. Reporting to the Government and the Parliament, by a specific act, of particularly serious cases of non-compliance or distorted application of sectorial legislation;
4. Advice to the Government on proposals regarding changes required in relation to current sector regulations;
5. Preparation and address to the Government and the Parliament on the annual report on the activity carried out highlighting the dysfunctions encountered in the exercise of its functions;
6. Supervision of the qualification system of executors of public works contracts and exercises related sanctioning powers;

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<sup>21</sup> Relatório Anual (n. 3), para. 10, p. 61.

7. Supervision on the prohibition of awarding contracts through procedures other than the ordinary ones and control the correct application of the specific derogating rules provided for cases of high urgency;
8. Conduction of activities of collaborative supervision for contracts of particular interest, carried out following the signature of memoranda of understanding with the requesting contracting authorities, aimed at supporting them in the preparation of acts and in the organisation of the entire tender procedure.

The ANAC presents an annual report to the Italian Parliament stressing the main problems arising in the fight against corruption and public procurement and the dysfunctions of the rules. According to the Anti-Corruption Law, the ANAC analyses causes and factors of corruption to point out actions to prevent and fight corruption. The ANAC also reports annually to the Parliament. In its reports, the ANAC presents its analyses on the prevention activities; on its supervisory measures and their overall effectiveness in the fight against corruption.

## **Slovenia**

There is no annual report or detailed analyses about public procurement performance.

However, the open contracting principle is fully enforced. According to Article 10a of the Public Information Access Act,<sup>22</sup> the contracting authorities must publish publicly available information of a public nature from the contract on the performance of the public procurement. The manner, formats and place of publication of publicly available information of a public nature from public procurement contracts are defined in more detail in the Rules on the publication of contracts in public procurement, concessions and public-private partnerships (hereinafter also: the Rules).<sup>23</sup> However, these are scanned public contracts, i.e. only unstructured data is available, and search has to be made on the notification portal<sup>24</sup> contract-by-contract, i.e. the user needs to enter information enabled in the advanced search functionality to find the data (the name or the title and contracting authority of the specific public procurement procedure).

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<sup>22</sup> *Zakon o dostopu do informacij javnega značaja* (ZDIJZ), Official Gazette of the RS, no. 51/06 – officially consolidated text, 117/06 – ZDavP-2, 23/14, 50/14, 19/15 – CC dec., 102/15 and 7/18.

Article 10a(5) ZDIJZ reads as follows: “The registered entities liable referred to in Article 1 and paragraph two of Article 1a of this Act, acting in the capacity of public procurement contractors, grantors of concessions or public partners shall publish the generally accessible public information from the contract on public procurement, concession or public-private partnership within 48 days from the award of the contract, granting of concession or selection of a contractor in a public-private partnership based on the procedure regulated by acts on public procurement, concessions or public-private partnership. This information shall be published on the websites intended for electronic public procurement in a machine-readable format. The manner, the possible formats and the place of publication shall be determined by the minister, responsible for administration in agreement with the minister responsible for finance.”

<sup>23</sup> Rules on the Publication of Contracts in the Field of Public Procurement, Concessions and Public-Private Partnerships, Official Gazette, No. 5/15.

<sup>24</sup> See: <<https://www.enarocanje.si>>.

Under Article 3(2) of the Rules, in addition to the electronic copy of the contract from which the data constituting an exception to access in accordance with the law is pre-excluded, the contracting authority shall publish publicly available information on the public procurement contract by referring to the number of the public procurement notice and, if necessary, correct or supplement data automatically obtained from the published related to information on:

- The contracting authority (registration number, name, address of the registered office, postal code of the registered office, place of establishment);
- The subject-matter of the contract, type of the subject-matter, main reference to the CPV, with amendments, description of the subject-matter for each lot;
- The contract (contract value including VAT, date of conclusion of the contract, duration of the contract in months or one-off supply, an indication of whether or not it is a framework agreement);
- The economic operator to whom the contract has been awarded (name, registered office address, postal code of the registered office, place of establishment, country of the tenderer).

On 11 April 2022, the Minister of Public Administration, in agreement with the Minister of Finance, issued Rules on Amendments to the Rules on the Publication of Contracts in the Field of Public Procurement, Concessions and Public-private Partnerships, which were published in the Official Gazette of the Republic of Slovenia No. 53/2022 of 15 April 2022. The adopted Rules came into force on 16 April 2022. The Rules also stipulate the date of the application of changes, namely the amended Article 3(6) and the new Articles 3(8) and 3(9) of the Rules shall come into force on 1 January 2023 for public procurement contracts concluded from 1 January 2023 onwards. The Rules were amended by Article 1 with reference to recent official gazettes concerning the Access to Public Information Act.

The Rules added new paragraphs 8 and 9 to Article 3. Paragraph 8 stipulates that after the publication of the information referred to in Article 3(2), the reporting agent shall communicate publicly available information of a public nature from the public procurement contract relating to payment transactions under individual published contracts by reporting the recipient's identification data and the amount and date of the executed payment to the bank account of the individual payee by the 18th of the month for the previous month unless no payments have been made in a particular month. Paragraph 9 stipulates that the reporting agent shall report every month on the payment transactions referred to in paragraph 8 through the dedicated portal of the body responsible for public payments. The body responsible for public payments must set up the portal referred to in paragraph 9 by 25 April 2022.

Also, contracting authorities are obliged to publish the information on purchases in framework agreements (second phase) and low-value procedures (direct awards, i.e. procedures below EUR 40,000).

Additionally, an application – Erar – is available to show the spending of public money in the Republic of Slovenia,<sup>25</sup> a project by the Commission for the Prevention of Corruption.<sup>26</sup> The

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<sup>25</sup> See: <<https://erar.si/doc>>.

<sup>26</sup> See: <<https://www.kpk-rs.si>>.



purpose of the application is to show the use of public money in the Republic of Slovenia in the most transparent way possible. Some data is censored for the protection of personal data. However, some of the data is only visible to users who prove that they are not robots – the purpose is to prevent some data from appearing among search engines search results).

The Erar application provides the general public, media, professionals and state bodies with insight into transactions of public institutions and companies owned by the state and municipalities related to goods and services, salaries, social benefits, pensions, subsidies, scholarships, etc. Public coverage of the flow of money between public and private increases the responsibility of public officials for the efficient and effective use of public funds and enables reasoned discussion of accepted and planned investments and reduces risks of mismanagement, abuse of power and, above all, limits systemic corruption, unfair competition and clientelism.<sup>27</sup> The Erar application includes data on transactions of companies that are in the register of persons liable for public information from 17 October 2014 onwards (on that day, the obligation to publish data came into force). In the Erar application, one can search by the recipient (a government agency), payer (economic operator or government agency), or a combination of recipient and payer. In addition to the entity's name, one can also enter the code of the business user (state authority) or tax number (business entity). The application does not provide insight into the legal basis or public procurement number. Only basic information on the transfer is available.

The Commission for the Prevention of Corruption obtained data on legal entities from the Slovenian Business Register (*Agencija Republike Slovenije za javnopravne evidence in storitve* – AJPES), the list of taxpayers, the Public Payments Administration, the Ministry of Finance, and the Official Gazette of the Republic of Slovenia, the Financial Administration and the Anti-Laundering Office. The Commission for the Prevention of Corruption does not comment on the published data and does not take responsibility for their accuracy. One cannot necessarily conclude from the data displayed among the search results that the recipient of funds from the general government sector was also the final beneficiary of these funds. The information is about payments. Further comprehensive information based on a specific payment can be obtained by individuals from an individual spending unit under the Public Information Access Act.

The Erar application also provides insight into data of legal entities (as payers) under private law, liable for the information of a public nature (the register is available at AJPES), which was made possible by an amendment to the Public Information Access Act (ZDIJZ-C). State-owned companies do not operate through the state treasury (as state administration bodies and local communities) but have their own accounts with commercial banks. Data on transactions of these companies are provided by banks to the AJPES, which publishes them on its website. The Erar application thus includes data on transactions of companies that are in the register of persons liable for public information from 17 October 2014 onwards (on that day, the obligation to publish data came into force).

The data in the Erar application are as provided to the Commission for the Prevention of Corruption by database managers. Occasionally, there may be discrepancies between the data

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<sup>27</sup> See: <<https://erar.si/doc>>.

and the actual situation. In such a case, individuals may inform the Anti-Corruption Commission and the database administrator. Any irregularities are then rectified. The published data are informative. The Commission for the Prevention of Corruption recommends that users check their completeness, accuracy and timeliness with the original database administrator before making decisions based on them. Due to such corrections, the published data may change without prior notice.

## **Hungary**

The report published annually by the Public Procurement Authority is also adopted by the Parliament. The report contains general information on the most important public procurement statistics, as well as data on appeals and the results of the Public Procurement Authority's audit and other activities.

The report contains very detailed data on control activities, as well as detailed data and information on green and social criteria, evaluation criteria and other information from the notices. Its weakness is that it fails to cover the activities of central purchasing organisations (CPOs), and its specificity is that it creates its own indicators and does not follow the methodology of the EU Public Procurement Scoreboard indicators in all respects.

