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Accountability and Transparency in Public Procurement

Philippe ROLAND, Senior President, Belgian Court of Audit

I would like to briefly present to you some considerations on accountability and transparency in public procurement in Belgium and the role of the Belgian Court of Audit in this respect. To give you a clear understanding of my subject matter, I will start my presentation with a short introduction to the structure of the Belgian State and the audit mandate and the organization of the Belgian Court of Audit.

In the last decades of the 20th century the Belgian State evolved from a unitary State to a federal state structure. The Federal State retains important competences in areas such as justice, police and social security. Other competences, including the power to legislate on their competences, were transferred to new public law entities, mainly three Communities: a French-speaking, a Dutch-speaking and a German-speaking Community; and three Regions: Wallonia, Flanders and Brussels-Capital. The Communities have important 'soft' competences, such as education and culture while the Regions have primarily a range of 'hard' competences as for instance economic policies, provinces and local authorities.

Nevertheless there is only one Court of Audit that audits the Federal State, the Communities and Regions and the provinces. The audit mandate of the Belgian Court of Audit is mainly defined in article 180 of the Belgian Constitution, in the Court of Audit Organic Act and in the Communities and Regions financing Act. In 2003 a major public accounting reform resulted in amending the Court of Audit Organic Act, in a new Federal State budgeting and accounting Act and an Act laying down minimum requirements for Communities and Regions budgeting and accounting. On this basis the Belgian Court of Audit acts as the external auditor of the expenditure and revenue of the Federal State, the Communities and Regions, their dependent public service agencies and the provinces. The purpose of its audits is to assist, in other words to inform the legislative assemblies of the State and the Communities and Regions as well as the provincial councils in areas of their respective competences.

The Federal State structure has been mirrored in the Court of Audit's organization. The Court itself, consisting of 12 Members elected by the federal House of Representatives, operates as a collegiate body. The General Assembly of the Court deals with federal matters, the Brussels-Capital Region and the German-speaking Community, as well as the Court management and its international affairs. The French-speaking Chamber and the Dutch-speaking Chamber deal with matters related to their respective Communities, Regions or provinces. The Court's administrative services also reflect the Federal State structure, with a federal sector reporting to the General Assembly and the Communities and Regions sector reporting to the

Chambers. Within each sector there are Financial Audit directorates and Thematic Audit directorates.

The Court of Audit carries out different types of audits. It analyses draft budgets of the State and the Communities and Regions. It audits their general accounts and the accounts of their agencies, and it also audits the accounts of their accounting officers, ending in an administrative ruling and in case of a deficit possibly a jurisdictional ruling. The Court carries out, for all these public law entities, compliance audits and since 1998 it has also carried out performance audits.

In Belgium the power to set general rules in the field of public procurement is vested with the Federal State, the Communities and Regions' powers being extremely limited in this area. In order to implement and enforce public procurement regulations, the federal legislator receives advice from the Public Procurement Committee in which the Court of Audit has a representative.

This Committee set up within the Prime Minister's services delivers an opinion on all draft laws or royal decrees defining the general rules applicable to the award and execution of public contracts. At the contracting authority's request it has also to provide an opinion on issues related to the implementation of legal and regulatory provisions on public procurement as well as on general issues in this area. Finally it can on its own initiative provide the Prime Minister with any proposed improvement and coordination of regulation with regard to public procurement.

The reform introduced by the Act of 24 December 1993 on the award of public works contracts, public supply contracts and public service contracts allowed for the creation of a Belgian code applicable to all authorities empowered to award public contracts. This code incorporated various innovative measures originating mostly from the European Union public procurement directives. This reform contributed to a greater transparency, particularly in areas such as the extension of the scope, the definition of the types of contracts, the distinction between classic and utilities sectors, the generalization of the disclosure requirement, the qualitative selection of candidates and tenderers, a better acknowledgement of services contracts and of obligations to provide information to the candidates and tenderers as well as to state the reasons for the decisions taken by the contracting authority involved**.**

The preparation of the implementation into Belgian law of two new European directives on the award of public works contracts, public supply contracts and public service contracts has been entrusted to the Public Procurement Committee. The directives in question are 2004/18/EC, for the general framework[1], and 2004/17/EC, for the utilities sectors[2]. The implementation of these directives involved the need to

[1] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, *OJEU* n° L 134 of 30 April 2004, pages 114 to 240.

[2] Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement of entities operating in the water, energy, transport and postal services sectors, *OJEU* n° L 134 of 30 April 2004, pages 1 to113.

reform the regulatory provisions applicable to public procurement so as to incorporate all new provisions and rules they contained.

