



# WARNING ON CRIME

Valeria Ferraris / Caterina Mazza / Laura Scomparin

PREVENTING AND COMBATTING  
CRIME IN PUBLIC PROCUREMENT

**Final Report**



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## Abbreviations

- ABW** Internal Security Agency - Poland
- AFM** Authority for Financial Markets - Netherlands
- AIVD** General Intelligence and Security Service - Netherlands
- ANAC** National Anti-Corruption Authority - Italy
- ANI** National Integrity Agency -Romania
- ANRMAP** Authority for Regulating and Monitoring Public Procurement - Romania
- AT** Austria
- BAK** Federal Anti-Corruption Bureau - Austria
- BBG** Federal Company Responsible for Public Procurement - Austria
- BDI** Federation of German Industries - Germany
- BG** Bulgaria
- BIOS** National Office for Promoting Ethics and Integrity in the Public Sector - Netherlands
- BKA** Federal Criminal Police Office - Germany
- BvD** Bureau Van Dijk
- C&AG** Comptroller and Auditor General - Ireland
- CAB** Criminal Assets Bureau - Ireland
- CBA** Central Anti-Corruption Bureau - Poland
- CBI** Central Bureau of Investigation - Poland
- CCASGO** Coordination Committee for Close Monitoring on Major Public Works - Italy
- CICO** Organised Crime Intelligence Unit - Spain
- CIPE** Inter-Ministerial Committee for Economic Planning - Italy
- CJEU** Court of Justice of the European Union
- CoE** Council of Europe
- CPACI** Commission for Prevention and Ascertainment of Conflict of Interest - Bulgaria
- CPC** Commission for the Prevention of Corruption - Slovenia

**CPCCOC** Centre for Preventing and Countering Corruption and Organised Crime - Bulgaria  
**CPI** Corruption Perceptions Index  
**CZ** Czech Republic  
**DCIAP** Central Department of Investigation and Penal Action - Portugal  
**DDA** Anti-Mafia District Directorate - Italy  
**DE** Germany  
**DGA** Anti-Corruption Directorate General - Romania  
**DIA** Anti-Mafia Investigation Directorate - Italy  
**DIICOT** Directorate for Investigating Organised Crime and Terrorism - Romania  
**DK** Denmark  
**DNA** Anti-Mafia National Directorate - Italy  
**DNA** National Anti-Corruption Directorate - Romania  
**EC** European Commission  
**EE** Estonia  
**ES** Spain  
**ESF** European Social Fund  
**EU** European Union  
**FI** Republic of Finland  
**FIOD** Fiscal Intelligence and Investigation Service - Netherlands  
**FR** France  
**GVH** Hungarian Competition Authority - Hungary  
**GRECO** Group of States against Corruption  
**HR** Croatia  
**HU** Hungary  
**IAID** Internal Audit and Investigative Department - Malta  
**IE** Ireland  
**INAIL** National Institution for Insurance against Accidents at Work  
**INPS** National Institute of Social Security  
**IT** Italy  
**JTF** Joint Task Force - Italy  
**KAPO** Estonian Internal Security Service - Estonia  
**KNAB** Bureau for Preventing and Combatting Corruption - Latvia  
**LIEC** Information and Expertise Centre - Netherlands  
**LT** Lithuania  
**LU** Luxembourg  
**LV** Latvia  
**MEAT** Most Economically Advantageous Tender  
**MEPS** Member of Parliament  
**MS** Member State  
**MT** Malta  
**NAKA or NCA** National Criminal Agency - Slovakia  
**NAV BF** Criminal Directorate - Hungary  
**NBI** National Bureau of Investigation - Finland  
**NCA** National Crime Agency - United Kingdom  
**NIK** Supreme Chamber of Control - Poland  
**NL** Netherlands  
**NO** National Ombudsman - Netherlands  
**NPPPU** The National Public Procurement Policy Unit - Ireland  
**OCAP** Central Observatory of Public Procurement - Italy  
**OCLCO** Central Office for the Fight against Organised Crime - France  
**ODCE** Office of the Director of Corporate Enforcement - Ireland  
**OECD** Organisation for Economic Co-operation and Development  
**PAC** Committee of Public Accounts - United Kingdom  
**PCTIIS** Public Contracting Transparency and Integrity Indicators  
**PJ** Judiciary Police - Portugal  
**PL** Poland

PPO Public Procurement Office  
PPS Public Prosecution Service - Netherlands  
PT Portugal  
RO Romania  
SANS State Agency for National Security - Bulgaria  
SAO State Audit Office - Latvia  
SCC Specialised Criminal Courts - Slovakia  
SCPC Central Service on Prevention of Corruption - France  
SCSPP The State Commission for the Supervision of Public Procurement - Croatia  
SDI Investigation System - Italy  
SDLCOF Directorate for the Fight against Organised Crime and Financial Crimes - France  
SE Sweden  
SFO Serious Fraud Office - United Kingdom  
SI Slovenia  
SIRASCO Information, Advice, and Strategic Analysis Service on Organised Crime - France  
SK Slovakia  
SPJ Service of the Judiciary Police - Luxembourg  
STT Special Investigation Service - Lithuania  
TED Tenders Electronic Daily  
TI Transparency International  
UCVAP Unit for Coordination and Verification of Public Procurement - Romania  
UK United Kingdom  
UNCC National Unit for Combatting Corruption - Portugal  
ÚOKFK Corruption and Financial Crime Detection Department - Czech Republic  
ÚOOZ Organised Crime Detection Department - Czech Republic  
USKOK Bureau for Combatting Corruption and Organised Crime - Croatia  
WKStA Special Prosecutor's Office for White-Collar Crime and Corruption - Austria

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## Executive summary

The 'Warning on Crime' (WOC) project ([www.warningoncrime.eu](http://www.warningoncrime.eu)) has been carried out with the financial support of the European Commission, Directorate-General for Migration and Home Affairs (DG HOME), in the framework of the Programme Prevention of and Fight against Crime (ISEC). The research is a comparative study on criminal infiltration and corruption in public procurement, involving all Member States (MSs) except Belgium, Cyprus, and Greece. The aim is to compare the vulnerability of public procurement across 25 MSs, as well as legislation and measures adopted to prevent and reduce it, with a view to clarifying what makes public procurement a ground for fruitful cooperation among white-collar criminals, unfaithful public officers, and members of criminal organisations. Specific attention is paid to major and cross-border public works. The report is divided into four chapters. Chapter 1 reflects on the available legal framework on countering illegality in public procurement; chapter 2 presents the assessment of vulnerability of public procurement; chapter 3 describes the preventive measures put in place in MSs; and chapter 4 analyses the control measures envisaged in the post-tender phase.

### The Legal framework

Countering illegality in public procurement through law provisions involves different legal rules and soft-law tools. The legislative framework focuses on four areas: criminal organisations, bribery, public procurement law, and integrity pacts.

All the countries studied criminalise criminal organisations in conformity with Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime, and in most of them the offence could represent a tool to punish groups – provided they meet the requirements established by law – that run criminal activities, including corruption, related with public procurement. In addition, the Italian legal system specifically envisages the offence of mafia-type association, which explicitly mentions public procurement. The Austrian legislation includes an offence of criminal association, which can also encompass corruption. However, case law is very limited across MSs.

The legal framework on bribery and trading in influence has been subjected to a process of evolution and approximation across MSs, and although loopholes and contradictions remain, the overall response results much more comprehensive than a few years ago.

New directives on public procurement focus the attention on prevention, transparency, and accountability as means to reduce illegality in public procurement. The research shows that the transposition of rules on the grounds for exclusion and subcontracting varies significantly across countries. This is partly connected with the idea that public procurement is a nationwide market which needs to face local threats in terms of illegality, and also take into account a more technical consideration on the degree of discretion the legislator intends to leave to the contracting authority.

Soft-law instruments are gaining more relevance in countering illegality in public procurement. Integrity pacts – a tool developed by Transparency International (TI), consisting of an agreement signed by the contracting authority, bidders, and an independent monitor, which commit themselves to refraining from any form of corruption and collusion – are about to be tested in 11 countries on 17 projects co-financed by the EU structural funds and the Cohesion Fund. Italy has a longstanding experience of legality pacts signed over the years, which commit the parties to adopting specific actions to implement legal rules countering corruption and organised crime and to enhancing integrity and transparency in the public procurement cycle. In the major public work studied, the Turin-Lyon high-speed railway line, a soft-law instrument (*reglement des contracts*) has been used to provide common rules for this public work, regardless of the nationality of the bidders involved. In particular, it extends Italian anti-mafia controls to all bidders involved in works execution. However, as for most soft-law instruments, it is debatable whether it could have a binding value before an administrative court in the case of complaints.

## The vulnerability of the public procurement lifecycle

The public procurement lifecycle is vulnerable to crime. Some business sectors turn out to be more exposed thereto: construction and healthcare are highly vulnerable. Transportation, energy, waste disposal, and IT and telecommunication are all medium/high-risk sectors, with differences across countries. For those countries that still have a mining industry, this sector is considered highly vulnerable. Public procurement related to the defence sector lacks transparency. Social services and education is emerging as a new sector where public procurement is becoming increasingly vulnerable. The vulnerability of several of the countries under investigation is closely intertwined with the exposure to corruption and illegality of local governments and state-owned enterprises. The whole procurement cycle (pre-tender, tender, and post-tender phases) is vulnerable. In the pre-tender phase, however, the planning stage – the one preceding the beginning of the procedure – is considered highly vulnerable in almost half of the countries, and features some problems concerning the adoption of countermeasures. All of this is due to manipulation of needs and of funding allocation, as well as to the risk of disclosure of information. The lack of clarity of tender specifications and the submission of a low bid price accompanied by extensive possibilities of expanding the contract in the post-award phase are often observed in most countries. The tender phase is highly regulated. The selection procedure, however, features a high/medium risk in 60% of the countries due to non-objective or inadequate weighting of selection criteria and manipulation of the evaluation board. The misuse, too, of judicial actions by bidders appears to be a concrete risk in most countries. Overall the post-tender phase turns out to be the most risky. The contracting authority seems to forget the contract after it is signed, and in most countries there is no authority to monitor contract execution. Low-quality material, inflated work volume and costs, and delays in works execution are all widespread problems, particularly – but not exclusively – in relation to public works.

## The prevention system in public procurement

Due to the various risks affecting the public procurement lifecycle, the prevention system is rather complex and constantly evolving. It includes prevention bodies and tools.

Beside the role played by the court of audits in monitoring the use of public funds, there is a wide range of bodies in MSs, focused on prevention of corruption and organised crime, and whose action concerns public procurement. Some MSs have specific bodies in place whose task is to counter crime and illegality in public procurement, albeit with differences across countries.

As far as prevention tools are concerned, the Netherlands and Italy boast specific measures aimed at monitoring companies and their owners and legal representatives. In Italy, these checks are carried out in the framework of the anti-mafia legislation.

Red flags are emerging from among the various tools used to monitor misconduct in public procurement. Red flags are warning signals on potential issues to be addressed, such as corruption, misconduct, and frauds.

Although these indicators are considered useful predictors for the risk of corruption, only eight countries use some types of red flags with national specificities.

Debarment measures are used in 14 MSs. White lists work as a pre-selection condition to choose companies that will take part in the bidding process, while black lists entail a procedure that excludes companies and individuals. In all countries but Romania, these tools are managed by public authorities. In spite of the general recognition of the usefulness of these tools as an incentive to comply with law provisions and as a reputational sanction, their use is not yet widespread due to practical difficulties in managing them (risk of manipulation and difficulties in defining clear criteria and rules for the appeal).

Databases are a crucial tool to share information for law enforcement purposes. With the exception of Italy and the Netherlands, the use of databases to monitor companies is not yet so common. Owing to the lack of common rules at EU level and to national public procurement markets with limited access for foreign bidders, the set-up of a common information-sharing mechanism on companies is not high on the agenda.

## Control measure in the post-award phase

Control measures that are common in all MSs in the post-tender phase can be divided into two groups:

- internal monitoring, usually performed by the contracting authority;
- external monitoring, carried out by independent and external institutions (such as courts of auditors, finance or tax agencies, labour inspectorates, etc.), which generally focus their attention on economic and financial aspects, transparency of accounts, compliance with labour laws, etc.



Besides, only Italy boast control systems focused on abusive practices that can be observed during public contract execution. In particular, Italy is the only MS with special law enforcement units responsible for carrying out monitoring and investigative activities in relation to major public works. All other MSs do not make any distinction – among control and/or monitoring bodies – based on the type of public works.

Two thirds of MSs feature law enforcement bodies specialised in detecting corruption in various economic sectors, including public procurement. Half of these countries also feature a specialised prosecutor's office in charge of prosecuting corruption.

Along with these bodies, one third of the countries have special law enforcement units in place, which have been specifically established to investigate serious organised crime and/or economic and financial crimes.

Slovenia, then, boasts a Special Prosecutor's Office responsible for investigating serious forms of crime in public procurement/concessions.

## Introduction

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The 2-year 'Warning on Crime' (WOC) project started in March 2014, and includes the following activities:

- three background analyses on: a) EU legislative framework on bribery, organised crime, and public procurement; b) *modus operandi* of organised crime infiltration in the legitimate economy and in particular in public procurement; and c) studies on the public discourse about organised crime infiltration in public works;
- a case study on the Turin-Lyon high-speed railway line major work. This activity was aimed at outlining the measures that have been implemented with a view to countering crime in public procurement;
- a comparative study on vulnerability of public procurement across 25 Member States (MSs), as well as on legislation and measures adopted to prevent and counter it.

The project idea emerged from the known presence of organised crime infiltration in public procurement in Italy and the current globalisation of crime, as well as from the construction of the Turin-Lyon high-speed railway line, which has been an object of interest for criminal groups. This idea led the research group of the Law Department of the University of Turin and Professor Fabio Armao as advisor to decide to focus on the vulnerability of public procurement to criminal infiltration and corruption. Correlations between corruption and organised crime, although having been recognised recently by some academics and EU institutions (Buscaglia and van Dijk, 2005; Gounev and Ruggiero, 2014; Europol, 2009) are still little explored due to the lack of awareness of relationships between them, as well as due to disciplinary segmentation of scholars and policy-makers, and difficulties in defining organised crime.

The project tried to further investigate the legal framework, the vulnerability of public procurement, and the existence of a prevention and control system, having in mind both phenomena.

This report presents the results of the comparative study involving all MSs, except Belgium, Cyprus, and Greece, with specific references to major public works.

The report is divided into four chapters. Chapter 1 reflects on the available legal framework on countering illegality in public procurement; chapter 2 presents the assessment of vulnerability of public procurement; chapter 3 describes the preventive system put in place in MSs; and chapter 4 analyses the control measures envisaged in the post-tender phase. The main findings summarise the main results, and suggest some recommendations. Annex 1 contains the questionnaire and Annex 2 the methodological remarks as well as the answers to questions 9, 12, 13, and 14. Annex 3 contains the executive summary of this report translated into 13 languages in order to promote dissemination in EU MSs and neighbouring countries.

The project website ([www.warningoncrime.eu](http://www.warningoncrime.eu)) contains this report as well as all background studies. It furthermore presents country profiles of the MSs analysed.

The website also includes a repository of publications and main case law across the countries.

## The legal framework

This chapter analyses the legal framework of MSs from a specific point of view. Public procurement is of crucial importance for the internal market of the EU and MSs. As reported by the EU Anti-Corruption Report (EC, 2014), one fifth of EU GDP is spent yearly by European contracting entities on goods, works, and services. A 2013 study (Wesink and De Wet, 2013) aimed at estimating the cost of corruption in public procurement in eight MSs (France, Italy, Hungary, Lithuania, Netherlands, Poland, Romania, and Spain) for five major sectors (i.e. road and rail, water and waste, urban/utility construction, training, and research and development) ranged from €1.4 billion up to €2.2 billion. These figures make crystal clear why **public procurement is an attractive sector for criminals** involved in different criminal practices. Public procurement is a field of valuable and successful cooperation among white-collar criminals, unfaithful public officers, and members of criminal organisations. For this reason, the choice was to widen the analysis, including the offence related to participation in a criminal organisation and those related to corruptive practices. This also means, on the other hand, that the analysis will be narrowed on how these offences can be applied to criminal activities in public procurement.

Moreover, a specific focus will be on the first evidence from the transposition by MSs of the articles of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (Text with EEA relevance) aimed at preventing criminal activities in this area.

Finally, soft-law instruments consisting of integrity pacts will be analysed.

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### 1. Criminal organisations and public procurement: any space for sanctioning the involvement of organised crime in public procurement?

The first two questions of the questionnaire deal with the provisions in national legislation on the offences relating to participation in a criminal organisation.

As previously outlined<sup>1</sup>, Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime maintained the dual approach of the so-called 'civil law' and 'common law' models, giving MSs the possibility to choose whether to punish participation in a criminal organisation and/or conspiracy to commit criminal offences. According to the researchers, **all MSs - with the exception of Denmark and Sweden - have transposed Article 2 of the framework decision** under scrutiny. This means that all MSs have in their legal system a self-standing provision that punishes organised crime. Taking into account the recent development in the legislation of the United Kingdom, which in July 2015 introduced the 'offence of participation in activities of an organised criminal group', the dual approach has today the sole effect of providing an 'EU umbrella' to those countries that have chosen to punish both behaviours (Bulgaria, Croatia, Ireland, and Malta in addition to the United Kingdom).

As pointed out by a recent report on the transposition of Framework Decision 2008/841/JHA (Di Nicola et al., 2015), the level of compliance with EU legislation is very high: all key elements have been transposed and only few discrepancies remain.

Looking at this offence from the point of view of safeguarding public procurement, the more interesting aspect is related to the **predicate offences**.

The aforementioned framework decision was not certainly drafted focusing on the possible connections between criminal organisations and crime in public procurement. EU policy-makers had traditional organised crime in mind, i.e. criminal organisations involved in serious crimes related to the illegal economy (such as drug and human trafficking, extortion, money laundering, etc.), to be punished with rather harsh penalties. Therefore, the definition of criminal organisation provided for

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<sup>1</sup> See Ferraris, *EU legislative framework on organised crime, corruption and public procurement*, Working Paper, p. 2, available at: [http://www.warningoncrime.eu/wp-content/uploads/2015/12/ws1\\_EU\\_legislative\\_framework.pdf](http://www.warningoncrime.eu/wp-content/uploads/2015/12/ws1_EU_legislative_framework.pdf).

in the framework decision refers to a group established ‘with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty’ (Article 1, paragraph 1).

However, several countries have adopted an approach going beyond the scope of the framework decision. Nine MSs (Czech Republic, Germany<sup>2</sup>, Italy, Latvia, Netherlands<sup>3</sup>, Poland, Portugal, Romania, and Spain) do consider any offences without relevant restrictions; six MSs (Austria, Bulgaria, Croatia, Estonia, Lithuania, and Slovenia) have reduced the punishment threshold to three years; four MSs (Finland, Ireland, Luxembourg, and Malta) have adopted the EU threshold, and three MSs (France, Hungary, and Slovakia) have increased punishment to five years; finally, in a new legal provision, the United Kingdom has set out ‘imprisonment for a term of 7 years or more’.

Moreover, beside the general limit, three countries (Austria, Czech Republic, and Finland) mention, in the same article, some offences that imply the criminalisation of participation in a criminal organisation, regardless of the penalty. These offences do not include bribery.

For those countries that criminalise also conspiracy to commit criminal offences, it is worth recalling that no predicate offences are required. There are thus no restrictions in place.

Figure 1 . **Predicate offence limit**

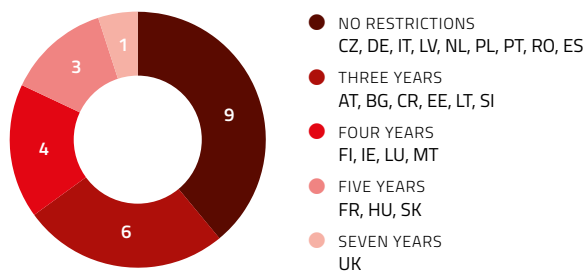


Table 1 . **Predicate offence limit – wording and reference**

Country	Threshold	Text of legal rules in English	Reference
<b>Austria</b>	Three years	Commitment of one or more crimes [...], other considerable acts of violence against life and limb, not only petty damages to property, thefts, or frauds or misdemeanours under sections 165, 177(b), 223 to 239, 304 or 307, or under sections 104 or 105 of the Aliens Act. According to Article 17 of the Criminal Code, ‘crimes are intentional acts that are punishable by lifelong or with more than three years’ imprisonment’.	Articles 278 and 17 of the Criminal Code
<b>Bulgaria</b>	Three years	The commission of criminal offences punishable with more than three years’ imprisonment	Article 93 of the Criminal Code
<b>Croatia</b>	Three years	Whoever conspires with another to commit a criminal offence for which a punishment of imprisonment exceeding three years may be imposed.	Article 328 of the Criminal Code
<b>Czech Republic</b>	No restrictions	Commission of intentional criminal activities	Article 129 of the Criminal Code
<b>Denmark</b>	--	--	--

2 Germany limits the application ‘if the commission of offences is of merely minor significance for the objectives or activities or to the extent that the objectives [or] activities of the organisation relate to offences under sections 84 to 87’ (Art. 129, par. 3 of the Criminal Code).

3 The Netherlands limits the application of the approach to serious crimes.

Country	Threshold	Text of legal rules in English	Reference
Estonia	Three years	Commission of second-degree criminal offences for which the maximum term of imprisonment of at least three years is prescribed.	Article 255, paragraph 1 of the Criminal Code
Finland	Four years	Committing one or more offences for which the maximum statutory punishment is imprisonment for at least four years.	Chapter 17, Article 1(a), paragraph 1 of the Criminal Code
France	Five years	One or more felonies, or one or more misdemeanours punished with at least five years' imprisonment	Article 450(1), paragraph 1 of the Criminal Code
Germany	No restrictions	Commission of offences	Article 129, paragraph 1 of the Criminal Code
Hungary	Five years		Article 459 of the Criminal Code
Ireland	Four years	Commission or facilitation of serious offence. Serious offence is defined by section 70 as 'an offence for which a person may be punished by imprisonment for a term of four years or more'.	Articles 71(a) and 70 of the Criminal Justice Act of 2006
Italy	No restrictions	Committing offences	Article 416, paragraph 1 of the Criminal Code
Latvia	No restrictions		Article 21 of the Criminal Code
Lithuania	Three years		Article 25 of the Criminal Code
Luxembourg	Four years	Committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty.	Article 324(bis) of the Criminal Code
Malta	Four years	Criminal offences liable to punishment of imprisonment for a term of four years or more	Article 83(a), paragraph 1 of the Criminal Code
Netherlands	No restrictions	Commission of serious offences	Article 140, paragraph 1 of the Criminal Code
Poland	No restrictions	Commission of offences	Article 258, paragraph 1 of the Criminal Code
Portugal	No restrictions	Commission of one or more crimes	Article 299, paragraph 1 of the Criminal Code
Romania	No restrictions	Committing one or more crimes	Article 367, paragraph 6 of the Criminal Code
Slovakia	Five years		Article 11 of the Criminal Code
Slovenia	Three years	Committing criminal offences for which a punishment of imprisonment of more than three years is envisaged.	Article 294, paragraph 1 of the Criminal Code
Spain	No restrictions	Commission of felonies	Article 570(bis), paragraph 1 of the Criminal Code
Sweden	--	--	--
United Kingdom	Seven years	An offence in England and Wales punishable on conviction on indictment with imprisonment for a term of 7 years or more	Article 45, paragraph 4 of the Serious Crime Act of 2015

However, in spite of the offences that have been introduced with a view to transposing the framework decision, the legal system of several countries envisages **other offences related to organised crime** in general, which could be applied to crimes in public procurement.

Italy is the only country whose legal system envisages an offence that specifically mentions public procurement. It is Article 416(bis) of the Criminal Code, which defines the mafia-type association as that whose members 'take advantage of the intimidating power of the association and of the resulting conditions of submission and silence in order to commit criminal offences, to manage or in any way control, either directly or indirectly, economic activities, concessions, authorisations, public procurements and services, or to obtain unlawful profits or advantages for themselves or for any other persons [...]'.<sup>4</sup>

The Austrian legislation, on the other hand, includes an offence of criminal association which can also encompass corruption. Article 278(a) of the Criminal Code punishes participation in an association consisting of a 'considerable number of persons, intended to last a longer period of time and similar to an enterprise [...] if the association [...] (2) aims at profits on a high scale or at considerable influence on politics or economy, and (3) undertakes to corrupt, or intimidate, others, or to avoid prosecution measures'.<sup>5</sup> However, no cases have been brought to court for corruption related with public procurement.

Broader offences can be found also in France and Luxembourg.

Article 132(71) of the French Criminal Code envisages the concept of organised gang (*bande organisée*) as 'any group formed or association established with a view to preparing one or more criminal offences, marked by one or more material actions'.<sup>6</sup> The commission of a crime within an organised gang is an aggravating circumstance for a number of crimes, but none of them is related with public procurement.

The Luxembourgian legislation criminalises gangs (*association de malfaiteurs*). Article 322<sup>7</sup> punishes the formation of any association with the goal of attacking persons or property.

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4 Art. 416(bis) of the Italian Criminal code states: 'L'associazione è di tipo mafioso quando coloro che ne fanno parte si avvalgono della forza di intimidazione del vincolo associativo e della condizione di assoggettamento e di omertà che ne deriva per commettere delitti, per acquisire in modo diretto o indiretto la gestione o comunque il controllo di attività economiche, di concessioni, di autorizzazioni, appalti e servizi pubblici o per realizzare profitti o vantaggi ingiusti per sé o per altri, ovvero al fine di impedire od ostacolare il libero esercizio del voto o di procurare voti a sé o ad altri in occasione di consultazioni elettorali.'

