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## Improving the organisational structure of public procurement

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This chapter provides an overview of the institutional framework of the public procurement system in Malta. It assesses the existence of the core and supplementary functions of the public procurement system and provides an overview of the institutional changes within the Department of Contracts (DoC) and the roles of each Directorate within the DoC in particular for the administration of public procurement processes. The Chapter also discusses the three categories (Schedules) of contracting authorities defined by the Maltese procurement framework and how belonging to a category impact procurement processes. Lastly, the chapter examines the collaboration among key stakeholders of the public procurement system in Malta.

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## 1.1. Strengthening key public procurement functions in Malta

International good practices promote the need for coherent and stable institutional, legal and regulatory frameworks regardless of the policy area. That is also the case for public procurement where efficient and functional systems benefit from this approach. The Recommendation of the OECD Council emphasizes that these frameworks should be as clear and simple as possible (OECD, 2015<sup>[11]</sup>).

The functions, structures, status within the government, and capacity of central public procurement bodies are key elements to consider for the well-functioning of a public procurement system. Indeed, key stakeholders in public procurement systems rely extensively on the capability of public procurement bodies to support the development of national procurement systems (OECD-SIGMA, 2016<sup>[21]</sup>). To make the public procurement system work at all levels, a set of functions needs to be performed at the central level. It is possible to identify two sets of functions: core functions and supplementary ones. On the one hand, core functions usually comprise primary policy and legislative functions, secondary policy and regulatory functions, international coordination functions, and monitoring and compliance assessment functions. On the other hand, supplementary functions include the remaining functions such as advisory and operations support, publication and information, professionalisation and capacity strengthening (OECD-SIGMA, 2016<sup>[21]</sup>).

### 1.1.1. Core functions: the need to strengthen the monitoring functions

Core functions should be covered at the central government level. In Malta, the primary procurement policy and legislative functions are covered by the Department of Contracts (DoC) within the Ministry of Finance and Employment, more particularly by the Directorate for Procurement Policy and Quality Assurance (DPPQA). This directorate is responsible for public procurement policy development and implementation and for ensuring compliance with legislative and administrative requirements. It is also responsible for the secondary policy and regulatory functions. The international coordination functions are covered by the DoC. Indeed, the DoC is the body representing Malta on public procurement matters in different international organisations and fora such as the working groups on Public Procurement organised by the European Commission and the Organisation for Co-operation and Development (OECD). However, as described in detail in Chapter 6, the monitoring of public procurement activities plays a key role in the well-functioning of the procurement system. It supports policy makers to assess the way in which the development and functioning of the system as well as the desired (targeted) state of play has been achieved (OECD-SIGMA, 2016<sup>[21]</sup>). Monitoring may include the preparation of an annual report to the government or the parliament on the functioning of the national public procurement system and the collection of statistical and other information on the performance and efficiency of the public procurement system. The monitoring function is partially covered by DoC. In fact, despite the current lack of a comprehensive set of available performance indicators on public procurement in Malta, the DPPQA through the Compliance and Monitoring Unit, prepares every three years a “Procurement Monitoring Report” to the European Commission. Additionally, This gap should be closed in the near future as the DoC is committed to developing performance indicators to measure the efficiency and effectiveness of the organisational structure and public procurement processes (see Chapter 2). The compliance assessment includes methods and proceedings that are applied in order to detect and remedy irregularities in public procurement. The compliance assessments are performed by different departments within the DoC (the Operations Directorate (OD), the DPPQA and the Sectoral Procurement Directorate (SPD). For instance, the OD and SPD are in charge of approving procurement processes and documents in specific cases (see section 1.2.2). Table 1.1. provides a summary of the mapping of core functions in Malta. In this context, Malta should continue its efforts to reinforce the monitoring function of the DoC.