### **1.4. Database on appeals concerning public procurement contracts**

## **Finland**

Information on appeals concerning the public procurement contracts is maintained by the Market Court. According to Section 148 of the Procurement Act, the Market Court shall maintain and publish an optimally comprehensive and current list of all procurement cases filed at the Market Court. The list is maintained on a daily basis. In pending procurement cases, the Market Court publishes information on the date of the appeal, on the contracting authority and the subject-matter of the procurement decision.

The Market Court also publishes on its website the decision of each procurement case under investigation. The decisions of the Market Court are published in their entirety, so they contain considerably detailed information about the subject-matter of the complaint and the decision.

According to Section 165 of the Procurement Act, the parties can appeal the Market Court's decision to the Supreme Administrative Court (*Korkein hallinto-oikeus* – KHO) only if the Supreme Administrative Court grants leave to appeal. In Finland, the Supreme Administrative Court is the court of last resort in administrative cases. Correspondingly, the decisions of the Supreme Administrative Court are published in its entirety, so it contains detailed information about the subject of the complaint and the decision.

## **Portugal**

Database on appeals concerning public procurement contracts cannot be found in the Portuguese legal system. The annual reports of the Superior Council for the Judiciary of

Administrative and Tax Courts<sup>28</sup> do not provide for that level of detail since it focuses on the number of judicial pendencies or the creation of new administrative and tax Courts. Nonetheless, most of the superior Administrative Courts case-law can be found only on the website under the control of IGFEJ, I.P., <[www.dgsi.pt](http://www.dgsi.pt)>.

Judicial challenges of public contracts. In that case, the appeals are not published on the contracting authority's website.

## Italy

No dedicated database for appeals exists.

## Slovenia

No specific database exists on appeals concerning public procurement contracts.

However, a case-law search engine was set up, where a detailed search of all the case-law is available. It is possible to search by courts: Supreme Court<sup>29</sup>, higher courts<sup>30</sup>, Higher Labour and Social Court<sup>31</sup> and the Administrative Court<sup>32</sup>. For each of the courts, it is possible to search by fields where one can enter the record number, case number, second instance case number, the Constitutional Court decision, ECLI, department of each court, the date of the hearing, whether the case was decided by a panel of judges or a single judge, field (here, the field of "public procurement" can be mentioned), institute, core, disposition, explanation, association (e.g. "Penal Code"), publications in the Supreme Court collection. Finally, the search engine provides an opportunity to indicate whether it is a more important decision.

It might also be beneficial to note that a search engine is set up<sup>33</sup> following the decisions of the National Review Commission for Reviewing Public Procurement Award Procedures.<sup>34</sup> The search engine, through the Commission's decisions, allows the user to first limit to the decision on the filed case (e.g., "permission to inspect the documentation", "withdrawal of the appeal", "rejection", etc.). Then one can enter the type of application (e.g., "proposal under Article 19 of the ZPVPJN", "complaint-client", "request for review", etc.). The next search string is "regulation". The search engine then provides the user with an opportunity to enter the field (public procurement, public-private partnership or concession). One can also indicate the legal basis for the decision (ZPVPJN or ZRPJN). The search engine also allows the search by limiting

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<sup>28</sup> Last available annual report (2020) from the Superior Council for the Judiciary of Administrative and Tax Courts, <<http://www.cstaf.pt/documentos/Relatorio%20CSTAF%202020.pdf>>.

<sup>29</sup> Supreme Court, SP case-law, <<https://www.sodnapraksa.si>>, 7 April 2022.

<sup>30</sup> Supreme Court, SP case-law, <<https://www.sodnapraksa.si>>, 7 April 2022.

<sup>31</sup> Higher Labour and Social Court, SP case-law, <<https://www.sodnapraksa.si>>, 7 April 2022.

<sup>32</sup> Administrative Court, SP case-law, <<https://www.sodnapraksa.si>>, 7 April 2022.

<sup>33</sup> National Review Commission for Reviewing Public Procurement Award Procedures, Decisions, <<https://www.dkom.si/sl/revizijske-zadeve/odlocitve-dkom>>.

<sup>34</sup> National Review Commission for Reviewing Public Procurement Award Procedures, About us, <<https://www.dkom.si/en/about-us/about-us>>.

the date or specifying a period in the calendar (e.g. between 1 January 2018 and 1 January 2020). The search engine is available in Slovenian only.

## **Hungary**

Public procurement appeals database is directly available and searchable on the Public Procurement Authority's website.

As regards public procurement contracts, if the contracting authority has accepted performance that is not in conformity with the contract or if there has been a breach of the provisions of the Public Procurement Act relating to contracts, the Public Procurement Arbitration Committee will act. As it is not a civil court that decides on the above cases, public procurement remedies also include remedies relating to public contracts. The Public Procurement Arbitration Committee also has the power to declare a contract null and void. The decisions and appeals against the decisions of the ACPC and the decisions of the Court of Justice are also searchable and available on the website.

Although Hungary is not governed by a common law system, the decisions on appeals are at least as much the basis for case-law as the decisions of the EU Court of Justice. Reference to previous appeal decisions is typical in the Hungarian case-law, which is mainly made possible by the public and easily accessible nature of the decisions.

### **1.5. E-public procurement system and the contract performance phase (proof of performance, invoice)**

## **Finland**

The Procurement Act does not require the use of a particular electronic procurement system or systems during the procurement procedure or afterwards. The Procurement Act prescribes submitting the notices for electronic publication on the Hilma website and electronic exchange of information in the procurement procedure in Sections 60 and 62. Several different electronic procurement systems are available. Moreover, no central system exists but Hansel's customers use Cloudia and it has also been adopted by several other contracting authorities as it has been in use for a long time. Some e-public procurement systems cover the contract performance phase but monitoring the contract performance is the responsibility of each contracting authority and there are several ways of implementation.

Through the interfaces of Cloudia system, notifications prepared in Cloudia are published on the Hilma website in case of national procurements, and correspondingly on both Hilma and EU's TED websites in case of procurement exceeding the EU threshold value. As a part of the total lifecycle management of the procurement, Cloudia offers a tool for contract management. In Cloudia, the contract lifecycle can be managed from preparation to monitoring of the contracts. As the usage of an electronic procurement system is voluntary, so is the usage of the contract management. Cloudia offers one solution, whereas the contracting entities adopt the most suitable solution to them among all solutions. Furthermore, Cloudia does not contain solutions for ordering or invoicing. Additionally, information on the contract performance phase is not publicly available even if it exists.

No public register exists for all public procurement contracts. Hansel, as being the most significant central purchasing body in Finland, maintains a register of its own contracts and monitors the performance of the contracts. In addition, the <hansel.fi> website has a free Hankintapulssi tool available to Hansel customers. Hankintapulssi provides information on the use of Hansel joint procurement and professional services. It collects the organisation's procurement data into an easily processed entity and helps with the information management. The visualised service describes what has been acquired and additionally from which supplier and when the procurement has been made. Some purchase invoice information becomes automatically available to Hansel from the customers covered by the state budget economy.

According to Section 170 of the Procurement Act, contracting authorities shall archive copies for at least the duration of the agreement of all concluded procurement agreements with a value of not less than EUR 1,000,000 in the case of supply contracts and service procurement agreements, and EUR 10,000,000 in the case of public works contracting agreements. According to the Section 1 (1)–(6) of the Act on Archives, the Act is applied to public authorities, and to other entities performing a public function based on legislation, including public contracting entities. In general, the Act on Archives and its obligations to archive applies to a broader range of contracts and other documents, not just procurement contracts or contracts exceeding EUR 1,000,000 as required by the Procurement Act. However, there is no obligation to publish the signed agreement or any modifications thereof.

## **Portugal**

BASE is a website under the supervision of IMPIC. In addition, BASE is a website where the contracting authorities must publish the information (tender documents and contract), regarding their contracts if preceded by a procurement procedure. This is mandatory by law.

The public administration suppliers as co-contractors under the Public Procurement Code are required to issue electronic invoices according to the rules defined in Article 299-B of the Public Procurement Code, within the deadlines established in Article 9(3) of the Decree-Law N<sup>o</sup>. 111-B/2017, of 31 August. However, due to the COVID-19 pandemic the entering into force of this regime has been postponed to the end of 2022.

## **Italy**

In 2002, with the Presidential Decree 101, Italy was among the first European countries to establish the procedures for awarding an online tender. Since 2018, an obligation exists to award all contracts through telematic procedures. Unfortunately, the single platform model was immediately given up, resulting in infrastructures or even only in the software code, reused and managed by several bodies. So, each institution created its own platform in complete autonomy starting from the user requirements and the technical specifications.

Recently, the Decree no. 148 of 12 August 2021 “Regulation containing the procedures for digitising public contract procedures, to be adopted pursuant to Article 44 of Legislative Decree 50/2016” (the Code of public contracts) was issued defining the first e-procurement

system rules. Unfortunately, these rules are of too high a level to represent the regulation desired by the Code. It looks like the new Decree intentionally renounced to regulate e-Procurement, limiting itself to providing general principles that can be easily deduced from the Code to avoid upsetting the existing platforms now already made for a long time.