5 Art. 278(a) of the Austrian Criminal Code states: '(1) Wer eine kriminelle Vereinigung gründet oder sich an einer solchen als Mitglied beteiligt, ist mit Freiheitsstrafe bis zu drei Jahren zu bestrafen. (2) Eine kriminelle Vereinigung ist ein auf längere Zeit angelegter Zusammenschluss von mehr als zwei Personen, der darauf ausgerichtet ist, dass von einem oder mehreren Mitgliedern der Vereinigung ein oder mehrere Verbrechen, andere erhebliche Gewalttaten gegen Leib und Leben, nicht nur geringfügige Sachbeschädigungen, Diebstähle oder Betrügereien, Vergehen nach den §§ 104a, 165, 177b, 233 bis 239, 241a bis 241c, 241e, 241f, 304 oder 307, in § 278d Abs. 1 genannte andere Vergehen oder Vergehen nach den §§ 114 Abs. 1 oder 116 des Fremdenpolizeigesetzes ausgeführt werden. (3) Als Mitglied beteiligt sich an einer kriminellen Vereinigung, wer im Rahmen ihrer kriminellen Ausrichtung eine strafbare Handlung begeht oder sich an ihren Aktivitäten durch die Bereitstellung von Informationen oder Vermögenswerten oder auf andere Weise in dem Wissen beteiligt, dass er dadurch die Vereinigung oder deren strafbare Handlungen fördert. (4) Hat die Vereinigung zu keiner strafbaren Handlung der geplanten Art geführt, so ist kein Mitglied zu bestrafen, wenn sich die Vereinigung freiwillig auflöst oder sich sonst aus ihrem Verhalten ergibt, dass sie ihr Vorhaben freiwillig aufgegeben hat. Ferner ist wegen krimineller Vereinigung nicht zu bestrafen, wer freiwillig von der Vereinigung zurücktritt, bevor eine Tat der geplanten Art ausgeführt oder versucht worden ist; wer an der Vereinigung führend teilgenommen hat, jedoch nur dann, wenn er freiwillig durch Mitteilung an die Behörde (§ 151 Abs. 3) oder auf andere Art bewirkt, dass die aus der Vereinigung entstandene Gefahr beseitigt wird.'

6 Art. 132(17) of the French Criminal Code states: 'Toute association formée dans le but d'attenter aux personnes ou aux propriétés est un crime ou un délit, qui existe par le seul fait de l'organisation de la bande.'

7 Art. 322 of the Luxembourgian Criminal Code states: 'Toute association formée dans le but d'attenter aux personnes ou aux propriétés est un crime ou un délit, qui existe par le seul fait de l'organisation de la bande.'

The sanction changes according to the seriousness of the offence - felony or misdemeanours (*crimes* or *delits*) - and the role covered within the gang (Articles 323<sup>8</sup> and 324<sup>9</sup>).

Finally, Article 570(ter)<sup>10</sup> of the Spanish Criminal Code punishes the participation in criminal groups (*grupos criminales*). These groups aim to commit offences and the penalty varies according to the seriousness of felonies. Moreover, as to misdemeanours (*delitos leves*), participation in criminal groups is a crime only in the case of reiterated commission of misdemeanours.

In conclusion, in those countries (Czech Republic, Germany, Italy, Latvia, Netherlands, Poland, Portugal, Romania, and Spain) where the offence of participation in a criminal organisation is not limited to certain predicate offences<sup>11</sup>, **the offence could potentially apply to situations in which a group that meets the requirements established by law runs criminal activities related with public procurement.** The same can be observed in relation to those countries (United Kingdom, Bulgaria, Croatia, Ireland, and Malta) that opt for the criminalisation of conspiracy to commit crimes. However, this would require a shift in the approach of investigators and public prosecutors towards the application of this type of offence in cases other than traditional criminal organisations involved in illegal activities. For all other countries, the offence of participation in a criminal organisation could provide a tool to punish illegal behaviours related with public procurement only if the provisions that sanction such behaviours set out a punishment above the threshold. As a matter of fact, considering the leniency generally featured by white-collar crimes/crimes of the powerful (Ruggiero, 2015), this is unlikely to occur. In France and Luxembourg, the offences of *bande organisée* and *association de malfaiteurs* could cover groups that commit crimes related with public procurement.

## 2. Bribery and trading in influence in relation to public procurement

Corruption is a complex phenomenon. The degree of complexity is so significant that scholars, international organisations, and NGOs involved in fighting corruption do not share the same **definition of corruption.**

It is worth noticing that the United Nations Convention against Corruption, the most universal tool, does not define corruption, mainly because the parties could not agree on a common definition.

8 Art. 323 of the Luxembourgian Criminal Code states: 'Si l'association a eu pour but la perpétration de crimes emportant la réclusion supérieure à dix ans, les provocateurs de cette association, les chefs de cette bande et ceux qui y auront exercé un commandement quelconque, seront punis de la réclusion de cinq à dix ans. Ils seront punis d'un emprisonnement de deux à cinq ans, si l'association a été formée pour commettre d'autres crimes, et d'un emprisonnement de six mois à trois ans, si l'association a été formée pour commettre des délit.'

9 Art. 324 of the Luxembourgian Criminal Code states: 'Tous autres individus faisant partie de l'association, et ceux qui auront sciemment et volontairement fourni à la bande ou à ses divisions des armes, munitions, instruments de crimes, logements, retraite ou lieu de réunion, seront punis: Dans le premier cas prévu par l'article précédent, d'un emprisonnement de six mois à cinq ans; Dans le second cas, d'un emprisonnement de deux mois à trois ans; Et dans le troisième, d'un emprisonnement d'un mois à deux ans.'

10 Art. 570(ter) of the Spanish Criminal Code states: '1. Quienes constituyeren, financiaren o integraren un grupo criminal serán castigados: a) Si la finalidad del grupo es cometer delitos de los mencionados en el apartado 3 del artículo anterior, con la pena de dos a cuatro años de prisión si se trata de uno o más delitos graves y con la de uno a tres años de prisión si se trata de delitos menos graves.

b) Con la pena de seis meses a dos años de prisión si la finalidad del grupo es cometer cualquier otro delito grave.

c) Con la pena de tres meses a un año de prisión cuando se trate de cometer uno o varios delitos menos graves no incluidos en el apartado a) o de la perpetración reiterada de delitos leves. A los efectos de este Código se entiende por grupo criminal la unión de más de dos personas que, sin reunir alguna o algunas de las características de la organización criminal definida en el artículo anterior, tenga por finalidad o por objeto la perpetración concertada de delitos. 2. Las penas previstas en el número anterior se impondrán en su mitad superior cuando el grupo:

a) esté formado por un elevado número de personas.

b) disponga de armas o instrumentos peligrosos.

c) disponga de medios tecnológicos avanzados de comunicación o transporte que por sus características resulten especialmente aptos para facilitar la ejecución de los delitos o la impunidad de los culpables.

Si concurrieran dos o más de dichas circunstancias se impondrán las penas superiores en grado.'

11 See notes Nos 2 and 3 on Germany and the Netherlands.

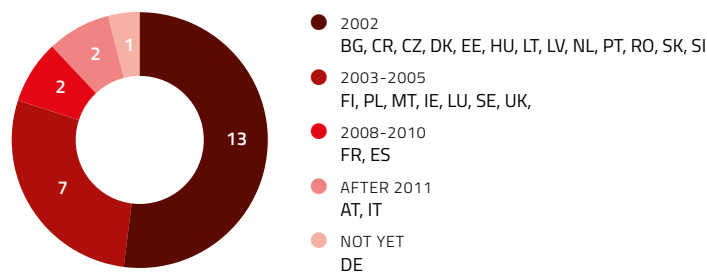
In its report on the Corruption Perceptions Index (CPI), Transparency International (TI) – definitely the most influential NGO working on corruption – defines corruption as ‘the abuse of public office for private gain’. However, TI also promotes and circulates another broader definition – ‘the abuse of entrusted power for private gain’<sup>12</sup> – decoupling corruption from the presence of a public official. As Holmes (2015, p.3) clearly pointed out, ‘even TI’s first – narrow – definition is subject to diverse interpretation’. Does the abuse of public office refer to economic or also to social improprieties? Is a gift an economic impropriety? What about the meaning of ‘public’ in decades featuring increasing privatisation of public services? Should geography matter when defining corruption? (See Holmes, 2015, p. 1–17 for a short and useful overview of these issues.) Scholars have not come out with any final solution (see Mikkelsen, 2013 and the references cited there).

A common view today is that corruption represents a problem because it distorts markets and competition, hampers the growth of legitimate business, and overall undermines the rule of law. Moreover, any benefits it may bring do not last for a long time<sup>13</sup>. Bearing in mind the main topic of this study, **we will focus our attention on some specific offences** that criminalise corruption related with behaviours of public officials, **emphasising any specific aspects connected with public procurement**. We will not address issues that are only indirectly connected with public procurement, such as funding of political parties or the accountability and integrity of elected officials. There is no doubt that legal rules on integrity of elected officials have a role in corruptive practices in the public administration. However, we would risk enlarging too much the focus, thus making the comparison too broad for the scope of our analysis.

For this reason, the focus will be on the offences of active and passive bribery of public officials and trading in influence. The choice of these offences is due to the fact that they refer to situations that often occur in the case of illegality in public procurement. The Council of Europe (CoE) Criminal Law Convention on Corruption is the chosen term of reference. As previously explained<sup>14</sup>, the CoE is currently carrying out significant efforts in tackling corruption among its MSs. These efforts are based mainly on the monitoring mechanism named ‘Group of States against Corruption’ (GRECO), which is stimulating changes in legal rules, as well as reforms in general. Several States either have enacted major legal reforms also in order to comply with the convention and GRECO recommendations (this is the case of Estonia in 2006, Lithuania in 2011, and Italy, Romania, and Austria in 2012) or have been adjusting their legal framework over the years through specific amendments (e.g. Croatia), guidelines (this is what happened in several States in relation to the acceptability of gifts), or interpretative acts (such as those of the Ministry of Justice of Poland on trading in influence).

Through its evaluation round, GRECO moreover pays attention to the actual enforcement of amended provisions, and this gives a further contribution to the approximation of law provisions in practice. All the countries under scrutiny, except Germany<sup>15</sup>, have signed and ratified the CoE convention. More than 50%, mostly among the newest MSs, did it in 2002 when the convention entered into force.

Figure 2 . **Entry into force of the CoE Criminal Law Convention on Corruption**



12 See [http://www.transparency.org/whoweare/organisation/faqs\\_on\\_corruption](http://www.transparency.org/whoweare/organisation/faqs_on_corruption).

13 Contra: for the functionalist theory, see Leys (1965); for the argument that the cost of countering corruption should not exceed the costs of corruption itself, see Klitgaard (1991); for the argument that citizens support a corrupted government if ‘things get done’ more than a clean but ineffective government, see Manzetti and Wilson (2007).

14 See Ferraris, *EU legislative framework on organised crime, corruption and public procurement*, Working Paper, p. 10, available at: [http://www.warningoncrime.eu/wp-content/uploads/2015/12/ws1\\_EU\\_legislative\\_framework.pdf](http://www.warningoncrime.eu/wp-content/uploads/2015/12/ws1_EU_legislative_framework.pdf).

15 Germany signed the convention in January 1999, but never ratified it.



All the countries have also implemented Article 3 of the Convention on the fight against corruption involving officials of the European communities or officials of Member States of the European Union. Taking into account the relevance of EU funds in major public procurement, this is a promising starting point.

Today, **all the countries criminalise active and passive bribery** and, in general terms, all of them have increased penalties. Nevertheless some differences remain.

Two of the Nordic countries (Denmark and Sweden), Ireland, the Czech Republic, and Slovakia do not differentiate by law between passive and active bribery committed to perform an act of duty (or a lawful act) and an act in breach of duty (or an unlawful act).

The decision on whether and how to increase the penalty is left entirely to the court through a judgment. The legal systems of all other countries envisage two separate offences, with a significant higher penalty in the case of breach of duty.

Romania does not punish as bribery the acts that fall outside the responsibility of a public official. It must therefore be proved that the act falls within the competence of the official. Romania's concern is to maintain the difference between a bribe-taker and a fraudster; it is however the only country featuring the formula 'act [falling] within a public official's responsibility' or 'act contrary to such responsibility'.

For the focus of this report, it is worth mentioning that the Latvian legislation punishes active bribery of an employee of a local or state institution who is not a state official, only if the performed act is unlawful. There is no offence in the case of an omission or of a lawful act. In addition, the sanction is much lower compared to the same offence committed by a state official.

Bulgaria does not criminalise active bribery when the advantage is intended for a third party, whereas it does for passive bribery.

In all countries, the **definition of bribe** includes any advantages, either material (money, goods) or non-material (such as supports for promotion, sexual favours, etc.).

Gifts are not mentioned in the offences of some of the countries (e.g. Czech Republic, Germany, Italy, Portugal, Romania, and Slovakia), however a valuable gift would be considered inappropriate.

In the Czech Republic, this rule is better specified for state employees: according to the Act on State Service, accepting gifts or other benefits worth more than CZK 300 (about €11) is prohibited.

In general, only customary or low-value gifts are considered acceptable and excluded from the scope of the offences. Some countries do have more specific rules. For instance, in Slovenia the Integrity and Prevention of Corruption Act<sup>16</sup> details which gifts can be accepted and their maximum value. It also introduces the obligation for each administration to prepare a list of gifts. The Commission for the Prevention of Corruption can scrutinise the gifts received by public officials.

In 2010, the Finnish Ministry of Finance enacted the guidelines on hospitality, benefits, and gifts that cannot be considered as acceptable. Some years before, in 2001, it had adopted the guidelines on travel expenses when covered by a third party.

In Spain, there is no national provision but some Autonomous Communities have set limitations, in general €50, on the gifts officials can accept. If the value is higher, a body is responsible for determining whether the officer can keep the gift or should donate it to public institutions, NGOs, food banks, etc.

Furthermore, several countries (e.g. Slovenia, some municipalities in Italy) have specific rules for members of parliament (MEPs) or elected officials, such as the obligation to donate any gifts received to the administration that financially support their stay in special premises (this applies, for instance, to any gift in the case of official visits by foreign delegations).

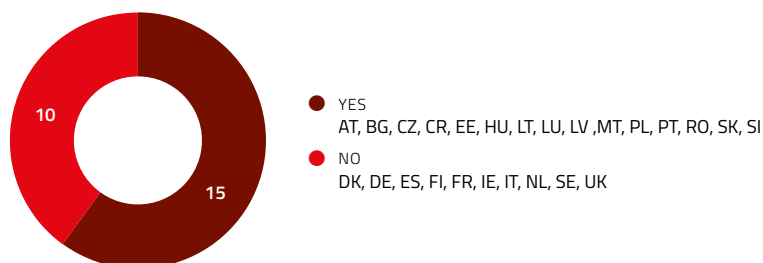
Eleven (Austria, Bulgaria, Czech Republic, Finland, Germany, Ireland, Lithuania, Latvia, Poland, Portugal, and Romania) out of 25 countries distinguish between **petty and grand corruption**.

Obviously, everywhere judges are supposed to assess the amount of money involved when deciding the sanction. The aforementioned countries, however, have this distinction specified in a law provision.

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16 The text is available in English at: <https://www.kpk-rs.si/upload/datoteke/ZintPK-ENG.pdf>.

Figure 3 . **Countries that distinguish between petty and grand corruption by law**



Petty and grand corruption are not differentiated according to the same criteria across all EU MSs. In four countries, the law states that in the case of ‘considerable/major benefit’, ‘considerable loss’ (Finland and Germany) or ‘on a large scale basis’ (Estonia) or in the case of ‘affair of greater importance’ (Bulgaria, only for passive bribery), the sanction will be increased.

The other countries have specific ceilings that modify the sanction. It is worth underlining that the ceilings are defined with respect to monthly wages. This means that the higher the wage, the higher the ceiling for a more severe sanction. Among these countries, Romania has a specialised prosecution office. The National Anti-Corruption Directorate (DNA) has exclusive investigative and prosecuting powers in the case of a bribe above €10.000 or damage greater than €200.000. The Czech Republic explicitly distinguishes between petty and grand corruption in the Criminal Code, on the basis not only of the amount but also of the perpetrator. Corruption is always considered grand if a public office holder is involved.

A specific case is that of Ireland where, according to the level of seriousness of corruption in office, an offence is classified either as a summary offence or as an indictable offence, with consequences in terms of sanctions and procedure.

Table 2 . **Ceilings for petty and grand corruption**

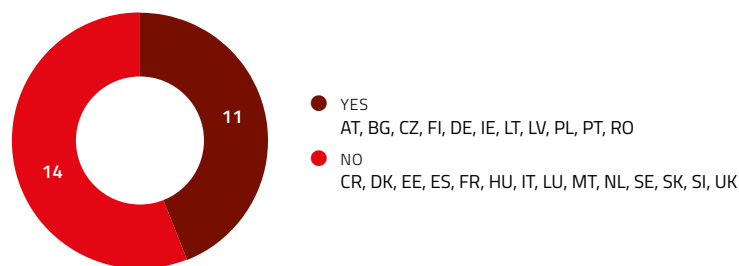
<b>Austria</b>	Three ceilings: more than €50,000; more than €3,000; less than €3,000
<b>Czech Republic</b>	Two ceilings in monetary terms: substantial benefit defined by law of at least CZK 500,000 (about €20,000); major benefit defined by law of at least CZK 5,000,000 (about €200,000) only for passive bribery One ceiling based on the subject involved: the corruption is grand if a public office holder is involved.
<b>Latvia</b>	On a large scale, at least 50 times the minimum monthly wage
<b>Lithuania</b>	Above 250 times the minimum subsistence level
<b>Poland</b>	Benefit of considerable value, more than 200 times the lowest monthly salary
<b>Romania</b>	Amount greater than €10,000 or damages for more than €200,000

Despite there are differences, the overview shows the **existence of a common ground in criminalising bribery, together with a trend in increasing penalties**. However, this better approximation of criminal legislation has no immediate effects on common actions against corruption. Many other offences cover misbehaviour in public procurement procedures and, as underlined by several researchers, public prosecutors still favour easier-to-prove offences. In addition, **not all the countries include**, in their legal system, the **offence of trading in influence**. Fifteen countries (Austria<sup>17</sup>, Bulgaria, Czech Republic, Croatia, Estonia, Hungary, Lithuania, Latvia, Malta, Poland, Portugal, Romania, Slovakia, and Slovenia) do have the offence in their legal framework, but in many of them it has been introduced recently and it is thus too early to assess its effectiveness.

17 Austria does criminalise the ‘feeding process’ of corruption, i.e. granting of lawful favours and privileges as a preparation for corruption (Art. 306 of the Criminal Code).

All other countries formulate at least one reservation on the CoE articles that introduce the offence of trading in influence. However, the picture is quite complex. Some countries (Denmark, Finland, Ireland<sup>18</sup>, and Sweden) do not have in their national legislation any offence that criminalises trading in influence. Some countries (France, Germany, Italy, Netherlands, Spain, and United Kingdom) have many offences that address, not always clearly and even with overlaps, some aspects of trading in influence.

Figure 4 . **Countries that have implemented trading in influence according to CoE standards**



From the perspective of illegality in public procurement, trading in influence is interesting because it addresses those who claim to be able to influence public officials. Considering that collusive practices carried out by ‘white-collar professionals above all suspicion’ or by middlemen are one of the methods used by criminal organisations to infiltrate public procurement<sup>19</sup>, trading in influence seems to describe a situation that can lead to further crimes.

This kind of influence has to be improper, it means that it is outside a legitimate lobbying activity. Certainly, the increasing relevance and power of lobbying, in particular in some countries, make it more difficult to criminalise these behaviours and to distinguish them from lawful conducts. This could lead to an increase in legal uncertainty.

### 3. New EU legislation on public procurement: the directions taken by MSs

#### 3.1 New directives

Public procurement in the EU is harmonised through a common legislative framework, which has been recently renovated with three new directives (see Caranta and Dragos, 2014 and Williams, 2014 for a brief overview of the changes). These are:

- Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (Text with EEA relevance)<sup>20</sup>;
- Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (Text with EEA relevance)<sup>21</sup>;
- Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (Text with EEA relevance)<sup>22</sup>; concession contracts were marginally touched by the previous EU regulation.

Beyond the traditional goals of guaranteeing fair competition, transparency, and non-discrimination, these directives aim at achieving simplification, efficiency, and flexibilisation of the regime. In addition, they envisage several rules designed to prevent, or at least reduce, the risks of illegality and corruption in public procurement.

18 The draft Criminal Justice Corruption Bill published in June 2012 includes offences outlawing trading in influence. However, the legislation has not been adopted yet.

19 See Ferraris, V. and Mazza, C., *The infiltration of criminal groups into public works: strategies and methods*, Working Paper, p. 14, available at: [http://www.warningoncrime.eu/wp-content/uploads/2015/12/ws\\_1\\_the\\_infiltration\\_of\\_criminal.pdf](http://www.warningoncrime.eu/wp-content/uploads/2015/12/ws_1_the_infiltration_of_criminal.pdf).

20 Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32014L0024>.

21 Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32014L0025>.

22 Available at: [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2014.094.01.0001.01.ENG](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.094.01.0001.01.ENG).

The issue of illegality in public procurement was firstly addressed in 2011 when the European Commission issued 'The Green Paper on the modernisation of EU public procurement policy. Towards a more efficient European Procurement Market'.<sup>23</sup> This document dedicates one section titled 'Ensuring sound procedures' to the issue of conflict of interest, favouritism, and corruption. The guiding principle is that more effective mechanisms to prevent unsound business practices can not only ensure fair competition and efficiency of public spending, but also strengthen the fight against economic crime. The European Commission underlines that in the directives of 2004 this area was mainly left to the responsibility of MSs, whose level of safeguards varies greatly. The green paper identifies the integrity and fairness of the process as desirable objectives. These objectives could be reached through the use of measures that increase the level of transparency and accountability, such as a higher level of scrutiny of public officials' personal and business situation, a more transparent procedure that enables to scrutinise decisions, clearer rules on reporting documents, and protection of whistle blowers.

Finally, the exclusion of bidders guilty of professional misconduct and serious crimes – already envisaged in 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 – requires some clarification on the scope, interpretation, transposition, and practical application.

However, since more procedural guarantees against unsound business practices at EU level entail additional administrative burdens for procurers, they have to be weighted against a possible negative impact on simplification and fair competition.

For this reason, the green paper suggests the possibility to adopt a self-cleaning procedure that allows economic operators to tackle a situation that may lead to their exclusion, or to allow bidders in an advantageous situation to participate if they disclose the privileged information they possess.

The new directive on public procurement (2014/24/EU) takes notice of the suggestions contained in the green paper, proposing: some measures directly aimed at preventing illegality in the procedure; some others aimed at governing the procedure in order to enhance transparency and reduce opportunities for illegal behaviours; and finally some rules on the governance, i.e. monitoring of the application of the directive in MSs. Most of these measures address the role of contracting entities; others are targeted at bidders (see Di Cristina, 2014).

In comparison with the previous directives, greater attention is certainly paid to the integrity of the procedure and the need to counter corruptive or collusive conduct, through measures addressing the above-mentioned aspects. The measures are summarised in the following table.

Table 3 . **Measures aimed at ensuring sound procedures**

Purpose	Measures
Preventing illegality in the procedure	Conflict of interest; grounds for exclusion
Enhancing transparency and reducing opportunities for illegal behaviours	Publication of information; aggregation of demand; subcontracting
Strengthening governance	Monitoring reports

Grounds for exclusion and conflict of interest are the core measures aimed at preventing illegality in the procedure.

The directive maintains the distinction between **mandatory and discretionary ground for exclusion**, clearly stating the possibility for MSs to implement all the grounds for exclusion as mandatory. Exclusion rules can be applied at any time during a public procurement procedure.

23 COM (2011) 15 final, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0015:FIN:EN:PDF>.

The grounds for mandatory exclusion (Article 57, paragraphs 1–3) are:

- convictions for several offences according to a final judgment.<sup>24</sup> The list of offences is longer than in 2004, and the references to how these offences are described in EU documents will require some MSs to redefine them to apply the directive;
- violation of obligations to pay taxes and social contributions. In comparison to 2004, in the case of a judicial or administrative decision having final and binding effect, the exclusion shall be mandatory. This new mandatory ground for exclusion points to the relevance given to the payment of taxes and social contributions in terms of reliability of bidders and how this behaviour is a red flag to identify areas prone to illegality. However, if the economic operator fulfils its obligations, it cannot be excluded. In the case of minor violations, MSs can derogate from the mandatory rule of exclusion.

In addition to the mandatory ones, new discretionary grounds for exclusion have been added or modified. They can be classified into two categories: those based on doubts regarding the bidders' reliability, capability, or suitability; and those aimed at avoiding distortion of competition.

The former includes: 1) violation of environmental, social, or labour law; 2) bankruptcy, insolvency, or winding-up proceedings; 3) grave professional misconduct; 4) deficiencies in the performance of a public contract; 5) misrepresentation in the course of proceedings.

The latter includes: 1) non-remediable conflicts of interest; 2) plausible indication of agreements among competitors; 3) prior involvement of economic operators in the preparation of the procurement procedure, that results in a non-remediable distortion of competition; 4) the exercise of undue influence on the decision-making process in order to obtain confidential information or to provide misleading information. This ground for exclusion will often result in crimes (bribes, extortion, and blackmail), but this is not necessary to exclude bidders.

In order to avoid excessive rigidity, the new directive allows economic operators to avoid exclusion by taking responsibility, and to rehabilitate themselves by proving that: a) they have paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct; b) they have clarified the facts and circumstances in a comprehensive manner by actively collaborating with investigating authorities; and c) they have taken concrete technical, organisational, and personnel-related measures suitable to prevent further criminal offences or misconduct. MSs have a wide margin of discretion in the implementation of such self-cleaning measures although this certainly represents a step further towards a more harmonised practice (for more details on grounds for exclusion and self-cleaning measures, see Priess, 2014). However, an effective implementation of such measures certainly requires an efficient public administration.

According to the new directive, '**conflict of interest**' includes any situation in which officers involved in the procedure<sup>25</sup> 'have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure' (Article 24, paragraph 2). It is the responsibility of MSs to enact appropriate measures to effectively prevent, identify, and remedy conflicts of interest arising in the procurement procedure.

24 These offences are: 1) participation in a criminal organisation, as defined in Art. 2 of Council Framework Decision 2008/841/JHA; 2) corruption, as defined in Art. 3 of the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union and Art. 2(1) of Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, as well as corruption as defined in the national law of the contracting authority or the economic operator; 3) fraud within the scope of Art. 1 of the Convention on the protection of the European Communities' financial interests; 4) terrorist offences or offences linked to terrorist activities, as defined in Arts. 1 and 3, respectively, of Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, or inciting, aiding and abetting, or attempting to commit an offence, as referred to in Art. 4 of that framework decision; 5) money laundering or terrorist financing, as defined in Art. 1 of Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (Text with EEA relevance); 6) child labour and other forms of trafficking in human beings as defined in Art. 2 of Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

25 According to Art. 24(2), they include 'staff members of the contracting authority or of a procurement service provider acting on behalf of the contracting authority who are involved in the conduct of the procurement procedure or may influence the outcome of that procedure.'

