



Setting the scene: the legal framework for public procurement

7 April 2017, Lausanne



The legal framework for public procurement *in the EU and Poland*

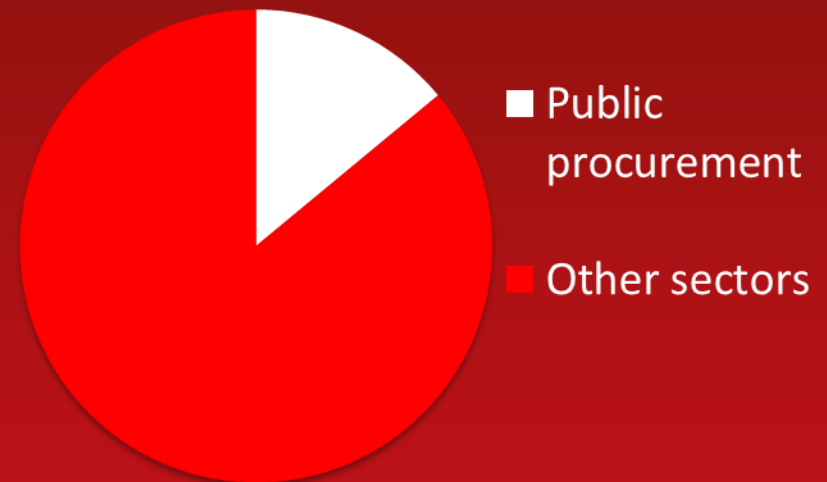
Katarzyna Kuźma

Public procurement in EU - numbers

Public expenditure on goods, works, and services in EU:

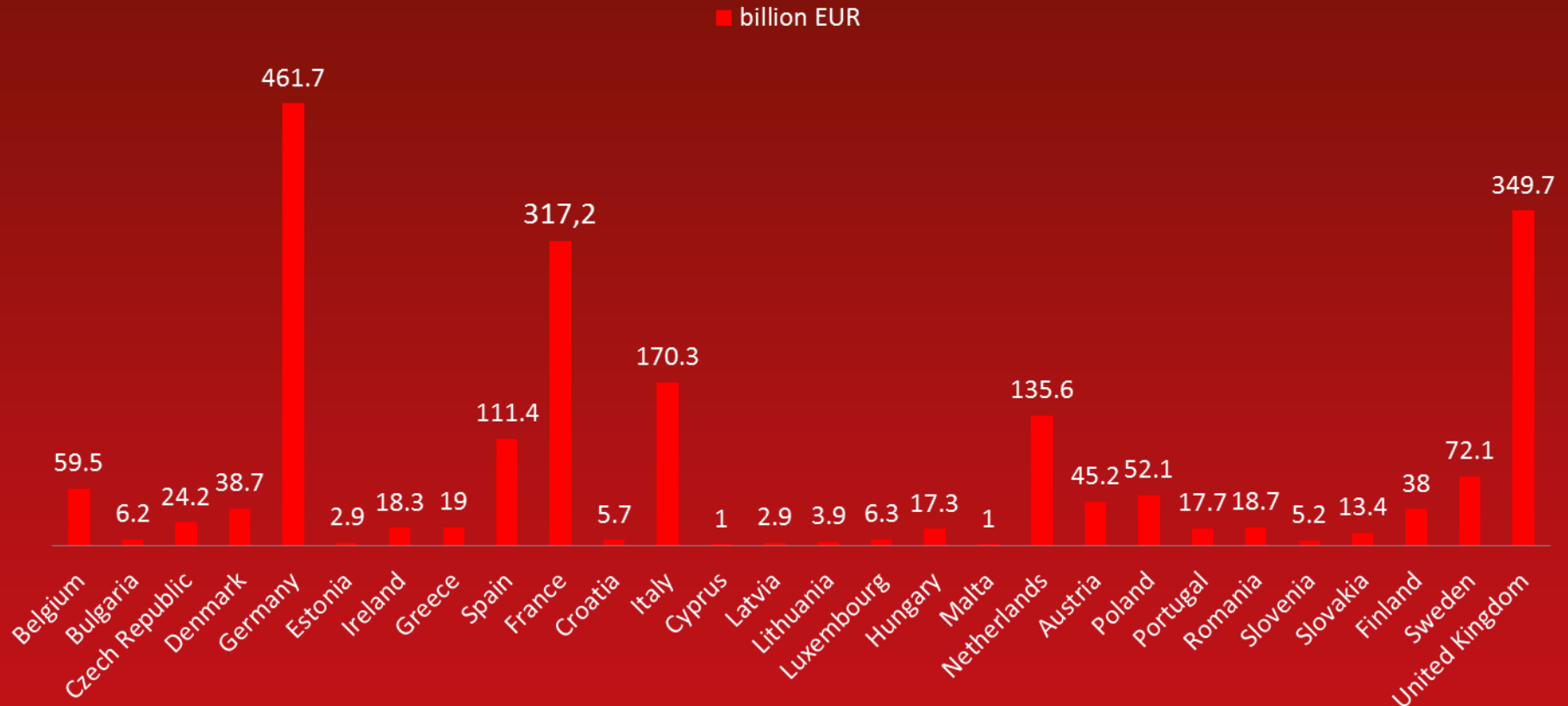
- **14% of EU GDP**
- **annual value of €2 trillion**
- **250 000** contracting authorities
- **2 milion** of contract awards a year