**Table 1.1. Mapping of core functions in Malta**

Central Public Procurement Category and Function	Description	Addressed in Malta
Primary policy and legislative functions	Establishing the overall legal framework for public procurement through drafting public procurement legislation	Yes
Secondary policy and regulatory functions	Regulations formally adopted by government or provision of tools to support primary law implementation	Yes
International co-ordination functions	Participation and contribution in international regulatory activities, EU advisory committees and working groups, and acting as a national point of reference on procurement procedures	Yes
Monitoring and compliance assessment functions	Monitoring and review of public procurement system and method in line with policy	Partially (resolved in the near future)

Source: Based on information provided by DoC

### **1.1.2. Supplementary functions: Reinforcing the advisory, operations support and professionalisation functions**

Supplementary functions cover all the other functions that are not included in the core functions. Nevertheless, their existence is no less key than the core functions for the well-functioning of the procurement system (OECD-SIGMA, 2016<sup>[2]</sup>). The advisory and operations support functions are crucial to support both contracting authorities and economic operators in conducting public procurement processes in compliance with the regulatory framework (OCDE, 2019<sup>[3]</sup>). Advisory and operations support functions include the following: organisation of a help-desk function to provide legal and professional support to contracting authorities and economic operators on a daily basis; development of guidance systems and operational tools for managing all phases of the procurement process, e.g. methodologies for tender evaluation; and issuance of publications, commentaries and interpretative communications on various aspects of public procurement (OECD-SIGMA, 2016<sup>[2]</sup>). This function is partially addressed in Malta primarily in relation to IT support on the ePPS, and the provision of guidance notes by DoC. However, some gaps exist in relation to help-desk for legal and professional support. Based on discussions with selected contracting authorities, this gap results in individuals trying alternative means to contact DoC to seek assistance. In order to improve service and enhance knowledge sharing in a more structured way, Malta should consider implementing a help-desk to provide support to the users of the public procurement system.

As highlighted in the OECD Recommendation on public procurement, transparency is key for the well-functioning of the public procurement system, and it is also central to promoting good governance in the public sector. The recommendation also highlights the role of Information and communication technologies to ensure transparency and access to public tenders, increasing competition (OECD, 2015<sup>[1]</sup>). The implementation of transparency relies mainly on the publication and information functions which aim at publishing and disseminating public procurement information accessible to all. In Malta, these functions are covered by the DoC. Public procurement information is disseminated through the DoC website or the e-procurement platform ePPS (Department of Contracts, 2022<sup>[4]</sup>). Regarding the professionalization and capacity-building functions in procurement, the DoC and the People and Standards Division within the Office of the Prime Minister (OPM) are partially in charge of these functions. Within DoC, DPPQA is formally in charge of the coordination of training on the new Public Procurement Procedures for all ministries on a national level, in conjunction with Institute for Public Service (IPS). The OPM has worked in partnership with DoC towards the recognition for prior learning (RPL) of the public procurement function (see Chapter 6). However, the professionalisation function goes beyond training. It includes for instance, the regular organisation of conferences and seminars of an informative nature, the facilitation of

independent teaching and research in universities on public procurement. In addition, these functions should not be limited only to central government. Therefore, Malta should consider further strengthening the professionalisation and capacity building functions on public procurement. Table 1.2. provides a summary of the mapping of the main supplementary functions in Malta.

**Table 1.2. Mapping of supplementary functions in Malta**

Central Public Procurement Category and Function	Description	Addressed in DOC Structure
Advisory and operations support functions	Measures to support contracting authorities and economic operators in their procurement operational tasks. This includes a help-desk for legal and professional support, and guidance systems	Partially
Publication and information functions	Publication and dissemination of public procurement related information. This includes contract notice issuance through the ePPS, the publication online of different documents, including circulars, procurement policy notes and guidance notes	Yes
Professionalisation and capacity strengthening	Strengthening the capacity of employees in the public procurement system	Partially

Source: Based on information provided by DoC

## 1.2. Reinforcing the public procurement institutional framework in Malta

### 1.2.1. An evolving public procurement institutional framework in Malta

In Malta, the public procurement system has been strongly reformed in the past five years. The main reform started in 2016 with the transposition of the European Public Procurement Directives 2014/24, the Concession Contracts Directive 2014/23 and the Utilities Contracts Directive 2014/25 (OECD, 2019<sup>[5]</sup>).