Among the measures aimed at enhancing transparency, **broad dissemination of information** on tender procedures is the basic one. The directive clearly establishes the obligation to publish the prior information notice and then the award contract notice. Moreover, as a general rule, e-procurement should become mandatory: this means that all procurement documents should be made available electronically and free of charge from the date of publication, and that electronic means of communication should become the standard ones. In the intent of the EU legislator, these measures should enhance cross-border participation in procurement.<sup>26</sup>

The **aggregation of demand** is another core measure in the new directive. This includes several measures<sup>27</sup> whose main aim is to obtain more efficiency in terms of a higher level of professional procurement management, economies of scale, and lower prices and transaction costs. Although there are some concerns in terms of excessive concentration of purchasing power and preservation of transparency and competition, these measures could reduce the possibility for criminal groups and corruptors to exercise their influence on contracting authorities.

As regards **subcontracting**, the directive introduces stricter rules. The rationale is that, in order to enhance transparency, contracting authorities should know who is working within building sites or who is actually providing the required services. The directive leaves open the possibility for MSs to introduce rules on subcontracting directly in the law or leave to the discretionary power of the contracting authority the choice of which measure is to be implemented case by case. However, the measures mentioned in the directive cover all the relevant issues on subcontracting, and they represent a step forward compared to previous regulations. MSs or the contracting authority:

- may require the tenderer to state 'any share of the contract it may intend to subcontract to third parties and any proposed subcontractors' (Article 71, paragraph 2);
- shall require the main contractor to inform the contracting authority of the name, contact details, and legal representatives of its subcontractors, and shall notify any changes in this information (Article 71, paragraph 5);
- may provide direct payment from the contracting authority to subcontractors (Article 71, paragraph 3).

Finally, in order to monitor the application of public procurement rules, every three years (the first time by 18 April 2017), MSs shall submit to the European Commission a **monitoring report** on 'the prevention, detection, and adequate reporting of cases of procurement fraud, corruption, conflict of interest and other serious irregularities' (Article 83). The results of the monitoring shall be made available to the public through appropriate means of information. Should problems arise, procedures need to be established aimed at reporting such problems to proper bodies – 'national auditing authorities, courts or tribunals or other appropriate authorities or structures, such as the ombudsman, national parliaments or committees' (Article 83).

In conclusion, the measures established in the new directive on public procurement certainly represent something new. However, the success of this preventive system highly depends on the capacity of the public administration to lead the way. The public administration has to accept the challenge of assuming responsibilities, making decisions, and taking full ownership of the process. In other words, in some MSs a successful public procurement system requires a relevant reform of the public administration in terms of efficiency and responsibility.

### 3.2 The directions taken by MSs

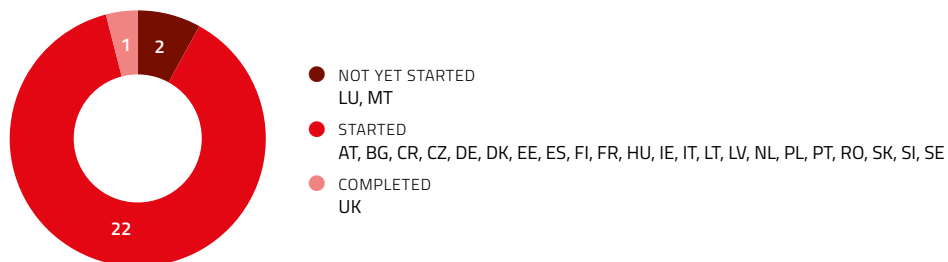
In August 2015, most of the countries were in the process of transposition, whereas Luxembourg and Malta had not yet started it and the United Kingdom had already completed it. It is worth mentioning that in the transposition of EU directives, the United Kingdom either applies the copy-out

<sup>26</sup> According to a recent study on the extent of cross-border contracting (Ackermann, Beke, and Sanz, 2015): 'Between 2012 and 2014, EU Member States awarded 113,749 contracts, related to EU funds, amounting to 116.17 billion EUR. Approximately 90% of these contracts (by value) were awarded to contract operators within the respective Member State. There were 2,882 cross-border contracts amounting to approximately 9.14 billion EUR. Italy and Spain accounted for 35% of all cross-border contracts by value. Poland, Romania, and Slovakia were the top cross-border buyers (5.5 billion EUR).'

<sup>27</sup> Such as central purchasing bodies, aggregated procurement, framework contracts. For more details, see Lichere and Richetto, 2014, Racca, 2014, and Risvig Hamer, 2014.

method, i.e. it adopts the same wording as that of the directive to be transposed, or makes direct reference to relevant provisions.

Figure 5 . **State of play of the transposition of Directive 2014/24/EU**



As outlined above, most of the countries are still in the process of adoption of the directive under scrutiny.<sup>28</sup>

Several countries have carried out a consultation before starting the transposition process. Some of them (Austria, Bulgaria, France, Ireland<sup>29</sup>, Romania, and United Kingdom<sup>30</sup>) opted for an open consultation with the most relevant stakeholders (public administration, economic operators, and NGOs), while some others for the establishment of a working group (Lithuania and Portugal). Finland carried out a public consultation and then set up a working group. In addition, after the publication in May 2015 of the working group's memorandum, everyone was given a chance to comment and provide written suggestions.

Among the countries that have started the procedure, some have not prepared a draft bill to be submitted to parliament. Ireland carried out a public consultation, which closed on 12 December 2014, and the government is analysing the results and drafting a bill. Due to the Danish general election of June 2015, the draft presented to Parliament in March 2015 expired, and a new one is currently being prepared. A similar situation is experienced in Spain where the draft bill submitted in April 2015 is currently in abeyance due to the general election held in December 2015. In Croatia, the Ministry of Economy is drafting a proposal. In August 2015, the Portuguese Ministry of Economy was analysing the results of the working group; the legislative election was then held in October and the new ministry took office in December. In Finland, an initial draft in the form of a memorandum was published in May 2015. The government's proposal, initially expected in the autumn, has been postponed to 2016. A specific case is that of Romania: the draft law, submitted for public consultation in July 2015 for only ten days, received strong criticism by NGOs and business associations. Consequently, the government was forced to extend the consultation period until September. Later on, in autumn 2015, the government resigned.

It is not easy to compare draft bills when all the countries are changing a previous comprehensive regulation whose strengths and weaknesses are country-specific. Therefore, we will outline some commonalities by grouping the countries moving in the same direction, although there are differences within each group.

As to the **grounds for exclusion**, Italy did not introduce in the 'Enabling Law' – the law through which the Parliament delegates to the government legislative power in specific fields – any rules to change the current norm, which sets out a longer list of compulsory grounds for exclusion, without room for any discretionary power of the contracting authority. However, due to the prohibition of gold-plating,

28 All the information provided below is updated as at August 2015.

29 The questionnaire used in the consultation is available at: [http://www.procurement.ie/sites/default/files/news/transposition\\_of\\_the\\_new\\_public\\_procurement\\_directives\\_-\\_consultation\\_document.pdf](http://www.procurement.ie/sites/default/files/news/transposition_of_the_new_public_procurement_directives_-_consultation_document.pdf).

30 The government's response to the consultation is available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/400242/Government\\_Response\\_to\\_the\\_Consultation\\_on\\_UK\\_Transposition\\_of\\_new\\_EU\\_Procurement\\_Directives\\_Public\\_Contracts\\_Regulations\\_2015.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/400242/Government_Response_to_the_Consultation_on_UK_Transposition_of_new_EU_Procurement_Directives_Public_Contracts_Regulations_2015.pdf).

introduced as a general principle into the Italian legislation by Article 32 of Law No. 234 dated 24 December 2012, the grounds for exclusion should be reviewed.

All other countries maintain the division between mandatory and discretionary grounds for exclusion as in the directive. However, some countries clearly state the possibility of waiving the mandatory exclusions (except those concerning convictions) when the exclusion could be disproportionate (Germany and Netherlands) or for compelling reasons of public interest (Germany and Slovenia).

Several countries (Finland, Netherlands, and Slovakia) seem not to intend transposing some of the non-mandatory grounds for exclusion, or using – to the largest extent possible – the flexibility given by the directive. On the other hand, the Estonian draft bill makes mandatory the grounds for exclusion related with payments of taxes and contributions, and Poland has already transposed as compulsory the ground for exclusion in the case of grave professional misconduct.

As to **subcontracting**, we can split the countries into two main groups.

In the first group, we can classify the countries (Czech Republic, France, Italy, Lithuania, Poland, Slovenia, and Austria) that are opting for the introduction of compulsory or at least stricter provisions compared to the directive. This regards the implementation of the rules on the identification of subcontractors, the proof of subcontractors' qualifications, and direct payments from the contracting authority to subcontractors. With some differences, all these countries identify as a compelling need the protection of the public administration from a lack of transparency in subcontracting, as well as the protection of SMEs from 'a weak payment culture'.

In the second group (Estonia, Finland, Hungary, Netherlands, Slovakia, Sweden, and United Kingdom) are the countries that quote the wording of the directive, empowering the contracting authority to choose to what extent the provisions on subcontracting is to be implemented.

In addition, the rules concerning direct payments to subcontractors appear not to be considered in several of these countries.

'**Conflict of interest**' is the more challenging area to comment on. In general, all the countries (except Germany<sup>31</sup> and Italy<sup>32</sup>) leave contracting authorities free to take effective measures to 'prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators', and make reference at least to the 'financial, economic or other personal interests' of those involved in the procedure on the side of the contracting authority.

In addition, several countries (Czech Republic, Finland, France, Germany, Netherlands, Poland, Slovenia, and United Kingdom) intend to transposing the non-mandatory ground for exclusion in the case of a conflict of interest, leaving the contracting authority free to decide whether to exclude the bidder when the conflict of interest cannot be effectively remedied by other less intrusive measures. Among them, there are also some of the countries that do not transpose most of the non-mandatory grounds for exclusion. This suggests once again the importance of the conflict of interest.

As a final remark, it is worth noticing that several MSs do have other laws on conflict of interest, which can overlap with a specific regulation on public procurement. Therefore, conflicts of interest require a specific and broader analysis, which is not in the purpose of this project.

To conclude, when the research was conducted, all the countries were expected to meet the deadline. Today, less than three months before its expiration, this goal seems more difficult to attain.

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31 In Germany, the rules on conflict of interest are set out in the Procurement Regulation and are not left to the discretion of the contracting authority.

32 Italy has not introduced in the Enabling Law the rules at hand according to the wording of the directive. It has instead introduced a specific rule on the necessity to assess any conflicts of interest of the people who are on the list of possible members of evaluation boards.



## 4. Integrity pacts

The Integrity Pact is a tool developed by TI with a view to supporting governments, businesses, and the civil society in fighting against corruption in the field of public procurement. It consists of an **agreement signed by the contracting authority, and the bidders**. In addition, a monitor agreement is signed by the contracting authority and the monitor. The basic commitment is to refrain from any form of corruption and to disclose any information and data requested by the monitor. In addition, bidders agree to refrain from colluding with other competitors (Transparency International, 2013). What makes this tool different from other similar initiatives is the role played by the monitor: this acts as an observer, a sort of ‘watchdog’, working with a view to helping public authorities guarantee transparency and accountability of bidding processes and works execution, as well as to supporting bidders in fulfilling their tasks as set out in the integrity pact. The guiding principle is the restoration of confidence and trust in public decision-making and in the relationships between the public authority and bidders. It has to be a win-win situation: bidders gain from a fair competition and promote themselves; contracting authorities reduce the costs generated by malpractices and corruption.

Among the 25 responding countries, seven have already implemented or are implementing integrity pacts, in the form described above.

Table 4 . Integrity pacts: when and what

Where	Monitoring organisation	Some examples of implemented integrity pacts
Austria	TI Austria	Renovation of the parliament building
Bulgaria	TI Bulgaria	Trakia highway
Germany	TI Germany	Berlin airport <sup>1</sup> ; Bremen hospital; Berlin Building Society ‘Howoge’, Klinikum Region Hannover GmbH
Hungary	TI Hungary	Drinking water supply infrastructure of the town of Ózd; refurbishment of a nursery in the Municipality of Budapest
Italy	TI Italy	Public procurements of the Municipality of Milan
Latvia	TI Latvia (Delna)	Latvian National Library
UK	TI UK	Defence integrity pacts

1 A brief summary of the Berlin airport case study is available at: [http://integrity.transparency.bg/media/cms\\_page\\_media/2/Germany\\_1\\_1.pdf](http://integrity.transparency.bg/media/cms_page_media/2/Germany_1_1.pdf).

In addition to these countries, Transparency International Spain started in March 2015 a project named ‘Implementing and evaluating corporate integrity policies in the Spanish private sector: A holistic approach’<sup>33</sup>, which aims at promoting integrity in public contracting through integrity pacts. The pilot project will implement integrity pacts for some tenders of the Spanish central public procurement system.

This project is financed by the Siemens Integrity Initiative<sup>34</sup>, which supports organisations and projects fighting corruption and fraud.

In the previous funding round of the Siemens Integrity Initiative, TI Bulgaria’s project ‘Promoting integrity through advocacy: Counteracting corruption in public contracting’<sup>35</sup> promoted actions in the country, aimed at enhancing – through policy change – integrity standards and transparency in

33 Further information on the project is available at: <http://www.siemens.com/about/sustainability/en/core-topics/collective-action/integrity-initiative/status-second-funding-round/transparency-international-espana-ti-espana.htm>.

34 Further information on the Siemens Integrity Initiative is available at: <http://www.siemens.com/about/sustainability/en/core-topics/collective-action/integrity-initiative/index.php>.

35 Further information on the project is available at: <http://www.siemens.com/about/sustainability/en/core-topics/collective-action/integrity-initiative/status-first-funding-round/transparency-international-bulgaria.htm>.

the awarding of contracts with significant public interest. In particular, it promoted the concept of integrity pact and its pilot implementation, the change of the Bulgarian legal framework, and the creation of a Public Contracting Transparency and Integrity Indicators (PCTIIs) tool.

In the framework of the same initiative, other projects in the Czech Republic, Slovakia, Poland, and Italy have been implemented with the aim of improving public procurement practices, increasing awareness on corruption and fraud in the business environment, promoting ethical business conduct or model compliance system, etc.

In coming years, several integrity pacts will be implemented within the initiative of the Directorate-General Regional and Urban Policy (DG REGIO)<sup>36</sup>, aimed at piloting integrity pacts in projects co-funded by structural funds and the Cohesion Fund, named 'Integrity Pacts – **Civil control mechanism for safeguarding EU funds**'. In the framework of the first phase of this pilot project, an international conference was organised by Transparency International Secretariat on 5 May 2015 in Brussels and another one by transparency International Croatia in June in Zagreb. In October 2015, 11 countries covering 17 projects run by 15 civil society organisations were selected to implement the second phase of the pilot project by testing integrity pacts in several EU-funded projects. The implementation of integrity pacts started in January 2016, and will run until December 2019.

Other countries have not implemented integrity pacts, but developed **other soft-law policy instruments** aimed at enhancing transparency and accountability in public procurement processes.

For example, a circular on the promotion of SMEs in public procurement has been recently introduced in Ireland. More specifically, Circular No. 10/2014 'Initiatives to assist SMEs in public procurement' is a non-mandatory government guidance document designed and adopted to ensure that SMEs are not prevented from tendering for contracts they could successfully enter into. One of the most significant features of this soft-law policy is the requirement for contracting authorities to advertise all contracts for supplies and services with an estimated value of €25,000 and upwards on the website [www.etenders.gov.ie](http://www.etenders.gov.ie). The eTenders website is a central facility for all public sector contracting authorities to advertise procurement opportunities and contract notices. Suppliers can register for free on the site to view procurement opportunities of the Irish public sector on a daily basis. Contracting authorities are further encouraged to implement fully transparent procedures by posting all contract notices on the eTenders site. Similarly, Finland boasts a national contract notice system<sup>37</sup>, and the applicable legislation sets out that all contracting authorities shall publish in this national centralised notice system all contract notices on procurements above national thresholds.<sup>38</sup>

In Italy many legality pacts (*protocolli* or *patti di legalità*) have been signed over the years. They are written public agreements between the local representatives of the Ministry of the Interior (*Prefettura*) and the contracting authority whereby the parties commit themselves to adopting specific actions to implement legal rules countering corruption and organised crime, and to enhancing integrity and transparency in the entire procurement cycle. Between 2005 and 2013, more than 100 legality pacts were signed mainly in the domain of public procurement and public works, which appear to be among the areas most vulnerable to corruption and mafia-type infiltration.<sup>39</sup>

Legality pacts can differ somewhat in scope and content, but they generally encompass measures including the collection and sharing of information on companies, so as to allow for the implementation of preventive mechanisms of control, the inclusion of additional exclusion clauses into public contracts, the implementation of specific monitoring mechanisms, and the promotion of internal codes of conduct.

According to their scope, legality pacts might be signed by subjects such as ministers, national agencies (National Institution for Insurance against Accidents at Work – Inail, National Institute of Social Security – INPS, etc.), regional and local authorities, business associations (General

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36 [http://ec.europa.eu/regional\\_policy/en/policy/how/improving-investment/integrity-pacts/](http://ec.europa.eu/regional_policy/en/policy/how/improving-investment/integrity-pacts/)

37 Available at: [www.hankintailmoitukset.fi](http://www.hankintailmoitukset.fi).

38 €30,000 in the case of supplies and services, and €150,000 in the case of works.

39 All signed agreements are listed at: <http://culturaprofessionale.interno.gov.it/exssai/contenuti/166056.htm>.

Confederation of Italian Industry - Confindustria, Italian General Confederation of Companies, Professional Activities, and Self-employment – Confcommercio, etc.). Soft-law instruments have also been used to introduce specific rules in the bidding procedure of the Turin–Lyon high-speed railway line.<sup>40</sup>

#### 4.1 Benefits and challenges of integrity pacts

Due to their limited application and absence of rigorous monitoring evaluation and learning (MEL) in the past, it is almost impossible to provide an extensive and conclusive evaluation of integrity pacts. However, some benefits are clear. Integrity pacts increase the access to information on public contracts and, in this way, they make it easier to raise the attention of the media and to mobilise a better-informed public opinion. Moreover, they help to reduce litigation on procurement processes and should provide support in detecting corruption or business malpractices. Besides, several cases have shown that integrity pacts decrease the cost of public contracts, avoiding waste of public money.

As an indirect effect, confidence and trust in public decision-making increase, reputation of bidders improves, and more bidders should be encouraged to participate. As a matter of fact, a clean business environment tends to attract more bidders.

Nevertheless, there are several challenges. The integrity pact is essentially a collaborative tool, built on trust and support and aimed at strengthening prevention. Its strengths should be in its nature of gentlemen's agreement, of soft-law instrument, which also obliges participants to adopt or abstain from certain behaviours. Therefore, for integrity pacts to be successful, they need real political will along with commitments by the public administration, in order to face difficulties and introduce actual changes among public administration staff.

This also requires a monitor with advanced technical expertise not only in legal or technical aspects, but also in creating a constructive environment among bidders and between bidders and government authorities, and also in maintaining its own independence. Moreover, the risk that integrity pacts are used by governments or bidders as 'window dressing', should always be considered. Consequently, the role of the monitor appears to be crucial. Even in a case that appeared promising as the one of the Berlin airport, Transparency International Germany has recently unilaterally withdrawn from the agreement. This decision is related with two relevant corruption cases, which have involved the management of the airport (Imtech case<sup>41</sup> and Großmann case<sup>42</sup>). Transparency International Germany reports a lack of transparency considering that information on these two cases has not been provided, as well as the fact that some proposals advanced by TI have not been accepted.<sup>43</sup>

The overall challenge of this tool lies in its potential to represent a **vehicle for a systemic change**. In all the cases where they have been implemented successfully, integrity pacts have been an example of good administration of public funding. However, in most of the cases, they represent a successful story against a background featuring the constant increase in corruption and business malpractices. Only if integrity pacts penetrate daily business practices in several countries, they could represent a major result.

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40 Mazza and Thevand, *The High-speed railway and the prevention of economic crimes, corruption and organised crime*, Working Paper, available at: [http://www.warningoncrime.eu/wp-content/uploads/2015/12/w2\\_high\\_speed\\_railway.pdf](http://www.warningoncrime.eu/wp-content/uploads/2015/12/w2_high_speed_railway.pdf).

41 'Backhanders amounting to several hundred thousand euros are said to have been paid to one of the airport's divisional directors. In return for the bribes, the director is believed to have arranged the unmonitored payment of Imtech invoices totalling €65 million (US\$72 million)', available at: <https://www.wsws.org/en/articles/2015/08/17/berl-a17.html>.

42 The former technical director of the Berlin international airport was convicted for corruption and fraud in October 2014 (he was accused of demanding bribes from a prospective contractor).

43 Some details are available at: <http://www.tagesspiegel.de/berlin/ausstieg-von-transparency-international-beim-berlin-flughafen-flucht-oder-spektakulaerer-warnruf-gegen-bestechnung/11620748.html>.

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## Integrity pacts and legislation

In most of the countries, the use of integrity pacts is not envisaged in legislation, but their application is the result of the long-lasting promotion of this tool by TI.

One interesting exception is Italy.

Pursuant to the new law on corruption (Article 1, paragraph 17 of Law No. 190 dated 6 November 2012), the contracting authority can include in public contract documents the rule according to which bidders can be excluded if they do not respect the provisions set out in legality or integrity pacts. This rule was introduced after several judicial cases that questioned the legitimacy of integrity pacts. However, this seems not to have tackled the issue. Several doubts remain due to the wording of the legal rules adopted. What is worth pointing out here is that the provision of a legal basis in order to legitimate legality or integrity pacts does not seem a fully successful choice. In Italy doubts have been raised also in relation to compliance of the provisions of legality protocols with EU legislation.

On 9 July 2015, the Council of Administrative Justice for the Region of Sicily referred a question for a preliminary ruling to the Court of Justice of the European Union (CJEU).

The question concerns the interpretation of the EU public procurement law on the exclusion clause in order to assess the compatibility of a provision set forth in a legality protocol that envisages exclusion in the case of non-acceptance – by the bidders – of the commitments set out therein and, more generally, in agreements between contracting authorities and participating undertakings, intended to prevent criminal organisations from infiltrating the public contract awards sector.

The CJEU enacted its final decision on 22 October 2015, stating that: 'The fundamental rules and general principles of the FEU Treaty, in particular the principles of equal treatment and of non-discrimination and the consequent obligation of transparency, must be interpreted as not precluding a provision of national law under which a contracting authority may provide that a candidate or tenderer be automatically excluded from a tendering procedure relating to a public contract for not having lodged, with its tender, a written acceptance of the commitments and declarations contained in a legality protocol, such as that at issue in the main proceedings, the purpose of which is to prevent organised crime from infiltrating the public procurement sector. However, inasmuch as that protocol contains declarations that the candidate or tenderer is not in a relationship of control or of association with other candidates or tenderers, has not concluded and will not conclude any agreement with other participants in the tendering procedure and will not subcontract any type of tasks to other undertakings participating in that procedure, the lack of such declarations is not to lead to the automatic exclusion of the candidate or tenderer from that procedure.'<sup>44</sup>

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<sup>44</sup> Available at: <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-425/14>.

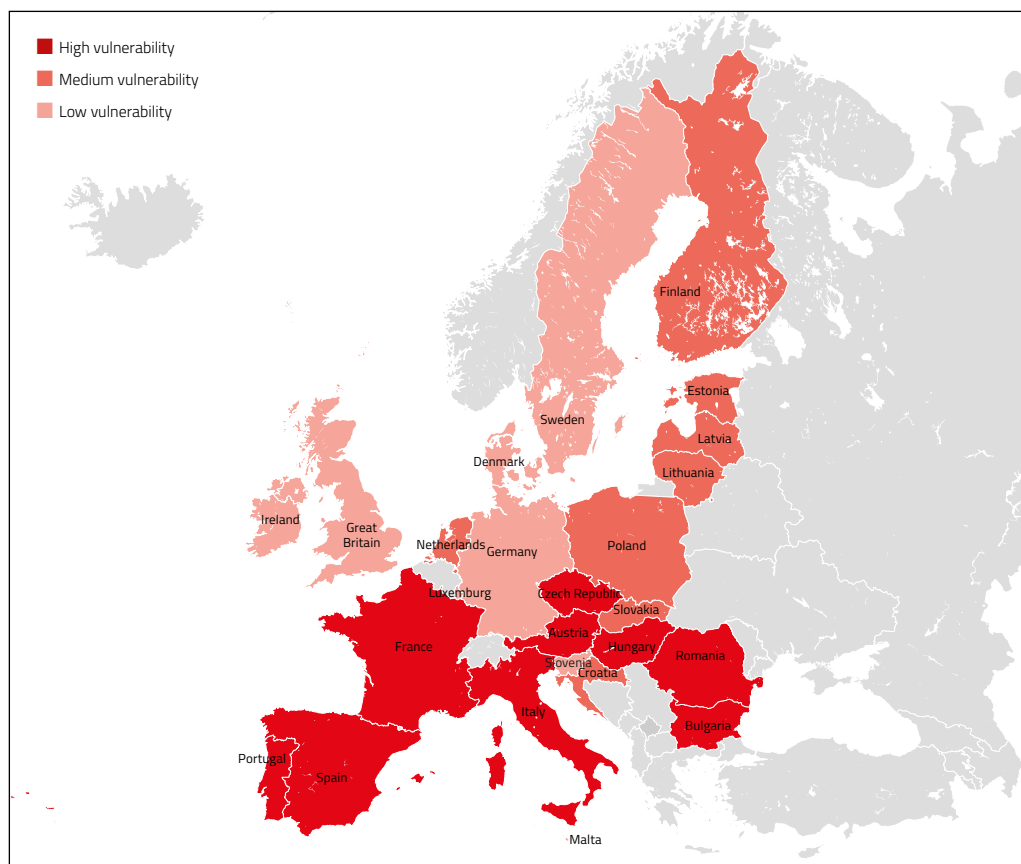
# The vulnerability of the public procurement lifecycle

This chapter scrutinises the vulnerability of public procurement in the MSs analysed. We asked the researchers to answer some questions (both general and specific) aimed at assessing the vulnerability of public procurement to criminal infiltration and corruption. Answers had to be rated on a scale from 1 to 10. Researchers rated them relying on secondary sources, interviews with experts, as well as their own expertise. As a consequence, the results also reflect researchers’ individual perception. Subsequently, through the use of the Statistical Package for Social Science (SPSS) software, we analysed the results by means of descriptive analysis techniques and we grouped the countries into three areas of risk: high, medium, and low. While the answers on the overall vulnerability of the public procurement and business sector involve all the 25 MSs analysed, the second group of questions does not include Sweden. Methodological remarks and the answers to some questions are available in Annex 2.