The first step of this transposition was the adoption of the Act of 15 June 2006 governing public contracts and certain public works contracts, public supply contracts and public service contracts. Subsequently the Public Procurement Committee set about working out implementation decrees of the abovementioned act while introducing in the regulation in force the changes decided on the European level, more particularly the provisions contained in Directive 2007/66 on review procedures[3].

Auditing public procurement has always been an important part of the Belgian Court of Audit's activities at all levels of government. Public procurement audits have been mostly legality or compliance audits, where the Court checks whether the law rules that apply to the award and execution of public contracts have been correctly implemented. But increasingly also performance audits regarding public procurement and public-private partnerships have been carried out in recent years. These public procurement audits have been carried out on the Court's initiative in most cases, but have also been in some cases requested by the competent parliament[4].

For the past ten years, the Court of Audit has formalized its specific methodologies regarding financial and thematic audits. Audit manuals on the award and performance of public contracts and on public works concessions were already available. In 2010 the Court also adopted an audit manual on the procurement cycle, which emphasizes a system-based audit mainly aimed at assessing the procurement policy of a whole entity, i.e. the organization and execution of the procurement function. This type of audit consists in describing, analyzing and checking the internal control system of the procurement cycle on the basis of COSO and INTOSAI standards, in particular the INTOSAI Guidance for good governance (INTOSAI GOV), which enables it to cover the whole range of audit activities. This handbook can be used for planning and performing thematic and recurrent audits. It describes the different stages of the procurement cycle with a specific focus on the different processes linked to acquisition of public goods or services: formulation and specification of requirements, contract award, notice of tender and contract performance, invoice processing and payment, as well as monitoring of contracts at the individual or at the global or strategic levels. Every process is represented by a flowchart. The audit objectives and the risks auditors and controllers should keep in mind have been reviewed for each process, and a checklist has been added with questions they should ask themselves when performing their audit to determine whether risks are sufficiently addressed.

[3] Directive 2007/66 of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, *OJEU* n° L 335 of 20 December 2007, pages 31 to 46.

[4] The audit reports referred to subsequently are available, in French and/or in Dutch, on the Court's website : http://www.ccrek.be/EN/Publications.htm

The Belgian Court of Audit sometimes uses international benchmarking in its procurement audits. This was the case in a Federal State level audit concerning "framework agreements", i.e. contracting authorities entering into arrangements with suppliers or service providers to supply goods or services under agreed conditions for a period of time. In 2002 the Federal Procurement Office responsible for concluding framework agreements was dismantled and replaced by a cross-departmental framework agreements office (FOR-CMS). This reorganization induced the Court in 2005 to examine whether FOR-CMS operated regularly and efficiently. The Court assessed that it worked according to the rules but that efficiency was liable for improvement.

Two years later the Court verified to what extent the main bottlenecks had been resolved. It examined whether proper use was made of the framework agreements and whether the product range was sufficiently wide. The study methodology used included benchmarking and a comparative survey with other government central procurement offices both in Belgium, i.e. at the regional government level, and abroad (Austria, Denmark, the Netherlands, Portugal, France, Italy, the United Kingdom) as to the product range offered, the methods used to calculate economies of scale and savings, the resources available, their status and organizational structure, the nature of their customers and the purchase obligations if any.

The Court found that the use of existing framework agreements as well as the development of new framework agreements could be improved, implying that possible savings remained untapped. Large federal government departments were mainly the ones that made little use of the framework agreements available with FOR-CMS. The study showed that there was a market for new, potentially very favourable framework agreements for supplies and services in the field of telecommunications and fixed telephony, ICT, catering and energy, which the federal authorities did not go into. In terms of comparisons with other purchasing bodies the Court was of the opinion that annually 20 to 70 million euros could be saved by making a better use of framework agreements.

The Belgian Court of Audit reviews, whether or not at the request of the competent parliament, major multi-annual public contracts or government investments at the successive stages of the project. A case in point was a project of the Brussels-Capital Region, namely the public concession contract for the design, construction and operation of the North-Brussels wastewater treatment plant involving a type of contractual public-private partnership, similar to the model of the *Private Finance Initiative* (PFI), awarded in 2001 for a lump sum of 830 million euros (without VAT) and payable in twenty annuities.

In a first report, in 2003, the Court examined the legality and compliance of the procedures for the award of the contract and its funding scheme.

The Court's second report in 2006 focused on the period that had elapsed between the decision to award the contract and the end of the first phase of the plant construction works. The Court found among others a lack of a permanent review framework set up

to support the implementation of this contract taking into account its complexity and innovative nature in Belgium.

The third report, published in 2009, covered a period that comprised the completion of the construction works, the approval of the works, the start of the plant operation and evidence of the level of wastewater treatment as well as the degree of success of the sewage sludge treatment. This responded to the wish expressed, at the occasion of the Court's presentation of its first report, by the Environmental Committee of the Parliament of the Brussels-Capital Region to continue its study at least up to the plant operation stage.