However, the Decree provides that some harmonisation efforts must continue by delegating to the Agency for Digital Italy (AgID) through specific Guidelines the issue of technical rules for the definition of digitisation methods. In December 2016, AgID published the first guidelines with Circular n.3 “Additional technical rules to guarantee the dialogue and sharing of data between the electronic purchasing and trading systems”. Consequently, the managers of the e-Procurement systems, starting with Consip (the Italian central purchasing body) are reviewing their platforms, not because they have been created incorrectly but simply because they have been created in the complete absence of rules.

Having rules that standardise not only the format of incoming and outgoing data, but also the interfaces and interaction procedures with the platform is not just a fulfilment dictated by the Code, but is actually essential to reap the benefits of e-procurement.

Currently, each public e-procurement platform adopts its own format, its own interfaces, its own technical and procedural rules. And this circumstance forces companies to learn how to use all the different e-procurement platforms existing in Italy by dedicating a lot of time every day to access each of them to look for tenders to participate in. The negative consequence is not only the cost of the time spent consulting these different platforms which inevitably causes an increase in the prices offered to the bodies, but above all the objective impossibility for the economic operators to manage all the telematic platforms and the consequent choice to focus on one or two of them (generally the national Consip and one regional) to the detriment of the competitiveness of public tenders.

Despite the different platforms, as of today, the e-procurement system in Italy allows administration at the central and decentralised levels to provide the following information about contract performance, that are eventually collected in the BDCNP:

- Variations of the contract;
- Litigations during execution;
- Time delay during execution of the contract;
- Contract termination;
- Verifications of the executed contract;
- Payments.

## **Slovenia**

The national public e-procurement system does not cover the contract performance phase.

However, there are two additional e-procurement systems operating in Slovenia – one provided by S-Procurement<sup>35</sup> (powered by global provider Vortal) and the other one provided by ePonudbe.si<sup>36</sup>. The S-Procurement system covers end-to-end procurement process,

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<sup>35</sup> See: <<https://www.s-procurement.si>>.

<sup>36</sup> See: <<https://eponudbe.si>>.

including proof of performance and invoicing, but those modules are not (yet) used in Slovenia by contracting authorities, as neither a legal obligation nor the culture to use them exist.

Mandatory electronic invoicing (which was in the EU part of the 2014 legislative package within public procurement renovation package) was introduced to Slovenian legal order by Act amending the Provision of Payment Services to Budget Users Act (ZOPSPU-1)<sup>37</sup> adopted in 2013 and published prior to the adoption of the e-invoicing Directive (2014/55/EU). As regulated by the ZOPSPU-1, the e-invoicing in Slovenia is mandatory for all budget users since 1 January 2015. As contracting authorities in Slovenia are predominantly budget users, the personal scope of ZOPSPU-1 covered also the majority of the contracting authorities as covered by Directive 2014/55/EU, although not transposing Directive 2014/55/EU. However, not all of them were covered. Accordingly, in 2019 with Act Amending the Provision of Payment Services to Budget Users Act [*Zakon o spremembah in dopolnitvah Zakona o opravljanju plačilnih storitev za proračunske uporabnike – ZOPSPU-1A*] the e-invoicing Directive 2014/55/EU was transposed into Slovenian legal order in a manner that ZOPSPU-1 was amended by ZOPSPU-1A and that all contracting authorities under Directive 2014/55/EU are now covered – the classic and utilities sector are covered. The invoices are not publicly available, and are, therefore, also not searchable.

## Hungary

A mandatory system called the Electronic Public Procurement System (EPS) was introduced. It follows the public procurement process from the preliminary market consultation to the contract performance. Contract modifications and contract performance notices are also uploaded and monitored by the system in such a way that it aggregates the contract performance and indicates if the contract is performed at a higher value than the original contract value. However, this is a very simple automatism. It is not suitable for tracking contract performance based on qualitative and truly structured data. In principle, invoices can be uploaded, but as this is not mandatory, it is not possible to track the flow of public money in the EPS for the invoices received.

There are several central purchasing organisations that publish key information on their framework agreements and dynamic purchasing systems on their websites. The Directorate General for Public Procurement and Supply is responsible for the procurement of a broad range of procurement items (furniture, fuel, motor vehicles, magazines, etc.), while the Digital Government Agency is responsible for IT procurement. The International Communication Authority is responsible for government communication procurement. The use of the services of these organisations is compulsory for state-owned companies and government agencies as defined in the relevant government regulations. On the websites, the status of framework agreements, information on contracts, exhaustion rates and contract prices of framework agreements are searchable and available for each central purchasing organisation.

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<sup>37</sup> *Zakon o spremembah in dopolnitvah Zakona o opravljanju plačilnih storitev za proračunske uporabnike* (ZOPSPU-1), Official Gazette of the Republic of Slovenia, No. 111/2013.

## 1.6. Publication of contract modification and performance notice

### Finland

According to Section 58 of the Procurement Act concerning the procurements above the EU threshold value, the contracting authority shall submit for publication a notice of changes in a procurement agreement and a concession contract concerning the changes<sup>38</sup> in the cases where (1) it is necessary for the original contractual partner to perform additional work, services or extraordinary deliveries of goods that were not included in the original agreement, and a change of contractual partner is not possible for financial or technical reasons and would cause significant inconvenience or a significant overlap of costs for the contracting authority<sup>39</sup>, or (2) the need for amendment is due to circumstances that a diligent contracting authority could not have foreseen, and the amendment does not affect the general character of the procurement agreement<sup>40</sup>. This Section shall not apply to national procurements or procurements below national threshold value. During the latest legal amendments to the Procurement Act (Government's proposal HE 244/2020), it was proposed that Section 136, concerning amendment of a procurement agreement during the agreement period, should also apply to the contracts below the EU threshold value. Due to negative feedback from the contracting authorities, the proposal was rejected. No guidance exists to publish a contract modification notice of procurements below the national threshold value.

The Procurement Act does not direct a contracting authority to report the procurement contract execution, progression, or termination or to give any related performance notices.

Although no notices about the contract execution, progression, or termination are published, the deficient performance in the contract period may be considered in the future procedures. According to the Procurement Act's Section 81 (point 9), the contracting authority may decide to exclude from competitive tendering a candidate or tenderer whose performances in previous procurement agreements or concession contracts have involved significant or repeated shortcomings in implementing some key requirement; it shall be a further condition that the shortcomings led to premature termination, rescission, damages or other corresponding sanctions with respect to the previous agreement in question. According to the Government's legislative proposal (HE 108/2016 vp) concerning the current legislation, when applying the proposed provision, it should be ensured that shortcomings in previous contracts are sufficiently documented and that the shortcomings, in accordance with the principle of proportionality, are sufficiently serious.<sup>41</sup> According to legal cases, sufficient documentation has been the identification of errors to the contracting partner, a description of non-performing contractual obligations, as well as reports and reclamations relating to misconduct in the previous agreement.<sup>42</sup>

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<sup>38</sup> Section 58, subsection 1, point 9.

<sup>39</sup> Section 136, subsection 2, point 2.

<sup>40</sup> Section 136, subsection 2, point 3.

<sup>41</sup> Government's legislative proposal to the Parliament on the public procurement procedure legislation (*Hallituksen esitys eduskunnalle hankintamenettelyä koskevaksi lainsäädännöksi*), HE 108/2016 vp, pp. 187–188.

<sup>42</sup> Referred to legal cases KHO:2019:132, MAO:286/19, and MAO:109/19.



Although the Procurement Act addresses that the notice must be published, non-publishing of the modification notice does not impose sanctions on the contracting authority. In the ruling MAO:399/19, the Market Court investigated the case concerning contract modification, but it did not refer to the fact that the contracting authority did not publish a notice of the contract modification pursuant to the Section 136 2 (2) concerning additional purchases.

Contracting authorities publish contract modification notices in Hilma and TED websites, both free of charge. Equally, anyone can access the websites and search for information about the contract modification notices. No structured data is available, only the number of the published notices. Each contracting authority publishes its own contract modification notices. There were published 118 contract modification notices in 2020, and 129 contract modification notices in 2021 according to the Hilma statistics.<sup>43</sup>

The organisations and citizens can find information on procurements made by the state and Finnish municipalities via <[tutkihankintoja.fi](http://tutkihankintoja.fi)> website. The procured products and services can be examined at an invoice level. The information of the invoices is available if the purchase is not classified as confidential. Regardless of the transparency, the openness, and the specific invoicing information, no information is available whether the contract period progressed in accordance with the contract or the encountered challenges during its execution.

## Portugal

Under Article 315 of the Public Procurement Code contract modifications, including those concerning additional works, services or goods must be advertised on website dedicated to publishing public procurements awarded by the contracting authorities, <[www.base.gov.pt/base](http://www.base.gov.pt/base)>, up to five days after they were materialised. This information is free of charge and can be accessed by any economic operator, through the website's search options.<sup>44</sup>

Moreover, the notice should remain available to the public up to six months after the termination of the contract. In the case of contracts published in the Official Journal of the European Union, the modifications based on the provisions for complementary services and those based on circumstances which a diligent public authority could not have foreseen must be published following a specific model of announcement. Both publications, regarding contractual modifications are a condition of effectiveness of the modifying acts or agreements. Notices are not controlled by any controlling body.

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<sup>43</sup> Annex 1. Contract award notices and contract modification notices published in Hilma in 2020 and in 2021.