EU's GDP structure



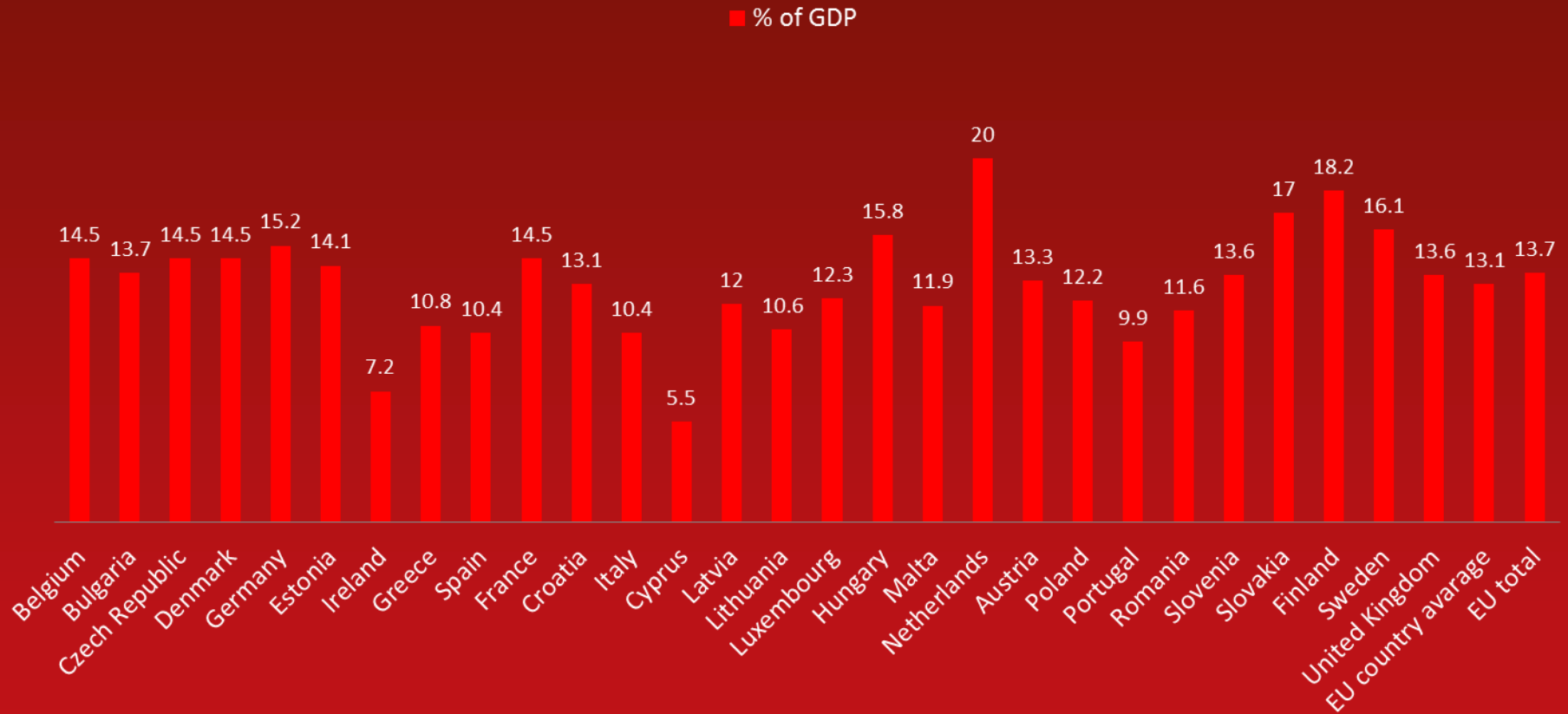
Public procurement in EU

Estimate of total general government expenditures by country:



