Corruption and probity in public procurement

Tünde Tátrai
Corvinus University of Budapest
Paris
Conflict of interest: The original proposal of the directive contained a specific provision on conflict of interest covering actual, potential or perceived conflict of interest situations affecting staff members of the contracting authority or of procurement service providers intervening in the procedure and members of the contracting authority’s management who may influence the outcome of an award procedure even if they are not formally involved in it.

Illicit conduct: The proposal made it clear that candidates or tenderers engaging in illicit behaviour – such as attempts to improperly influence the decision-making process or entering into agreements with other participants to manipulate the outcome of the procedure – have to be excluded from the procedure. Such illicit activities violate the basic principles of the European Union and can result in serious distortion of competition.

Unfair advantages: Market consultations are a useful instrument for contracting authorities to obtain information on the structure, capability and capacity of a market while at the same time informing market actors on public purchasers’ procurement projects and requirements. However, preliminary contacts with market participants must not result in unfair advantages and distortion of competition. The proposal contains therefore a specific provision on safeguards against undue preference to participants who have advised the contracting authority or been involved in the preparation of the procedure.”
## EU Directives

**Active and passive corruption**

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Passive corruption</strong></td>
<td>the deliberate action of an official, who, directly or through an intermediary, requests or receives advantages of any kind whatsoever, for himself or for a third party, or accepts a promise of such an advantage, to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties.</td>
<td>the deliberate action of a person who, in the course of his business activities, directly or through an intermediary, requests or receives an undue advantage of any kind whatsoever, or accepts the promise of such an advantage, for himself or for a third party, for him to perform or refrain from performing an act, in breach of his duties, directly or through an intermediary, requesting or receiving an undue advantage of any kind, or accepting the promise of such an advantage, for oneself or for a third party, while in any capacity directing or working for a private-sector entity, in order to perform or refrain from performing any act, in breach of one's duties.</td>
<td></td>
</tr>
<tr>
<td><strong>Active corruption</strong></td>
<td>the deliberate action of whosoever promises or gives, directly or through an intermediary, an advantage of any kind whatsoever to an official for himself or for a third party for him to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties</td>
<td>The deliberate action of whosoever promises, offers or gives, directly or through an intermediary, an undue advantage of any kind whatsoever to a person, for himself or for a third party, in the course of the business activities of that person in order that the person should perform or refrain from performing an act, in breach of his duties, promising, offering or giving, directly or through an intermediary, to a person who in any capacity directs or works for a private-sector entity an undue advantage of any kind, for that person or for a third party, in order that that person should perform or refrain from performing any act, in breach of that person's duties;</td>
<td></td>
</tr>
</tbody>
</table>
EU Dir.

- Transparency and publication;
  - Art. 48-55.
- General consideration in the awarding phase of the procedure;
  - Exclusion grants Art. 57.
- Communication between participants of the procedure;
  - Preliminary market consultation Art. 40.
- Statistical obligations and monitoring.
  - Article 84: Individual reports on procedures for the award of contracts
  - Article 85: National reporting and statistical information

Contract register
Self-cleaning

• Clarification of the relevant facts and circumstances: the company has to assist in order to clarify the facts and the responsibility of all persons involved in a comprehensive manner.

• Reparation of the damage caused: it is required to repair the financial damage caused.

• Personnel measures: the company has to ensure that all persons who have been strongly involved in the wrongdoing are dismissed.

• Structural and organizational measures: the company has to verify organisational preventive measures, reviews, guidelines and take care of the future.

• Arrowsmith et al. (2009)

• “the firm that might be excluded from public procurement procedure because of some kind of wrongdoing should be admitted to the self-cleaning process, on the basis that it has taken measures to ensure that the wrongdoing of the past will not occur again in the future”
• 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, in particular Article 45(2)(c), (d) and (g) of that directive, and the principles of equal treatment and proportionality, must be interpreted as not precluding national legislation which allows the contracting authority:
  • to take into consideration, in accordance with the conditions it has laid down, a criminal conviction of the director of a tendering company, even if the conviction is not yet final, for an offence concerning the professional conduct of that company where the director ceased to perform his duties in the year preceding the publication of the tender notice, and
  • to exclude that company from taking part in the tendering procedure at issue, on the ground that, by failing to declare the conviction which was not yet final, it had not fully and effectively dissociated itself from that director’s activities.
## Eu Related statistics