<sup>44</sup> I. Rosa and J. Almeida: Digital Transformation in the Public Sector: Electronic Procurement in Portugal. In: Digital Multimedia: Concepts, Methodologies, Tools, and Applications, edited by Information Resources Management Association. IGI Global, 2018, pp. 497–518, <<https://doi.org/10.4018/978-1-5225-3822-6.ch025>>.

## Italy

Contracting authorities having modified a contract in the cases allowed shall publish a notice to that effect in the Official Journal of the European Union. For contracts with the amounts below the EU threshold, the publicity takes place at the national level.

In case of contract modification, the contracting authority shall notify the ANAC of the modifications to the contract within 30 days of their completion. In case of failure or late communication, the ANAC shall impose an administrative sanction on the contracting authority in the amount between EUR 50 and EUR 200 per day of delay. The ANAC publishes in the section of the Transparent Administration website the list of communicated contractual changes indicating the work, the contracting authority administration, the contractor, the designer, and the value of the modification. The information is accessible to the broader public free of charge.

For contracts and concessions whose value is below the EU threshold, the variations in progress of public contracts for works, services and supplies, as well as those whose amounts are less than or equal to 10% of the original contract amount for contracts equal or higher to the EU threshold, are communicated by the “unique responsible for procedure – RUP” to the ANAC Observatory through the regional sections within 30 days from the approval by the contracting authority for evaluations and possible measures of competence.

For contracts and concessions whose value is equal or above the EU threshold and whose changes exceed 10% of the original contract amount, the RUP transmits the changes to the ANAC together with the executive project at the time of validation and a special report of the RUP, within 30 days from approval of the contracting authority. In the event of non-compliance with the obligation to communicate and transmit the variants set forth in Article 213, the ANAC can apply the administrative pecuniary sanctions provided in Article 213(13).

Post-award contract changes are permitted in limited cases only. Article 106 of the Public Procurement Code lays down specific regulations for “amendments of the contracts during their period of validity”.

## Slovenia

Modification of contracts during their term are defined by Article 95 of ZJN-3 and are stricter as in the 2014 classical and utilities Directives. In accordance with Article 95 of ZJN-3, contracts and framework agreements may be modified without a new procurement procedure in exhaustively listed cases therein. Terms in Article 95 of ZJN-3 are stricter than in Article 72 of Directive 2014/24/EU. All contract modifications (annexes) should be published. The same manner of publishing applies for the amendments as for the original contracts (see above, Q3).

Under Article 3(7) of the Rules on the Publication of Contracts in the Field of Public Procurement, Concessions and Public-Private Partnerships, it is considered that when an addendum is concluded to the contract for which the contracting authority did not have to carry out the procedure according to the law which regulates public procurement, the liable

party shall publish an electronic copy of the addendum to the contract within eight days from the conclusion.

Simultaneously, if a public procurement contract or framework agreement is modified, in the case of additional works, services or supplies of goods performed by the original contractor and in the event of a change due to circumstances, the contracting authority acting with care could not foresee, and the modification does not alter the general nature of the contract, the contracting authority shall publish notice of the modification no later than 30 days after the modification on the public procurement portal, if necessary in terms of value, as well as in the EU Official Journal. Under Article 59, the notice of the amendment of the public procurement contract during its validity shall be published within 30 days after the amendment. The notice of a modification is a form that is published on the public procurement portal and can be easily found, and is linked to the dossier of an individual contract. In the notice of a modification, the contracting authorities must enter a description of the modification, the reasons for the modification and the amount of any price increase.

It is obligatory for all the contracting authorities to publish contracts concluded in specific procurement procedure and contract modification. It is free of charge for all the contracting authorities to publish. The information is available and is searchable for anyone looking for information concerning the contracts concluded in a specific procurement procedure and contracts modifications, but not also on contract performance (i.e. it is not possible to check if the performance of the contract was problematic or similar). The data is available by the national notification portal – above and below the EU threshold (only direct awards are excluded, the threshold for direct awards is below EUR 40,000 for supplies and services and below EUR 80,000 for works), provided by Republic of Slovenia, Ministry of Public Administration in cooperation with public company Official Gazette.<sup>45</sup> The information available is free of charge for everybody – economic operators and third parties (media, etc.).

Advanced search is available. Advanced search allows the following fields: publication number, publication date, type of subject, CPV, law, place of publication, type of procedure, type of form, main fields of activity of the contracting authority, category of the contracting authority in general, environmental, social or ethical considerations, the contracting authority (registration number, tax number and name) and the time limit for receipt of the tender.

In terms of “performance notice”, there is no reporting obligation enforced about the execution of the contract, either periodically or when finalising the performance.

However, a register is available of economic operators with imposed collateral sanctions for exclusion from public procurement procedures (“black list”), as foreseen by Article 110 of ZJN-3, and in the field of defence and security in Article 73 of the Public Procurement in the Defence and Security Sector Act.<sup>46</sup> Only economic operators who fail to provide the contracting authority upon its request with a statement from the subcontractor that the subcontractor has received payment for performed works or services or supplied goods

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<sup>45</sup> See: <<https://www.enarocanje.si>>.

<sup>46</sup> Public Procurement in the Defence and Security Sector Act, Official Gazette of the Republic of Slovenia, Nos. 90/12, 90/14 – ZDU-1I and 52/16.

directly related to the subject-matter of the public procurement and economic entities that submit a false statement or a false or altered document as a true one shall be entered in the register (Article 112 of ZJN-3).

## **Hungary**

The PPA requires contracting authorities to keep written records of their public procurement procedures, from their preparation to the performance of the contract concluded under the procedure.

All documents relating to the preparation and conduct of the procurement procedure must be kept for at least five years from the date of the conclusion of the procurement procedure (Article 37(2)), and all documents relating to the performance of the contract must be kept for at least five years from the date of performance of the contract. In the case of a contract performance notice, in the case of a contract of more than one year or of indefinite duration, it shall be updated every year from the date of conclusion of the contract.

The written documentation also applies to the publication of notices of contract modification and contract performance, which is mandatory in Hungary.

A contract notice must also be published on the modification and performance of contracts, failing which the contracting authority may be subject to legal remedies and fines in the event of an audit.

The notices must be published in the Electronic Public Procurement System and in the public electronic contract repository (CoRe) operated by the Public Procurement Authority. The contract performance notice is a Hungarian national notice (Appendix 1).

The fee for the publication of the contract notice, which is paid by the contracting authority for the control of the contract notice:

1. for the contract modification notice: HUF 100,000,
2. for notices not falling under points a) and c) to e): HUF 80,000.

According to the PPA, the publication obligation concerns the following information:

1. notice of the conclusion of in-house contracts, the contract, contract amendments immediately after the contract is amended;
2. in the case of contracts concluded following a public procurement procedure, the contract award notice, the contracts, contract amendments;
3. the following particulars concerning the performance of the contract:
  - a reference to the notice opening the procurement procedure (or, in the case of procedures without a notice, a call for competition);
  - the names of the contracting parties;
  - whether performance was in conformity with the contract;
  - the date of performance of the contract recognised by the contracting authority; and
  - the date of performance of the consideration and the value of the consideration paid within 30 days of the date of performance of the contract

by each of the parties, or, in the case of a subsidised procurement, by the entity liable to pay in the case of a supplier payment.

## 2. Monitoring systems, redress forums

The second part of the analysis deals with the organisational structure, taking into account the bodies involved in the control and modification of contracts, and the forums for legal remedies.

### 2.1. Existing monitoring system (institutional, IT, legal) for public procurement contract executions

#### Finland

There is no special monitoring system for public procurements contract executions in the meaning that one body would be responsible for that.

Section 139 of the Procurement Act states that the Finnish Competition and Consumer Authority (FCCA) supervises the compliance with the Procurement Act. The FCCA may be requested to investigate the legality of the procedure by anyone considering that the contracting authority has been in breach of the Procurement Act. Additionally, the FCCA may also take a matter for investigation within its competence on its own initiative.

In accordance with the Government's legislative proposal (HE 108/2016 vp) concerning the current legislation, the primary purpose of controlling is to interfere with the direct award procurements, i.e. a negotiated procedure without prior publication, executed without legal grounds and from where the contracting authority has not published a notice, as well as other incorrect or discriminatory procedures which are in line with direct procurements. Additionally, the aim is to orient the FCCA's resources to the key principles of procurement legislation such as transparency and non-discrimination in terms of the most significant mistakes and neglects. As it is stated in the Government's proposal, the supervision should not lead to a situation where the FCCA appeals of the illegal procurement procedures behalf of other economic operators or tenderers. The supervision is mainly complementary to the regular appeal procedure by ensuring the common interest and the effective use of public funds from the perspective of the transparency and non-discrimination of public procurements as well as the effective implementation of the tendering procedures. However, the supervision may reduce procedures contrary to the Procurement Act and thus indirectly reducing the need for tenderers to submit appeals to the Market Court in the long term.<sup>47</sup>

Pursuant to the Procurement Act, in the beginning of the process, the FCCA must familiarise itself with the request for action or matter taken into consideration on its own initiative. The FCCA must make a preliminary legal assessment and observe the importance of the issue under consideration. Based on the assessment, the FCCA should take further actions under the Procurement Act if there are grounds for that. The FCCA should consider on a case-by-

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<sup>47</sup> Government's legislative proposal to the Parliament on the public procurement procedure legislation (*Hallituksen esitys eduskunnalle hankintamenettelyä koskevaksi lainsäädännöksi*), HE 108/2016 vp, pp. 231–234.

case basis what measures each request requires. The contracting authority subjected under investigation should be given an opportunity to be heard if there is a reason to assume that the case may lead to measures in this regard.