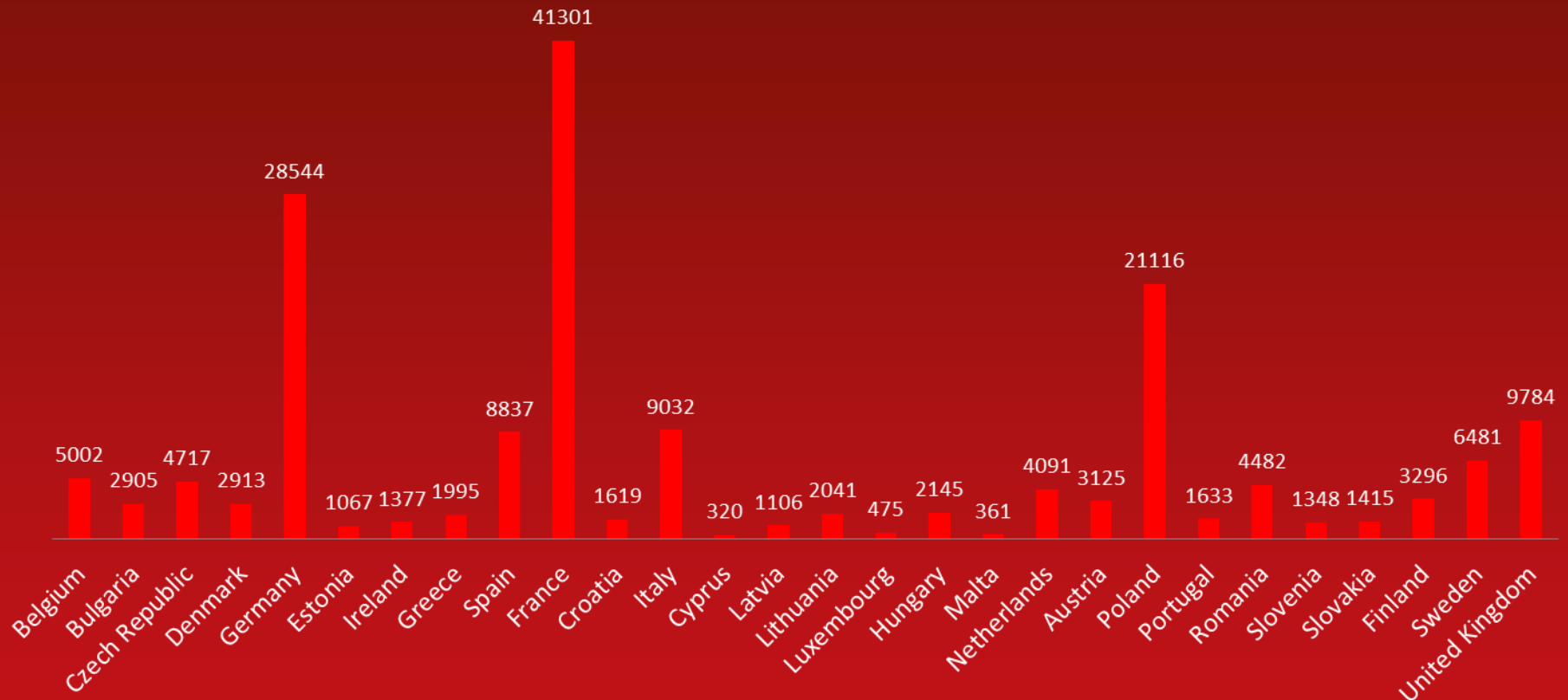
Public procurement in EU

Estimate of total general government expenditures by country:



