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Thematic Paper on Corruption

Corruption crimes in relation to public procurements

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Introduction

Public procurement is vulnerable to corruption crime. According to Transparency International public procurement has been identified as one of the key problems across the Member States of the European Union (EU). In order to avoid corruption in public procurement, it is necessary for the EU to ensure that public procurement is sound, transparent, and accountable and open to the public.¹ Due to this reason, a strong legal framework and the correct, efficient and effective application of these common rules are required.

Public procurement in the EU is harmonised by a legislative framework, which is constantly reformed and adapted to the needs of the internal market. At the same time this sector of public expenditure is in many cases victim to corruption, organised crime and irregularities. It is impossible to provide statistics about the economic and financial damage caused by corruption in public procurement, because it is hard to detect. However, clear statistics and data would help to identify common indicators of corruption in public procurement in order to develop a better prevention system.

Research on corruption crime is difficult, thus only approximate estimates of the amount of procurement-related corruption can be given. For example, one estimate of the amount of worldwide corruption crime relating to public procurement is US\$ 1 trillion², another constitutes 15 per cent of GDP in OECD countries.³ Nevertheless, it is more than obvious that corruption is closely linked to the economic sovereign-debt Europe is suffering since 2008. As consequence of the lack of legal regulation, European citizens are losing trust in their national governments, institutions and in Europe. Thus the European Commission proposed in 2011 three new directives covering EU public procurement policies in an aim to close legal loopholes and to simplify existing public procurement procedures. The European Commission announced in its Annual Public Procurement Implementation Review (2012) that the Commission should take the lead in collecting, analysing and reporting information and best practice in accordance with the EU Member States in order to guarantee a better and effective implementation of EU laws.⁴ The right implementation of legal rules and good governance are crucial for a well-functioning procurement system.⁵

This paper aims to analyse corruption crimes in relation to public procurements. The first subject of examination will be a glance of public procurement in the EU and the difficulty to give a clear and precise definition. Furthermore, an overview on international and EU public procurement laws will be given, before proceeding in the second part to the transposition of the public procurement directives into national law and corruption crimes in EU Member States. Finally, the paper gives some recommendations resulting from the conclusion.

¹ Transparency International's report on Money, Politics, Power: Corruption risks in Europe, Regional Policy Paper #1, Increasing integrity and EU citizen's trust in public procurement (2012), p. 1.

² Myths and Realities of Governance and Corruption, Daniel Kaufmann, World Bank Institute, http://www.worldbank.org/wbi/governance/pdf/2-1_GCR_Kaufmann.pdf

³ The Size of Government Procurement Markets, OECD, 2002, Offprint from OECD Journal on Budgeting Vol. 1, No.4, March 2002.

⁴ European Commission, Commission Staff Working Document, Annual Public Procurement Implementation Review (2012), SWD (2012)342 final, Brussels 9 October 2012, p. 4.

⁵ Conference of the States Parties to the United Nations Conventions against Corruption: United Nations Convention against Corruption: implementing procurement-related aspects. Submitted by the United Nations Commission on International Trade Law, 15 January 2008, p. 3.

Public Procurement in the EU at a glance

Public procurement is a method through which public authorities and certain public utilities operators purchase goods (e.g. information technology equipment), services (e.g. treating drinking water) and works (e.g. construction of infrastructure). It is the process used by government institutions and public sector organisations to buy supplies, services and public works. In the EU, public authorities spend around 18% of GDP on supplies, works and services.⁶ That accounts for €2 trillion annually of EU Member States' GDP, and is linked to approximately 30 million jobs.⁷ In 2009, the value of calls for tender represented nearly €420 billion for all EU Member States.⁸ Public procurement accounts for a sustainable part of the EU economy: given the volume of purchases, public procurement can be used as a powerful lever for achieving a Single Market fostering smart, sustainable and inclusive growth. It plays a key role in the Europe 2020 strategy. The Commission stressed in its proposal for a new directive the fact that public procurement policy must ensure the most efficient use of public funds and that procurement markets must be kept open 'Union-wide'.⁹