If the FCCA finds out that the contracting authority has made a procurement exceeding the EU threshold value and a procurement contract without the grounds prescribed in the Procurement Act, the FCCA may prohibit the contracting authority from implementing the procurement decision according to Section 140 of the Procurement Act.

Under Section 144 of the Procurement Act, the FCCA shall prepare an annual report of its regulatory control activities under this Act, which shall include a summary of:

1. Unlawful procedures and practices harmful to transparency or non-discrimination that are detected in the course of regulatory control activities, and their most common background factors;
2. The number and content of the measures referred to in Section 139 (Control authority and taking of measures to investigate an unlawful procedure);
3. The number and content of the prohibitions and undertakings referred to in Section 140 (Stay of implementation of a direct procurement decision); and
4. The number and content of the motions referred to in section 141 (Proposal of the Finnish Competition and Consumer Authority to the Market Court), and the court rulings issued in response to these motions.

In 2020, a total of 61 matters related to public procurement supervision were commenced at the FCCA. The FCCA received 200 hints and 25 request for measures. Additionally, the FCCA took 33 matters for investigation within its competence on its own initiative. In 39 of the total 61 matters, there was a suspicion of a direct award procedure lacking the legal grounds. Furthermore, 10 of the 39 matters regarding direct award procedures concerned contract modifications. The FCCA has intervened in cases such as contract modifications, incorrect calculation of estimated value of the procurement, and incorrect application of both grounds for direct procurement and in-house provisions of the Procurement Act. Currently, the FCCA is working to develop a tool for sending the suggestions.

## **Portugal**

The relevant controlling public bodies are the IMPIC, I.P., Court of Auditors, and the Public Prosecutors Office. Nonetheless, it is worth mentioning the role of the Competition Authority and other sectorial entities, which can supervise regulatory infringements on the execution of contracts in sectorial areas, such as food safety or medical equipment etc.<sup>48</sup>

IMPIC, I.P., is a public institute responsible for monitoring procurement activities of contracting authorities, which encompasses both the procedural and contract execution phase. On a side note, IMPIC, I.P. is also the public institute for the construction sector.

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<sup>48</sup> For more details, see, M. Assis Raimundo: Primeira Análise das Novas Directivas (Parte I). In: 9, Revista dos Contratos Públicos, 2013, pp. 16–17.

IMPIC, I.P., publishes annual report concerning the procurement activities in Portugal. It is also the administrator of the BASE webpage. It is also responsible for licensing, monitoring and supervising electronic platforms for public procurement and issuing good practices guidelines (soft law) regarding some legal issues where some legal uncertainty was found, such as preliminary market consultations; limitations of direct award; lots; special measures during COVID-19 pandemic; use of electronic platforms. Recently, in cooperation with other public entities, IMPIC, I.P., has also adopted some measures to increase ecological and innovative public purchases.

Unfortunately, IMPIC, I.P., does not have a more proactive role in finding infringements of public procurement rules, mostly due to the lack of means and powers. This entity is also the reference national entity for the purposes of Article 83(5) of Directive 2014/24/EU.<sup>49</sup> Lastly, it can issue administrative sanctions, which can include a debarment period of one year for those economic operators who have failed to comply with the contract.<sup>50</sup>

From a financial perspective, the Court of Auditors has also a relevant monitoring function, since it can conduct audits on contracts being executed, mainly to assess the legality of complementary works.<sup>51</sup>

Lastly, economic operators and the public prosecutors have legal standing to challenge both the validity and the execution of public contracts, in accordance to procedural law. Therefore, concerning the execution of contracts not only the parties in the contractual relationship have legal standing, but also natural or legal persons having an interest or subjective rights based on which the contractual clauses have been established; natural or legal persons under the popular action regime and those have been excluded from the procedure that preceded the signing of the contract.<sup>52</sup> However, it is highly doubtful that economic operators (the market) have the capacity to detect them and consequently proceed with a legal claim due to the lack of transparency during the execution phase and litigation costs.

## Italy

The Italian public contract monitoring system is laid out in the procurement policy framework set up by the Parliament (the legislature), the Government (the executive) and the ANAC (a supervision department). At the national level, the main public procurement legislation is provided by the Public Contracts Code (PCC) as amended by the Legislative Decree No. 56/2017 (the Corrective Decree), the Law Decree No. 50/2017 and recently the Law Decree No. 32/2019 as converted, with amendments to the Law No. 55/2019 (published in the Italian Official Gazette No. 140 of 17 June 2019). The Code has implemented the EU public procurement directives. However, its scope is broader than the EU directives, since it regulates all awarding procedures for contracts both above and below the EU thresholds and contains further rules not provided for by the EU directives, although inspired by the same principles.

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<sup>49</sup> Article 454(A) of the Public Procurement Code.

<sup>50</sup> Article 464(A) of the Public Procurement Code.

<sup>51</sup> Article 454(B) of the Public Procurement Code.

<sup>52</sup> Article 77(3) of the Procedural Administrative Law Code. See, M. Aroso de Almeida: *Manual de Processo Administrativo*, 6<sup>a</sup> ed. Almedina, 2022, p. 255.

Other supplementary legislation, which aims at dealing with specific issues, includes ministerial decrees and guidelines from institutions such as National Anti-Corruption Authority (ANAC).

The regulatory framework at the national level is supplemented by the laws and regulations laid down by the regional, provincial and municipal authorities (Regions, Provinces and Municipalities). At the regional and municipal levels, the regulation and supervision of legal compliance are very restrictive. Most of the regions (except a few ones, such as Emilia-Romagna and Lazio) adopted their own regulation along with the National Code.

In terms of bodies with specific public contract monitoring function, until 2014, it was the Italian independent Authority for the Supervision of Public Contracts (AVCP) to be mandated with supervising compliance with procurement rules and procedures. The AVCP had extensive functions with respect to procurement including dispute resolution, identification, and reporting of potential illegal conduct to the Criminal Court and to the Court of Auditors, and reporting to the Parliament and to the Government. It also carried out an advisory function, as it could propose legislation to the Ministry of Infrastructure. Since 2014, the responsibilities of the AVCP were transferred to the ANAC directly linking public contract monitoring with the country's anti-corruption efforts. The integration of the functions of the two institutions and the consequent extension of the powers of the ANAC set the conditions to oversee more effectively the scope of the contracts and public procurement in which nestles a substantial part of the corruption phenomena.

The Code of Public Contracts (the Legislative Decree n. 50/2016) identified (Article 213) the ANAC as the responsible entity for the supervision and regulation of public contracts to ensure compliance with the principles of transparency, legitimacy and competition of the operators in the public procurement market to prevent corruption. Considering the legislative evolutions, and the complex of the ANAC's functions, its new institutional mission consists of skills that can be clustered within three pillars: the prevention of corruption in public administrations and in subsidiaries and state controlled companies; the implementation of transparency in all aspects of public management; the supervisory activity in the framework of public contracts, and in every area of the public administration that can potentially develop corruption phenomena, as well as through the orientation of the behaviours and activities of public employees by means of advisory and regulatory interventions.

With respect to tender procedures carried out pursuant to the Italian laws on public procurement, the tasks of the ANAC are as follows:

- To supervise the developments in the execution of public contracts, in cooperation with local monitoring entities (the so called *Osservatori regionali sui lavori pubblici*);
- To prepare, develop and guide the implementation of the legislation concerning public contracts and the standard tender documents;
- To gather information related to the contract and the tender proceedings;
- To compile and publish statistics related to the quantity, price and other elements;
- To regulate the principles and the main provisions.

Therefore, since 2014, the ANAC has supervised the entire public procurement system, both at the state and regional levels, to grant compliance with principles of rightfulness and



transparency in awarding procedures and with effective and convenient execution of contracts, as well as compliance with the competition rules within each tender. In particular, it supervises the correct application of laws and regulations, while verifying the regularity of awarding procedures and the economic efficiency in contracts execution, also through sample verifications; it also ensures that any injury does not occur for the exchequer.

The ANAC reports both to the Parliament and the Government on particularly serious cases concerning non-observance or distorted application of public procurement legislation. It also proposes legislative modifications to the Government on the same matter and suggests revisions of implementing regulation to the Minister of Infrastructure.

Within the supervisory functions attributed to the ANAC, of particular relevance for public contract execution monitoring is the management of the National Database of Contracts for Public Works, Services and Supplies (BDNCP). In addition to allowing the collection and publication of a series of relevant data on subjects, the BDNCP is active in the sector as well as on contracts and assignments implemented, contains a series of information strategic to the detection of distortion phenomena in the context of the public procurement market. The ANAC, through the Observatory, ensures the collection and processing of national data on public procurement to provide indications for the supervising departments and to address the regulating activity towards rules of transparency, simplification and competition. In particular, the Observatory:

- Processes data collected and assesses the structural characteristics of the public procurement market and its evolution;
- Assesses whether the criteria of efficiency and value for money are respected during the procurement process;
- Detects dysfunctions and anomalies of the market.