Public procurement in EU

Number of contract notices published in TED:



Public procurement law in EU – legal framework

**Treaty on the Functioning of the
European Union**



Directives
(to be transposed into national law)

Treaty on the Functioning of the European Union

- Article 18: **prohibition on all forms of discrimination** on grounds of nationality
- Article 34: **free movement of goods** within the EU
- Article 49: right of **establishment** in another EU member state
- Article 56: right to **provide services** in another EU member state

-
- Article 101: prohibition on **cartels and other agreements** that **could distort competition** in the internal market;
 - Article 102: prohibition on **abusing a dominant position**
 - Article 107: general prohibition on granting **public aid**

Directives – principles

transparency

equal
treatment

non -
discrimination

open
competition

proportionality

mutual
recognition

Who is to be equally treated?

- Economic operators from the **EU**
- Economic operators from European Economic Area (**EEA**): Iceland, Norway, Lichtenstein
- Economic operators from **GPA** member states: Israel, Japan, Canada, South Korea, **Switzerland**, United States of America...
- Economic operators from countries with **Free Trade Agreements**: Chile, Colombia, Iraq, Mexico...

-
- *Negotiations are underway with several regions and countries: MERCOSUR (Argentina, Brazil, Paraguay, Uruguay), India, Morocco...*
 - ***Russia, China, Turkey***

Who is to be equally treated - GPA

Directive 2014/24/EU (Article 25)	Directive 2014/25/EU (Article 43)
In so far as they are covered by Annexes 1, 2, 4 and 5 and the General Notes to the European Union's Appendix I to the GPA...	In so far as they are covered by Annexes 3, 4 and 5 and the General Notes to the European Union's Appendix I to the GPA...

Contracting entities shall accord to the works, supplies, services and economic operators of the signatories to those agreements **treatment no less favourable than** the treatment accorded to the works, supplies, services and economic operators of **the Union**.

Any tender submitted for the award of a **supply contract** may be **rejected** where the **proportion of the products originating in third countries** (with which the Union has not concluded, whether multilaterally or bilaterally, an agreement ensuring comparable and effective access for Union undertakings to the markets of those third countries) **exceeds 50% of the total value** of the products constituting the tender.

Directive 2014/25/UE (Article 83)

New Directives

Directive 2007/66/EC

- with regard to improving the effectiveness of review procedures concerning the award of public contracts

Directive 2009/81/EC

- on the coordination of procedures (...) in the fields of defence and security

New directives adopted on 26 February 2014:

Directive 2014/24/EU

- on public procurement

Directive 2014/25/EU

- on procurement by entities operating in the water, energy, transport and postal services sectors

Directive 2014/23/EU

- on the award of concession contracts

to be transposed into national law by 18 April 2016

Transposition of the new EU directives

New law on public procurement

Belgium*	Italy
Czech Republic	Romania
Finland	Slovakia
Germany	Sweden
Hungary	Spain*
Ireland	United Kingdom