Public Procurement and corruption: the difficulty to give a clear and precise definition

Corruption crime relating to public procurement appears in different forms. According to the UN Convention against Corruption, procurement related corruption can take the following forms:

- Corrupt practice, i.e. offering, giving, receiving, or soliciting, directly or indirectly, anything of value to influence the action of a public official in the selection process or in contract execution;
- Fraudulent practice, i.e. a misrepresentation or omission of facts in order to influence a selection process or the execution of a contract;
- Collusive practices, i.e. a scheme or arrangement between two or more respondents with or without the knowledge of the procuring entity, designed to establish prices at artificial, non-competitive levels;
- Coercive practices means harming or threatening to harm, directly or indirectly, persons or their property to influence their participation in a procurement process, or affect the execution of a contract.¹⁰

⁶ European Commission: Directive of the European Parliament and of the Council on public procurement, COM(2011) 896 final, Brussels, 20.12.2011, p. 2.

⁶ European Commission: Directive of the European Parliament and of the Council on public procurement, COM(2011) 896 final, Brussels, 20.12.2011, p. 2.

⁷ Needham, Christopher: EU international public procurement policy, Library Briefing, Library of the European Parliament, 08 May 2012, p. 2.

⁸ European Commission, Commissions Staff Working Paper, Executive Summary of the Impact Assessment, Accompanying in the document Proposal for a Directive for the European Parliament and of the Council on Public Procurement and Proposal for a Directive for the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal sectors, SEC(2011)1586 final, Brussels, 20 December 2011, p. 2.

¹⁰ Conference of the States Parties to the United Nations Conventions against Corruption: United Nations Convention against Corruption: implementing procurement-related aspects. Submitted by the United Nations Commission on International Trade Law, 15 January 2008, p. 4.

According to the OECD, conflict of interest in public-services and in post-public employment, abuse and manipulation of information, discrimination in the public procurement process and the waste and abuse of organisational resources are additional forms of violation of public procurement rules.¹¹ Transparency International stresses that corruption in public procurement includes bribery, facilitation payments, conflict of interest, bid-rigging and trading of influence as well and can appear throughout the five stages of public procurement: needs assessment, preparation, contract and supplier selection, contract execution and final accounting and payment.¹²

Current situation: international and EU public procurement laws

Existing international and EU legislation aim to tackle corruption crime in public procurement. On a global level, the **United Nations Convention against Corruption** is the most important legal document. 140 States have currently signed and ratified the UN Convention against Corruption including all EU Member States; except Germany and the Czech Republic, which never ratified the convention.¹³ But also the **OECD Convention in Combating Bribery and Foreign Public Officials in International Business Transaction** provides a required set of instruments and measures to boost the effectiveness of the fight against corruption crime in government procurement. In an answer to the global economic crisis, the G20 Member States adopted in 2010 an **anti-corruption action plan** with a wide-ranging nine point anti-corruption scheme to tackle money laundering, bribery, protection of whistle blowers and recovery of assets. Furthermore, public procurement is also the subject of the **Government Procurement Agreement**, an international treaty under the auspices of the World Trade Organisation. It contains framework rights and obligations, which obligates its Member States to enhance transparency in the public sector and to minimise the risks of corruption and discrimination against foreign goods and services. The Government Procurement Agreement currently counts 42 Member States (all 27 EU Member States are included).¹⁴

A wide-ranging existing EU legislation framework provides rules and laws in order to prevent corruption crime within the EU Member States. On the one hand, the **EU treaties** provide general principles, which are applicable to public procurement law: Article 34 TFEU guarantees the free movement of goods within the EU; Article 49 TFEU guarantees the right of establishment in another Member State; Article 56 TFEU guarantees the right to provide services in another Member State and finally Article 18 TFEU prohibits all forms of discrimination on grounds of nationality.

