

manipulate the award decision in favour of one of the members. Cartel practices can include informal agreements to assign “turns” among the members for winning public bids, or they may agree to internal compensation payments for submitting high or other “failed” bids.⁶

III. INTEGRITY GAPS IN THE EU

Public procurement is one of the areas in the EU where corruption risks are highest, according to an assessment of anti-corruption systems in 25 European countries that was carried out in 2012 by Transparency International (TI).⁷ In most European countries TI has identified significant weaknesses in national legislative frameworks on public procurement that lead to, if not invite, systematic circumvention of the laws. Problems appear to be most acute in Bulgaria, the Czech Republic, Italy, Romania and Slovakia.⁸ The current revision of the EU legislation on public procurement⁹ presents an opportunity for European leaders to address these breakdowns and close the following integrity gaps.

WEAK LEGISLATIVE FRAMEWORKS

Legislative loopholes – as in the case of Romania – allow for the bypassing of procurement rules and raise the risk of corruption. For example, the Romanian government has the right to invoke a state of emergency, which allows it to negotiate contracts with only one single company. Allegations in other countries have also been raised about preference being given to a single vendor by micro-tailoring the tender criteria to match only that company’s profile.¹⁰

Similar problems of legal gaps exist in the Czech Republic that has permitted corruption to arise in public procurement. According to a survey of small and medium-sized Czech companies, three out of five managers believe that it is impossible to win public contracts without resorting to bribery, a kickback or some other “incentive”.¹¹

The procurement loopholes that exist in Europe vary and lead to low levels of transparency and accountability, including limited access to information and public participation in the processes. Final public procurement contracts are not published in a number of European countries, including Bulgaria, Germany and Italy. Another concern is the ability to renegotiate contracts outside of the public’s oversight after they

are signed. In Italy¹² and Bulgaria,¹³ there is a common practice of renegotiating the annexes to the contracts that can permit a de facto change in the tender conditions. Finally, the general lack of whistleblower protection in many countries also means that even when problems are detected, they are not always reported, made public or appropriately addressed.

INEFFICIENT OVERSIGHT BODIES

Findings from TI’s study of National Integrity Systems in Europe show that oversight bodies are not sufficiently resourced, structured or empowered to effectively monitor public procurement.¹⁴ At times the system is fragmented, as in Greece, or is under-resourced, as in Estonia, where the oversight body for EU structural funds has double the capacity as the oversight body for public procurement. In other instances the domestic legal framework on procurement lacks oversight provisions, as in the case of Romania. In Hungary, the State Audit Office has even officially recognised that its monitoring of public procurement is inadequate to fight corruption.¹⁵ Lack of oversight functions also means that problems such as conflicts of interest between companies bidding and the officials reviewing them may go undetected.

INADEQUATE THRESHOLDS TO PROMOTE PUBLIC SCRUTINY

In public procurement, thresholds should theoretically promote a more efficient and effective system. They set a bar above which tighter rules and better legal protection are applied to “larger” contracts and under which more limited oversight is given to “smaller” contracts that are worth less. However, the system can be manipulated so that public contracts fall outside of stricter legal provisions and public scrutiny.

According to Czech law, a simplified below-the-threshold procedure applies. In the case of construction contracts, if the value does not exceed CZK 20 million (approx. €800,000), the contract does not pass through a more rigorous oversight process. As a consequence, most construction contracts happen to be found just below this threshold.

Often domestic laws do not oblige the contracting authority to publically announce and report on contracts falling below the threshold and which have been concluded under more simplified procedures. This can lead to reduced levels of transparency and accountability. In Hungary for instance, only 55 per

cent of tenders below the threshold were publically announced, limiting public scrutiny or oversight.¹⁶ In Estonia, public contracts are sometimes split up in order to fall below different thresholds and reduce their obligations, including the need to follow more stringent rules of public procurement.