The ANAC prepares public procurement guidelines and ensures that the law and rules are respected. It also conducts inspections and, if necessary, files complaints to the competent judicial authorities. The ANAC also operates a whistle-blowing procedure, which can be used to report any unlawful behaviour and encourages public authorities to create a similar procedure internally.

The Italian Court of Auditors also oversees public procurement and can fine contracting authorities or responsible individuals for damage to the treasury.

Furthermore, every public administration has a supervisor for transparency and anti-corruption responsible for preventative measures and regular controls.

Contracts can be challenged through a simplified procedure at a competent Administrative Court. The Public Procurement Code provides for alternative dispute resolution, such as requesting a binding opinion from the ANAC, amicable agreement, or arbitration at a relevant tribunal named by the ANAC.

The ANAC achieves its goals by mainly fulfilling regulatory activities of the sector, also including an advisory function to prevent disputes, and supervising activities, along with inspection and sanctioning powers. These competences are followed by important monitoring

activities through the collection of data on tenders and on the companies operating in the sector. For this purpose, the Observatory for Public Contracts operates. This data is made public through the institutional website to increase the transparency of the market.

The ANAC operates at three different levels:

1. Constant supervision and prompt reporting to the competent authorities on irregularities or illegal situations, through the inspection function, also eventually sanctioning certain behaviours;
2. Interpretation of the law, also issuing preventive advices (the so-called pre-litigation) to prevent disputes; and
3. Information gathering and continuous monitoring of the awarding and execution of public contracts.

The ANAC introduced “collaborative supervision” as a particular and exceptional form of verification of documentation of public procurement, above all preventive, aimed at fostering a profitable control collaboration with the contracting authorities and thus guaranteeing the correct functioning of the tender operations and the contract execution, also to prevent attempts of criminal infiltration in the tenders. This approach marks a cultural change the ANAC no longer intervenes to sanction and condemn illicit behaviour *ex post*, when damage done is often difficult to remedy, but to prevent anomalies *ex ante* by guiding the administration towards better and more transparent choices, discouraging improper economic operators to participate to the awarding procedure.

The “collaborative supervision” can be activated upon the contracting authorities’ request. The novelty appears to respond to the contracting authorities’ needs in memoranda of understanding specifying the conditions and the methods for the implementation of “collaborative supervision” that have been signed among the ANAC and several contracting authorities.

The Laws Nos. 190/2012 and 114/2014 attributed the ANAC the supervisory and sanction functions over public contract execution. These functions include the supervision and sanction on public contracts by central and peripheral administrations and on those of regional interest, supervision on the compliance of procurement procedures with legislation and regulation, the cost of execution of public contracts, and on the execution of contracts to verify that it does not result in injury to the revenue. It does so by conducting spot-checks and by the BDCNP as the system shows red flags when variations occur.

The supervisory activity aims to ensure the fairness and transparency of procurement procedures, to guarantee the protection of small and medium-sized enterprises, the efficient execution of contracts and compliance with the rules of competition in the single tendering procedures. The supervision also affects the system of qualification of competitors participating in public procurement contracts. Supervised entities are the Companies Certificate Organisms (SOA), which issue certificates of qualification to the economic operators (of which the ANAC supervises the composition and activity); also, these acts are checked to verify their authenticity.

## Slovenia

No systematic monitoring system (institutional, IT, legal) exists for public procurement contract executions available, i.e. meaning that all contracts would be controlled. However, extensive systematic control is provided for the projects co-financed from the EU funds.<sup>53</sup>

Additionally, Article 109 of the ZJN-3 defines that the implementation of this Act shall be supervised by the National Review Commission as a minor offence authority. Minor offence procedures shall be conducted and decided on by an authorised official of the National Review Commission who meets the conditions laid down in the law governing minor offences and regulations adopted on the basis thereof. In line with Article 111 of the ZJN-3 penal provision is foreseen, *inter alia*, if the contracting authority modifies the contract during its term contrary to Article 95 of the ZJN-3.

Also, limited control on selected cases is provided by the Court of Audit.<sup>54</sup> The key task of the Court of Audit is to review and control the operations of the public funds users. By auditing, it obtains appropriate and sufficient evidence to express an opinion on the operations of an auditee. After the completion of the audit it issues audit report that is submitted to the auditee and the National Assembly (the legislature) and is published on its website.

## Hungary

In addition to the State Audit Office, the audit of public contracts is mainly linked to the special audit activity of the Public Procurement Authority. The Public Procurement Authority's statutory tasks are to monitor the performance and modification of contracts concluded as a result of public procurement procedures, to carry out the tasks of controlling the publication of notices and to exercise the power of control of legality in respect of negotiated procedures without prior publication of notices.

The control of notices is the first control point in the public procurement process. The purpose of the control is to ensure that the notices are published in compliance with the requirements of the EU public procurement directives, the PPA, and other Hungarian legislation applicable to the given public procurement (and coherent within the given notice), and that the prescribed deadlines are met.

As part of the control activity, the control of contract notices also includes the control of contract modification notices and contract performance notices, the publication of which is mandatory.

The Authority's contract monitoring activities are carried out on the basis of an annual monitoring plan, drawn up in accordance with the relevant government regulation and published on the website, which includes the public contracts whose performance is expected to be subject to monitoring during the year in question. In addition, the persons and

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<sup>53</sup> European Structural and Investment Funds, <<https://www.eu-skladi.si/portal/sl/ekp/izvajanje/opis-sistema-1>>.

<sup>54</sup> Republic of Slovenia, the Court of Audit, <<https://www.rs-rs.si/en>>.

organisations referred to in Article 152(1) of the Public Procurement Act may also initiate an audit of a specific public contract with the President of the Authority, so that the annual audit plan does not limit the scope of the audits. Among the persons defined in Article 152(1) of the Public Procurement Act is the Authority's President, who is, therefore, entitled to initiate an *ex officio* control procedures without any specific external initiative/request, in particular on the basis of suspected infringements detected by the Authority.

In addition to the above, the Authority also carries out the so-called capacity organisation checks: a set of procedural actions aimed at establishing and verifying that tenderers and the capacity providers used in a given procurement procedure comply with the suitability requirements laid down by the contracting authority and that they effectively and substantially participate in the performance of the public contract in accordance with the commitments made in their tenders.

A capacity organisation check is a set of procedural acts aimed at establishing/verifying that tenderers and/or the capacity providers they have engaged comply with the suitability requirements set by the contracting authority for a given procurement procedure and that they will effectively and substantially participate in the performance of the public contract in accordance with the commitments made in their tender (where required).

The capacity organisation check will examine whether:

1. An economic operator who claims to meet the eligibility criteria for a given procurement procedure may have sufficient capacity;
2. The economic operator who satisfies the suitability criteria laid down in several tendering procedures/partial invitations to tender in a single procurement procedure can actually have the necessary capacity;
3. The economic operator demonstrating that it meets the suitability requirements is in fact capable of performing the contracts awarded under the procurement procedures, in particular in the case of contracts with overlapping delivery times;
4. The economic operator who has demonstrated that it meets the suitability requirements is actually participating in the performance of the public contract;
5. The contracting authority has exercised due diligence in assessing tenders and verifying the performance of the contracts awarded to ensure that the legal provisions on the suitability requirements are complied with.

It is also responsible for maintaining a list of defaulting tenderers, monitoring the performance of contracts and the activities of capacity contractors.

Pursuant to Article 142(5) of the Act CXLIII of 2015 on Public Procurement (hereinafter: the Act on Public Procurement), the contracting authority is obliged to notify the Public Procurement Authority if the successful tenderer has seriously breached its contractual obligations and this has led to the termination or withdrawal of the contract, the claim for damages or the enforcement of other legal consequences applicable under the contract, and if the successful tenderer has caused the impossibility of the contract, in whole or in part, by the conduct for which it is responsible. The notification shall contain a description of the infringement, the legal remedy applied on the basis of the infringement and the documents establishing that the successful tenderer has not contested the infringement or that the

infringement has been the subject of legal proceedings. In the event of a legal action, the contracting authority must send the final decision closing the case to the contracting authority.

Under Articles 142(6) and 142(1) of the Public Contract Procedures Act, the contracting authority is obliged to notify the Public Procurement Authority of the fact, description and essential characteristics of the breach of contract, including the fact of the breach of contract by the successful tenderer, in the event of a breach of its contractual obligations as established by a final court decision, where the breach of contract has led to termination or withdrawal from the contract, to the claim for damages or to the application of other penalties applicable under the contract, and where the successful tenderer has caused (in whole or in part) the impossibility of performance of the contract by the conduct for which it is responsible.

## 2.2. Specific redress forum dealing with public procurement contracts

### **Finland**

There is no specific redress forum dealing with public procurement contracts. The Procurement Act regulates procurement process but fails to address the actual terms of a contract or the consequences of non-compliance with the contract terms. The competence of the Market Court is to consider the conformity of the contract modification with the Section 136 of the Procurement Act. The non-compliance with the contract terms usually falls within the jurisdiction of general district courts. However, there is a grey area that falls in between the courts.