On the other hand, two EU directives are dedicated to public procurement issues: **Directive 2004/18/EC for the public sector** (public works, supply and service contracts) and **Directive 2004/17/EC for contracts awards by utilities** (procurement in the water, energy, transport and postal service sectors). These directives are designed to implement the above mentioned principles of the EU treaties and to guarantee the opening up of procurement to competition. Moreover the directives aim to guarantee free and non-discriminatory access of all European undertakings to public contracts.

¹¹ OECD, recommendation of the Council on enhancing integrity in public procurement, October, 2008.

¹² Transparency International, Money Politics, Power, Berlin, 2012, p. 5.

¹³ United Nations Office on Drugs and Crime, United Nations Convention against Corruption, UNAC Signature and Ratification Status at 19 October 2012, <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html>.

¹⁴ Needham, Christopher: EU international public procurement policy, Library Briefing, Library of the European Parliament, 08 May 2012, p. 1.

Despite the existing legal framework, corruption crime in relation to public procurement is not an exception within the EU. In order to revise the current system and to close loopholes in the legislation the European Commission devised three proposals in relation to public procurement in 2011.

Based on extensive external expertise, stakeholder consultation and detailed analysis, the Commission identified insufficient cost-efficiency, missed opportunities for society, and national rather than EU public procurement markets as the three key problems of the current legislation.¹⁵

To address these grey-zones covered by the current Directives and to make current laws better suited to dealing with the evolving political, economical and social context, the Commission's proposals are part of an overall programme aimed at an in-depth modernisation of public procurement. The reform of the EU public procurement legislation is one of the twelve priority areas set out in the **Single Market Act**.

To replace the current public procurement regime the Commission published the **Proposal for a Directive of the European Parliament and the Council on Public Procurement (COM(2011)896)** and the **Proposal for Directive of the European Parliament and the Council on procurement by entities operating in water, energy, transport and postal sectors (COM(2011)895)**.

Furthermore the Commission introduced a new **Directive on concession contracts (COM(2011)897)**, which were until now only partly regulated at EU level. Transparency is the primary objective of the current EU public procurement reforms, and it includes the enforcement of accountability and control mechanisms, the prevention of misconduct, guarantees for compliance and monitoring of procurement procedures.

To make the public procurement procedures simpler and more flexible, the main simplification measures proposed by the Commission are:

- Increased possible use of negotiation;
- Simplified procedures for regional and local contracting authorities;
- Reduction of documentation requirements;
- Ambitious measures in electronic procurement;
- Shortening of deadlines;
- Alleviation of public requirements.

The reform also includes improvement to the existing guarantees aimed at combating conflicts of interest and the appointment by the Member States of a single national authority responsible for monitoring. The coming into force of the new legislation was scheduled by the end of 2012, but according to Commission's officials this will not be reached before 2013. The three legislative proposals aim to reform the current public procurement system. However, why is a reform necessary? The following part overviews the transposition of the

¹⁵ European Commission, Commissions Staff Working Paper, Executive Summary of the Impact Assessment, Accompanying in the document Proposal for a Directive for the European Parliament and of the Council on Public Procurement and Proposal for a Directive for the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal sectors, SEC(2011)1586 final, Brussels, 20 December 2011, p. 2.

current public procurements directives into national law and points out the necessity to reform the current EU legal system.

Transposition of the public procurement directives into national law

Corruption crimes are so called "grey zones". They are in general, and especially in relation to public procurement, hard to detect. This makes not only the prosecution and the sanction of corruption crime difficult, but also the monitoring and the research on corruption crime. As already introduced, (1) there is a lack of statistics on corruption crime in relation to public procurement. Only estimations are possible, and these facts might merely be the tip of the iceberg. (2) Otherwise, it is debatable how to measure corruption crime. It is an invisible phenomenon. That is the reason, why it is difficult to cluster a "naming-and-shaming" of EU Member States, which are more vulnerable to corruption crime than others.

The European Commission is aware about this difficulty and has made a concrete step forward. First, in 2011, the European Anti-Fraud Office made an open call for a tender for a survey on the development of an EU Evaluation Mechanism in the area of Anti-Corruption with a particular focus on identifying and reducing the costs of corruption in Public Procurements involving EU Funds.