In addition to the regulatory improvements to the public procurement system, the institutional framework in Malta has also been reformed and recently shifted from a decentralised approach through the Ministerial Procurement Units (MPUs) established in 2016 (OECD, 2019<sup>[5]</sup>) to a more centralised organisational structure when MPUs were moved in 2021 to the Sectoral Procurement Directorate (SPD) within the Department of Contracts (DOC) under the Ministry of Finance and Employment (Legal Notice 56/2021 of the 15<sup>th</sup> March 2021). With these changes, the DoC is currently comprised of four directorates: the SPD, the Directorate of Operations (OD), the Directorate Procurement Policy and Quality Assurance (DPPQA), and the Administration Directorate (AD). Both the SPD and the OD are in charge of administering public procurement processes (see Box 1.1).

### Box 1.1. The roles of OD and SPD when administrating public procurement processes

Both the Directorate of Operations (OD) and the SPD hold several key responsibilities related to the oversight of procurement processes of Contracting Authorities (CAs), including:

- vetting and approving procurement documents,
- publishing and managing the publication process
- coordinating evaluation reports
- issuing letters to successful and unsuccessful bidders,
- coordinating signatures and contract dissemination (for OD) and,
- issuing Dynamic Purchasing Systems and Framework Agreements on behalf of CAs.

The SPD is in charge of administering procurement procedures published under open or restricted procedure of contracting authorities listed under Schedule 16 of the Public Procurement Regulations 2016 whose estimated value is between EUR 10 000 and EUR 750 000 excluding VAT, whilst the OD administers the rest of the open or restricted procurement with an estimated value exceeding EUR 750 000 excluding VAT. Additionally, the OD administers (i) all procurement for contracting authorities listed under Schedule 2 which equals or exceeds the estimated value of EUR 140 000, and (ii) any other procurement procedure which is not open or restricted and which estimated value is above EUR 140 000.

Source: Responses of the DoC to the OECD questionnaire

The Public Procurement Regulations (PPR) Subsidiary Legislation 601.03, in particular Legal Notice 56/2021 of the 15<sup>th</sup> March 2021 (Legizlazzjoni Malta, 2022<sup>[6]</sup>), foresees three categories of contracting authorities: Schedule 2, Schedule 3 and Schedule 16 (DoC Malta, 2016<sup>[7]</sup>). Depending on the respective Schedule, the procurement volume and the category of procurement procedures, are either administered by the contracting authorities, the SPD or the OD:

- Schedule 2 refers to contracting authorities falling within the competence of the OD for all procurement whose estimated value is equal to or exceeds EUR 140 000 excluding VAT. Procurement estimated beneath this threshold are administered by contracting authorities.
- Schedule 3 of the PPR provides a list of contracting authorities which shall administer their own public procurement procedures (without the involvement of the SPD or the OD).

Schedule 16 provides a list of contracting authorities involving the SPD for open and restricted tenders with an estimated value ranging between EUR 10 000 and EUR 750 000 excluding VAT. When the procurement estimated value does not exceed EUR 10 000 excluding VAT, contracting authorities administer their own procurement. In addition, open or restricted tenders above EUR 750 000 are administered by the OD. The OD also administers procurement procedures which are not open or restricted tenders and with an estimated value above EUR 140 000 (Design Contest, Innovation Partnership, Competitive Dialogue, Competitive Procedure with Negotiations and Negotiated Procedures). Table 1.3. provides a summary of the different categories for processing public tenders in Malta as of 2021.

**Table 1.3. Categories for processing public tenders in Malta (as of March 2021)**

Schedule/ Entity responsible for managing the public tenders	Schedule 16	Schedule 2	Schedule 3
<b>Contracting authorities</b>	< EUR 10 000	< EUR 140 000	Any amount
	< EUR 140 000*		
<b>SPD (DoC)</b>	EUR 10 000 – EUR 750 000	N/A	N/A
<b>Operations Directorate (DoC)</b>	> EUR 750 000**	= or > EUR 140 000	N/A
	= or > EUR 140 000***		

Note: \* which are not Open or Restricted Procedure (after prior approval of the Operations DOC), \*\* Open or Restricted Procedures, \*\*\* not Open or Restricted Procedure. All the thresholds mentioned in this table are excluding VAT.