Fortunately, e-procurement and online procurement platforms are helping to open up information through full public disclosure of all relevant documents (as well as final contracts and amendments) for below – as well as above – these thresholds.

IV. RECOMMENDATIONS

TI welcomes statements by the EU to create new mechanisms that “would allow public authorities and their supplier to conclude transparent, competitive contracts”.¹⁷ Such steps are needed if corruption risks are to be mitigated and for public procurement to be efficient. TI is convinced that an increase in efficiency and value for money of public expenditure could enhance economic growth in the years to come. TI therefore recommends the EU to:

- **INTRODUCE E-PROCUREMENT SYSTEMS**

To achieve better value for money, the EU should facilitate robust and comprehensive e-procurement systems and standards around Europe, which would help to foster access, competition, impartiality and transparency as well as control by civil society. In the aim of reducing costs, the national or EU e-procurement online platform could also be used to publish final contracts and amendments.

- **STRENGTHEN NATIONAL MONITORING SYSTEMS FOR PUBLIC PROCUREMENT**

Effective national oversight bodies are necessary to tackle the deficiencies identified in most EU member states, including the use of thresholds.¹⁸ An effective ‘red flag’ indicator system¹⁹ should be established, with a common set of criteria and methodology to allow for cross-country comparisons.

- **INTRODUCE EU-LEVEL TRACKING SYSTEM OF NATIONAL TENDERS**

Public procurement databases and statistics should be unified at the EU-level to ensure

comparability between public procurement systems and data of different member states.

- **PROMOTE AND ENSURE PUBLIC SCRUTINY**

Public stakeholders, such as interest groups, civil society and the public at large, should be given a stronger role in the oversight of public procurement processes.²⁰ It is essential that as much data, documents and information are publically available from the start of the process and provisions to ensure citizens’ access to all relevant information are included.

- **INCREASE TRANSPARENCY IN PROCUREMENT PROCESSES**

To counterbalance legislative loopholes and to enable public scrutiny, details of final contracts and subsequent amendments should be made public. While a balance must be found between transparency and confidentiality this information should be disclosed, including contracts both above and below thresholds.

- **PROMOTE THE STRENGTHENING OF LEGAL FRAMEWORKS IN EU MEMBER STATES**

The EU should urge the member states to bring their legal provisions concerning bribery and corruption (including facilitation payments) in line with the UN Convention against Corruption (UNCAC), which has been ratified by almost all member states.

- **STRENGTHEN PROVISIONS ON CONFLICTS OF INTEREST AND EXEMPTIONS**

Conflict of interest and how to deal with it throughout the procurement cycle need to be clearly defined in legislation, including clear guidelines on implementation, monitoring and sanctions. Current proposals are detailed but there is scope to tighten these rules.²¹ Exemptions from thresholds for specific sectors, which lead to reduced scrutiny and oversight, should be limited and regulated by strict rules.

- **INCLUDE PROVISIONS ON WHISTLEBLOWER PROTECTION**

To strengthen the detection of corruption cases in public procurement and to facilitate the reporting of mismanagement and misconduct, the implementation of a well-functioning whistleblowing system in all member states is essential.²²

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1 European Commission Press Release on Modernising European public procurement to support growth and employment (20 December 2011), p. 1, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1580&format=HTML&aged=0&language=EN&guiLanguage=en>

2 Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004, <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:134:0114:0240:EN:PDF>

3 Communication on the Commission Anti-Fraud Strategy, SEC(2011) 791 final, http://ec.europa.eu/anti_fraud/documents/preventing-fraud-documents/ec_antifraud_strategy_en.pdf

4 Communication on the Single Market Act. Twelve levers to boost growth and strengthen confidence, SEC(2011) 467 final, <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52011DC0206:EN:NOT>

5 Transparency International, 'Corruption and Public Procurement', TI Working Paper No. 05/2010 (Berlin: TI, 2010), www.transparency.org/whatwedo/pub/working_paper_05_2010_corruption_and_public_procurement