## 1. Overall vulnerability and business sectors

Firstly, the researchers were asked to define the level of vulnerability of public procurement in their own country on a scale from 1 (very low) to 10 (very high). As already explained, the countries were grouped into three areas of risk: **low vulnerability** (1 to 5), **medium vulnerability** (6 to 7), and **high vulnerability** (8 to 10).

Figure 6 . Overall vulnerability of public procurement to crime and corruption



It is worth clarifying that an assessment of high risk does not mean that public procurement in that specific country is affected by criminal infiltration, corruption, or unethical behaviours. It does not either mean that the situation in that specific country is worse than in the other MSs. It rather explains that public procurement is vulnerable according to the standards in that specific country.

In the **first group** are Denmark, Germany, Ireland, Luxemburg, Malta, Slovenia, Sweden, and the United Kingdom. It is worth noticing that this group is internally clearly divided in two groups: Denmark, Sweden, and Germany, whose score is below three, and all the other countries, whose score is four or five.

As to the former group of countries, the argument of being law-abiding societies and the relevance given to trust as a fundamental principle play a major role in defining the score. In addition, for the two Nordic countries, the perception of low corruption based on the TI Corruption Perception Index (CPI), Eurobarometer surveys, and the opinions of the experts interviewed complete the definition of the score. Germany, on the other hand, relies on the integrity of institutions and the government at national and federal state levels.

For all other countries, the arguments are mainly based on processes of reform and consolidation of the public administration and on the perceived effectiveness of legislative provisions on public procurement (Ireland, United Kingdom, and Slovenia, the latter with a different nuance due to the reform of the state apparatus); they are also based on the reduced opportunities provided in a small country (Luxemburg and Malta). On the other hand, the issue of small inner circles and close networks due to the size of the country appears relevant in Luxembourg, Malta, and Slovenia.

As concerns the **second group** (Croatia, Estonia, Latvia, Lithuania, Netherlands, Poland, and Slovakia), all the countries except the Netherlands give a major role to the reform process and the progressive consolidation of their political and institutional structure. The Netherlands gives credit to its competitive economy and overall good public governance. On the other hand, all the countries belonging to this group emphasise the relevance of the entanglement and close interpersonal connections between public officials and private actors. As clearly affirmed by the Croatian researcher, 'the State plays a key role as legislator, regulatory supervisor, and economic operator in the public procurement market. However, in the performance of these three functions, the State avails itself of the very same narrow group of people.'

In the **third group** (Austria, Bulgaria, Czech Republic, Finland, France, Hungary, Italy, Portugal, Romania, and Spain), the arguments change across the countries, with some commonalities though. Once again, the relevance of groups with preferential relationships with public administrators and political representatives is reported in all the countries.

The use of non-competitive public procurement for contracts below €100,000 and the widespread phenomenon of splitting contracts into smaller lots below the threshold are considered relevant indicators of vulnerability in Austria, even though this policy is justified as a support for the national economy.

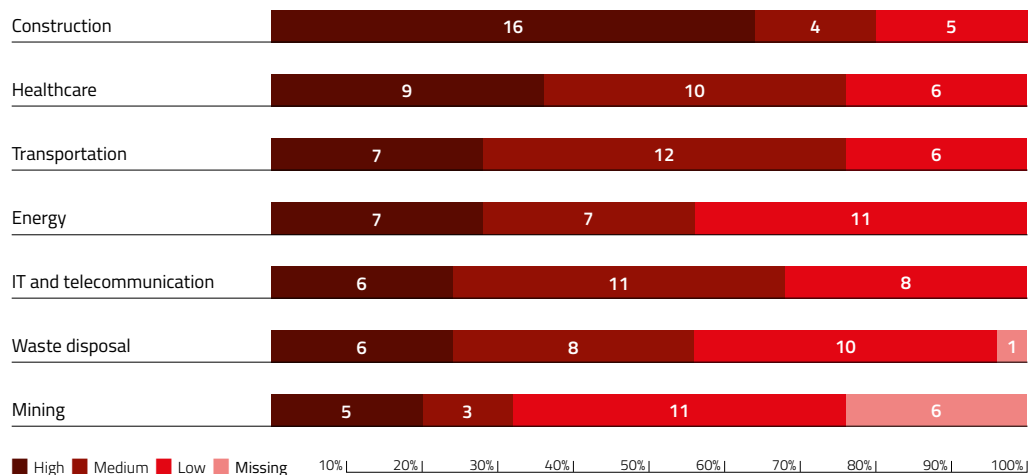
The over-bureaucratisation of control measures or legal provisions on public procurement (Czech Republic and Italy) is seen as a crucial vulnerability factor because it tends to benefit business operators able to 'play with the system', instead of rewarding those who respect the rules.

In addition, the lack of control in business ownership (Czech Republic and France) and the lack of awareness in connection with high economic value of public expenditure (Finland and France) are referred to as relevant elements.

Finally, the presence of investments of organised crime in legitimate business in Italy is an additional element increasing the level of vulnerability in public procurement.

As regards the business sector (see Figure 7), construction and healthcare appear to be the most vulnerable sectors across the countries.

Figure 7 . **Level of vulnerability by sector**



**Construction** is a sector that represents in many countries a major proportion of public procurement procedures. In Austria and Estonia, for which recent statistics are available, this sector accounts for more than 50% – in terms of contract value – of all public procurement procedures every year. It is also the sector with much case law even in those countries traditionally featuring little case law on the matter (e.g. Finland). In particular, subcontracting turns out to be the most sensitive issue. In addition, being a less ‘sophisticated’ business sector (i.e. a conventional sector featuring a low degree of innovation, large staff with basic skills, etc.) with a significant amount of money involved increases the risks. The construction sector also provides a breeding ground for cooperation among white-collar criminals and organised crime, as shown by judicial cases in Italy.

The **healthcare sector** is a high-risk one for almost opposite reasons. It also involves significant amounts of money but in a much more sophisticated supply chain. Procurements for medical supplies and equipment are targeted at a closed circle of business operators. Quite interestingly, it is very difficult to find a foreign bidder that is awarded these procurements.<sup>45</sup> In some countries (Germany and Netherlands) not all the healthcare institutions qualify as contracting authorities, and consequently they can buy supplies outside public procurement procedures.

In both sectors, collusion, cartels, and bid rigging appear as common practices.

**Transportation** is a medium/high-risk sector, which in most countries is connected with construction in relation to infrastructure, and whose vulnerability is similar to the construction sector. Relevant are also corruptive practices for transport licences, supplies, and services mainly – but not exclusively – linked with public transportation. State-owned companies that manage public transportation need to be monitored due to their political influence and the high amount of money involved.

**Energy** and **waste disposal** are medium/high-risk sectors, too. Despite a more varied picture across countries, it is worth pointing to the relevance, on the one hand, of mono/oligopoly markets and, on the other, of public or state-owned companies in both sectors (and, as already said, partially in transportation). The risks featured by these two sectors seem to be intertwined with the level of concentration of economic powers due to mono/oligopolies or state-owned companies.

**IT and telecommunication** is characterised by some high-profile cases, in particular in eastern European countries (Czech Republic, Poland, and Romania), involving major international players in business. In the other countries, public procurement in this sector often entails a significant increase in costs, as well as important delays.

**Mining** is not an economically relevant sector in many countries, with the significant exception of France, Hungary, Poland, Romania, and Slovakia. Mining is still an important sector in these countries, and involves public companies (in the case of France, even one newly established large public company), which makes the sector highly sensitive.

<sup>45</sup> This finding is supported by a recent study (Ackermann, Beke, and Sanz, 2015), which shows that cross-border contracts account for only 2.48% of the value of contracts for the supply of medical equipment, pharmaceuticals, and personal care products.

The following diagrams illustrate the level of risk for each sector by country. Looking at the bar graphs, we can have a clear understanding of the extension of the risk, as well as of the sectors where the risk is common and widespread among the countries (as in the construction sector) or where it turns out to be highly problematic for some countries and less or no problematic at all for others (as in the energy and waste disposal sectors and in the extreme case of the mining industry).

Beside the business sectors referred to above, the research shows other problematic areas. Public procurement related with defence, public security, and the military is considered very sensitive, mainly for a widespread lack of transparency. In several countries, the legislation that allows public authorities not to go through competitive procedures is broadly applied.

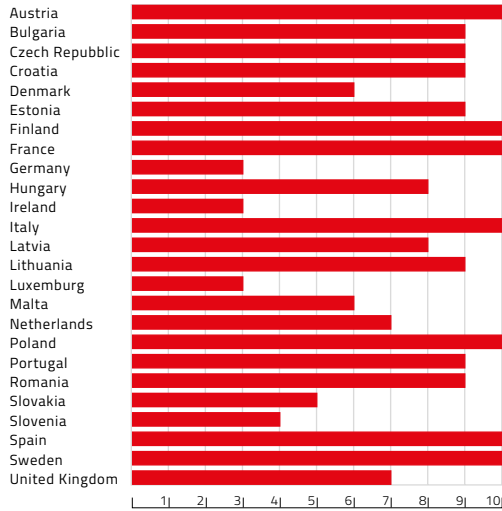
In addition, public procurement by municipalities and local governmental authorities emerges as a highly problematic area. First of all, because local administrators and local business are intertwined. Family ties, social relationships with family members, friends, and acquaintances, the need to provide job opportunities for local communities, especially in a time of crisis, and the lack of knowledge and professionalism in small contracting authorities are all factors that make it necessary to strictly monitor local governmental authorities.

Partly in connection with what has been outlined above, social services and education is emerging as a new sector where public procurement, mainly of services and supplies, is becoming more and more relevant and increasingly vulnerable. In particular, not only does the abuse of emergency procedures for social services, motivated by the necessity to address a compelling need, prevent any competitive bidding, but it also makes it impossible to implement any scrutiny in terms of transparency and accountability.

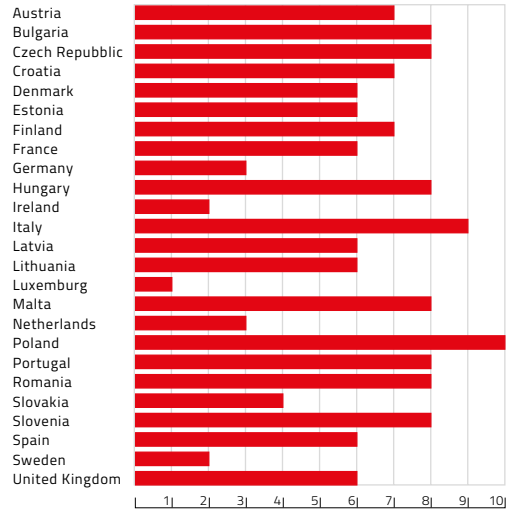


Figure 8 . Sector vulnerability across countries

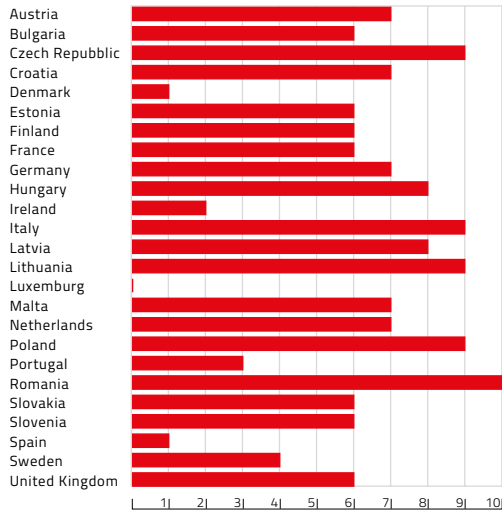
**Construction**



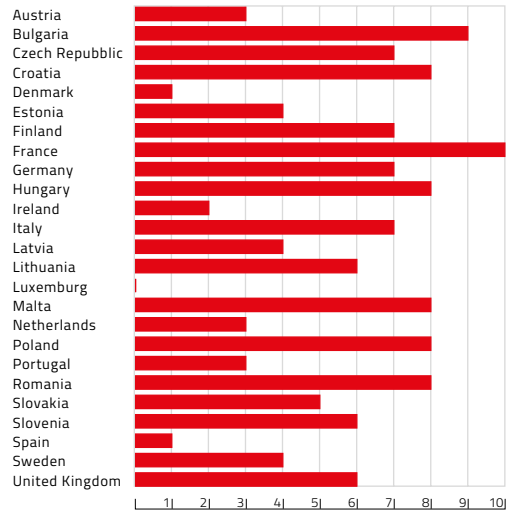
**Healthcare**



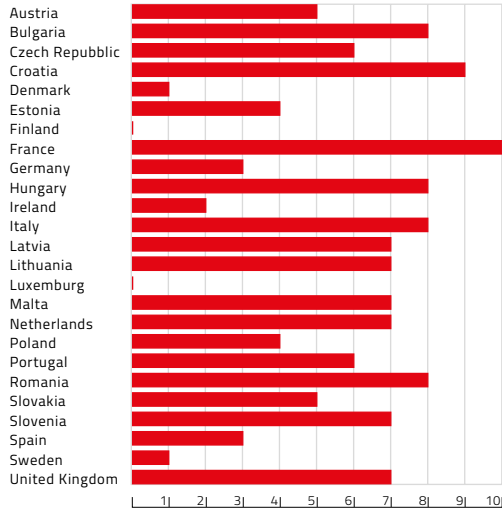
**Transportation**



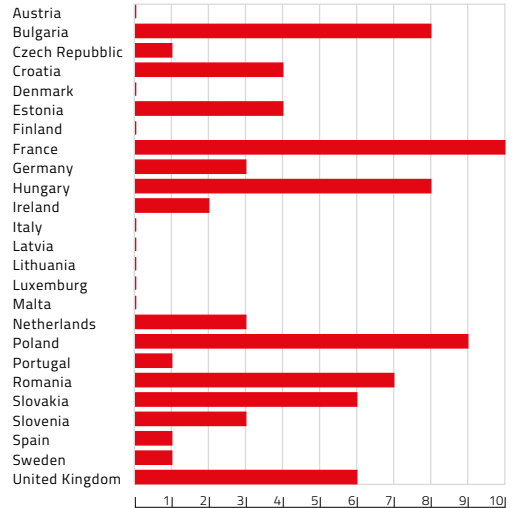
**Energy**



**Waste disposal**



**Mining**



## 2. Vulnerability of the public procurement life cycle

The public procurement process can be described as a flow (OECD, 2007) starting with planning in the allocation of funds and ending with final testing and payment. Along this process, several key activities can be isolated and each of them is potentially vulnerable to illegality and crime. In the questionnaire, three questions pointed out these key activities in the pre-tender, tender, and post-tender phase.

### 3.1 The pre-tender phase

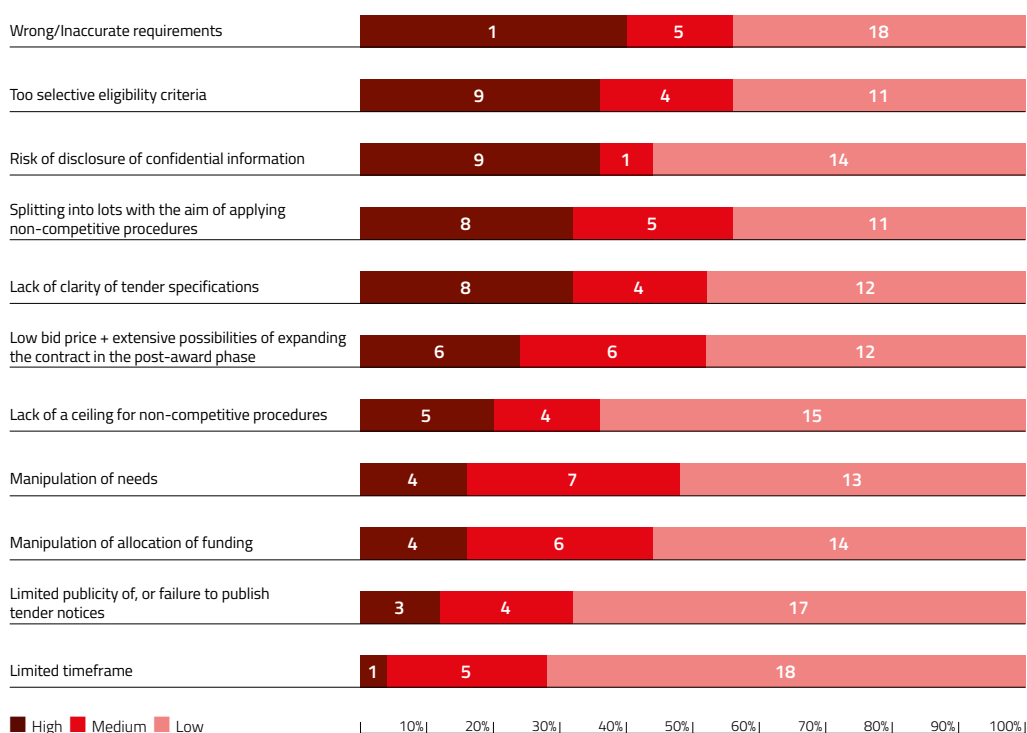
In more than 50% of the countries the risk is high or medium for: 1) **wrong or inaccurate requirements**; 2) **too selective eligibility criteria**; 3) **splitting into lots** with the aim of applying non-competitive procedures. In particular, for the first and the second point, the risk is high in 10 (Austria, Bulgaria, Czech Republic, France, Hungary, Italy, Latvia, Portugal, Romania, and Spain) and 9 (Austria, Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Italy, Latvia, and Romania) countries, respectively, out of 24, among both old and new MSs.

While in the case of wrong or inaccurate requirements the lack of professionalism of the contracting authority is advanced as an explanation, not necessarily related with widespread illegality, the intention to restrict competition or to allow only one bidder to participate is the main explanation across the countries for tailor-made public procurement procedures with specifically designed eligibility criteria. Splitting into lots, although it features a high score in only eight countries, represents a common practice. The reasons are more varied. A certain degree of protectionism in favour of in-country bidders is widespread, along with the idea of reducing bureaucracy, and so being able to conclude the procedure more quickly.

Half of the countries feature high or medium risk for: 1) **lack of clarity of tender specifications** and 2) **low bid price accompanied by extensive possibilities of expanding the contract in the post-award phase**. The lack of clarity of tender specifications is often connected with the lack of professionalism of contracting authorities, which can foster illegality and judicial litigations.

It is a common opinion that the criterion of the most economically advantageous tender (MEAT) is limiting unfair competition on prices. However, bad practices consisting in negotiating contracts after the award are still widespread even in low-corrupted countries.

Figure 9 . Level of risks in the pre-tender phase



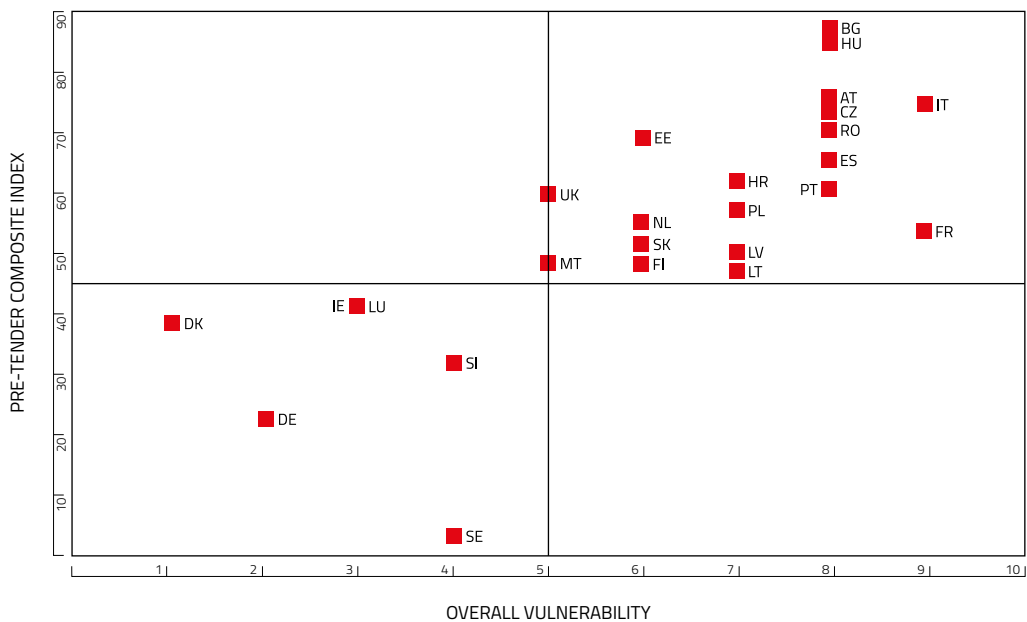
Between 40% and 50% of the countries feature a high or medium risk in the **planning phase**, in terms of: 1) manipulation of needs; 2) manipulation of allocation of funding; and 3) risk of disclosure of confidential information. All these activities prior to launching a tender represent a good opportunity to influence the procedure, without intervening in the procedure itself. This is also the phase where serious episodes of corruption may occur, which are the most challenging to detect since they are outside the procedure itself.

The **lack of a ceiling for non-competitive procedures** entails a high/medium risk for eight countries. However, it is worth pointing out that this risk is considered more broadly relevant in relation to the so-called 'emergency or public security public procurement' and to the defence sector. Major abuses may occur, but due to the lack of accountability it is again very difficult to detect them.

Low is the risk entailed by **limited publicity of, or failure to publish tender notices** and by a **reduced timeframe** to respond to a tender call. As regards publicity, some of the countries have recently established well-functioning e-procurement platforms (e.g. Ireland, Latvia, and Slovakia). The limited timeframe is a difficult aspect to assess. However, very few reports and key experts interviewed referred to this as a relevant issue.

Finally, we can observe the position of the countries as a result of the comparison of the overall vulnerability (see paragraph 1) with the vulnerability of the pre-tender phase. To do so, we calculated a composite index of vulnerability for each phase by adding the vulnerabilities of any single item of each phase. The position of the countries on the x-axis shows the overall vulnerability, whereas the overall vulnerability of the pre-tender phase is displayed on the y-axis. The figure below shows that vulnerabilities are widespread across Europe, with the notable exception of Nordic countries. As we will explain further, this is not the phase with the highest vulnerability.

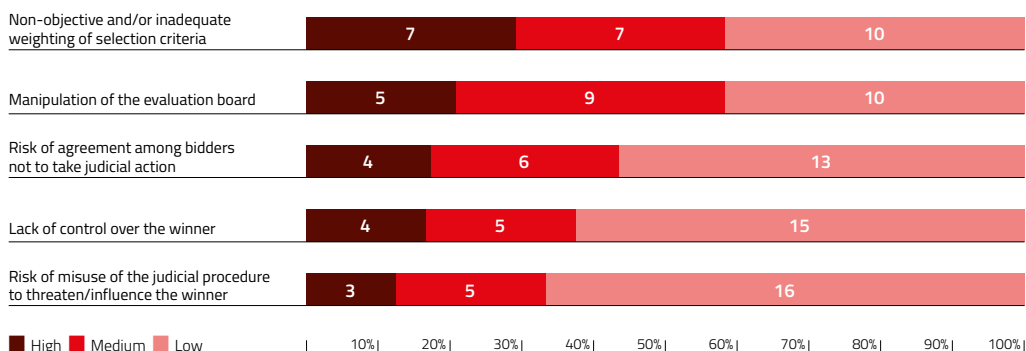
Figure 10 . **Pre-tender phase vulnerabilities across countries**



### 3.2 The tender phase

The tender phase is highly regulated, even for non-competitive procurement. However, vulnerabilities are still present.

Figure 11 . Level of risks in the tender phase



The **choice of non-objective selection criteria** or the **inadequate weighting of these criteria** is the most frequent case. Evidence thereof has been found in case law in many countries (e.g. Austria, Czech Republic, Denmark, Finland, and Italy).

Weighting of criteria set after the submission of bids, new criteria or subcriteria added at the evaluation stage, vague criteria that do not allow for any checks, and evaluation processes that cannot be reviewed or controlled are just a few examples of what often occurs.

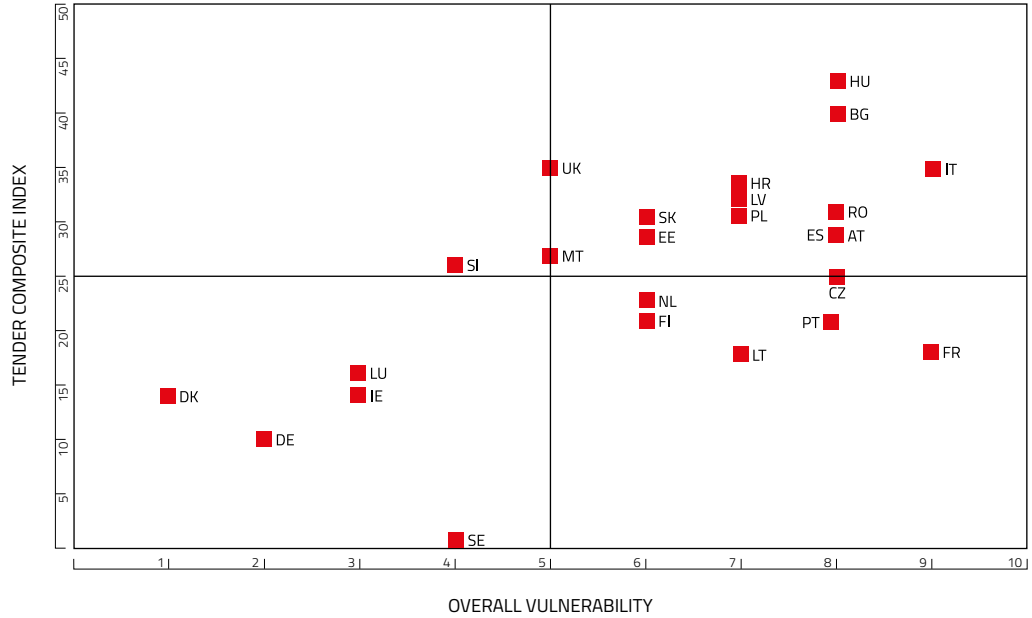
Fourteen countries report high or medium risk also in relation to the **manipulation of the evaluation board**. This risk is reduced in those countries that have introduced rules on the selection of members of evaluation boards or rely on external auditors.