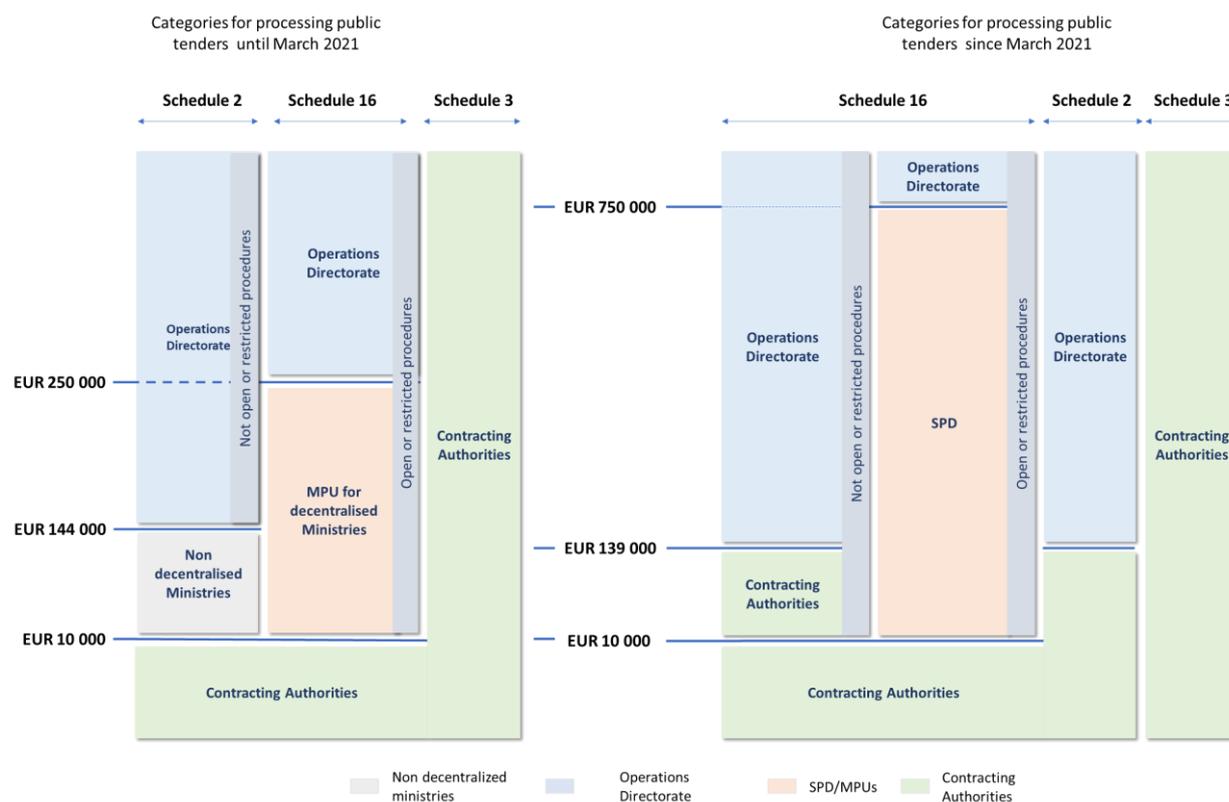
The EUR 140 000 threshold in 2022 corresponds to EUR 139 000 in the previous years

Source: the PPR

These schedules determine the scope of actions of the SPD, the OD, and the contracting authorities (CAs). There were two main changes that significantly influenced the capacity of the SPD. First, within the Subsidiary Legislation 601.03, there are currently 7 contracting authorities listed under Schedule 2, while 227 contracting authorities are listed under Schedule 16. Second, particularly through Legal Notice 56/2021, the regulatory changes increased the threshold for the SPD to administer tenders. While in the past the 7 MPUs used to administer only open tenders with a procurement value ranging between EUR 10 000 to 250 000, the new thresholds for SPD to administer open and restricted tenders are ranging now from EUR 10 000 to 750 000. This results in both a higher number of CAs under the SPD scope of action and a higher number of procedures.