6 Transparency International Handbook, Curbing Corruption in Public Procurement (2006), p. 16, www.transparency.org/whatwedo/pub/handbook_for_curbing_corruption_in_public_procurement

7 The findings of the 25 participating European countries are available online at www.transparency.org/whatwedo/activity/european_national_integrity_systems_project

8 Transparency International, Money, Politics, Power (Berlin: TI, 2012), p. 5, www.transparency.org/enis/report

9 European Commission Proposals on the reform of public procurement, http://ec.europa.eu/internal_market/publicprocurement/modernising_rules/reform_proposals_en.htm

10 Other such examples are the use of addendums to contracts after signature boosting the price and complicating the tender criteria to an extent that other

potential bidders who do not have access to confidential information are discouraged. See Transparency International, Money, Politics, Power (2012), p. 40

11 AMSP (2010) Nazory podnikatelů na korupci, www.ampsp.cz/uploads/soubory/pruzkum4_web_final.pdf (in Czech) cited in Transparency International Czech Republic (2012), Studie narodni integrity Czech Republic, www.transparency.cz/studie-narodni-integrity/

12 Decarolis, F., Giorgiantonio, C. and Giovanniello, V. (2010) The Awarding of Public Works in Italy: An Analysis of the Mechanisms for the Selection of Private Contractors, http://www.bancaditalia.it/pubblicazioni/econo/quest_ecofin_2/QF_83;internal&action=_setlanguage.action?LANGUAGE=en, cited in Transparency International Italy, National Integrity System Assessment (2012), www.transparency.org/whatwedo/pub/corruzione_e_sistema_di_integrita_in_italia

13 Access to Information Programme, Access to Information in Bulgaria 2010 (2011), p.27, http://store.aip-bg.org/publications/ann_rep_eng/2010.pdf, cited in Transparency International Bulgaria (2012) National Integrity System Assessment, <http://media.transparency.org/nis/cogs/assets/bu/pdf/NIS%20BULGARIA%20ENG.pdf>

14 The findings of the 25 participating European countries are available online at www.transparency.org/whatwedo/activity/european_national_integrity_systems_project

15 Hungarian State Audit Office (2008), Report on the monitoring of the public procurement system, [www.asz.hu/ASZ/jeltar.nsf/0/EF2A44F5115DD750C12574C5004E1461/\\$File/0831J000.pdf](http://www.asz.hu/ASZ/jeltar.nsf/0/EF2A44F5115DD750C12574C5004E1461/$File/0831J000.pdf), as cited in NIS assessment Hungary, www.transparency.hu/National_Integrity_Study

16 Transparency International, Money, Politics, Power (Berlin: TI, 2012), p. 40, www.transparency.org/enis/report

17 European Commission Press Release on Modernising European public procurement to support growth and employment (20 December 2011), p.1

18 To maximise the potential positive impact of oversight bodies, the contract threshold amounts as laid down in Article 84.6 of the new proposed directive (€1 000 000 in the case of public supply contracts or public service contracts; €10 000 000 in the case of public works contracts) should, for instance, be lowered. This would contribute to the prevention of contracts being deliberately set below the proposed threshold figures to avoid safeguard measures. See <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52011PC0896:EN:NOT>

19 Proposed Article 84.3 (d) of the Proposal for a Directive on Public Procurement, COM(2011) 896 final, <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52011PC0896:EN:NOT>

20 TI contribution to the European Commission public consultation on issue 3, www.transparencyinternational.eu/focus_areas/eu-public-procurement/

21 For instance conflict of interest provisions should also cover preliminary market consultations and clearer definitions of "direct" and "indirect" interests could be made. Member states could also be recommended to develop general guidance on conflicts of interest and the procedures to follow.

22 This was also the recommendation of the European Parliament in the report by MEP Heide Rühle on the modernisation of public procurement (2011/2048(INI)) published on 5 October 2011, www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2011-0326&language=EN