### **Portugal**

The Portuguese legal framework has a duality of civil jurisdiction and administrative and tax jurisdiction. Public procurement disputes are mostly solved under the administrative and tax jurisdiction, namely in the administrative courts. However, the administrative courts have large backlogs, implying that any judicial dispute regarding public procurement will take long.<sup>55</sup> Nonetheless, if the procurement dispute regards any procedural aspects, such as illegal tender documents or exclusion or award decisions, the procedural law states it is an urgent matter, which takes normally two to three months. On the contrary, disputes during the execution phase take much longer (three to five years) at the first instance. To try to reduce the levels of judicial pendency's, the Portuguese legislator created in 2019 specialised instances for public procurement under the administrative courts of Porto and Lisbon, with extended jurisdiction over other areas in the Portuguese territory. According to the Government this measure aims at safeguarding public finances and ensuring the necessary confidence in an important economic field such as public procurement, by providing a faster and more specialised judgment associated with public procurement, in the geographic and economic areas where it is most significant. Lastly, it is also possible if agreed by the parties to choose arbitration.

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<sup>55</sup> See the Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, The 2021 EU Justice Scoreboard, COM(2021) 389, p. 10, <[https://ec.europa.eu/info/sites/default/files/eu\\_justice\\_scoreboard\\_2021.pdf](https://ec.europa.eu/info/sites/default/files/eu_justice_scoreboard_2021.pdf)>.

## Italy

Any dispute arising from, or connected to, awarding procedures of public works, services and supplies, including relevant claims for damages, falls within the exclusive jurisdiction of the Administrative Courts (that seats in every regional capital and greater province capital).

The decisions issued by a regional administrative court may be further appealed before the Council of State (the Administrative Supreme Court, based in Rome). Exceptional remedies may also be sought against the decisions of the Council of State (i.e. an appeal to revoke the decision in the exceptional cases provided by Article 395 of the Italian Procedural Civil Code, and an appeal before the Supreme Court for reasons of jurisdiction).

After the contract has been signed, any disputes arising from its performance fall within the jurisdiction of Italian civil courts, except those connected to the awarding procedure.

## Slovenia

Any disputes arising from cases concerning public procurement contracts, including relevant claims for damages, fall within the jurisdiction of general (civil) courts. General jurisdiction rules apply in case of disputes.

The court system of the Republic of Slovenia consists of general and specialised courts. General courts operate at four levels: local and district courts (first-instance courts), higher courts, which allow appeals against first-instance courts, and the Supreme Court, which is the highest court in the country.

Specialised courts are divided into labour courts, which are competent to reach decisions on labour-law disputes and disputes arising from social security, and the Administrative Court, which provides judicial protection in administrative matters and has the status of a higher court.

## Hungary

The Public Procurement Arbitration Committee (PPAC) and civil courts decide on cases concerning public procurement contracts. This dichotomy exists because the Public Procurement Act and its related government decrees contain a number of provisions on the substance of public contracts, the infringement of which is not the responsibility of civil courts but of the PPAC within the Public Procurement Authority.

Initiation of remedies for public contracts is typically done *ex officio*. It is rare for applicants to go specifically to the PPAC during the performance of a contract, sometimes because, for example, the tenderer does not wish to enter into a contract.

The chairman of the Public Procurement Authority initiates *ex officio* proceedings before the PPAC if the Public Procurement Authority, on the basis of the results of its official control or if it is likely, even without the initiation of an official control, that the contract has been modified

or performed in a manner contrary to the law, in particular if an infringement under Article 142(2) has occurred.

If the Public Procurement Authority establishes during the official control that the content of the contract is likely to infringe Article 142(3), it shall bring an action for a declaration that the amendment to the contract is invalid and for the application of the legal consequences of such invalidity.

### 2.3. Organisation/body responsible for examining the legal basis for the modification of contracts

#### **Finland**

The Market Court investigates the legal basis of the contract modifications of the cases involved in the received appeals. The FCCA supervises the compliance with the Procurement Act, as stated in Section 139 of the Procurement Act. When a procurement exceeding the EU threshold value has been executed and the contract made without the grounds of the Procurement Act, the FCCA may submit the issue to the Market Court. According to Section 141 of the Procurement Act, the FCCA may propose the Market Court (1) to impose an inefficiency sanction or (2) a penalty fee, (3) to shorten the agreement period or (4) to quash the procurement decision provided that the Authority has called for the sanction referred to in point 1. The Market Court is competent to examine whether the contract modification is in accordance with Section 136 of the Procurement Act. Furthermore, the Market Court will consider whether grounds exist for the use of a direct award procedure – a negotiated procedure without prior publication – if the contract modification is not in accordance with Section 136. According to the Government's proposal, the Market Court only imposes sanctions proposed by the FCCA. It is stated in Section 158 of the Procurement Act that when imposing a sanction, the Market Court shall consider the nature of the error or default of the contracting authority and the value of the procurement that is the subject-matter of the appeal. A penalty fee shall not exceed 10% of the value of the procurement agreement or concession contract. According to Section 165 of the Procurement Act, the parties can appeal the Market Court's decision to the Supreme Administrative Court only if the Supreme Administrative Court grants leave to appeal.

Nevertheless, FCCA is not obligated to investigate all the contract modifications. Due to this, the previously described process does not apply systematically to all contract modifications but only those taken under investigation by the FCCA on their own initiative or based on a request or a hint and for which it is appropriate to submit the issue to the Market Court. In 2020, five court rulings were issued based on the FCCA's proposals.<sup>56</sup>

#### **Portugal**

Public contracts modification under Portuguese legal system can be based upon: (1) an agreement between the parties; (2) administrative act issue by the contracting authority; (3)

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<sup>56</sup> Court rulings based on the FCCA's proposals in 2020: MAO:450/20, MAO:449/20, MAO:378/20, MAO:375/20, and KHO 4368/2020.

court decision or arbitration.<sup>57</sup> The hypotheses in (2) is a competence of the contracting authority, in accordance with the law. Therefore, the lawfulness of the contractual modification identified in (1) and (2) is monitored mostly by the Court of Auditors from a financial perspective, and IMPIC, I.P., administrative courts or arbitration can also examine the legal basis for modification of the contract in a specific dispute.

## Italy

Only administrative courts are empowered to rule on the setting aside of the award procedures and to declare the invalidity of the awarded contract in the cases provided for under the law (Articles 121 and 122 of the Code of Administrative Procedure). However, it is possible to apply to the ANAC to obtain pre-litigation protection. In these cases, the ANAC has the power to express a binding pre-litigation opinion for the parties, which they have agreed to in advance (Article 211(1) of the Code). The ANAC is also entitled to take legal action to challenge the calls for tenders, the other general acts and the provisions relating to contracts of significant impact, issued by any contracting authority, if it considers that they violate the rules on public contracts relating to them for works, services and supplies (Article 211(1-bis)). Then the ANAC, if it believes that a contracting authority has adopted a provision vitiated by serious violations of the Code, issues, within 60 days from the notice of the violation, a reasoned opinion in which it specifically indicates the legitimacy flaws found. The opinion is sent to the contracting authority. If the contracting authority fails to comply with the deadline set by the ANAC, in any case not exceeding 60 days from the transmission, the ANAC can appeal, within the following 30 days, to the administrative judge, applying the procedure established by Article 120 of the Code (Article 211(1-ter)).

## Slovenia

There is no organisation/body responsible for systematic examination of the legal basis for the modification of contracts. The lawfulness of the contractual modification identified is done by general courts in a specific dispute.

Also, Article 109 of the ZJN-3 defines that the implementation of this Act shall be supervised by the National Review Commission as a minor offence authority. In line with Article 111 of the ZJN-3, penal provision is foreseen, *inter alia*, if a contracting authority modifies the contract during its term contrary to Article 95 of the ZJN-3.

## Hungary

There is a notice control, which also concerns the control of contract modification notices. The Public Procurement Authority directly controls each contract notice, where lawyers examine the justification for the contract modification. If they are not found to be sufficiently substantiated, the President of the Public Procurement Authority initiates an appeal procedure. Accordingly, a very large number of appeals are launched against contract modifications. One of the best-known examples of this is the ECJ C-263/19 *T-Systems* case,

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<sup>57</sup> Article 311 of the Public Procurement Code.



which resulted in the ECJ ruling that both the contracting authority and the tenderer can be fined as a consequence of an illegal contract modification.

The modification of public contracts can only and exclusively be brought before the Public Procurement Arbitration Committee, as it is explicitly considered as a public procurement infringement.

### 3. Conclusion

The research examined the performance of public procurement contracts in five EU Member States. To this end, questions were put to national experts on data on contracts published in public procurement, structured reports, information available to the public, and control systems and institutions related to public procurement contracts. As a result of the research, it can be concluded that direct monitoring of contracts and structured data reporting on contract performance are not widespread.

Each of the countries studied offered something new and interesting in some respect. The cultural differences are apparent. For example, in Finland, where corruption in public procurement is lower, the rules are much more flexible and relaxed than in countries with high levels of corruption (Italy, Hungary).