Amendments to the existing act

Austria
France
Latvia
Lithuania
Netherlands
Poland

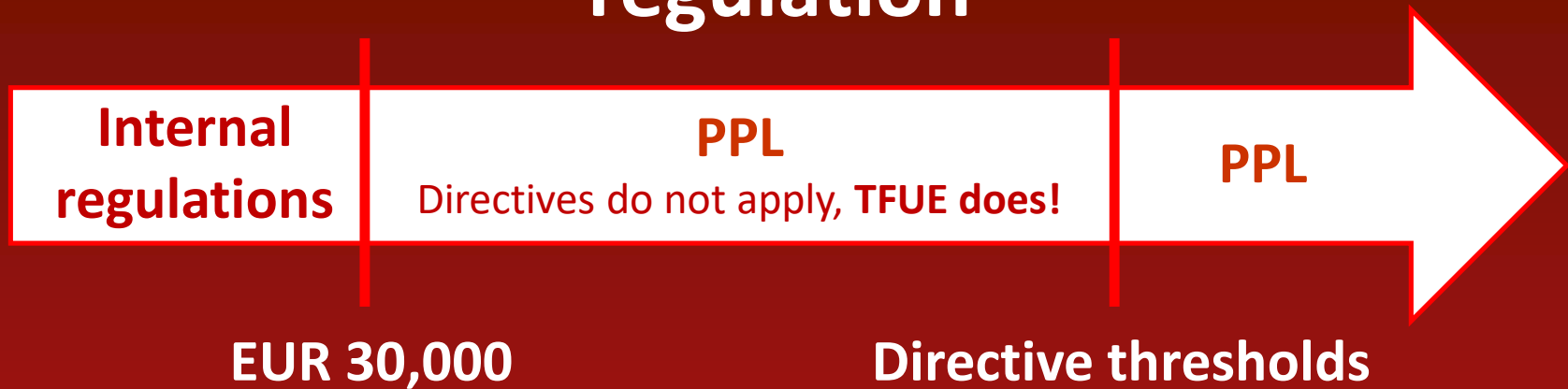
No transposition yet: Estonia

Directives – thresholds

Every two years the European Commission reviews the thresholds in the Directives. Current thresholds apply until 31 December 2017.

PUBLIC	Supply, Services and Design contracts	Works contracts	Social and other specific services
Central Government	€ 135,000	€ 5,225,000	€ 750,000
Other contracting authorities	€ 209,000	€ 5,225,000	€ 750,000
UTILITY	Supply, Services and Design contracts	Works contracts	Social and other specific services
Utility authorities	€ 418,000	€ 5,225,000	€ 1,000,000
DEFENCE AND SECURITY	Supply, Services and Design contracts	Works contracts	Social and other specific services
Defence and security authorities	€ 418,000	€ 5,225,000	€ 1,000,000

Public Procurement Law – scope of regulation



PPL does not apply in the following areas:

- loans, regardless of whether they are associated with the issue, sale, purchase or transfer of securities or other financial instruments
- acquisition of real property and other rights to existing real property, regardless of the value of the contract

Public Procurement in Poland

The Public Procurement Law
of 29 January 2004



Act on Concession contracts for Works or Services
of 21 October 2016



Public-Private Partnership Act
of 19 December 2008

Public-Private Partnership (EU vs PL)

European Union	Poland
<p>Definition: <i>'Public private partnerships' (PPPs) means forms of cooperation between public bodies and the private sector, which aim to improve the delivery of investments in infrastructure projects or other types of operations, delivering public services through risk sharing, pooling of private sector expertise or additional sources of capital (Regulation 1303/2013)</i></p> <p>PPP IS COVERED BY THE DIRECTIVES</p>	<p>Definition: <i>The subject-matter of a public-private partnership is the joint implementation of a project based on the allocation of responsibilities and risks between the contracting authority and the private partner (Public-Private Partnership Act)</i></p> <p>A SEPARATE ACT ON PPP</p>

Public Procurement Law – recent amendments (28 July 2016)

Direct implementations of Directives 2014/24/EU and 2014/25/EU

- European Single Procurement Document (ESPD)
- new catalogue of **grounds for exclusion**
- new rules of **modifying** public procurement contracts

Other amendments

(particularly in Poland):