PWC-Ecorys


<table>
<thead>
<tr>
<th></th>
<th>Utility</th>
<th>Classic</th>
</tr>
</thead>
<tbody>
<tr>
<td>Share of total (EUR)</td>
<td>17%</td>
<td>83%</td>
</tr>
<tr>
<td>Mean contract (mill EUR)</td>
<td>5,9</td>
<td>2,8</td>
</tr>
<tr>
<td>Median contract (mill EUR)</td>
<td>1</td>
<td>0,35</td>
</tr>
<tr>
<td>Offers (mean)</td>
<td>4,4</td>
<td>5,5</td>
</tr>
<tr>
<td>Offers (median)</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>Time to offer</td>
<td>50</td>
<td>48</td>
</tr>
<tr>
<td>Time to award</td>
<td>100</td>
<td>81</td>
</tr>
</tbody>
</table>

1 in 5 tenders receive 1 bid
Costs of PP
Ecorys study
Evaluation mechanism – reducing the costs of corruption

OLAF project

• Measuring the costs of corruption
• “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”.

• 447 Billion EUR

- Road and rail
- Water and waste
- Urban/utility construction
- Training
- Research and development
Conclusions

• The fight against corruption is however not only carried out by formal public institutions, but increasingly so by informal networks, such as NGOs, press and citizens. Such a change in attitude has at least three major consequences.

• 1 decision-makers are under increasing pressure to ensure transparency and reinforce, update and coordinate the national and international anti-corruption agendas.

• 2 private and civil actors are increasingly detecting corruption and denouncing corrupt behaviour to the competent authorities. This trend is supported by the creation of whistle-blower systems and protection programmes, which represent a real incentive to share and denounce illegal behaviour, both in private companies and in public institutions. It is also supported by political will, free and properly resourced press, and active social media networks.

• 3 these societal trends and in particular the rise of social media networks provides new opportunities for formal investigators as well, who see an increase in the amount of leads and data to be pursued.
Data availability and corruption

• Digiwhist
• www.redflags.eu
Contract registry working subgroup EXEP

**Contract Registry:**
freely accessible, searchable record, at national level, that provides structured and unstructured information about public contracts.
Practice

• 20 replies, 17 affirm to have a national CR, and 3 MS state that they do not have a CR, but are willing to establish such a system.

• Most of the systems were set up between 2005 and 2008, the remaining CR are recent and were set up starting from 2013.

• All of the systems are managed by a public institution. The majority of the national CR are managed by the Ministry of Finance, The Procurement Agencies or the Ministry for Public Administration (PA).

• Almost all of the CR contain both structured and unstructured data.
Practice

• There seems to be a trend in publishing all types of contracts (goods, services, public works), and cover the different kinds of procedures (open, restricted, negotiated...).

• Very often the threshold for publishing a contract is the EU threshold (€135,000 or €209,000) but some MS have abolished the threshold or reduced it to a very low value, such as €1,000.

• It is common for the CR to publish both information on contract notices and contract awards. Several CR also publish information on contract modifications. Very few CR provide details on payments.

• Several enforcement mechanisms are in place, the most common is the obligation to publish the notice. It is very common to declare the contract null if the notice had not been published.
<table>
<thead>
<tr>
<th>Positive aspects</th>
<th>Negative aspects</th>
</tr>
</thead>
<tbody>
<tr>
<td>• information in real time</td>
<td>• increasing complexity of technological systems</td>
</tr>
<tr>
<td>• creation statistical information including performance assessment on public</td>
<td>• further costs in developing the application</td>
</tr>
<tr>
<td>procurement including KPI</td>
<td>• need for common sense regarding exceptions</td>
</tr>
<tr>
<td>• decisions based on reliable data</td>
<td>• wrong conclusions may crop up on the published information</td>
</tr>
<tr>
<td>• a State’s accountability tool</td>
<td>• potential fostering the creation of cartels</td>
</tr>
<tr>
<td>• to allow citizens to monitor</td>
<td>• breach of confidentiality</td>
</tr>
<tr>
<td>• conditions for monitoring the procurement processes</td>
<td>• influences the behaviour of market players</td>
</tr>
<tr>
<td>• improved auditing processes.</td>
<td></td>
</tr>
<tr>
<td>• benchmark for market players</td>
<td></td>
</tr>
</tbody>
</table>
Thank you for your attention!

Tunde.tatrai@uni-corvinus.hu