Second, the Commission engaged PricewaterhouseCoopers with collecting information and developing methodologies and tools for the implementation of the EU anti-corruption policies, as well as promoting the implementation of the Commission Anti-Fraud Strategy in Member States.

Third, the objective of the survey is to identify a common definition and indicators of corruption in public procurement, so called "red-flags", which signal increased costs of the projects, losses for the public budget etc. The survey was supposed to be complete by the end of this year, but it has been rescheduled and will not be released and published before the end of 2013. The European Parliament will carefully follow the results of this survey.

According to the EU treaties it is the role of the European Commission to monitor and to verify the correct implementation of EU law into national law. Member States are responsible for the correct implementation of EU legislation; nevertheless the European Commission is the guardian of the treaties. According to Article 258 TFEU and 260 TFEU the Commission executes its watchdog role by requesting infringement procedures in case a Member State fails to fulfil its obligations and may refer the case to the Court of Justice of the European Union.

Corruption crimes relating to public procurement have an impact on all countries, and are not only limited to developing countries. As mentioned above it is the role of the European Commission to monitor the implementation of EU legislation into national law. Nevertheless, due to the lack of a clear monitoring system even the Commission has no overreaching overview about the situation in all 27 Member States. However, this year the European Commission published for the first time an Annual Public Procurement Implementation Review, which monitors the application of the public procurement rules across Europe. Notwithstanding this, the Commission stressed the need to approach the results with caution due to the disparity of national definitions. Thus, the survey on the development of an EU Evaluation Mechanism in the area of anti-corruption with a particular focus on identifying and reducing the costs of corruption in public procurement involving EU Funds, which

intends to give a clear and common definition on this issue, will be a major step forward in the field of monitoring corruption crime in the EU. The European Commission announced in its Annual Public Procurement Implementation Review that it expects more consistent information to become available in the future once the review is established as a regular contribution to the EU public procurement policy.¹⁶

According to the Commission transparency in the public procurement markets has been continuously improving over recent years, especially in the electricity, oil, gas and postal sectors which have seen major developments with the introduction and elaboration of EU Directives requiring the opening of markets to competition. Less progress has been made in the field of infrastructure, airports and in the water sector.¹⁷ Nevertheless, the Commission defined only nine Member States, which transposed the Public Sector Directive (2004/18/EC) on time (Austria, Bulgaria, Cyprus, Denmark, Malta, the Netherlands, Romania, Slovakia and the United Kingdom). The utilities Directive (2004/17/EC) was transposed by eleven Member States within the deadline set (Austria, Bulgaria, Cyprus, Denmark, Latvia, Hungary, Malta, the Netherlands, Romania, Slovakia and the United Kingdom). The Commission identified 97 cases of wrong application of public procurement rules; illegal use of the negotiated procedure without publication of a notice, discrimination, direct awards and lack of transparency are just some examples.¹⁸ Furthermore, 18 cases are attributed to incorrect transposition of the public procurement laws.¹⁹ The Commission analysed the infringement cases and aimed to establish clear monitoring mechanisms, however the result is not very fruitful. The outcome presented in the Annual Public Procurement Implementation Review is very general and gives no clear information about corruption crime in relation to public procurement; neither has it named "good" nor "corrupt" Member States.

Corruption crimes in EU Member States

Corruption crimes affect the economy of the EU, and therefore the life of EU citizens; this is why the European Parliament in representing the EU citizens has a particular interest in strengthening the fight against corruption. The work of the Committee on Civil Liberties, Justice and Home Affairs (LIBE) is dedicated to this issue; furthermore the Committee on Organised Crime, Corruption and Money Laundering (CRIM) has a special mandate in analysing criminal activities and to draw up an action plan to combat corruption crime at EU level. The Commission is playing its role of guardian of the treaties, in focusing on the implementation of EU laws.