Agreements (cartels and bid rigging) among bidders are a well-known issue (see the latest report by OECD, 2015). In the questionnaire we tried to assess a specific aspect, such as the **risk of agreement among bidders not to take judicial action**. This risk appears high in a limited number of countries (Croatia, Hungary, Netherlands, and Spain) and medium in six MSs (Estonia, France, Italy, Latvia, Romania, Slovakia, and United Kingdom). The same can be observed in relation to the **risk of misuse of the judicial procedure to influence or threaten the winner**, which is high for Bulgaria, Estonia, and Hungary, and medium for Italy, Latvia, Lithuania, Romania, and the United Kingdom. So, the risk connected with manipulation of judicial actions is high or medium in 12 countries. In addition, several countries report the misuse of judicial actions by the current contractor in the subsequent tender procedure won by a different bidder. In this situation, judicial actions are often used to postpone the award and gain additional income from the extension of the contract. This suggests that the abuse of judicial review is a specific issue.

The **lack of control over the winner** is not widespread. Procurement documents are widely accessible pursuant to the rules on transparency, freedom of information acts, or similar legal provisions. However, it is difficult to assess whether and to what extent the access is effective, and this assessment certainly requires additional investigation.

Looking at the position of the countries as a result of the comparison of the overall vulnerability with the vulnerability of the tender phase, we can observe a more diverse picture than in relation to the pre-tender phase. The countries are not grouped together in the top-right quarter, but feature a higher degree of dispersion.

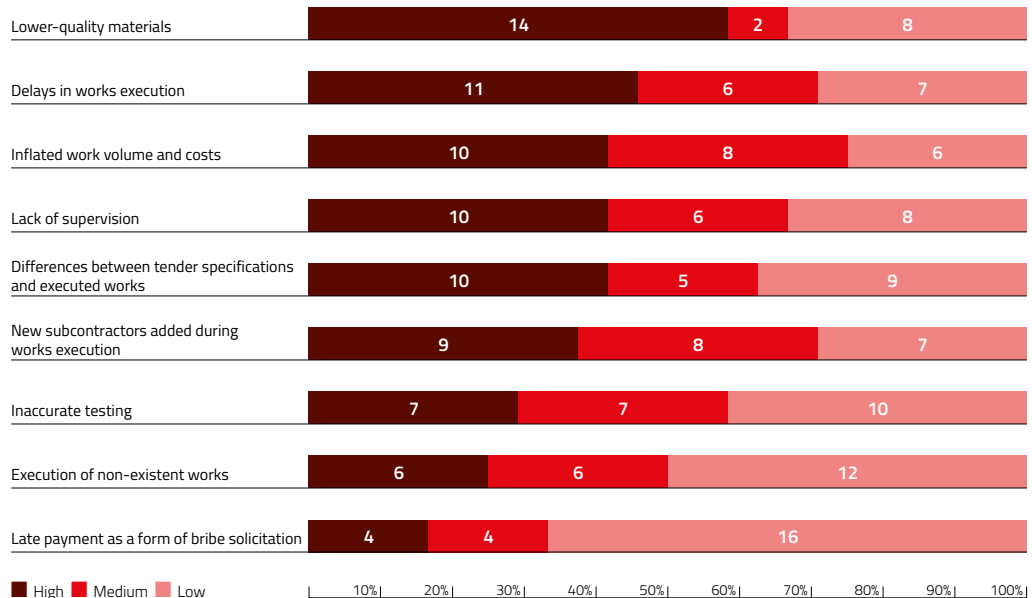
Figure 12 . Tender phase vulnerabilities across countries



### 3.3 The post-tender phase

The phase following the contract award presents several risks related to contract management and payment. All the outlined risks but one affect more than half of the countries. Overall the post-award phase, which is the least controlled of all public procurement phases, turns out to be the most risky, also due to the lack of defined rules and procedures (see also OECD, 2013, p. 84). As effectively pointed out by the Finnish researcher, ‘contracting authorities seem to forget the contract after it is signed and they rarely control a contractor’s performance’. In addition, in almost all the countries, relevant institutions monitor the procurement procedure but rarely the contract execution phase. Courts of auditors often issue an assessment even long after the conclusion of the contract, but it is not considered an effective form of control in all the 24 MSs. The most significant exception is Italy with the anti-mafia legislation that stipulates that checks be carried out during public works execution. However, this experience is country-specific and its results are debatable (see chapter 4).

Figure 13 . Level of risks in the post-tender phase



The risk of using **lower-quality materials** is high in 14 out of 24 countries. This is particularly frequent for construction and infrastructural works. **Delays in works execution** and **inflated work volume and costs** represent medium/high risks in 17 and 16 countries, respectively. Several experts pointed out that both risks have increased during the recent economic crisis. Contract execution is a 'living experience'. Consequently, the fact that changes occur is not necessarily a bad indicator, particularly considering the lack of clarity of tender specifications and the risk of wrong or inaccurate requirements. However, this confirms the need to increase contracting authorities' professionalism.

**Unjustified differences between tender specifications and executed works** and the **involvement of new subcontractors** during the contract execution phase are considered high risks in 10 and 9 countries, respectively, and medium risks in 5 and 8 analysed MSs, respectively.

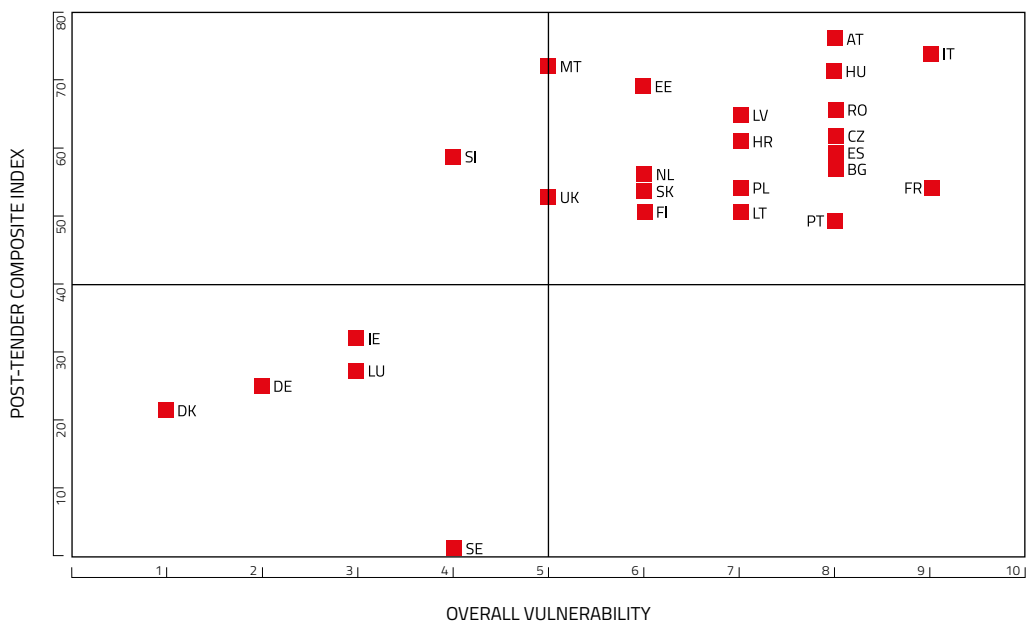
The risk of **inaccurate testing** is high and medium in 14 countries, with no geographic specificity. Lack of experience, close affiliations with the contractor, and lack of standards for performing testing are the reasons behind this inaccuracy as pointed out in Finland and the Czech Republic, respectively. In Italy and the Netherlands, testing is a routinised practice. According to the law, the scope is to verify the conformity of executed works with tender specifications, without carrying out a quality assessment. Bad planning choices cannot be tackled at the testing stage. Consequently, new rules need to be introduced to make testing something useful in terms of lawfulness and quality.

The **lack of supervision** is a general concern that could summarise most of the issues in the post-award phase.

On the other hand, **late payment as a form of bribe solicitation** is a significant issue only for Hungary, Latvia, Poland, and Romania. In some countries (e.g. France and Italy), recent reforms – which tackle the problem of delayed payment by the public administration – seem to effectively reduce the possibility of using this tool to solicit bribes.

The scatter diagram shows that the dispersion of the countries is lower: they are grouped together in the top-right quarter and their position is closer. This confirms that the post-tender phase is perceived as the most vulnerable.

Figure 14 . **Post-tender phase vulnerabilities across countries**



# The prevention system in public procurement

The vulnerability of the public procurement cycle to criminal infiltration and corruption focuses the debate on what type of preventive system is in place in MSs. In this regard, the various countries have increasingly adopted legal provisions and soft-law instruments and/or established special bodies with national specificities.

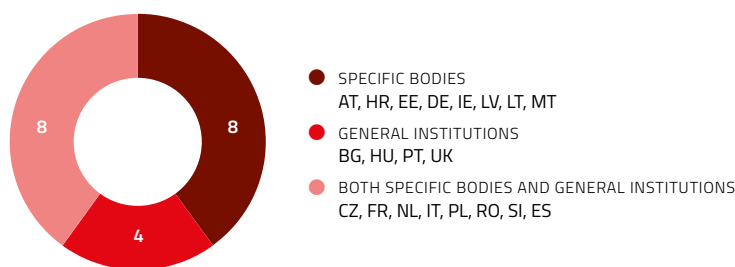
The analysis thus focuses on bodies and measures (red flags, debarment instruments, and controls on bidders) that each country has established with a view to strengthening the national administrative preventive system beyond the ordinary checks performed by contracting authorities within the procedure. Both the bodies and measures aimed at monitoring and/or preventing criminal infiltration and corruption in public procurement are analysed.

## 1. Monitoring and prevention bodies

The national **courts of audit carry out a monitoring function in all the MSs analysed**. These institutions, as authorities responsible for overseeing the lawful and correct use of public funds, monitor the financial aspects of various sectors, including public procurement (both for the tender phase and contract execution - see chapter 4 of this report). In Ireland and Portugal, the courts of audit have moreover specific responsibility for auditing procurement activities and for notifying other authorities of suspected corruption.

In addition, MSs boast a wide range of institutions in place, focused on countering corruption and/or organised crime in various sectors, which also play an important role in guarantying legality and transparency in public tenders. These bodies, not specifically tailored on public procurement, exist in 12 out of 25 countries studied. In addition, some countries have specific bodies. Nordic countries and Luxembourg, instead, do not have any such bodies in place.

Figure 15. **Bodies in MSs**



Beside the monitoring institutions mentioned above, **six States<sup>46</sup> boast parliamentary committees and/or committees** at national or local level that carry out inquiries and hold hearings aimed at acquiring information in different fields – including corruption, conflicts of interest, and unethical conduct connected with public procurement and expenditure of public money – as well as at disseminating it. The existence in MSs of specific bodies responsible for monitoring and/or preventing criminal infiltration and corruption in public procurement reflects the approach and the features of the preventive system implemented at national level. **Institutions specifically focused on public procurement procedures are established in 16 out of 25 countries studied**, and most of them were established during the first decade of the 2000s, with different functions according to national provisions. Among their tasks during the tender procedure or some stages thereof, there is: controlling bidders' conduct; monitoring any conflicts of interest; reviewing tender procedures after

46 Austria, Bulgaria, Croatia, France, Ireland, and Italy.

contract award and, if need be, deciding remedial measures; controlling the actions of contracting authorities and/or of the public administration; providing advice to public contracting authorities; and identifying best practices and guidance in public procurement.

The majority of MSs where this kind of monitoring bodies exists feature a single institution that performs one or more preventive tasks. However, it is worth recalling some particular cases.

The Netherlands, for instance, has a sophisticated administrative framework in place to prevent corruption-related offences in public procurement. It includes various bodies with specific tasks, such as investigating the integrity of tenderers and of applicants for licences (performed by the BIBOB Office) or, if specific conditions are met (in relation to financial risks and the branch involved), performing in-depth screening of high-risk contracts and projects, and providing advice and recommendations (these tasks are carried out by the Screening Unit). Italy, too, boasts several authorities involved in implementing in-depth controls on bidders. The particularity of the Italian case, as better explained in the next paragraph, is that law enforcement units carry out police investigations on companies that wish to participate in a public tender. In Germany there are public procurement tribunals that investigate only public procurement procedures even though only those above EU threshold. Finally, Romania boasts two public authorities that verify public procurement – the National Authority for Regulating and Monitoring Public Procurement (ANRMAP) and the Unit for Coordination and Verification of Public Procurement (UCVAP) – whose actions often overlap although they are formally tasked with different functions. Further details on the preventive bodies across countries are provided in the following table.

Table 5. **Monitoring/Prevention bodies in MSs**

## **AUSTRIA**

### **Federal Company Responsible for Public Procurement (BBG)**

It is a public company founded by the Austrian government in 2001. The overall mission of BBG is to organise lawful public procurement processes at national level and to serve as a procurement provider for public procurers in Austria. Its tasks include prevention of corruption and criminal infiltration. To this aim, the company has developed an anti-corruption strategy envisaging organisational adjustments, awareness-raising measures, and emergency management processes.

PUBLIC PROCUREMENT PHASE INVOLVED

Entire tender lifecycle

### **Parliamentary committees of inquiry**

Two parliamentary committees were established at the end of the 1990s with the aim of dealing exclusively with corruption issues.

## **BULGARIA**

### **Commission for Prevention and Ascertainment of Conflict of Interest (CPACI)**

Established in 2010, it consists of five members: three elected by the National Assembly, one appointed by the President of the Republic, and one named by the Council of Ministers. This body assesses any conflicts of interest involving public officers, and submits to the National Assembly an annual report on the work carried out.

### **Centre for Preventing and Countering Corruption and Organised Crime (CPCCOC)**

It is a specialised administrative structure responsible for implementing the national policy in the field of prevention and combatting of corruption and organised crime. The CPCCOC was established in 2011 following the recommendations contained in the reports of the European Commission and in the Integrated Strategy to Prevent and Counter Corruption. The CPCCOC implements preventive control measures on bills with a view to identifying weaknesses, shortcomings, contradictions, and obscure definitions that create an ideal breeding ground for corrupt practices. It moreover analyses legal acts, administrative procedures, and judicial procedures in order to detect any conditions and opportunities for corrupt behaviours, and to identify countermeasures.

PUBLIC PROCUREMENT PHASE INVOLVED

Entire tender lifecycle



## CROATIA

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### **State Commission for the Supervision of Public Procurement (SCSPP)**

Established in 2003, it is an independent national body in charge of investigating potential breaches of law in connection with the rights and interests of concerned parties or competing tenderers. It acts only at the request of tenderers or potential tenderers, and its enquiries are limited to the irregularities reported by the complainant. Since 2010, the SCSPP has also been authorised to file indictments for misdemeanours set out in the Public Procurement Act and in other regulations pertaining to the public procurement field.

PUBLIC PROCUREMENT PHASE INVOLVED

Entire tender lifecycle

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### **Directorate for the Public Procurement System**

Established within the Ministry of Economy, this body is in charge of capacity building in the procurement system, supervising all aspects of public procurement. It is also in charge of initiating procedures before the Misdemeanour Court for violations of legal provisions set out in the Public Procurement Act. Since 2012, it has been tasked with initiating administrative proceedings.

PUBLIC PROCUREMENT PHASE INVOLVED

Entire tender lifecycle

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### **Commission for Conflicts of Interest**

It is appointed by the Croatian Parliament and checks whether there are any conflicts of interest in public procurement procedures (Article 13 of the Public Procurement Act provides a list thereof).

PUBLIC PROCUREMENT PHASE INVOLVED

Entire tender lifecycle

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## CZECH REPUBLIC

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### **Office for the Protection of Competition**

Established in 1991, it supervises public procurement. Administrative proceedings are initiated *ex officio* or based on written complaints. This body's main tasks are: adoption of interim measures (i.e. prohibition to conclude the contract or suspension of procurement procedures); assessment of the lawfulness of public procurement processes; adoption of remedial measures; implementation of monitoring mechanisms on the actions of contracting authorities in public procurement and analysis of administrative offences and adoption of sanctions.

PUBLIC PROCUREMENT PHASE INVOLVED

Entire tender lifecycle

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### **Government Council for Coordination of the Fight against Corruption**

Established 2011, it reports to the Cabinet of the national government. It is aimed at coordinating the fight against corruption within ministries and other relevant institutions. Its tasks include coordination and preparation of strategies and policies against corruption at governmental level.

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## DENMARK

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## ESTONIA

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### **Public Procurement Office**

Created in 2003, it is responsible for supervising the implementation of public procurement legislation. Its main responsibility is to verify compliance of public procurements with the requirements established by law.

PUBLIC PROCUREMENT PHASE INVOLVED

Entire tender lifecycle

## FINLAND

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### **Ombudsman**

The Ombudsman is responsible for monitoring all actions of public authorities and entities performing public tasks (therefore including public procurement and corruption/unethical behaviours). More specifically, this body monitors that such authorities comply with applicable legislation. It does not have specific tasks relating to public procurement or corruption, but conducts investigations if a complaint is filed.

## FRANCE

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### **Central Service on Prevention of Corruption (SCPC)**

Created in 1993 as an autonomous interministerial structure within the Minister of Justice, it is in charge of centralising and processing information about corruption. It also monitors public procurements, even though this is not its exclusive competence.

PUBLIC PROCUREMENT PHASE INVOLVED

Entire tender lifecycle

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### **Commission for Deontology**

Established in 2000 under the authority of the Prime Minister, it is in charge of assessing the compatibility of any lucrative activity of a former civil servant within three years after the end of his/her public functions. It is moreover involved in the prevention of corruption and unlawful taking of interest, and monitors various sectors, including public procurement.

PUBLIC PROCUREMENT PHASE INVOLVED

Entire tender lifecycle

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### **High Authority for Transparency in Public Life**

It was established in 2013 with a view to gathering declarations of assets and interests. It also deals with conflicts of interest.

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### **Information, Advice, and Strategic Analysis Service on Organised Crime (SIRASCO)**

It was established in 2009 as a body cutting across police and gendarmerie forces. It is in charge of gathering, centralising, and analysing information on organised crime in France, and covers various sectors, including public procurement. In 2013, local sections were established.

PUBLIC PROCUREMENT PHASE INVOLVED

Entire tender lifecycle

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## GERMANY

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### **Public Procurement Tribunals**

These bodies are in charge of monitoring tender procedures for contracts above EU thresholds. They are administrative authorities existing at both central and federal state level. These tribunals, whose structure is similar to a court as they exercise their functions independently and on their own responsibility within the limits of the law (their act is administrative, but their organization and procedure are quasi-judicial), decide whether the applicant's rights have been violated and take suitable measures to remedy a violation of rights and to prevent any impairment of the interests affected. They have the competence to issue an order to stop the awarding procedure or to alter the status of the proceedings.

Their decisions (first instance) can be challenged by filing an immediate complaint with the Higher Regional Court (appellate instance) within two weeks. In both instances the application for review generally has a suspensive effect, meaning that during the ongoing legal review, the contracting authority is not permitted to award a contract to any bidder.

PUBLIC PROCUREMENT PHASE INVOLVED

Tender Phase

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### **VOB- and VOL-Authority**

Most of the federal states have bodies, the so-called VOB-Stellen, which are the contact point for tenders below and above EU thresholds and are in charge of supervising tenders and giving advice to public awarding authorities in the field of construction below EU thresholds. Similar to them, there are VOL-Stellen, focusing on public supplies and services.

## **HUNGARY**

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### **National Defence Service**

It was established in 2010 as an internal intelligence and crime prevention unit of the police. It is supposed to protect public services from corruption and criminal infiltration. Its main task is to guarantee the integrity of public officials.

### **Hungarian Competition Authority (GVH)**

GVH was established in 1990 aimed at guaranteeing fairness and freedom of competition among companies in the market, and at strengthening the competition rules for the benefit of the public with regard to public procurement, GHV is supposed to issue recommendations intended for contracting authorities and the tenderers.

## **IRELAND**

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### **National Public Procurement Policy Unit (NPPPU)**

It was established in 2002 within the Department of Finance. Though no formal control or supervision system has been developed in Ireland, the NPPPU is tasked with the formulation of policy, dissemination of best practices and guidance in public procurements, and the delivery of the government's e-procurement strategy.

PUBLIC PROCUREMENT PHASE INVOLVED

Entire tender lifecycle

## **ITALY**

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### **National Anti-Corruption Authority (ANAC)**

ANAC is in charge of corruption prevention in the public administration and in state-owned enterprises. Established in 2014, it also monitors public contracts since the authority formerly responsible for this task has been abolished and all the competences transferred to ANAC.

PUBLIC PROCUREMENT PHASE INVOLVED

Entire tender lifecycle

### **Anti-Mafia Parliamentary Committee**

This bicameral committee was established in 1996, and consists of 25 MEPs. Committee members are re-appointed at the beginning of each term of parliament. The committee 'investigates and monitors with the same power and limits as the judicial authority' (Article 82 of the Italian Constitution). The results of monitoring activities are published in annual or thematic reports. Furthermore, there are other local and regional committees tasked with monitoring and disseminating information on mafia-type and other serious crimes.

### **Coordination Committee for Close Monitoring on Major Public Works (CCASGO)**

It consists of representatives from the Ministry of the Interior, the Ministry of Infrastructure and Transport, and the Ministry for Economic and Financial Affairs, as well as from ANAC and the National Anti-Mafia Directorate (DNA) (the latter two being outside the government). Its guidelines for prevention and control of organised crime infiltration in major public works are compulsory for contracting authorities and winning tenderers. In some cases, *ad hoc* guidelines have been drafted tailored on a specific major public work. CCASGO has also issued guidelines for financial monitoring of major public works.

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### **Local Task Force**

It is a group coordinated by the Prefecture, consisting of one representative from each of the following institutions: Carabinieri, State Police, Financial Guard, Public Works Managing Authority, Labour Inspectorate, and Anti-Mafia Investigation Directorate (DIA). It carries out necessary and compulsory controls aimed at preventing criminal infiltration in public procurement. Inspections are targeted at assessing that firms are not controlled by (or are not linked to) criminal groups. Specific anti-mafia certificates are then issued following this assessment.

The Prefecture is in charge of coordinating monitoring activities on companies having their headquarters located in the provincial territory.

PUBLIC PROCUREMENT PHASE INVOLVED

Entire tender lifecycle

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### **Joint Task Force (JTF)**

For major public works, special JTFs (e.g. the Joint Task Force for the Turin-Lyon High-Speed Railway Line – GITAV, and the Joint Task Force for EXPO Milano 2015 – GICEX) were established in 2003. In addition to providing supporting information and analysis to the Prefect, the JTF ensures constant information to CCASGO, and cooperates with DIA. Investigations are planned by the Prefect. Controls are performed on all subjects involved in the major work, regardless of where the company is headquartered.

PUBLIC PROCUREMENT PHASE INVOLVED

Entire tender lifecycle

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## **LATVIA**

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### **Procurement Monitoring Bureau**

It is a state administrative authority established in 2002 and supervised by the Ministry of Finance. Among its various tasks, this body ensures conformity of procurement procedures with law requirements. It also co-operates with relevant foreign authorities, compiles and analyses statistical information on procurement in the country, provides methodological assistance and consultancy, organises training for contracting authorities, and verifies that complaints with respect to violations of procurement procedures are examined.

PUBLIC PROCUREMENT PHASE INVOLVED

Entire tender lifecycle

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## **LITHUANIA**

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### **Public Procurement Office (PPO)**

Established in 1996 as an independent body, the PPO is the main body responsible for supervising/controlling public procurement procedures in all sectors, as well as for implementing awarded public procurement contracts. The PPO submits an annual activity report to the government and the national Parliament.

PUBLIC PROCUREMENT PHASE INVOLVED

Entire tender lifecycle

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## **LUXEMBOURG**

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## **MALTA**

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### **Department of Contracts and its two Contracts Committees**

Since 2010, the Department of Contracts has been responsible for the administration of procurement procedures. Its director is assisted by the General Contracts Committee and, should specialised expertise be needed, by the Special Contracts Committee. The two committees report any irregularities detected in the tendering process, and make recommendations. Moreover, they hear and determine disputes between contracting authorities and contractors, arising out of public

contracts, and formally investigate complaints concerning public contracts and procurements.

PUBLIC PROCUREMENT PHASE INVOLVED

Entire tender lifecycle

## NETHERLANDS

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### **BIBOB Office**

Established in 2002 within the Ministry of Justice, it reports directly to the minister. This office is tasked with advising authorised local authorities. At their request, the BIBOB Office investigates the integrity of applicants for licences, tenders, and subsidies. When the investigation is concluded, the office assesses the risks and likelihood that the applicant will adopt an abusive behaviour. However, its advice is not binding. The BIBOB Office is also tasked with coaching public bodies that wish to ask for its investigation activities.

PUBLIC PROCUREMENT PHASE INVOLVED

Pre-tender phase

### **National Office for Promoting Ethics and Integrity in the Public Sector (BIOS)**

It is an institution specifically aimed at helping the public administration draft and enforce anti-corruption policies. It was created in 2006 within the Ministry of the Interior and Kingdom Relations. BIOS supports the public sector in designing and implementing an integrity policy. It carries out a variety of tasks, including research, development, networking, and signalling functions. Furthermore, it has developed practical models, methods, products, and education and training materials tailored on its target group.

PUBLIC PROCUREMENT PHASE INVOLVED

Pre-tender phase

### **Screening Unit**

The Screening Unit, established in 2011, performs an in-depth screening of high-risk contracts and projects. This Unit adopts three different screening models (quick, standard and deep scan). The latter category has been developed to (re)intensify corporate integrity assessment in tender procedures with a high risk profile. As a result of the screening, the Unit gives advices and recommendations.

PUBLIC PROCUREMENT PHASE INVOLVED

Entire tender lifecycle

### **National Ombudsman (NO)**

Since 1999, the NO has been dealing with complaints against public bodies and people/local government organisations. The NO is an independent and impartial administrative body responsible for assessing the performance of public authorities and the lawfulness of their decisions, as well as for promoting citizens' rights. This body does not have judicial powers but can attempt to resolve citizens' complaints through non-binding judgments and interventions.

### **Regional Information and Expertise Centre (RIEC) and National Information and Expertise Centre (LIEC)**

RIEC and LIEC support the integrated strategy combining criminal law, administrative law, and tax law measures. They make recommendations to partners, and advise on the administrative approach to organised crime.