- application of **in-house** exception

EU: negotiated procedure without publication of contract notice

PL: single-source procurement



The legal framework for public procurement *in Switzerland*

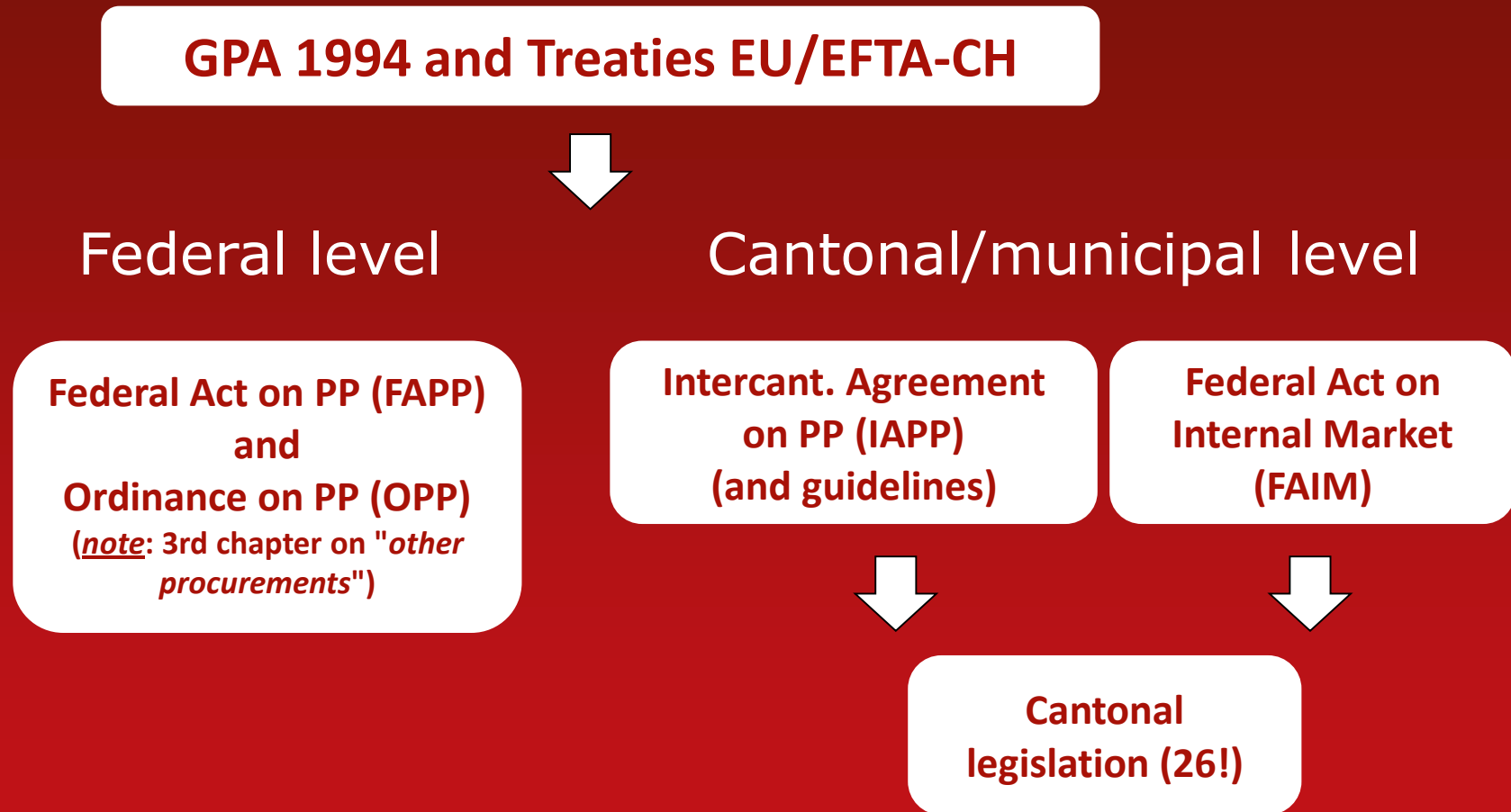
Marquard Christen

Public procurement in Switzerland - figures