The establishment of the SPD (and integration of the former MPUs) with widened procurement thresholds has contributed to alleviate and lighten OD's processes. Figure 1.1 provides a description of procurement processes under the previous and actual system processes. Notwithstanding these changes, the number of staff within SPD did not change. Therefore, these changes increased the SPD's workload and raised many challenges in terms of capacity planning and human resources. In addition, the SPD faces many difficulties to recruit capable public procurement workforce, leading to many vacant positions within the directorate. This can affect the way SPD performs and conducts its activities and ultimately negatively impact the smooth and efficient running of the public procurement processes. Therefore, the government of Malta should consider reinforcing the capacity of the SPD to deliver its mandate. In addition, many stakeholders mentioned that the SPD threshold for administering public procurement processes is too low (EUR 10 000) and might impact significantly the administrative burden for both the SPD and contracting authorities falling under its remits. Therefore, Malta should consider increasing gradually the SPD threshold.

**Figure 1.1. Public procurement processes under the actual and the previous system**



Source: Based on the PPR and (OECD, 2019<sup>[5]</sup>)

Note: The EUR 140 000 threshold in 2022 corresponds to EUR 139 000 in the previous years

In addition, currently the SPD is comprised of 8 units mirroring the sectorial organisation of the former MPUs (see Table 1.4). According to DoC, each SPD unit has to administer tenders for a certain number of contracting authorities and the allocation of contracting authorities under each SPD unit was set taking into account the related workload. Data provided by the SPD shows that the number of contracting authorities ranged from 18 to 59 in 2021. The estimated number of procedure ranges between 66 and 271. Some contracting authorities launched more procedures for certain procurement categories. For instance, data provided by the SPD shows that the SPD units 1 and 4 are well experienced in public works. The SPD mentioned that in practice, the different units are supporting each other when they face a higher workload. Given the organisational changes implemented in the recent years and the shift from decentralised MPUs to one central directorate, the current sectoral structure of the SPD could evolve in the long run by considering organising progressively the SPD by purchasing categories. This will strengthen the effectiveness of SPD's organisational structure and improve overall coordination and alignment with DoC operations.

**Table 1.4. Estimated data on SPD's 8 units in 2021**

SPD					
	Units	Staff	Number of CAs	Number of Procurement procedures	Total Volume in million (EUR)
	Director's Office	2	N/A	N/A	N/A
SPD 1	Education and Employment	7	26	271	108,9
SPD 2	Home Affairs and Tourism	6	34	66	22,9
SPD 3	Gozo	3	18	132	33
SPD 4	Inclusion, Equality and Social Welfare	4	27	121	26,2
SPD 5	Justice, Culture and Regional Affairs	4	35	114	25,3
SPD 6	Transport and Energy	9	28	112	38,3
SPD 7	Finance, Economy, OPM and Foreign Affairs	5	59	76	6,7
SPD 8	Environment, Agriculture and Fisheries	6	19	239	27,5

Source: Data collection from SPD in 2021

In addition, as described in Box 1.1, the SPD and the OD are performing similar tasks when it comes to administering public procurement processes. The existence of these two directorates with similar tasks is related to historical reasons, as the SPD has replaced the former MPUs that were within the ministries and imported many of their features and functions. In this context, Malta could consider rethinking the organisational structure of the DoC in the long term and exploring the possibility to centralise the tasks related to administering public procurement processes within one directorate.