PUBLIC PROCUREMENT PHASE INVOLVED

Entire tender life-cycle

## POLAND

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### **Central Anti-Corruption Bureau (CBA)**

Established in 2006, it deals with: identification, prevention, and detection of crimes and offences; prosecution of perpetrators; and control, analytical, and preventive activities. Among its tasks, CBA: monitors the public procurement market; analyses and identifies abnormalities and dysfunctions in the public procurement system; detects irregularities and crimes; conducts investigations with prosecutors in the case of crimes connected with the carrying out of contract awarding procedures;

and carries out prevention and educational activities, implements training courses with public officials, and organises conferences.

PUBLIC PROCUREMENT PHASE INVOLVED

Entire tender lifecycle

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#### **Public Procurement Office (PPO)**

It was created in 2004 within the decentralised Polish public procurement system. Its responsibilities include: development of draft normative acts concerning contracts; decisions on individual cases indicated by law; publication of the Public Procurement Bulletin, i.e. the list of all public procurements; monitoring of procurement processes to the extent indicated by law; analysis of the functioning of the procurement system and training activities; and international cooperation in matters related to public procurement. CBA cooperates with the PPO (e.g. CBA provides PPO staff with training on anti-corruption in public procurement).

PUBLIC PROCUREMENT PHASE INVOLVED

Entire tender lifecycle

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#### **Supreme Chamber of Control (NIK)**

Established in 1919, it is the supreme audit organ. It reports to the Parliament, and carries out audits on its own initiative or upon recommendation from the Parliament. NIK is tasked with eliminating or minimising factors that account for the growth of unethical activities in public life, as well as with limiting corruption.

PUBLIC PROCUREMENT PHASE INVOLVED

Entire tender lifecycle

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### **PORTUGAL**

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#### **Court of Auditors and Council for Prevention of Corruption (CPC)**

The Court of Auditors is the institution aimed at preventing corruption in public procurement. It boasts a good level of effectiveness in detecting irregularities and deviant practices in the management of public funds. It plays a significant role also in controlling contract execution. In 2008 the CPC was established within the Court of Auditors with a view to coordinating and analysing prevention policies. The CPC recommends that all central and local public bodies prepare plans for the management of corruption-related risks.

PUBLIC PROCUREMENT PHASE INVOLVED

Entire tender lifecycle

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### **ROMANIA**

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#### **National Authority for Regulating and Monitoring Public Procurement (ANRMAR)**

It plans public policies in the public procurement field, and assesses the conformity of procedures with legal requirements.

PUBLIC PROCUREMENT PHASE INVOLVED

Entire tender lifecycle

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#### **Unit for Coordination and Verification of Public Procurement (UCVAP)**

It is a unit within the Minister of Finance, endowed with *ex ante* control powers. Theoretically speaking, ANRMAR and UCVAP should assess different cases on the basis of the procedure used.

PUBLIC PROCUREMENT PHASE INVOLVED

Post-award phase

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#### **National Council for Resolving Complaints**

Established in 2007, it is an administrative body that receives complaints filed against contracting authorities. Its decisions can be – and often are – redressed in ordinary courts.

PUBLIC PROCUREMENT PHASE INVOLVED

Post-award phase

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### **Competition Council**

Established in 1996, it is an autonomous body dealing with anti-competitive behaviours, including among bidders in public procurement.

PUBLIC PROCUREMENT PHASE INVOLVED

Tender phase

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### **National Integrity Agency (ANI)**

It is an independent body in charge of verifying public officials' declaration of assets and conflicts of interest. It is implementing an EU-funded system aimed at preventing conflicts of interest in public procurement. The system has been set up recently (in the summer of 2015), and is activated on a voluntary basis for the time being: contracting authorities wishing to participate ask their officials and bidders to enter data into an IT system managed by ANI. This system can identify and report conflicts of interest.

PUBLIC PROCUREMENT PHASE INVOLVED

Tender phase

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## **SLOVAKIA**

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### **Office for Public Procurement**

Established in 2000, it is the central state administration authority that oversees public procurement procedures. It has been designed with a view to monitoring whether public procurement procedures comply with law provisions. It ensures the fulfilment of the principles of transparency, equal treatment, and non-discrimination of tenderers and candidates, along with the principles of economy and cost-effectiveness. The Office for Public Procurement can impose fines for violation/infringement of the Public Procurement Act, and maintains a list of operators and individuals that have been prohibited from participating in public procurement procedures.

PUBLIC PROCUREMENT PHASE INVOLVED

Entire tender lifecycle

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### **Anti-Monopoly Office of the Slovak Republic**

Established in 1990, it ensures protection of competition in the country. It can initiate proceedings on bid rigging in public procurement, and is empowered to impose fines of up to 10% of a company's turnover for the latest closed accounting period.

PUBLIC PROCUREMENT PHASE INVOLVED

Entire tender lifecycle

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## **SLOVENIA**

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### **National Commission for Reviewing Public Procurement Award Procedures (National Review Commission)**

It is a specific, independent, professional, and expert state institution that provides tenderers with legal protection. It performs a review of the public procurement award procedure. Reviews consist of two stages: a) before the contracting authority; b) before the National Review Commission. Proceedings before the National Review Commission can be initiated in the following cases: a) after a review before the contracting authority has proven unsuccessful; b) when the aggrieved party does not consent (partially or entirely) to the contracting authority's decision on a claim for review; or c) if the contracting authority does not make a decision in due time (eight days).

Beside the competences typical of an appellate body, the National Review Commission can advise a contracting authority about how to implement a procedure vitiated by an element that has been declared invalid.

PUBLIC PROCUREMENT PHASE INVOLVED

Entire tender lifecycle

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### **Commission for the Prevention of Corruption (CPC)**

Established in 2004, it is an independent state body tasked with preventing and investigating corruption, breaches of ethics, and the integrity of public office holders. Although it is part of the

public sector, it does not report to any other state institution or ministry, and does not receive any direct instructions from executive or legislative bodies.

PUBLIC PROCUREMENT PHASE INVOLVED

Tender and post-award phases

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#### **Office for Money-Laundering Prevention**

Established in 2007, it is a constitutive part of the Ministry of Finance, and performs duties referring to prevention and detection of money laundering and terrorist financing. It is moreover the central authority responsible for collecting and analysing financial data on clients and transactions in respect of which there exist reasonable grounds to suspect money laundering or terrorist financing, as well as for submitting these data to competent authorities.

PUBLIC PROCUREMENT PHASE INVOLVED

Post-award phase

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### **SPAIN**

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#### **Comptroller General's Office of the State Administration**

It controls any public administration acts that recognise rights or commit expenses, including public procurement. Its main function is to prevent illegality.

PUBLIC PROCUREMENT PHASE INVOLVED

Entire tender lifecycle

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#### **Central Administrative Court for Public Contract Remedies**

It was established in 2010 with external control functions. It does not act on its own initiative but at the request of the interested parties. It rules on the appeals against the following acts: calls for tenders, specifications, and documents that set out contract conditions; prior acts adopted in the procedure, provided that they directly or indirectly determine the award, make it impossible to continue the procedure, or cause irreparable harm to legitimate rights or interests; and agreements concluded by contracting authorities.

PUBLIC PROCUREMENT PHASE INVOLVED

Tender and post-award phases

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### **SWEDEN**

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### **UNITED KINGDOM**

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#### **Committee of Public Accounts (PAC)**

It is a select committee of the British House of Commons, responsible for overseeing government expenditures to ensure they are effective and honest.

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#### **Ombudsmen**

Ombudsmen are specific bodies for certain sectors, aimed at considering 'complaints where an individual believes there has been injustice or hardship because an organisation has not acted properly or fairly or has given a poor service'. They can be involved also to resolve public procurement complaints.

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## **2. Special preventive measures**

Not only do MSs boast bodies that carry out preventive tasks, but they also have measures in place within the framework of the national **anti-corruption strategy**. No matter how different anti-corruption policies are across countries, anti-corruption measures are adopted with a view to facing conflicts of interest, guaranteeing transparency in the public sector, and tackling misconduct by promoting codes of conduct, publishing information and financial data, or establishing monitoring systems. The measures impact on safeguarding legality in public tenders.



Nordic EU countries, too, adopt this approach, although they have no national and comprehensive anti-corruption strategies. However, they have established some new laws to cover various forms of corruption offences and to tackle misconduct in the public sector, which have regulatory effects in different fields, including public procurement (see chapter 2 in this report). Moreover, it is worth underlining that Nordic States do not have special preventive measures for public procurement, with the exception of the Municipality of Helsinki, which has adopted internal guidelines to fight against the shadow economy, including procurement-related matters. These guidelines include limitations concerning the length of **subcontracting chains**, which represents a problem especially in the construction and cleaning sectors. Subcontracting chains entail lower salaries, worse employment conditions, as well as illegal work. In addition, the Municipality of Helsinki recommends that all companies that have a tax debt of any amount whatsoever, and that have not entered into a payment agreement with the tax authority should be excluded from contract award procedures. This somehow anticipates the content of one of the non-mandatory grounds for exclusion set out in Directive 2014/24/EU. The Finnish case is important because it highlights two significant aspects of the phenomenon analysed: the role that municipalities can play in countering illegality in public tender procedures, and the high vulnerability of subcontracts and of the contract execution phase to the commission of offences and to criminal infiltration, as already outlined in chapter 2. This argument will be further developed in chapter 4.

Within this anti-corruption approach, it is worth mentioning some national specificities that underline a range of relevant aspects of the approach. First of all, **more professionalism** among employees of the contracting authority is certainly an asset. Austria, for instance, has attached great importance to **learning models/seminars** at national level, aimed at fighting against misconduct in the public sector, as well as at strengthening public officials' knowledge of codes of conduct. Courses, seminars, and training as primary tools to tackle corruption and conflicts of interest are implemented also in Spain, Germany, Latvia, and the Netherlands.

**Keeping records** of what happens in the procedure is essential to ensure accountability.

In particular, Germany boasts a document management system under the responsibility of the Federal Procurement Agency within the Ministry of the Interior. It is an **electronic workflow** that centralises all information and provides a record of the different stages of the procurement procedure. Employees can therefore count on, and certainly support the application of the four-eye principle. Each decision has to be well founded and documented all along the procurement procedure. In addition, supervisors within the procedure may access any document at any time and, in the case of suspicion, access to documents for inspection purposes is immediate, and it is not disclosed to the official concerned. The quality management department randomly examines documents in the system, while the internal audits review transactions of the previous year. These inspections are not exclusively used to prevent corruption, but also to ensure lawful and economically advantageous public procurement. Information analysis is another important aspect, as recognised by the Lithuanian **Central Risk Management Analysis System of Public Procurement**, created in 2014. This system aims at carrying out monitoring activities, prevention of violations, and assessment of performance results of public contracts. To achieve this goal, the system assesses and analyses information on public procurement in order to ensure operational plans, prevention programmes, and control measures. It also provides statistical information on public procurement issues.

A quite complex prevention system can be found in the Netherlands, where a professional and innovative public procurement network for contracting authorities, PIANOo, has been established within the Ministry of Economic Affairs **to enable the exchange of know-how and training among contracting authorities**. PIANOo assists in the exchange of information among government officials with a view to identifying and disseminating good practices. In addition to this peculiarity, the Dutch system considers two different kinds of preventive documents that consist of proper special measures: the **declaration of integrity** and the **certificate of conduct**. The former is a mandatory certificate that the contracting authority must request interested economic operators to submit. The declaration is provided by the Ministry of Security and Justice, and states that no objections have been raised against the economic operator on the basis of an investigation concerning the conduct of the economic operator in the past. This document leads to a sort of indirect white list of companies (see paragraph 4 of this chapter). The latter is a declaration from the Ministry of Security and Justice, stating that, pursuant to an assessment regarding the behaviour of a legal entity, no objections have

been raised regarding that corporation. The statement does not provide any additional information. If there are any objections, the certificate will not be issued. With this declaration, contract partners can prove their integrity to each other.

Moreover, since 2011 every legal entity in the Dutch system has been monitored permanently by Dienst Justis, a monitoring department of the Ministry of Security and Justice. Legal entities are screened at various stages for fraud or abuse. When situational changes with regard to the legal person occur, for instance a takeover or a change of management, a new screening will be carried out. This increases the effectiveness of the activities carried out by enforcement and supervisory bodies against financial and economic crimes such as tax fraud and bankruptcy fraud. Permanent monitoring is introduced to prevent and detect misuse of legal entities for criminal behaviours and specific economic crimes. When there is an increased risk of abuse, the authorities responsible for countering this risk are informed. It is up to those authorities to take the necessary steps within their sphere of responsibility.

In the Netherlands, beside these controls over legal persons, **screening of public employees** is implemented as part of the national administration recruitment and selection process of top managers. This screening is performed by the General Intelligence and Security Service (AIVD) every five years with a view to fighting against corruption. Furthermore, top managers in the national administration must take an oath in which special attention is paid to integrity. Top managers are obliged to report all their additional functions, which are checked in relation to any potential conflicts and/or incompatibility with their future position. Mayors and councillors at local and regional level have to comply also with a comparable set of rules on screening and integrity. Pre-employment screening, including all staff involved in procurement, is an integral part of the hiring process at Rijkswaterstaat, the executive arm of the Dutch Ministry of Infrastructure and the Environment. Finally, it is important to recall that the proposal for the new Dutch Public Procurement Act (which will probably enter into force in April 2016) envisages a new screening instrument.

The new system consists of two parts: the self-declaration (tenderers state that none of the legal exclusion clauses applies in their case) and the declaration of good conduct in tender procedures. Contracting authorities are no longer allowed to use their own testing tools, so as to avoid too many overlapping rules. However, if the contracting authority still has any doubts after the issuance of the declaration of good conduct, it can ask an opinion on the basis of the BIBOB Act. This opinion is additional to the declaration of good conduct, and covers further issues, such as the financial stability of the company (see next paragraph). In addition to the anti-corruption system, which also involves public procurement, Italy adopts an administrative preventive approach towards mafia infiltration in business activities. There are two different types of certificates, depending on the threshold of the public contract: the **anti-mafia communication** (when the contract amount is higher than €150,000 and lower than the EU threshold) and the **anti-mafia information certificate** (when the contract amount is higher than the EU threshold or when the amount of different types of contracts that need to be authorised is higher than €150,000).

These two certificates differ also due to the type of investigations performed by law enforcement institutions prior to their issuance. For the release of the anti-mafia communication, the Prefecture checks in the Single National Database whether there are any reasons for revocation, suspension, or prohibition following the application of a preventive measure<sup>47</sup>, as established in Article 67 of Legislative Decree No. 159 dated 6 September 2011 (Anti-Mafia Code).

For the release of the anti-mafia information certificate, in addition to the checks performed before issuing the communication, the authorities must verify the absence of attempts of mafia criminal infiltration aimed at changing or influencing choices and decisions made by enterprises. The legislation lists the situations the existence of such infiltration can be deducted from. There are not only charges or convictions for several offences, but also factual situations suggesting the existence of criminal infiltration. However, the simple suspicion without any factual basis does not suffice. Checks are carried out by law enforcement officers of Local Task Forces (see table above). Each law enforcement unit investigates those specific aspects falling within its sphere of competence: for instance,

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47 Preventive measures are applied to subjects that have been convicted for, or are suspected of some offences, as well as to persons who, on the basis of factual elements, are deemed to be involved in criminal activities or to live off the proceeds of such activities.

the Financial Guard screens corporate and entrepreneurial aspects, and inspects the individuals who manage and/or influence the choices of the company under control. All people with financial responsibility or influence (such as administrators, control bodies, technical managers, and building site managers) are investigated. Instead, the Police and Carabinieri investigate whether people involved in the company under investigation, and their cohabiting family members are somehow connected with criminal organisations. For each **major public work**, the Italian system envisages, beside Local Task Forces, the activation of a specific **JTF** (see the table above).

When an anti-mafia banning measure is issued, the Prefect has the duty to inform a long list of subjects, among others: contracting authorities, other Italian Prefectures, DNA, the Italian Antitrust Authority, ANAC, DIA, and the Chamber of Commerce. If the aforementioned certificates are not issued in due time, the contracting authority can sign the contract with the winner. Rules are also established for the payments to the winner pending the release of the certificates.

Close ties between corruption and organised crime prevention measures are evident in the guidelines on the use of special anti-mafia measures for managing, supporting, and monitoring companies.

The President of ANAC can ask the Prefect to apply these measures (i.e. re-appointment of management bodies or extraordinary and temporary administration) in the case of companies suspected or accused of serious crimes against the public administration or in situations revealing criminal conduct (Article 32 of Decree-Law No. 90 dated 24 June 2014). When a winning tenderer features an unlawful behaviour, it is possible to adopt these special measures to re-establish legality and transparency with a view to finalising public works execution. Two authorities have the power to adopt these special measures: the **President of ANAC**, when there emerge situations related to corruption, and the **Prefect**, when an anti-mafia banning measure is adopted against a company. Finally, works that can be implemented pursuant to extreme urgency procedures (governed by Article 9 of Decree-Law No. 133 dated 12 September 2014) are monitored by ANAC. The latter is responsible for verifying, among other issues, how urgent the public work is.

### 3. Red flags

Red flags are indicators that can be used to detect corruption, frauds, collusion, and management failures in different fields, including public procurement. Although it is quite difficult to give a precise definition, **a red flag is a 'pattern, practice, or specific activity that indicate the possible existence of corruption, unethical practice or fraud'** (Harris, 2013, p. 6). Therefore, a red flag provides information on the potential presence of corruption or other misconduct, without giving any actionable evidence or proof thereof. So, a red flag is a warning signal revealing a potential problem that needs to be tackled (see Campos and Pradhan, 2007, pp. 122–203, and Wensink and de Vet, 2013).

There are several types of red flags, which change over time and in relation to the context.

As highlighted by some scholars, 'they range from the specific - such as falsification of documents - to the indirect - long negotiation times or overruns' (Kenny and Musatova, 2010, p. 3). This distinction between direct and indirect indicators has been made also by the Austrian Association of Cities and Towns, which lists a number of natural red flags (e.g. secondary jobs associated with a job in the public sector, enjoyment of special conditions for shopping, a sudden change of mind in decision-making processes, etc.) and of specific ones (e.g. failing to conduct controls and checks despite there being a cause for it, repeatedly accepting invitations by external businesses, whose relevance for the public duty is not clear, repeatedly awarding tenders to specific contractors, etc.).<sup>48</sup> In public procurement, other red flags hinting at corruption or collusion are: any connections between bidders, that would undermine effective competition; prices quoted by some bidders, that are substantially higher than the prices quoted by other bidders; indications of physical alteration of one or more bids, particularly at the last moment; bidding time not in compliance with legal provisions; contract award and selection justification documents not publicly available; etc. (see Campos and Pradhan, 2007, pp. 302–303, and Wensink and de Vet, 2013, p. 23).

In addition to these examples, it is also important to mention the list of indicators identified in a study (Wensink and de Vet, 2013) on the direct cost of corruption in public procurement.

<sup>48</sup> Available at: <http://www.staedtebund.gv.at/gemeindezeitung/oegz-beitraege/oegz-beitraege-details/artikel/korruption-korruptionsbekaempfungdas-phaenomen-einige-wesentliche-merkmale-vom-dunkelf.html>.

The 27 red flags listed here below give a quite complete idea of the vulnerabilities of this sector:

- high inertia in the composition of the evaluation team;
- any evidence of conflicts of interest for members of the evaluation committee (for instance, because the public official holds shares in any of the bidding companies);
- multiple contact offices/persons;
- the contact office does not directly report to the contracting authority;
- contact person not employed by the contracting authority;
- any elements in the terms of reference, that hint at a preferred supplier (e.g. unusual evaluation criteria or explicit mentioning of the brand name of a good instead of general product features);
- shortened timespan for the bidding process (e.g. request advertised on a Friday for a bid to be submitted on the following Monday);
- use of an accelerated tender procedure;
- exceptionally large size of the tender (average value plus twice the standard deviation);
- bidding time not in compliance with legal provisions;
- acceptance of bids submitted after the deadline;
- limited number of offers received;
- any 'bogus' bids (e.g. bids from non-existing firms);
- any (formal or informal) complaints from non-winning bidders;
- an awarded contract including items not previously contained in bid specifications;
- substantial changes in the scope of the project or in project costs after the award;
- any connections between bidders, that would undermine effective competition;
- all bids being higher than the projected overall costs;
- not all/no bidders informed of the contract award and of the reasons for that choice;
- contract award and selection justification documents not publicly available;
- inconsistencies in reported turnover or in the number of staff;
- winning company not registered in the local Chamber of Commerce;
- no EU funding involved (as a percentage of total contract value);
- share of public funding from a MS (as a percentage of total contract value);
- failure by the awarding authority to fill in all fields in Tenders Electronic Daily (TED);
- audit certificates issued by an unknown/local auditor with no credentials (cross-checks reveal that the external auditor is not registered, is inactive, or is registered in a different field of activity);
- any negative media coverage about the project (e.g. failed implementation).

A good indicator is a starting point, but it is just an alert that has to be followed by further actions. Red flags are therefore valuable for analysing vulnerabilities. However, what really matters is the measure that follows the alert.

The research shows that **eight countries out of 25 somehow have red flags or similar tools** in place (Austria, Germany, Hungary, Italy, Lithuania, Portugal, Romania, and United Kingdom). In Austria, red flags, which are mentioned in the Code of Conduct for the Prevention of Corruption, are of two types: failure to report any secondary employment, and unexpected adoption of an exceptionally high-quality lifestyle. Similarly, some German federal states adopt indicators complemented with guidelines on how to act in situations possibly linked to corruption. In Saxony, for instance, the Code of Conduct against Corruption for Public Authorities makes a distinction between neutral indicators (e.g. conspicuously and inexplicably high living standard, display of status symbols, sudden changes of behaviour towards colleagues and/or supervisors, etc.) and alarm indicators. The latter are divided into two types: internal (within a department, e.g. insufficient transparency of official documents) and external (e.g. purchases at non-market price, useless purchases, conclusion of a long-term contract without transparent competition and with unfavourable conditions, etc.). In the United Kingdom, too, a non-exhaustive list of indicators is provided by the Serious Fraud Office (SFO) with a view to preventing corruption-related offences.

In Italy, the use of red flags is linked to the National Anti-Corruption Plan, which is renewed every three years. Its guidelines provide indications on how to implement corruption risk assessment by using risk identification mechanisms that are similar to red flags. In eastern EU countries, the use of these indicators is generally linked to specific projects. In Hungary, the use of red flags has been tested in a project implemented by K-Monitor, PetaByte, and TI Hungary. The project envisages

the use of red flags as an interactive tool that allows monitoring of procurement processes and its implementation by citizens, journalists, or even public officials, with a view to detecting fraud risks at different stages of the procurement process. This tool automatically checks procurement documents from TED, and filters risky procurements through the use of a special algorithm.

In Lithuania, indicators of corruption were established in 2014 in the framework of the Project on Creation and Installation of the Central Risk Management Analysis System of Public Procurement, financed through the European Social Fund (ESF) (85%) as well as the budget of the Republic of Lithuania (15%).

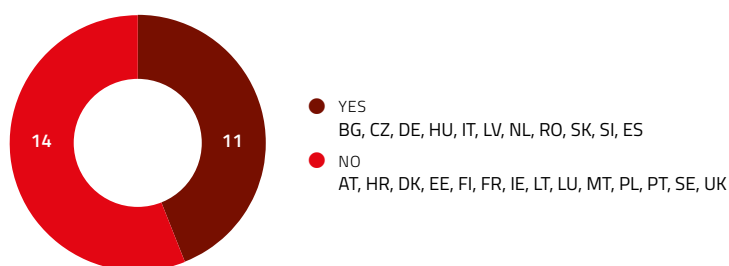
In Romania, red flags are instead mentioned in a guide on fighting criminality and corruption in public procurement, published by Freedom House. This NGO has implemented a project on this issue, financed by the European Commission (see paragraph 4).

Finally, Portugal features indirect red flags, which have not been designed as a tool to identify possible corruption practices. However, they represent a form of detection of malfunctioning in all kinds of public contracts. In this regard, two types of flags should be considered: a) information provided on the government webpage entitled '15% increase in contract price', concerning all contracts that have exceeded the initial contract value – this indicator might serve as a tool to identify irregular situations; b) information delivered yearly by the Court of Auditors and the Public Works Observatory, aimed at pointing out any possible malfunctioning of procedures.

#### 4. Debarment tools

Debarment tools are used **as selective criteria for bidders**. In particular, white lists work as a pre-selection condition for the selection of companies that take part in the bidding process, whereas black lists refer to a procedure that excludes companies and individuals (found responsible for bribery or corruption-related offences or serious misconduct, or not meeting legal requirements) from participating in public procurement. States and international organisations have increasingly suggested and used these tools in the last decade (Hjelmeng and Søreide, 2014; Transparency International, 2013b). Nevertheless, few States have established public and central registers of all listed companies and individuals entitled to access public procurement (Transparency International, 2013b; OECD, 2005), and the rules on these debarment tools significantly differ across countries. The research shows that **public white/black lists are available in 11** (Bulgaria, Czech Republic, Germany, Hungary, Italy, Latvia, Netherlands, Romania, Slovakia, Slovenia, and Spain) out of 25 countries analysed.

Figure 16. Use of white lists and black lists in MSs



Among the countries where no listing of firms currently exists, there were some examples in the past or there are law provisions establishing that information on companies and individuals suspected of misconduct shall be made public. For instance, 10 years ago Estonia tried to blacklist companies deemed not to comply with legal standards. However, the mechanism did not work, and the establishment of white lists is now on the agenda.

In Poland, too, lists of 'dirty' firms have been published on the Public Procurement Office website. However, they have been recently cancelled because of the lack of transparency of selection criteria. In France, although black/whitelisting is not established as a general rule, Article 8 of Law No. 2014-790 dated 10 July 2014 (relating to the fight against unfair social competition) introduced the possibility for criminal courts to order the dissemination – for a maximum of two years, on

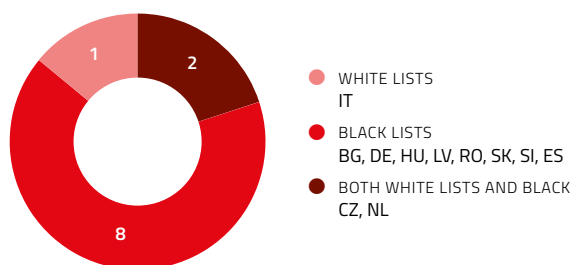
a dedicated website managed by the Ministry of Labour – of criminal judgments on concealed employment, employment of undocumented foreigners, or unlawful loan of labour. This could be considered as a first step towards the future introduction of white/blacklisting in the French legal system. In Lithuania, the new Public Procurement Law (not yet in force) includes a provision setting out that, if a company has a track record of not implementing works or being prosecuted, it is excluded from the public tender.