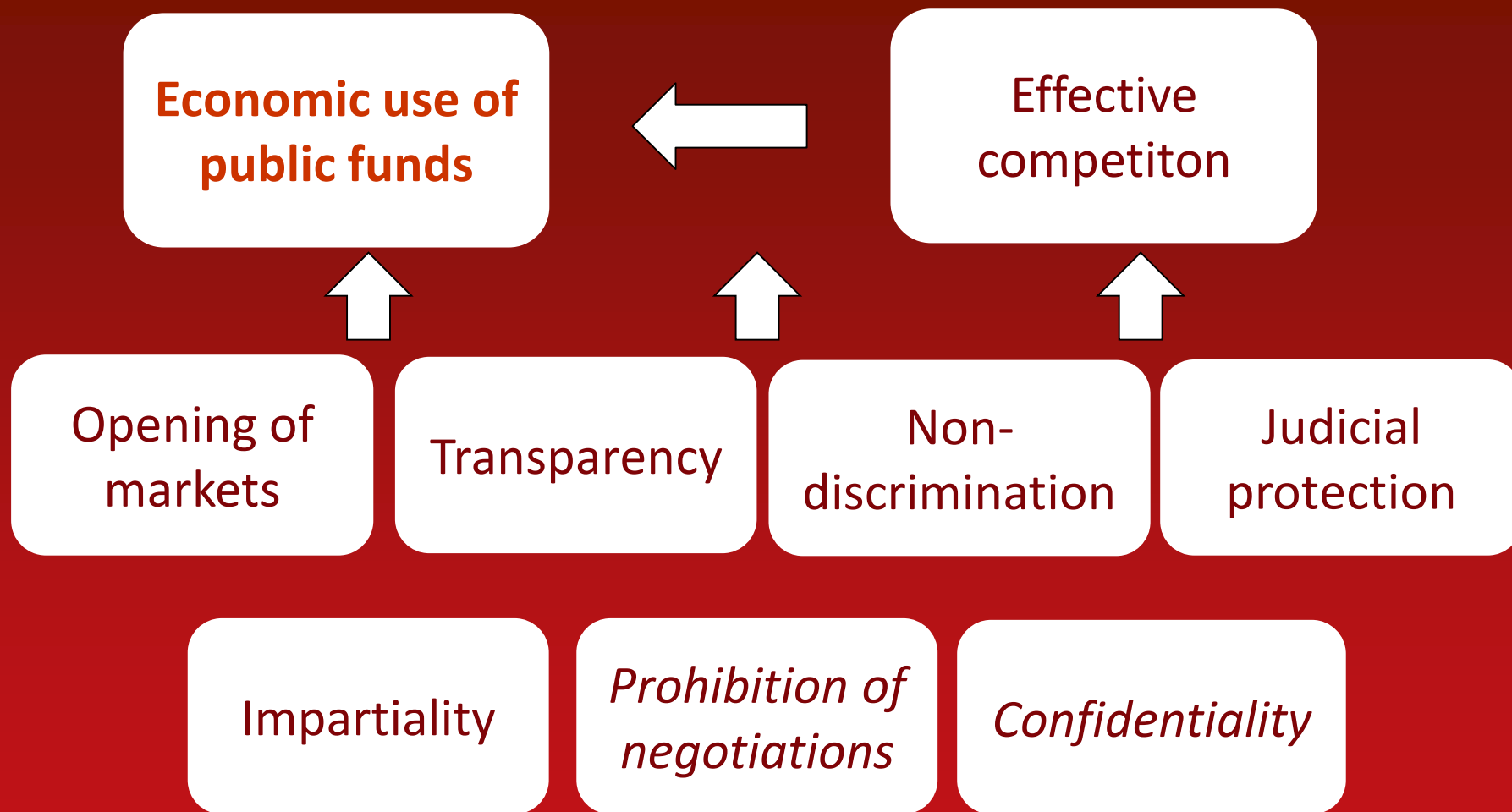
Public expenditure on public procurements amounts to approx.

- **CHF 41 billion** p.a., representing approx.
- **6%** of CH GDP and
- **20%** of all public expenditure

Public procurement in Switzerland – legal framework



Objectives and Principles



Other Objectives?