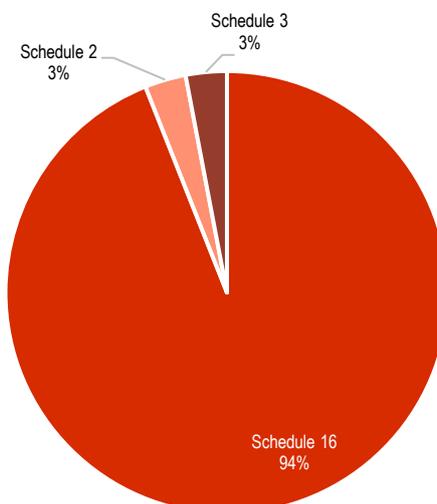
### **1.2.2. Different processes for entities belonging to different schedules**

As described in section 1.2.1, contracting authorities are organised under different schedules. Discussions with the DoC highlighted that the categorisation of contracting authorities under these three schedules aims at reinforcing the capacity of some contracting authorities (in particular those under schedule 16 and 2) and at ensuring that procurement documentation is compliant with the regulatory framework. Indeed, the administration of procurement procedures by the SPD or the OD is considered as an ex-ante control measure but has clear implications for contracting authorities in terms of administrative burden.

As of 2021, entities are by default categorised under Schedule 16, rather than Schedule 2 of the PPR. In fact, the majority (227) of contracting authorities are listed under Schedule 16, when compared to 7 under schedule 2 and 8 contracting authorities under schedule 3 respectively. Figure 1.2. summarises the distribution of contracting authorities in Malta for each schedule category. Since the creation of SPD in March 2021, and until December 2021, OECD survey revealed that the value of procedures administered by OD are higher than the ones administered by SPD with procedures estimated to EUR 856 million for OD between March and December 2021 against EUR 92 million for SPD. This is mainly due to the high thresholds applicable for the tenders administered by the OD. Despite the procedures value difference,

SPD administers a volume of procedures two times higher than OD, with 71% of Schedule 16 contracting authorities' procedures administered by SPD and 29% under OD remit.

**Figure 1.2. Share of contracting authorities under each schedule in Malta**



Source: the PPR

The categorisation of the different contracting authorities under each Schedule is based on the procurement capacity of each individual contracting authority. However, no detailed criteria have been communicated. Some contracting authorities mentioned that this has led to a situation of confusion as they were administering their own procurement procedures in the past. With the new categorisation, they must follow new processes involving SPD and/ or OD without clearly understanding the criteria for being under Schedule 2 or 16. In this context, Malta could consider introducing criteria for each Schedule for transparency and fairness purposes amongst the different contracting authorities. A system should be implemented based on compliance with key organisational performance indicators and criteria in order to shift from one schedule to another (see Chapter 6).

### **1.2.3. Enhancing cooperation with other key public procurement actors**

The OECD Recommendation of the Council on public procurement highlights the need to foster transparent and effective stakeholder participation (OECD, 2015<sup>[1]</sup>). The benefits of collaboration among the various stakeholders involved in public procurement are well recognised, in particular when reforming the public procurement system (OECD, 2019<sup>[8]</sup>). Indeed, it enables the identification of bottlenecks and areas to improve but also to strengthen trust in the system. Stakeholders of the public procurement system may include contracting authorities, business representatives, line ministries in charge of specific policies, review bodies, oversight bodies such as supreme audit institutions (SAIs) and the entities in charge of fighting corruption and enhancing competition, amongst others (OCDE, 2019<sup>[3]</sup>).

The DoC has regular exchanges with contracting authorities; however, discussions with contracting authorities highlighted that those exchanges do not follow a standard process and might take different forms with different degrees of formality (phone calls, emails, etc.). DoC should therefore consider organising regular discussions with contracting authorities using standard and better documented processes. For instance, since 2013, the Department for Public Procurement of the State in France (Direction des achats de l'Etat) created inter-ministerial teams for each purchasing category with

representatives from different ministries. This enables the Directorate for the procurement of the State to have regular discussions with contracting authorities on challenges and issues experienced in specific procurement categories (see Box 1.2) (Direction des Achats de l'État, n.d.<sup>[9]</sup>). Regarding the private sector, the DoC has regular exchanges with the Chamber of Commerce to understand the issues faced by economic operators in relation to public procurement in the country. For instance, discussions between the DoC, the Malta Chamber of Commerce and other stakeholders led to the development by the Chamber of a report on public procurement reform aiming at identifying core challenges faced by economic operators when dealing with public procurement in Malta and proposing relevant recommendations (The Malta Chamber, 2021<sup>[10]</sup>). According to the DoC, these recommendations were mostly addressed and implemented.