On the other hand, some MSs (mainly northern European countries) seem to be against blacklisting because they are reluctant to disclose information on individuals and companies. As outlined for Finland, from a cultural point of view, it is not appropriate to share information or have public databases on convictions.

All MSs but Romania refer to the so-called ‘**institutional model**’, governed by national laws and managed by public authorities, even though the types of listing differ.

This model includes both **whitelisting** and **blacklisting**.

Figure 17. **Types of debarment systems in MSs**



The whitelisting system (available in the Czech Republic, Italy, and the Netherlands) identifies eligible firms willing to take part in the public bidding process. In spite of differences across MSs, public authorities investigate companies and evaluate their suitability in terms of licences (enterprises) and/or of legality (individuals and companies that are not suspected of, or have not been convicted for corruption or other grave misconduct).

In Italy, white lists were used for the first time in April 2009, in the aftermath of the earthquake in Abruzzo, as a tool to identify eligible firms for rebuilding. From then on, white lists have been used only in exceptional situations until the entry into force of the new anti-corruption legislation, when they became a mandatory tool for some specific entrepreneurial activities (Article 1, paragraphs 52–57 of Law No. 190/2012).<sup>49</sup>

In addition to the cases where they are compulsory, each company can ask to be inserted in these lists. The application is evaluated by the Prefecture, which has to assess the presence of legal obstacles that can debar access to the list (Articles 67 and 84, paragraph 3 of the Anti-Mafia Code – Legislative Decree No. 159/2011).

Registration in a white list is valid for 12 months. The fact that the enrolment in white lists is mandatory for certain sectors but can be requested by any company creates misunderstanding among economic operators. They think that being on a white list can be an asset for the award of public works in general, and they thus apply even though they work in economic sectors for which registration is not required. As a result, the workload of Italian Prefectures increases.

<sup>49</sup> The activities for which enrolment in white lists is compulsory are: transportation of materials to dumping sites on behalf of a third party; national and transnational transportation and treatment of waste on behalf of a third party; extraction, supply, and transportation of topsoil and inert materials; packaging, supply, and transportation of concrete and bitumen; rental of machinery without staff; supply of wrought iron; rental of equipment with staff; road transport on behalf of a third party; and building site guard service.

In the Czech Republic, the Ministry for Regional Development maintains a list of approved economic operators (Article 125 of Act No. 137/2006 Coll., on Public Contracts). The list includes those economic operators that meet the requirements and qualifications set out in Articles 53 (basic qualifications criteria) and 54 (professional qualifications criteria) of the aforementioned legislation, have submitted evidence thereof to the Ministry for Regional Development, and have paid an administrative fee.<sup>50</sup> In the procurement procedure, economic operators are entitled to replace evidence, thus demonstrating they meet both basic and professional qualifications criteria through the submission of a document certifying enrolment in the list of approved economic operators. The contracting authority is obliged to recognise that document unless it is older than three months. The Dutch system features an **indirect form of whitelisting**, which is closely linked to the declaration of integrity introduced by the Public Procurement Act of 2012. As already explained, a contracting authority must request economic operators to submit the declaration of integrity as a compulsory document to access public procurement. Therefore, the issuance of this declaration does not automatically create a white list; however, failure to provide this document leads to the exclusion of companies from the tender procedure. In conclusion, this document has the same effect as a white list.

Black lists can be found in Bulgaria, the Czech Republic, Germany, Hungary, Latvia, the Netherlands, Slovakia, Slovenia, and Spain. In these countries, the listing of individuals and companies banned from competing in public bidding and/or from executing public contracts is governed by national acts. Among these States, Spain represents a particular case because the blacklisting of companies is strictly linked to the national **Official Register of Tenderers** (Articles 326–333 of the Revised Text of the Public Contract Act). In addition to the qualifications of registered companies, the aforementioned register lists the firms banned from concluding contracts with the public administration. In addition, the State and some Autonomous Communities have published a list of companies with some prohibitions, to be added to the Official Register of Tenderers. Companies are included in the black list when they are banned from obtaining civil service contracts for different reasons (conviction for serious crimes, infringement of professional rules or financial/tax obligations, false information, conflicts of interest, etc.). The length of the ban will be determined by the court, either criminal or administrative, that imposes it in relation to specific circumstances: starting from a maximum of eight years when the company has been convicted, under a final criminal judgment, for serious offences (including terrorism, human trafficking, business corruption, influence peddling, bribery, prevarication, fraud, etc.) up to a maximum of two years in the case of conflicts of interest. Instead, when the company has been sanctioned for administrative or financial infringements (such as tax obligations), the ban remains in force until irregularities are tackled. A peculiarity of the Spanish system is that bans apply also to those companies that, due to the individuals managing them or other circumstances, may be assumed to be a continuation or derivative of other companies affected by such bans, by virtue of transformation, merger, or succession.

Latvia, too, features a roster of banned tenderers, aimed at implementing a debarment system. A company that has previously failed to execute a contract can be excluded from public bidding. All contracting authorities must verify the **Register of Punishments** to determine whether participants in public procurement have been the subject of a disqualifying conviction. The register includes natural persons that have been convicted, as well as legal persons that have been subject to

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<sup>50</sup> The basic qualifications are related to the integrity of an economic operator. The latter a) has not been convicted with a final judgment for a criminal offence committed for the benefit of an organised crime group, for a criminal offence of participation in an organised crime group, legalisation of proceeds of criminal activities, accessoryship, taking of bribes, bribery, indirect corruption, fraud, loan fraud, including the cases involving preparation for, and attempts of complicity in such a criminal offence, or if the conviction on committing such a criminal offence has been expunged [...]; b) has not been convicted with a final judgment for a criminal offence that has been committed in relation to the object of business activities of the economic operator under separate legal regulations, or in case the conviction for committing such a criminal offence has been expunged [...]' (Art. 53, paras. 1 and 2 of Act No. 137/2006 Coll.).

Professional qualifications are linked to the bureaucratic and formal certification of the legal existence and expertise of an economic operator. The latter 'has to prove the fulfilment of professional qualifications requirements by submitting: a) a certification of the company register; b) evidence of possession of a licence to carry out business activities; c) evidence issued by a professional self-governing chamber or any other professional organisation, aimed at proving membership thereof; d) evidence attesting to professional competence [...]' (Art. 54, letters a), b), c), and d) of Act No. 137/2006 Coll.).

coercive measures. Foreign natural and legal persons are required to provide separate proof that they have not been the subject of a disqualifying conviction.

The German federal system does not envisage a national register of banned companies: only nine federal states<sup>51</sup> have black lists in place as a statutory provision. However, civil society is increasingly calling for a nationwide register, and its establishment has been under discussion for 11 years so far; even the Federation of German Industries (BDI) is in favour of the establishment of such a system. As a result, a proposal, supported by the Ministers of Economy and Justice, has been submitted to create a nationwide corruption register aimed at facilitating investigations on tenderers, applicants, and potential contractors, as well as at effectively combatting and preventing further white-collar crimes. The register will offer the possibility of deleting registered data in 1–3 years in the case of recovered and proven reliability. The authority has to consider all circumstances before imposing a blocking period of six months to three years.

In the Czech Republic, a black list of persons banned from performing public contracts came into effect on 1 January 2010. Based on Article 120(a) of Act No. 137/2006 Coll., an economic operator (legal or natural person) is blacklisted when it commits an administrative infringement by submitting false or incorrect information or evidence to demonstrate the fulfilment of basic and professional qualifications (the same criteria as for white lists apply, see note No. 50), which has or could have impacted on the assessment of the qualifications of such an economic operator in the following situations: award procedure, application procedure for enrolment in the list, application procedure for a change in the records, and issuance of the certificate. Moreover, the Czech legal framework envisages the publication of the list of subcontractors that are involved in each public work and that have reimbursed more than 10% and, in the case of a major public contract, more than 5%.

In Hungary, the Public Procurement Authority website publishes a list of tenderers excluded from participating in bids (based on previous behaviours, misconduct, irregularities, frauds, etc.). When tenderers are found in a conflict of interest or provide false data or false statements that may compromise the fairness of competition, they are excluded from bidding for a maximum of three years. Finally, the Dutch system also considers a sort of **warning list** instrument aimed at bringing the conduct of economic operators under control. The Dutch Authority for Financial Markets (AFM) publishes the name of the companies that are breaching the law, and ‘strongly advises’ investors not to do business with them. In this way, a company that does not comply with internal rules (or tries to back out of the pre-consultation system) is immediately isolated and stigmatised by other businesses. This reputational mechanism for debarring access to public bidding has been activated in the construction sector, where companies both act as investors, and constantly need to cooperate in subcontracting relationships (van Erp, 2008).

Similarly to the Netherlands, Slovakia features **shame lists** published by the Social Security Office as well as by the Tax Authority and public health insurance providers. Companies failing to pay their contributions on time are included in the list, which provides information on the amount of their debt, as well. Shame lists could be devised also for other obligations, such as payment of fees or penalties levied by regulation authorities with a view to protecting consumers.

In Slovenia a listing system is under development. It will be implemented with the new Public Procurement Act (currently under parliamentary discussion). The type of listing and the criteria to be applied have not yet been established in a definitive way.

In conclusion, as to blacklisting, it is worth underlining that the criteria for the inclusion of banned companies are similar across countries, and that they refer to both criminal integrity and/or bureaucratic conformity, and professional expertise of economic operators. Instead, the duration of the ban varies in relation to the kind of misconduct and to national regulations.

Alongside the institutional model, it is worth highlighting a **significant experience of listing ruled by civil society organisations** rather than by authorities. Although it is an exception across MSs, it represents an interesting experience.

In Romania, the lead was taken by Freedom House, an NGO that implemented a project financed by the European Commission. This project led to the publication of a guide on fighting criminality and corruption in public procurement, containing important advice on the most useful instruments.

51 North Rhine-Westphalia, Berlin, Hamburg, Schleswig-Holstein, Bremen, Hesse, Baden-Württemberg, Bavaria, and Rheinland-Palatinate (<http://www.bvdcm.de/news/aktuelle-korruptionsregister-deutschland>).



Freedom House moreover trained public officials (prosecutors, judges, and civil servants) on procurement cases. As a result, the Competition Council published a guide on how to prevent anti-competitive deals between companies participating in public biddings. This experience seems to be leading to a proper listing system. Such a measure has in fact been included in the action plan of the National Anti-Corruption Strategy 2012–2015. However, the National Authority for Public Procurement hampered the activation of this mechanism due to the lack of a legal basis.

#### 4.1 Effects and benefits of listing systems

**Are debarment tools useful?** Several authors and organisations hold that these tools, especially blacklisting, are useful not only as a **means to strengthen procurement processes**, but also as a **form of sanction** for companies involved in corruption and other grave misconduct and/or as an **incentive** for firms to comply with legal standards (Transparency International 2013b, pp. 2–3; Transparency International 2006, pp. 58–59; OECD, 2005, p. 14; van Erp, 2008, pp. 146–149).

However, the use of **with lists and black lists raises several challenges and concerns**. They can have an impact **on the economy**. If these tools are not used fairly and based on clear and uniform rules, they could negatively affect competition, which governs the markets. The new EU procurement directive of 2014 (Article 57, paragraphs 1 and 3) pays great attention to this issue, allowing contracting authorities to exclude economic operators from participating in a public procurement, but warning that the fair competition principle has to be respected (see Hjelmeng and Søreide, 2014, p. 2). Moreover, the EU legislation allows MSs to use debarment rules, warning governments that their implementation must respect the principles of equal treatment and proportionality. In fact, blacklisting and whitelisting have relevant **reputational effects on individuals and companies and affect their rights**. The exclusion from participation in a public bidding has to be limited in time and proportionate to the misconduct. Then, debarment systems have to consider the risks of a wrong evaluation, and have to guarantee the rights of defence and appeal. In this perspective, it is important to underline that, among all countries analysed in the present research, only six consider the right of appeal for individuals and firms.<sup>52</sup> In addition, several countries are reluctant to use black lists ‘because of the risk of manipulation or lack of sufficient evidence of companies’ involvement in corrupt activities’ or other serious misconduct (OECD, 2013, p. 88).

## 5. Databases

Databases represent a crucial tool for information sharing. Scholars (Zanotti, 2015; Di Nicola et al., 2015) have pointed to **the need to set up databases for collecting and sharing information about companies**, and experiences in some countries seem to confirm it. **Almost all countries have registers of companies** rather than databases. These registers store different information on features, qualifications, and financial data of firms. Some countries have a single register of national companies managed by a public authority (such as commercial courts), whereas others have different types of registers focused on specific data (e.g. tax liability or identity of firms, etc.) and managed by both public and private organisations (e.g. research institutes or associations).

In the former group (Austria, Croatia, Czech Republic, Germany, Ireland, Luxembourg, Malta, Italy, Lithuania, Poland, and United Kingdom), the register is usually aimed at ensuring transparency of the national market, and access is generally public and free of charge (except for certain sensitive data). However, these registers can have various functions, including providing information to contracting authorities for monitoring tenderers. With particular reference to Luxembourg, the register of companies can be used also in the case of suspected corruption. For example, if an unsuccessful bidder

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52 The countries are: Austria, the Czech Republic, Hungary, Italy, Latvia, and Poland. In Slovenia, the draft law envisages the right of appeal. The Italian legal system does not envisage a proper right of appeal, but companies whose registration in white lists has been denied by the Prefecture have 10 days (from the formal denial) to file a complaint. In Slovenia, the draft law envisages the right of appeal. Moreover the system in place in Hamburg and Schleswig-Holstein (Germany) is proposed as a model to be adopted at national level in the future: in this federal state, the Central Information Authority recognises companies’ right to be heard before a final decision imposing a blocking period is made.

has doubts about the winner, it can check the latter's financial health, and report to the authority. In the latter group (Estonia, Finland, France, Portugal, and Slovenia), access to registers can be free of charge, depending on the kind of information required or the rules of the organisations that manage them. A peculiarity of this second group of countries is that registers also contain criminal records on firms.

Contracting authorities can consult these registers to gather information on tenderers. Nevertheless, registers do not serve the same function as the databases used by law enforcement agencies to investigate candidates in relation to the access to procurement processes.

**Only five MSs** (Austria, Italy, Latvia, Netherlands, and Slovakia) use these databases.

In Italy, the use of databases with investigative purposes is strictly linked to the national system of anti-mafia monitoring. To screen all the companies that compete or wish to compete in a public bidding, several databases, both private and public, are accessed by police forces. In particular, the Financial Guard<sup>53</sup> consults both public (free-of-charge) and private (fee-based) databases.<sup>54</sup> Moreover, the Financial Guard also consults a database named 'Telemaco'<sup>55</sup>, which alerts the Financial Guard, should any changes in managerial bodies of companies occur. In addition, the Italian Prefectures consult the Investigation System (SDI) database, which contains information collected by national law enforcement agencies, both at local and national level, during their surveillance and ordinary monitoring activities. This database stores also all data on convictions and judiciary procedures. In addition, DIA has developed the Central Observatory of Public Procurement (OCAP), a database that includes information and data gained by the Local Task Force during on-site inspections. In the future, all law enforcement agencies in charge of anti-mafia controls will use the Single National Database (Article 96 of Legislative Decree No. 159/2011), which is not yet operational. This database will contain all anti-mafia documents issued at national level, and it will be linked to almost all existing databases, both national and international, that are useful for anti-mafia investigations, thus allowing for immediate consultation of different kinds of information.<sup>56</sup> Last but not least, ANAC manages the National Database on Public Contracts, which collects and processes data on public procurement, useful for authorities to carry out their supervising and monitoring duties. The Netherlands has a National Administrative Vulnerabilities Register located within LIEC. The register is an important source of information for all administrative authorities active in the fight against organised crime. The information on systemic vulnerabilities is usually compiled by the police in cooperation with the Public Prosecution Service, the Royal Military and Border Police, or a Municipality, and helps to address structural bottlenecks in combatting crime. In addition, LIEC – together with the Ministry of Security and Justice, the police, and the Public Prosecution Service – analyses, evaluates, and addresses these vulnerabilities. This makes LIEC the hub of knowledge for the administrative approach to organised crime. LIEC compiles existing information and expertise, which would otherwise be available only in a piecemeal fashion, and would thus prove difficult to access. Moreover, Municipalities can receive police information in a structured way. To this end, an agreement (so-called 'covenant') will be concluded between Municipalities and police bodies. Data gathered by the various covenant partners in the framework of their surveillance and detection task can be shared with other partners.

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53 The Financial Guard is specialised in financial and economic controls.

54 It is worth recalling: a) among public databases, the Tax Registry, a database held by the Income Revenue Authority, which stores fiscal information on individual persons and companies; b) among private databases, those owned by Cerved (an entrepreneurial group that works as a rating agency, also assessing financial conditions and reliability of companies), and Mint (a worldwide database held by Bureau Van Dijk - BvD, which stores information on firms, persons, banks, and insurance agencies concerning financial data, managers, corporate managerial bodies, etc. This database includes two specific operational systems: the first one is named 'Mint Italy', and is focused on Italian subjects; the second one is known as 'Mint Global', and stores information on economic data of subjects from all over the world). For further information, see Furciniti and Frustagli, 2013.

55 Telemaco is managed by the Chamber of Commerce.

56 The use of this national database is governed by Article 8 of Law No. 121 dated 1 April 1981. The databases the Single National Database will be linked to are already in use, and are being constantly consulted by law enforcement agencies. Moreover, the Single National Database will be connected to the operational system of DIA, which allows for access to data collected during inspections at building sites (see Furciniti and Frustagli, 2013, p. 217).

Moreover, in the Netherlands, the BIBOB Office (see paragraph 1) uses a wide range of sources, including judicial databases and databases of the police and tax authorities, with a view to investigating the integrity of applicants for licences, tenders, and subsidies. The information obtained is processed and can be retained in a BIBOB database for a maximum period of two years.

In Austria, the total number of databases could not be established due to the prohibition for law enforcement agencies to disclose information and data on inspections. Moreover, the Public Prosecutor's Office maintains another database, from where information on companies can be obtained in case there exists a justification according to law.

In Latvia, an electronic system on various kinds of information on bidders is in place. The contracting authority uses it to check, for instance, fiscal records of bidders or any tax violations, exclusion criteria, and technical resources of the bidder (infrastructural public works).

Finally, Slovakia features register of financial beneficial owners (containing around 4400 records and information on the ownership structure of legal persons that have been awarded a public procurement contract) and a register of persons that have been banned from participating in public procurement procedures. These public registers tend to be considered effective and transparent databases for contracting authorities and bidders in Slovakia.

Beside these public databases, there is another electronic monitoring tool managed by the NGOs TI Slovakia and Fairplay Alliance. This portal displays procurement expenditures by procurers, suppliers, sectors, and Regions, as well as it provides a large downloadable amount of structured procurement-related data.

# Control measures in the post-award phase

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## 1. Systems of control and supervision on contract execution

In the previous chapter, the preventive systems of the countries have been analysed, highlighting that the prevention of corrupt behaviours is one of the main purposes in planning national mechanisms of protection of administrative procedures, including tendering. Here, we focus on the **systems of control and monitoring of the post-tender phase**.

The questionnaire shows that basically two kinds of control are used in all countries: **internal** and **external monitoring**. The former is carried out by bodies that have taken part in the contract award procedure. This kind of controls is usually carried out directly by **contracting authorities** and is related to the compliance of public works execution with contractual provisions. So, monitoring bodies have to check whether the work has been accomplished within the deadline set out in the contract, all invoices and fiscal aspects are correct and law-abiding, the quality of executed works complies with the agreements, and so on.

Despite for all sectors the responsibility for supervising contract execution is usually delegated to the contracting authority, in Austria a private body is tasked with monitoring in the **construction sector**: the **Local Construction Supervision Body**. This private body performs a certified function that is contracted by constructors to civil engineers with the aim of overseeing and monitoring the overall compliance of executed works with contractual agreements: quality, financial limits, time, and so on. It is crucial to note that, by performing this function, the Local Construction Supervision Body, in order to contribute to the success of a construction project, carries out also control tasks that can prevent corruption.

External monitoring is carried out by institutions not directly involved in tendering procedures and works execution. These **independent and external bodies** (such as courts of auditors, finance or tax agencies, labour inspectorates, etc.) usually focus their attention on economic and financial aspects, the transparency of accounts, the efficient use of public funds, and compliance with labour laws. Among MSs having external monitoring institutions in place, Italy is a particular case because of the role played by **ANAC**. Although tasked with performing preventive monitoring, ANAC also has repressive powers (supervision, sanctions, and compulsory administration). ANAC plays a significant role in monitoring public contracts because it has been assigned all control duties previously performed by the former Authority for Monitoring Public Contracts (AVCP).

In addition, when the companies being awarded the works have subsequently become involved in investigations for crimes against the public administration (including bribery), ANAC has the power to propose that the local Prefect either (a) order the reorganisation of the corporate bodies of the corporation, by replacing the individuals involved in the alleged improper conducts, or (b) appoint up to three new managers in charge of the extraordinary and temporary management of public tender contracts within the company.

Table 6. Control measures

Country	External controls
Austria	As regards independent oversight in sectors other than construction, a system made up of different bodies is in place, which involves national and regional <b>courts of auditors</b> and the <b>municipal auditing bodies</b> (responsible for financial control), and the <b>Federal Procurement Agency</b> (responsible for controlling public procurement procedures).
Bulgaria	Control mechanisms (especially concerning quality checks and contract execution in compliance with specific requirements) are managed by the <b>Public Finance Inspection Agency</b> and the <b>Court of Audit</b> (Public Procurement Law, chapter 19, Article 123).
Croatia	For all sectors, the <b>State Audit Office</b> monitors all financial aspects of public contract execution. It also verifies whether the public procurement procedure has been applied whenever mandatory. Moreover, the Procurement Act includes a clause on monitoring public procurement contract execution. Although this clause came into effect on 1 January 2012, the institution responsible for overseeing this part of public procurement processes has not yet been established.
Czech Republic	For all sectors, the <b>Supreme Audit Office</b> , as an independent institution, performs audits on state procurement and contracts awarded (financial controls and budget performance).
Denmark	The <b>National Audit Office</b> is an independent institution that oversees the use of public funds in various sectors, including public procurement. The Danish Public Accounts Committee is the only body that can call upon the National Audit Office to examine a particular area. The audit approach is, however, determined by the latter.
Estonia	The <b>National Audit Office</b> is an independent institution tasked with monitoring the expenditures of public funding, including financial aspects of public procurement processes and public contract execution. Moreover, it issues non-binding recommendations on public procurement cases, targeted at contracting authorities and the Ministry of Finance.
Finland	The <b>National Audit Office</b> inspects the use of public funding by any entity subject to monitoring, including the accounts for public contract execution. The <b>National Tax Agency</b> carries out fiscal controls. It can then report corruption in various contexts, including public procurement.
France	Additional checks are either internal controls (by <b>inspection services</b> ) or controls launched by financial jurisdictions ( <b>Regional Audit Chambers, Court of Auditors, and Budget and Finance Disciplinary Court</b> ).
Germany	The <b>Federal Court of Audit</b> monitors public procurement and expenditures related to public contracts. Similar to that, the <b>State Audit Courts</b> supervise cost-effectiveness and public procurement procedures at central and local level.
Hungary	The <b>State Audit Office</b> monitors accounts and the use of public resources.
Ireland	The <b>Office of Government Procurement (OGP)</b> , established in 2014, takes full responsibility for procurement policy and procedures and is considering enhancing mechanisms to curb cost overruns in the implementation of the new rules. The <b>Comptroller and Auditor General (C&amp;AG)</b> provides independent assurance that public funds and resources are used in accordance with the law in various areas, including public procurement.
Italy	The <b>Court of Audit</b> inspects financial aspects of public contract execution. Although tasked with performing preventive monitoring, <b>ANAC</b> can exercise repressive powers (supervision, sanctions, and compulsory administration) aimed at guaranteeing that public contract execution complies with applicable legislation and the principles on public procurement and economic efficiency.
Latvia	The <b>State Audit Office (SAO)</b> oversees the use of central and local government resources, and enjoys a high degree of independence in monitoring administrative proceedings.
Lithuania	The <b>Public Procurement Office</b> assesses how the contract has been implemented. Other institutions involved in the monitoring of awarded public contracts are: the <b>National Audit Office</b> , the <b>Competition Council</b> , and <b>public legal persons authorised</b> by government resolution to administer EU financial assistance.
Luxembourg	The <b>Commission of Tenders</b> is a body of the <b>Ministry of Sustainable Development and Construction</b> that plays a small consultative role during the execution phase. Upon request, it can intervene and give its opinion on contract execution and monitoring. Besides, if the contracting authority decides to terminate the contract on grounds of lack of financial probity, the Commission has to be consulted in advance. Any other issue regarding contract execution and supervision must be reported to the <b>Administrative Courts</b> . Moreover, the <b>Court of Auditors</b> oversees financial management of public funds. As a result, it also monitors public contract and works execution.
Malta	The <b>National Audit Office</b> monitors the management of public resources, including those used for public contract and works execution.

Country	External controls
Netherlands	With regard to monitoring of financial aspects of the procurement process, the <b>audit offices</b> , both at national and local level, play a pivotal role. Every municipality has its own audit office, which is tasked with overseeing the procedure that has to be followed, as well as with carrying out an <i>ex post</i> evaluation thereof.
Poland	The <b>Supreme Audit Office</b> is an institution with an independent executive organ responsible for overseeing the use of public funding.
Portugal	The <b>Court of Auditors</b> and the <b>Public Works Observatory</b> are generally responsible for monitoring contract execution. However, recommendations from external bodies (especially the Court of Auditors) are not complemented with substantive measures. Moreover, the <b>Inspectorate General of Finance</b> is responsible for monitoring financial aspects in various sectors, including public procurement.
Romania	The only institution that is responsible for monitoring works execution is the <b>Accounts Court</b> . However, it has no explicit policy on procurement in place, and it pays attention to this issue only if during the overall verification of budgets (the budget of each institution is audited by this body), something odd stands out.
Slovakia	The <b>Audit Authority</b> is the institution within the central coordination body for the area of public contracts that carries out financial audits linked to the management of public financial resources. Moreover, the <b>National Audit Office</b> is the independent body responsible for monitoring the use of public budget.
Slovenia	<b>Inspection Services</b> are responsible for on-site monitoring in the case of public construction works, or for other type of checks during works execution. Financial aspects are monitored by the <b>Court of Audit</b> .
Spain	Systems of control and supervision of contract execution are carried out by the <b>Comptroller General's Office of the State Administration</b> , which assesses the quality of works execution and its compliance with contract provisions, before instructing payments to the contracting company. If controllers report any irregularities, they will refer the case to the <b>Court of Auditors</b> , which will carry out thorough investigations. Moreover, the assessment of workers' conditions is carried out by the <b>Labour Inspectorate</b> , which monitors safety conditions at work and compliance with employment legislation.
Sweden	The <b>National Audit Office</b> audits all financial and economic aspects linked to the expenditure of public resources.
United Kingdom	The <b>Crown Commercial Service</b> (which replaced the former Buying Solutions and the Government Procurement Service) has been operating since 2014 as a central purchasing body for the government and public entities. It does not have a specific 'control and supervision' duty, but it is responsible for: managing the procurement of common goods and services; improving supplier and contract management across the government; increasing savings for taxpayers by centralising buying requirements for common goods and services, and bringing together smaller projects; and leading on procurement policy on behalf of the national government. Moreover, the <b>National Audit Office</b> is an independent parliamentary body responsible for auditing central government departments, agencies, and non-departmental public bodies.