Public-private partnership is an alternative and in Belgium relatively new method to realize government investment objectives. In 2008 the Court examined the initiation and preparation stage of 11 PPP projects decided by the Flemish Government.

The Court found that the preparation of the public-private partnership projects focused more on the budget impact than on the operational and societal added value. Because of the arrangements taken between the Federal State, the Communities and Regions to meet the criteria set by the European Stability pact, budget constraints are imposed on the realization of investments : conventional government loans or budget deficits are not allowed. Therefore the government is set to use financing techniques with no impact on the financial balance or in other words that remain neutral within the European System of National and Regional Accounts (ESA) framework. But the government services that launched the PPP initiatives have nearly never carried out an added-value test or a *public private comparator* (PPC) to sustain the government's decision in principle.

Public-private partnership projects are in general complex and involve a specific breakdown of project risks between the public and the private partner all the way through the duration of the partnership. For most projects the public authority concerned carried out only a minimal risk pre-analysis. The government services were therefore not able to negotiate optimally the final contract terms. The unclear specification of risks can also result in the parties trying to shake off their responsibilities or offering abnormal prices. There were few attempts to breakdown risks optimally to ensure an efficient risk control : risks were nearly exclusively attributed from an angle of ESA neutrality.

Finally, the Court examined whether Parliament's right to information and monitoring was complied with. The budgetary information supplied about public-private partnership projects was not sufficiently complete and did not provide an extensive overall picture of the projects. It should more particularly allow to assess the extent to which payment obligations – that stretch beyond the duration of a legislature and the multiannual budget perspective – endangered the future scope for policymaking. There were insufficient reporting and explanatory notes on participations.

The parliamentary debate on the Court's audit report led to an adjustment of government's reports to the Flemish Parliament on alternative financing and public-private partnerships, in accordance with the Court's recommendations. The

Parliament asked the Court to check the next reporting in the light of these recommendations and this has been done this year.

National public procurement law in Belgium is based on the relevant European Union directives. Public procurement accounts for a significant proportion of EU expenditure. The Public Procurement Directives and the principles derived from the EC Treaty are intended to ensure that contracts are awarded in an open, fair and transparent manner, allowing domestic and non-domestic firms to compete for business on an equal basis, with the intention of improving the quality and/or lowering the price of purchases made by awarding authorities. It is therefore very important for the Supreme Audit Institutions of the Member States of the European Union to audit (important) public procurement contracts.

The Belgian Court of Audit is a member of the Contact Committee of Supreme Audit Institutions of the European Union. Within the framework of this Contact Committee a Public Procurement Working Group, now Updating Group, has contributed to effective public procurement auditing by member SAIs. The Belgian Court of Audit has been a task group chair of the working group and co-chair of the updating group. In this capacity it has contributed substantially to the Contact Committee Public Procurement Guideline for Auditors and related documents, which were finalized and published last year.

This Contact Committee guidance includes four documents meant to help auditors in public procurement related audits:

- A Guideline for Auditors**,** based on the EU Public Sector Procurement Directive 2004/18/EC and including diagrams explaining procurement procedures as well as summaries of the most important judgments of the European Court of Justice concerning public procurement;
- A Procurement Performance Model, i.e. key questions developed as reference pointers for auditors evaluating the performance of the procurement function in public sector bodies; it deals with the assessment of a government's overall procurement strategy (meta level), of a department's procurement function (macro level) and of a single procurement project (micro level);
- A Checklist for Financial and Compliance Audit of Public Procurement, to be used when auditing public procurement processes. The checklist is relevant and applicable to auditors operating within different frameworks and with different objectives, requirements and procedures and includes fraud and corruption risks;
- Summaries of relevant public procurement related audit reports published by EU Supreme Audit Institutions.

All these documents can be found on the Contact Committee website[5] and some of them are highly instructive even outside a European Union context.

[5] http://eca.europa.eu/portal/page/portal/contactcommittee/workinggroups/reportsproductsofworkinggroups

In short, I would like to say that the external audit of public procurement by Supreme Audit Institutions and, thus, their contribution to government's transparency and accountability in this area has become more complex and also more diversified over the last decade. A conventional approach to compliance audit of the award and execution of individual public contracts is still necessary and valuable, but should be supplemented, on the one hand, by a systems-based and cross-sectional audit approach of public procurement and, on the other hand, by increased focus on alternative ways to realize public investments, namely various forms of public-private partnerships. This implies a multidisciplinary mobilization of human resources and a multifaceted reporting by the Supreme Audit Institutions to the relevant parliament. This only can ensure that a Supreme Audit Institution continues to contribute effectively to public procurement transparency and accountability.