Oversight and control of the procurement cycle are essential in supporting accountability and promoting integrity in the public procurement process (OECD, 2019<sup>[8]</sup>). When auditing contracting authorities, SAIs assess different areas and processes including public procurement. Based on their findings, SAIs provide concrete recommendations to public entities. Therefore, SAIs have a wealth of information on incompliances, irregularities and areas to improve in the public procurement system. In Malta, the role and functions of the National Audit Office (NAO) are defined by Section 108 of the Constitution of Malta and the Auditor General and National Audit Office Act of 1997 (NAO, 2014<sup>[11]</sup>). The NAO performs both compliance and performance audits. NAO is responsible for monitoring the accounts and performance of all public authorities and private entities in which the government owns more than 51% of shares (OECD, 2019<sup>[5]</sup>). The NAO issues an Annual Report on Public Accounts providing many comments and recommendations regarding public procurement. In addition to the NAO, the Internal Audit and Investigation Division (IAID) is in charge of carrying out internal and financial investigations.

Discussions with contracting authorities highlighted that following an audit the NAO provides them with concrete findings and recommendations to improve their procurement practices. In addition, the yearly report of the NAO includes dedicated analysis of audited entities' compliance with the public procurement regulatory framework and various recommendations (NAO, 2020<sup>[12]</sup>). However, there are no regular discussions between the DoC, the NAO or the IAID on the public procurement system. However, the institutions collaborate on specific procurement audits and activities such as the activities of the National anti-fraud and corruption committee.

In addition to the NAO, there are no formal and regular exchanges on public procurement reforms between the DoC and other key stakeholders such as the public procurement review body – the Public Contracts Review Board (PCRB), the Permanent Commission against Corruption, and Malta Competition and Consumer Affairs Authority. Exchanges with PCRB are key as the entity helps guarantee effective enforcement of public procurement rules under the EU Remedies Directives (European Commission, 2019<sup>[13]</sup>). As developed in Chapter 3, public procurement is a high-risk area, which includes integrity and collusion risks. Discussions with entities in charge of corruption and competition issues could help further understand the extent of the issues in the country and findings ways of working together on the development of mitigation measures.

Moreover, as highlighted in Chapter 4, public procurement can be used as a strategic tool to advance the implementation of various policy objectives. This requires effective communication and collaboration between the public procurement body and the line ministries, entities and agencies in charge of specific policies like the protection of the environment, gender equality, innovation or the development of small and medium sized enterprises. In Malta, the Ministry for the Energy, Environment and Enterprise (MEEE) and the DoC have been collaborating on a regular basis. However, this is not the case for other ministries and agencies like the Ministry of Economy and Industry, Malta Council for Science and Technology, Ministry for Energy, Enterprise and Sustainable Development. The limited cooperation could explain the low uptake of these policies in the public procurement field. In this context, DoC could benefit from having formal and regular exchanges with key stakeholders of the public procurement system.

### Box 1.2. Standardised processes between the French Department for Public Procurement and contracting authorities

In 2013 and 2014, the French Department for Public Procurement implemented specific teams made up of representatives mandated by each ministry and led by a lead buyer, at both the national and regional level. Their main activities are:

- i. Monitoring
- ii. Report the needs, issues, and expectations of the different ministries
- iii. Suggest inter-ministerial purchasing strategies
- iv. Identify, set up and monitor purchasing projects
- v. Facilitate public procurement processes and their execution

The special teams cover many key purchasing categories, including postage and transport, intellectual services, IT infrastructure, telecommunications, printing solutions etc.

Source: (Direction des Achats de l'État, n.d.<sup>[9]</sup>)

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