Equal treatment
of
women and men

Protection of
employees

Sustainability

Good governance

International treaty area vs. internal area

- International treaty area applies
 - if international thresholds reached
 - only to certain contracting authorities and
 - not to all goods / services publicly procured
- Relevance: different rules apply, e.g.
 - publication of tender notices
 - applicable procurement procedures
 - judicial protection
 - bidders entitled to participate

Thresholds international treaty area

	in general	sectors
Supplies	CHF 230'000 (federal) / CHF 350'000	CHF 700'000*
Services	CHF 230'000 (federal) / CHF 350'000	CHF 700'000*
Construction works	CHF 8.7m	CHF 8.7m*

*Sectors water, energy, transport. Note: Other thresholds for railway transport, gas / heat supply, electricity [and telecom]

Personal scope of application (procuring entities)

- Federal level:
 - exclusive list of public authorities (annex to GPA)
 - additional sector specific contracting entities (water, transport, energy, [telecom])
 - other national contracting authorities: 3rd chapter of OPP (internal)
- Cantonal / municipal level (categories)
 - cantonal and municipal/district public authorities
 - bodies governed by public law ("*Einrichtungen des öffentlichen Rechts*")
 - sector specific contracting entities (water, transport, energy, [telecom])
 - other carriers of public tasks (except for their commercial activities; internal)
 - objects/services subsidized with public funds by > 50% (internal)

Who is to be equally treated? (bidders)

- International treaty area: bidders from contracting states (principle of reciprocity)
 - bidders from GPA / EU/EFTA-CH treaty states
 - bidders from other states based on bilateral agreements
 - not to forget: national bidders (Article 6 of FAIM)
- Internal area
 - national bidders (Articles 3 and 5 FAIM)
 - international bidders?

Procurement procedures

- Open procedure and selective procedure
 - international treaty area
 - as of certain thresholds in internal area
- Invitation procedure: only in internal area (below certain thresholds)
- Limited procedure (direct award):
 - international treaty area: list of exceptions
 - internal area: below certain thresholds and exceptions
- No "negotiated procedure" or "competitive dialogue", but "dialogue" and "planning and global solution competition" (federal level)

Judicial review

- Cantonal and municipal/district level:
 - Article 9 FAIM: in all public procurements
 - note: thresholds in some cantons
- Federal level
 - only in international treaty area (FAPP)
 - rest (3rd chapter of OPP): no legal remedy

Relationship public procurement / contract law

- Principle: distinction between
 - award (subject to public procurement / administrative law) and
 - conclusion of contract (subject to private law)
- No automatic suspensive effect of appeal
- Principle: no revocation / invalidity of contract once concluded
 - determination of unlawfulness in award decision
 - damage claim (limited to expenses related to participation in tender and, possibly, appeal proceedings)
- Recent case law: termination of contract

Selection of "particularities" of Swiss public procurement law

- (more than) 27 different public procurement regimes
- Differences between national and cantonal legislation, e.g.
 - "list" vs. "category" approach
 - prohibition of (price) negotiations on cantonal/municipal level
 - no legal remedy in internal area on federal level
- Differences between cantonal legislations
- No specific legislation on PPP and concessions (except Article 2 (7) FAIM), but subject to general provisions
- Note: currently ongoing revision of Swiss public procurement law

Revision of Swiss public procurement law

- 2 main objectives
 - implementation of GPA 2012
 - harmonisation of federal and cantonal legislation
- Harmonisation topics include
 - judicial review
 - (non-)admissibility of (price) negotiations
- Status
 - Bill drafted by working group consisting of federal and cantonal representatives (AURORA) as basis for revision
 - Federal level: draft for revised FAPP dated 15 February 2017 following consultations, now subject to adoption by parliament
 - Cantonal level: draft for revised IAPP to be adopted by conference of cantonal representatives (following adoption of revised FAPP on national level)

Thank you

Katarzyna Kuźma
Domanski Zakrzewski Palinka
Poland
katarzyna.kuzma@dzp.pl
+48 22 557 86 60



Marquard Christen, LL.M., MAS
CMS von Erlach Poncet Ltd.
Switzerland
marquard.christen@cms-vep.com
+41 44 285 11 11