Other organisations are taking the role of naming-and-shaming institutions. NGOs such as Transparency International, furthermore the World Bank, the Group of States against Corruption of the Council of Europe (GRECO), the World Economic Forum and the United Nations are trying to name the states, which are facing problems of corruption. Transparency International identified corruption crimes especially in the Czech Republic, Italy, Romania, Bulgaria and Slovakia. In the Czech Republic the threshold set for construction is

¹⁶ European Commission, Commission Staff Working Document, Annual Public Procurement Implementation Review, (2012), SWD (2012)342 final, Brussels, 9 October 2012, p. 4.

¹⁷ European Commission, Commission Staff Working Document, Annual Public Procurement Implementation Review (2012), SWD (2012)342 final, Brussels, 9 October 2012, p. 13.

¹⁸ European Commission, Commission Staff Working Document, Annual Public Procurement Implementation Review (2012), SWD (2012)342 final, Brussels, 9 October 2012, p. 29.

¹⁹ European Commission, Commission Staff Working Document, Annual Public Procurement Implementation Review (2012), SWD (2012)342 final, Brussels, 9 October 2012, p. 30.

systematically abused; the key problem in Bulgaria is a lack of transparency - public procurement contracts are not published; according to legislative loopholes the rules can be circumvented in Romania. Furthermore a huge number of Member States have little or no legislation in order to protect whistle blowers (Hungary, the Netherlands, Romania, the United Kingdom, Denmark, and Sweden). Moreover, transparency is a serious problem in certain Member States. According to Transparency International public procurement contracts are not published in Italy, Germany or Bulgaria. Greece, Romania and Hungary have insufficient oversight bodies to monitor public procurement procedures. Nevertheless, Transparency International is not only naming the "bad" Member States, but also mentioning the cases of good practice. For instance, in Latvia public bidding was used in 37 per cent of cases, whereas only 0,7 per cent of the calls for tender were the result of closed bidding.²⁰

Recommendations resulting from the conclusion

The outcome of this thematic paper is that public procurement is highly vulnerable to corruption crime, fraud and waste of public resources. Thus, to minimise corruption crimes in public procurement, the following proposals should be taken into account:

- More transparency;
- Stronger legal framework;
- Reinforcement of oversight bodies;
- Open calls for tender.

Two major recommendations can be made: (1) It is essential to establish concrete indicators and a "red-flag" system in order to strengthen the monitoring system. (2) One major issue is the question of responsibilities and competences.

The three proposals for new EU legislation aim to reform the current public procurement regime in order to establish a more efficient and transparent system to achieve better economic growth. Nevertheless, it is beyond all questions whether new EU laws will end corruption. The introduction of e-procurement systems, increased transparency, stronger protection of whistle blowers, reinforced legal frameworks and especially better national and European monitoring systems might be a step in the right direction.

As organised crime threatens to make the step to infiltrating the legal economy and even politics, a combined approach concerning EU procurement policy and fighting organised crime and corruption is needed in view of a more efficient public governance and expenditure, an efficient internal market and crime prevention.

More focused intelligence is needed to detect and prevent procurement crime - such as the following examples: the «CAPACI Project»²¹ presented in the public CRIM meeting on 24 September 2012 by Prefect Bruno Frattasi of the Italian Ministry of Interior which is an experimental programme for the financial monitoring of some major public works with the objective of pursuing an improved protection of the market of public contracts by enhancing transparency and exploiting the informative potential of financial flows recorded on bank accounts of all businesses (general contractor, subcontractors, suppliers) involved in the implementation of public works, in order to acquire an increased knowledge of the use of

²⁰ Transparency International's report on Money, Politics, Power: Corruption risks in Europe, Regional Policy Paper #1, Increasing integrity and EU citizen's trust in public procurement (2012), pp 1-4 and Transparency International, Money, Politics, Power: Corruption risks in Europe, (2012), pp. 39-43.

²¹ Creation of automated procedures against criminal infiltration in public contracts.

public resources and to provide support to investigations aimed at preventing criminal infiltration in public contracts.

The Commission services should provide for a structure or cooperation schemes to ensure a holistic approach on this issue rather than dealing separately with internal market rules, EU fraud and justice and home affairs.