The use of national contract performance notices is not widespread. For example, there is no direct sanction for not publishing a contract modification notice in Finland, nor is the publication of a contract award notice mandatory below the EU threshold. Typically, however, the publication of a contract modification notice is mandatory.

Typically, there is a separate public register for contracts in the countries surveyed, except in Finland, where contracting authorities are required to archive their contracts.

Central websites containing the most important information on public procurement are widespread. In Finland, for example, the Hilma website is the official public procurement notification service. It is a digital channel for the public sector to publish notifications of upcoming procurements, ongoing procurements, and the concluded contracts. But other, for example, Finnish self-governments have a separate publication option via [tutkihankintoja.fi](http://tutkihankintoja.fi) and [avoindata.fi](http://avoindata.fi), where the procured products and services can be examined at the invoice level.

In Portugal, BASE is a website under the supervision of IMPIC. In addition, BASE is a website where contracting authorities must publish the information (tender documents and contract) regarding the contracts they conclude if preceded by a procurement procedure. This is mandatory by law.

In Slovenia, the open contracting principle is fully enforced. Contracting authorities must publish publicly available information of a public nature from the contract on the performance of the public procurement. These are scanned public contracts, i.e. only unstructured data is available, and a search has to be made on the notification website, [www.enarocanje.si](http://www.enarocanje.si), contract-by-contract. It is worth highlighting that an application – ERAR – is available to show the spending of public money in the Republic of Slovenia, a project by the Commission for the Prevention of Corruption, <https://erar.si/doc>. The Commission for the Prevention of Corruption obtained data on legal entities from the Slovenian Business Register (AJPES), the list of taxpayers, the Public Payments Administration, the Ministry of Finance, the Official

Gazette of the Republic of Slovenia, the Financial Administration and the Anti-Laundering Office. The purpose of the application is to show the use of public money in the Republic of Slovenia in the most transparent way possible.

Similarly, in Hungary, contracts are available in the Core Database. In Hungary, a separate contract performance notice must also be published, and the Electronic Public Procurement System already tracks the performance of contracts by value.

In Italy, a National Database of Public Contracts has been established at the Authority and managed by the Observatory. The Observatory, hosted within the ANAC, acquires data and information electronically in a database (BDNCP) concerning public contracts and formulates standardised costs and provides statistical as well as economic analyses. Despite the fact that the quality of data can be improved, a very positive aspect of the Italian public contract execution monitoring system is the effective rationalisation and centralisation of data in the BDCNP, which provides a one-stop-shop for citizens and public administrators to access open data or even request specific data about public contract execution.

Central purchasing organisations, such as Consip (Italy), Hansel (Finland), KEF (Hungary), are particularly important for the publication of data on their activities and contract monitoring. Several countries have innovative ways of publishing data (Finland, Italy).

The in-house contracts are sometimes subject to publication (Hungary), but typically, such as defence procurement contracts, they are not available.

Electronic public procurement systems focus less on the performance phase. Cludia is the most used e-public procurement system in Finland, which provides digital procurement and contract lifecycle management solutions. In Italy, BDCNP collects plenty of information on contract performance in a structured way. In Hungary, due to the obligation to publish notices of contract performance, a large amount of information on the performance of public procurement is also available in a structured way, and the extent of this information is monitored by the Electronic Public Procurement System. Electronic invoicing is used but is not typically part of electronic public procurement systems in the countries surveyed.

Although there is no specific audit forum dealing with public procurement contracts in most countries surveyed, there is otherwise audit activity related to contract performance (e.g. State Audit Office).

In Finland, the FCCA has intervened in contract modifications, incorrect calculation of the estimated value of the procurement, and incorrect application of both grounds for direct procurement and in-house provisions of the Procurement Act.

The function of procurement activities monitoring in Portugal lies upon IMPIC. However, IMPIC, I.P., a public institute responsible for monitoring public procurement activities below or above the thresholds, issues an annual report where some data is processed and published.

IMPIC, I.P., does not have a more proactive role in finding infringements to the public procurement rules, primarily due to the lack of means and powers.

In Italy, the National Anti-Corruption Authority (ANAC), besides having significant responsibilities regarding transparency, integrity, anti-corruption plans and the development of supplemental codes of conduct for individual agencies/administrations within public administration, is also responsible for overseeing public procurement and contracts. The ANAC has the power of requiring that the contracting authorities, as well as economic operators, provide data and information about contracts in execution, design and public contracts awards.

Only in Hungary, there is a dedicated activity and a department within the Public Procurement Authority specifically dealing with the control of public contracts. Although this activity covers a handful of audits, most audits are subject to appeals, typically resulting in fines. Similarly, the only activity carried out here is the control of notices for a fee. This control also serves to check the legal basis for contract amendments and covers contract performance notices.

Although there is no specialised forum for the review of public procurement contracts in the countries examined, in several cases, a forum has been specifically set up to deal with public procurement cases (Finland, Hungary).

In Finland, the Market Court deals with public procurement review cases. In Portugal and Italy, public procurement disputes are mostly resolved under the administrative and tax jurisdiction, namely in administrative courts. In Slovenia, general (civil) courts deal with public procurement disputes in the execution phase.

In Hungary, the Public Procurement Arbitration Committee under the Public Procurement Authority is responsible for redressing breaches of public procurement contract rules contained in the Public Procurement Act. Thus, cases concerning contract modifications or non-conforming performance are also brought here rather than before a court of the first instance. The second instance is not typical. The Public Procurement Arbitration Committee has the power to declare a contract or its modification null and void.

Most of the cases on appeals concerning public procurement contracts are available in the countries surveyed (Finland, Slovenia, Portugal), but not in a dedicated database. As in Hungary, the Public Procurement Arbitration Committee deals with PPA infringements related to public procurement contracts, the database of the Public Procurement Authority contains only infringements specifically related to public procurement contracts.

There is no separate contract performance report publication in the examined countries. In Italy, the monitoring and management by the ANAC of the BDNCP allows the ANAC to perform all its functions and in particular, to report annually to the Government and Italian Parliament about public contract execution. In Hungary, the annual report of the Public Procurement

Authority details the results of the audit on the monitoring of contract performance, the involvement of capacity providers, the reported breaches of public procurement contracts.

In Portugal, IMPIC, I.P., annually publishes a report on procurement activities, which is also a good measure since it helps economic operators and public authorities to know the state of the art of the national public procurement system. However, the annual report only mentions price and time delivery deviations.

The Statistical Report on awarded public contracts in Slovenia is available for each year, but it is not about performance.

In Hungary, the annual report of the Public Procurement Authority provides detailed data and experience on the performance of public contracts, but it covers a relatively small number of contracts. The report also reports on the results of legal remedies in relation to contracts, with a particular focus on the increasing number of fines, which for some reason is considered important to record as an outcome. One of the best-known cases is C-263/19 *T-Systems*, in which the ECJ stated that European legislation also allows an infringement to be attributed to, and a fine imposed upon, not only the contracting authority but also the successful tenderer for the contract where, when a public contract is modified during its performance, the rules on public procurement have been unlawfully disappplied.

Overall, we see an increase in audit activity, typically dealing with *ad hoc* cases, more structured data reporting in the Member States examined and less specialised remedies for the performance of public procurement contracts.

Ljubljana, 30 May 2022

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# Appendix 1: National notice for publication about the performance of the contract in Hungary

Information on the performance of the contract

## Section I: Contracting authority

I.1) Name and addresses<sup>1</sup> (indicate all contracting entities concluding the contract)

Official name:	
Postal address:	
Town:	Postal code:

## Section II: Subject matter

### II.1) Definition

II.1.1) The subject of public procurement:
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### II.2) Volume of public procurement

II.2.1) Volume of public procurement:
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## Section IV: Procedure

### IV.1) Definition

IV.1.1. Which part or chapter of the Public Procurement Act has been used:
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IV.1.2. Type of procedure:
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### IV.2) Administrative information

IV.2.1) Notice initiating the public procurement procedure <sup>2</sup>
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The number of the notice in the Official Journal: <sup>1</sup> [ ] [ ] [ ] [ ] [ ] [ ] [ ] [ ] [ ] [ ]

Number of the notice in the Public Procurement Notice: <sup>1</sup> [ ] [ ] [ ] [ ] [ ] [ ] [ ] [ ] [ ] [ ] [KÉ-no/year]

IV.2.2) In the case of proceedings without the publication of a notice, the 5 date of sending the notice of initiation or the information of the Public Procurement Authority: <sup>2</sup> (yyyyyy/hh/nn)
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## Section V: Performance of the contract (1)

### V.1 The contracting party (parties)

V.1.1) Contracting Party (Parties)
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Official name:	
----------------	--

Postal address:	
-----------------	--

Town:	Postal code:
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### V.2) Performance of the contract

V.2.1) The performance was contractual O yes O no
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Reason for non-contractual performance:

V.2.2) Date of performance of the contract recognised by the contracting authority: (yyyyyy/hh/nn)
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V.2.3) Date of performance of the remuneration: (yyyy/hh/nn)
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V.2.4) Contract value
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The value of the consideration paid excluding VAT: [ ] Currency: [ ] [ ] [ ]

## Section VI: Additional information

### VI.1) More information:<sup>2</sup>

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Repeat 1 as needed

2 where applicable

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