In Italy, the same special law enforcement units that work under the provisions of the Anti-Mafia Code<sup>57</sup> and carry out preventive controls (see Chapter 3 paragraph 1) are in charge of inspections at building sites during public works execution. This kind of control is performed only over public works. As shown in the previous table, each unit of the **Local Task Force**, based on its own specific field of expertise, monitors various aspects: access to building sites and workforce; means of transport and materials used; and accounts. With reference to major public works, inspections are implemented by both this Local Task Force and a **JTF** specifically established for each major public work (the two most relevant examples of JTF are: GITAV, and GICEX). Another specific feature of major public works is that the contract is signed by one **general contractor** that takes on responsibility for all companies working at the building site and that acts as contact point for monitoring authorities. The national JTF carries out various tasks: 1) **monitoring and analysis of information** in order to strengthen prevention and countering criminal and mafia-type infiltration into major works (for instance, the Turin-Lyon high-speed railway line or EXPO Milano 2015). This information is related to the data collected during the inspections periodically carried out inside the building site; 2) **control of all companies winning tenders (or being awarded subcontracts)**. As to the construction sector, the first controls are focused on companies that carry out works related to the so-called 'cement cycle' (transport/purchase of materials, waste transport, etc.). Besides, all other companies working at the

57 Legislative Decree No. 159/2011.

building site are monitored; 3) **monitoring of property transfer of the plot of land** where a building site is settled. It is important to verify that this transfer is not led by criminal organisations. The JTF makes sure that expropriation procedures are lawful and that the owner of the plot of land does not belong to a criminal organisation (the latter could have bought the land with a view to gaining significant profits during expropriation).

Every JTF carries out in-depth monitoring, inspecting only a single and specific major public work. It has therefore the opportunity to check every aspect of a major work (physical persons, legal entities, materials, workforce, etc.), outlining the international and national context. More specifically, **Local Task Forces** carry out inspections inside building sites, whereas the **JTF** examines collected data and carries out closer and more complex inspections. At a later stage, these two task forces meet in plenary to discuss investigation results related to the specific major public work under monitoring, as well as to deliver all relevant information to the Prefect, who will make a decision.

Moreover, in relation to the Turin-Lyon high-speed railway line, the **JTF screens all data registered by the general contractor** in a weekly building site book and in a monthly report. The role of the JTF and its relationships with the general contractor are established in a legality pact in compliance with the CCASGO guidelines (see Table 5). It is worth recalling that on 3 August 2011 the Inter-Ministerial Committee for Economic Planning (CIPE) established that **legality pacts** are compulsory for each major public work, and approved the CCASGO guidelines. These kinds of agreement are concluded in the post-tender phase in order to meet three needs: 1) monitoring commitment procedures of the public work (including the winning company, all other works contractors and subcontractors, and any other person or company that has been granted access to the building site; a database containing information on all the subjects involved is thus set up); 2) preparing for the operational stage (e.g. checking materials to be used for building); 3) inspecting the building site.

Finally, the questionnaire shows that only Italy features different control measures and bodies in relation to the typology of public work. Local Task Forces, ANAC, and the Court of Audits carry out controls, based on their own procedures, for all kinds of public works, whereas the JTF is responsible for monitoring major public works and/or transnational ones. All the other 25 MSs analysed feature a unique control mechanism for all kinds of public contracts and works.

Although it is very hard to evaluate the effectiveness of control measures, it is important to **reflect on the real control power of the various authorities** in charge of this task. The role of **contracting authorities** needs to be supported and complemented with the monitoring activities carried out by other **independent and impartial authorities**. From an operational perspective, however, the autonomous bodies, which are completely out of the awarding procedures, may not always be able to carry out their monitoring tasks in an effective and continuative way. So, in order to strengthen monitoring activities, it is important to guarantee that more than one external body is involved. The public, the civil society, and naming-and-shaming institutions (both national and international) all could play a role.

Finally, it is worth inquiring whether the complex control systems that are focused also on abusive conduct could be a good practice for all EU MSs. In fact, contract and works execution offers several opportunities for the commission of criminal offences. As shown by Italian judicial cases, if a building site is controlled by a criminal organisation, the latter can easily be awarded subcontracts, or use materials and human resources with a view to achieving various purposes: gain additional income, strengthen its own criminal networks, commit other felonies such as money laundering, etc. (See *Ordinanza San Michele, 2014*, and *Commissione parlamentare d'inchiesta sul fenomeno mafia e sulle altre associazioni criminali, anche straniere, 2013*). Consequently, it is important to reflect on the usefulness of establishing in all countries some measures aimed at monitoring both compliance with economic and contractual provisions, and abusive behaviours that can occur during works execution. Finally, another important issue that has to be pointed out is related to the best way to implement controls on abusive practices. For instance, Italian control mechanisms are mainly based on desk monitoring. As a result, they imply a great deal of bureaucracy and delays. These aspects raise concerns on the effectiveness and efficiency of controls on illegal behaviours.

## 2. Law enforcement and prosecuting bodies

Considering law enforcement authorities and prosecutor's offices with investigative powers in relation to the post-tender phase, the questionnaire shows that the countries investigated have substantially similar authorities. In fact, as described in the following table, two thirds of MSs feature law enforcement bodies specialised in detecting **corruption** in various economic sectors, including public procurement. Half of these countries also feature a specialised prosecutor's office in charge of prosecuting corruption. Along with these bodies, it is worth highlighting that one third of the countries have special law enforcement units in place that have been specifically established to investigate **serious organised crime** and/or **economic and financial crimes**.

In those countries where such special law enforcement units are not present, organised crime and corruption are investigated by the ordinary law enforcement units.

As far as the following crimes are concerned – corruption, organised crime, and economic crimes – specialised law enforcement authorities and special prosecutor's offices in all the MSs analysed are not exclusively focused on the public procurement sector, but they are in charge of investigating all economic and social areas. Slovenia represents an exception due to its Special Prosecutor's Office, which investigates serious forms of crimes – in particular organised crime infiltration and corruption – in public procurement/concessions.

Italy too represents a particular case because it features investigative bodies that specifically work on monitoring public works execution: DIA, among its other investigative duties, is tasked with coordinating and stimulating the JTF and the law enforcement units forming part of Local Task Forces. Local task forces and the JTF perform both preventive and repressive actions (see paragraph 1 and Chapter 3).

Further details on the various investigative bodies are provided in the following table.

Table 7. **Investigating institutions and specialised prosecuting bodies**

Country	Investigating/Specialised prosecuting bodies	Mandate
Austria	Federal Anti-Corruption Bureau (BAK)	It is a federal office tasked with preventing and fighting corruption with a nationwide jurisdiction over security police and criminal police matters concerning <b>corruption</b> . It was established in 2010 as an institution of the Austrian Federal Ministry of the Interior.
	Special Prosecutor's Office for White-Collar Crime and Corruption (WKStA)	It is a special anti- <b>corruption</b> prosecution authority, created in 2011, which can moreover make policy recommendations to the Minister of Justice, based on its experience from past and ongoing cases.
Bulgaria	National Anti-Corruption Policy Body	It is a new single <b>anti-corruption</b> body established in the framework of the strategy for preventing and combatting corruption in the Republic of Bulgaria for the period 2015–2020. It acts as a specialised coordinating body liaising between the Prosecutor's Office, the State Agency for National Security (SANS), and the Ministry of the Interior, and its main goal is to investigate corruption.
Croatia	Bureau for Combatting Corruption and Organised Crime (USKOK)	Specialised in investigations related to <b>corruption and organised crime</b> , it has been operating within the State Attorney General's Office since 2001.
	USKOK National Police (PNSKOK)	Since 2009, PNSKOK has been USKOK's counterpart in the Criminal Police Directorate. PNSKOK is well equipped to carry out effective investigations with a view to fighting against <b>corruption and organised crime</b> .



Country	Investigating/Specialised prosecuting bodies	Mandate
Czech Republic	Corruption and Financial Crime Detection Department (ÚOKFK)	Established in 2003 as a special unit within the Czech police, it investigates <b>corruption and financial crimes</b> . ÚOKFK is recognised as a valuable element in the Czech security system, especially for its professional investigators who are able to unravel a broad range of key cases also with connections to classic organised crime (financial crimes, VAT frauds, money laundering, etc.).
	Organised Crime Detection Department (ÚOOZ)	Established as a special unit within the Czech police in January 1995, ÚOOZ deals with an increasing number of <b>corruption investigations connected to organised crime</b> . It is headquartered in Prague and has six regional branch offices. Its main tasks are: acquiring, gathering, storing, analysing, and using information relevant to the fight against organised crime; and detecting, investigating, and arresting organised crime offenders.
	Department for Serious Economic and Financial Crimes	It was established by the Supreme Public Prosecutor as a body specialised in <b>serious forms of economic and financial crime</b> in capital markets and in the banking and tax fields. It is also tasked with confronting some forms of corruption. Its main activities are: supervising compliance with the law in pre-trial proceedings in the abovementioned cases of intentional criminal offences; and developing methodological tools.
Denmark	Public Prosecutor for Serious Economic and International Crimes	It is the main body responsible for investigating <b>serious financial and international crimes</b> . Its multidisciplinary team is composed of prosecutors and investigators. It was established in 1973 and works with the police with a view to prosecuting crimes in pursuance of the Danish administrative regulations.
Estonia	Estonian Internal Security Service (KAPO)	It is a governmental agency established in 1991 within the Ministry of Internal Affairs. It is responsible for maintaining national security through collection of information and implementation of preventive measures, as well as investigation of offences. It deals with <b>crimes committed by high-rank officials</b> , judges, prosecutors, and high-rank police officials, as well as major crimes and corruption in Estonia's five largest cities (the ordinary police deal with the other cases).
Finland	National Bureau of Investigation (NBI)	There is a special anti-corruption unit within the NBI (created in 2007), which however consists of only one officer. Investigations of <b>corruption-related crimes</b> are conducted by <b>local law enforcement units</b> .
France	Central Office for the Fight against Organised Crime (OCLCO)	It was established in 2006 with the aim of fighting against <b>criminal organisations</b> , regardless of the nature of their illicit activities.
	Directorate for the Fight against Organised Crime and Financial Crimes (SDLCOF)	Since 2004, the specialised interregional jurisdictions have been fighting against <b>organised crime</b> (organised groups and criminal associations) and <b>financial and economic criminality</b> (for instance, violation of probity), especially in relation to very complex affairs.

Country	Investigating/Specialised prosecuting bodies	Mandate
Germany	Federal Criminal Police Office (BKA)	Established in 1951, BKA is a nationwide/federal investigative police agency tasked with monitoring and investigating <b>various forms of crime</b> . It reports directly to the Federal Ministry of the Interior. By acting as an information and communications centre of the German police, BKA provides support to national and federal state police forces in relation to prevention and prosecution of crimes that involve more than one German federal state and that are of international significance or otherwise of considerable significance. The fight against structural <b>corruption</b> is carried out by centralised investigation units within the national criminal police or central criminal departments with specialised staff. Moreover, each federal state has a specific organisation tasked with fighting corruption and financial crimes (e.g. the Department for Interior Investigations in Hamburg and the Central Anti-Corruption Office in Bremen). Investigations of corruption are not under the responsibility of the police; they are instead carried out by the Department of the Interior.
	Specialised Public Prosecution Offices/Departments in Federal States	Fourteen out of 16 federal states feature Public Prosecution Offices/Departments specialised in <b>corruption and/or economic crimes</b> .
Hungary	Coordination Centre against Organised Crime	It reports to the Minister of National Security and its main task is to gather and analyse information gleaned by law enforcement agencies and other authorities.
	Criminal Directorate (NAV BF)	It plays an important role in detecting and tackling <b>financial crimes connected to organised groups</b> .
	Hungarian Prosecution Service	It has its own investigative branch, which investigate prosecutors, judges, notaries, police officers, tax and custom officers in relation to certain crimes, including <b>corruption</b> .
Ireland	Criminal Assets Bureau (CAB)	Established in 1996, the CAB is a multi-agency law enforcement body which uses a multi-disciplinary partnership approach in its investigations into the suspected proceeds of criminal conduct. It works closely with international crime investigation agencies and bodies.
	Office of the Director of Corporate Enforcement (ODCE)	One of the important functions of this body (established in 2001) is to encourage compliance with the requirements of the Companies Acts. The investigative and enforcement function of the ODCE is quite extensive, including <b>white-collar crimes</b> .
	Garda Bureau of Fraud Investigation within the Police	It is a specialised division of Ireland's national police forces (formed in 1996) which investigates <b>financial crimes</b> . It operates as part of the Garda National Support Services branch, and works alongside other sections of the force, as well as the external ODCE.

Country	Investigating/Specialised prosecuting bodies	Mandate
Italy	Anti-Mafia Investigation Directorate (DIA)	Established in 1991, it is a law enforcement interagency body that carries out investigations on crimes related to the <b>mafia and other organised criminal groups</b> . It carries out both preventive and repressive actions.
	Anti-Mafia National Directorate (DNA)	Established in 1991, it is a national body under the authority of the National Anti-Mafia Prosecutor. It is specialised in mafia investigations all over Italy
	Anti-Mafia District Directorate (DDA)	Established in 1991, it is composed of 26 local sections located within the 26 districts of the Courts of Appeal. Local units are in charge of carrying out investigations on <b>organised crime</b> and the <b>mafia</b> .
	Local Task Forces	They are composed of five law enforcement agencies (Financial Guard, Police, Carabinieri, State Forestry Forces, and Fire Brigade) and the DIA, and are led by the Italian territorial Prefectures. Their main task consists in carrying out necessary and compulsory controls aimed at preventing <b>criminal infiltration in public procurement</b> and at detecting <b>criminal activities during public works execution</b> .
	Joint Task Force (JTF)	The Italian system envisages the activation of a JTF for each <b>major public work</b> (e.g. GITAV and GICEX), in addition to the local task force. In addition to providing supporting information and analysis to the Prefect, the JTF ensures constant information to CCASGO, as well as cooperation with DIA. Investigations (carried out by the JTF during both the pre-tender phase and works execution) are planned by the Prefect and are related only to the work falling under the responsibility of that specific JTF.
	National Anti-Corruption Authority (ANAC)	It is a body that beside the prevention of <b>corruption</b> (see table 5), also <b>monitors public contracts</b> and has repressive powers.
Latvia	Bureau for Preventing and Combatting Corruption (KNAB)	Established in 2012, it is the leading <b>anti-corruption</b> authority of Latvia. It is aimed at fighting corruption in a coordinated and comprehensive way, through prevention, investigation, and education. It is an independent public institution under the supervision of the Cabinet of Ministers, specifically of the Prime Minister – supervision is limited to monitoring the lawfulness of its decisions. KNAB is also a pre-trial investigatory body, and has traditional police powers.
Lithuania	Special Investigation Service (STT)	Established in 1997, it is a statutory law enforcement institution reporting to the President and the Parliament of Lithuania. It is aimed at detecting and investigating corruption offences, as well as at developing and implementing <b>corruption</b> prevention measures. STT acts as a facilitator in streamlining anti-corruption activities.
	Immunity Service	It is a body responsible for the prevention and investigation of <b>corruption</b> within the police. It reports to the Police Commissioner General.
Luxembourg	Service of the Judiciary Police (SPI)	Within the Judiciary Police, there are specialised departments dealing with <b>organised crime</b> and <b>economic and financial crimes</b> .
	Public Prosecutor's Office	The Luxembourg Public Prosecutor's Office boasts a section dealing with <b>economic and financial crimes</b> and a section dealing with <b>organised crime</b> .

Country	Investigating/Specialised prosecuting bodies	Mandate
Malta	Malta Police Force	It is the main law enforcement agency and is composed of different investigative units. Among the various units, the Economic Crimes Unit investigates <b>corruption</b> offences and produces annual statistics on its investigations.
	Anti-Fraud and Corruption Unit within the Internal Audit and Investigative Department (IAID)	This unit examines governmental activities, and provides internal <b>financial investigative services</b> , separate from criminal investigations.
Netherlands	Anti-Corruption Service of the Dutch Police	Established in 1897, it is a specialised investigation service within the Dutch police, aimed at combatting <b>corruption</b> . It has both repressive and proactive tasks, and investigates cases of possible criminal conduct of government officials and civil servants, such as corruption involving police officials, members of the judiciary, and prominent public office holders. Other investigations are carried out by ordinary police forces. In some investigations, the Anti-Corruption Service of the Dutch Police is assisted by local police units or special law enforcement agencies.
	Public Prosecution Service (PPS)	The PPS is responsible for criminal enforcement of the legal system and for other tasks as established by law. It includes two specialised offices: the National Prosecution Office for Serious ( <b>Organised</b> ) Crime and the Functional Prosecution Office. In 2000, the Ministry of Justice established a National Public Prosecutor for <b>Corruption</b> .
	Fiscal Intelligence and Investigation Service (FIOD)	The FIOD, which was established in 1945, is a special unit of the tax authorities, and acts as a special investigation service. It is aimed at contributing to the <b>prevention of fiscal, financial, and economic frauds</b> , at ensuring the integrity of professionals and businesses, and at fighting against <b>organised crime</b> . In addition to conducting its own investigations, FIOD also provides assistance to the police and prosecution service, notably when financial expertise is needed.
Poland	Central Anti-Corruption Bureau (CBA)	It is a separate agency established in 2006 with the aim of investigating <b>all forms of corruption</b> , including those related to public procurement. It combats corruption in the public and private sectors and any activities that may endanger national economic interests. CBA engages in criminal investigation, corruption prevention, anti-corruption information, and operational activities.
	Internal Security Agency (ABW)	Established in 2002, ABW is aimed at identifying, preventing, and detecting <b>corruption</b> of public office holders, likely to undermine the security of the country. The prosecutor may delegate inquiry and investigation powers to CBA and ABW. Both can also carry out specific tasks ordered by courts or by prosecutors, as specified in the Criminal Procedure Code and in the Executive Criminal Code.
	Central Bureau of Investigation (CBI)	It is a specialised unit within the Polish police, which is in charge of combatting <b>organised crime</b> .
Portugal	Judiciary Police (PJ)	It is the national police force in charge of criminal investigations related to the offence of <b>criminal association</b> , as well as to a range of other <b>serious offences</b> .
	National Unit for Combatting Corruption (UNCC)	UNCC is a police branch aimed at investigating corruption cases. It is responsible for prevention, detection, criminal investigation of, and assistance to judicial and prosecuting authorities, regarding corruption, embezzlement, influence peddling, and unlawful profit sharing. In the case of <b>corruption and economic criminality</b> , UNCC assists, with its investigations, the Central Department of Investigation and Penal Action (DCIAP) (see below).

Country	Investigating/Specialised prosecuting bodies	Mandate
	Central Department of Investigation and Penal Action (DCIAP)	DCIAP was created in 1986 as part of the Portuguese Public Prosecutor's Office, and is headed by a Deputy Public Prosecutor assisted by four Junior Public Prosecutors. Its mission is to coordinate and steer investigations and prevention of violent criminality, <b>organised crime</b> , and very complex criminality. Although this body works on specific areas of crime, its investigations are carried out along the lines of ordinary police investigations of other crimes.
Romania	Directorate for Investigating Organised Crime and Terrorism (DIICOT)	It is the only structure within the Public Ministry that is specialised in investigating and countering <b>organised crime and terrorism</b> . It has its own legal status and budget. Like the National Anti-Corruption Directorate (DNA), it is headed by a chief prosecutor having autonomy from the general prosecutor over budgetary decisions and activities.
	National Anti-Corruption Directorate (DNA)	DNA is a prosecutor's office specialised in combatting high and medium-level <b>corruption</b> . It carries out criminal investigation activities in the case of offences equivalent and directly connected to corruption. It moreover investigates offences committed against the financial interests of the European Communities, as well as certain categories of serious economic and financial crimes.
	Anti-Corruption Directorate General (DGA)	DGA is a specialised police structure within the Ministry of Home Affairs, mainly responsible for investigating <b>corruption</b> within the police, while also covering other sectors.
Slovakia	National Criminal Agency (NAKA or NCA)	It was created from the combination of the Bureau for Combatting <b>Organised Crime</b> (UBOK) and the Bureau for Combatting <b>Corruption</b> (UBPK), with a view to making investigations more effective.
	Specialised Criminal Courts (SCC)	Slovakia has a specific SCC in place, with exclusive jurisdiction over <b>corruption</b> cases, including domestic and foreign bribery.
Slovenia	National Bureau of Investigation	It has criminal investigation powers in several fields, including <b>corruption</b> crimes.
	Criminal Police	The Criminal Police boasts several specialised teams (Organised Crime Unit, Economic Crimes Unit, and National Investigation Unit – NPU) that are focused on <b>corruption, organised crime, and economic crimes</b> in different fields, including public procurement/concessions.
	Specialised Prosecutor's Office	It investigates serious forms of crime, in particular <b>organised crime infiltration and corruption</b> in public procurement/concessions.
Spain	Anti-Corruption Prosecutor's Office	Created in 1995, it does not feature a geographically limited scope, but covers the whole Spanish territory. It intervenes in particularly important cases on <b>corruption</b> at the discretion of the Attorney General. Other cases are dealt with by different institutions acting on behalf of the Attorney General, or by ordinary prosecutors.
	Central Bureau of Investigation of Money Laundering and Corruption	Established in 2013, it is a special body of the criminal police, responsible for investigating <b>corruption</b> in general, including those cases related to procurement procedures. Its tasks include investigation of criminal offences related to money laundering from criminal acts, <b>economic crimes</b> related to international piracy, corruption in its various forms, and asset recovery.
	Organised Crime Intelligence Unit (CICO)	CICO centralises intelligence services, and coordinates investigating activities on <b>organised crime</b> .

Country	Investigating/Specialised prosecuting bodies	Mandate
Sweden	National Anti-Corruption Unit of the Office of the Prosecutor General	Established in 2002, it is part of the Swedish Prosecution Authority. It is not specifically designed to investigate crimes in public procurement/concessions, but is responsible for investigating <b>corruption</b> in all public authorities. It deals with all criminal suspicions of bribery and acts of bribery, as well as with all suspected crimes closely linked with these criminal offences.
	National Anti-Corruption Police Unit	This police unit was created in 2012 to support the National Anti-Corruption Unit of the Office of the Prosecutor General in <b>corruption</b> investigations, including foreign bribery.
	Economic Crime Bureau	It is a police unit specialised in the fight against <b>economic and financial crimes</b> .
United Kingdom	National Crime Agency (NCA)	The NCA is a non-ministerial government department. It replaced the Serious Organised Crime Agency in 2013, and leads the British law enforcement's fight to cut <b>serious and organised crime</b> . It works closely with Regional Organised Crime Units (ROCs), the SFO, as well as individual police forces, and other international law enforcement agencies.
	Serious Fraud Office (SFO)	It is an independent governmental department that investigates and prosecutes <b>serious or complex fraud and corruption</b> , and it is accountable to the Attorney General.

## Main findings in pills

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**1. Potential use of organised crime offences in public procurement.** The organised crime offence could be used to criminalise the conduct of criminal organisations involved in public procurement-related offences, if these offences reach the threshold required for predicate offences. However, there is little evidence in case law. White-collar crime as organised crime is not yet a reality in the daily practice.

**2. Bribery and trading in influence in public procurement.** All MSs have criminalised active and passive bribery, and a common trend in increasing penalties is observed. However, due to difficulties in proving bribery, easier-to-prove offences are charged much more frequently. The criminalisation of trading in influence is not yet a reality in many MSs, and in most of them the offence is so recent that it proves difficult to assess. Reluctance towards this offence in some MSs is justified by the claimed difficulties in distinguishing collusive practices from legitimate lobbying activities.

**3. New safeguards in public procurement in theory but still big differences among MSs in practice.** MSs' draft bills show that relevant differences remain among MSs as regards grounds for exclusion, subcontracting, and conflicts of interest. The room left in many countries for the initiative of the contracting authority may result in zero increase in safeguards.

**4. Construction, healthcare, and transportation are the highest-risk sectors across MSs.** New sectors are also emerging and, in particular, social services and education.

**5. State-owned enterprises and local governments pop up.** No matter which is the sector or how high the risk is, public companies are always lacking transparency and accountability. Local governments are the weak link of the chain. Intertwining between the local government and local businesses, familism, localism, and lack of professionalism are the most frequent shortcomings among local governments as contracting authorities.

**6. The challenges of the tender procedure are outside it.** The pre-tender and post-tender phases are those featuring the highest risk across MSs. In particular, the post-tender phase is the most risky. Delays, lower-quality materials, inflated costs and work volume are some of the risks that emerge, while the contracting authority seems to forget the contract after it is signed. Moreover, in almost all MSs, no specific controls are performed apart from ordinary monitoring activities carried out by the contracting authority.

**7. The system aimed at preventing illegality in public procurement is highly country-specific.** Bodies involved in prevention vary across countries. In 16 MSs, there are bodies that focus their preventive or monitoring actions on public procurement. Overlapping of competences and excessive workload represent problems in several countries. In almost all the countries, no assessment is carried out on the effectiveness of the measures adopted.

**8. Debarment tools show limitations and concerns in practice.** Eleven countries use white lists or black lists and encounter problems in terms of transparency, equal treatment, and proportionality.

**9. Red flags have been tested in several MSs.** Red flags, as warning signals of the potential presence of corruption, collusion, unethical practices, and frauds, are used in eight countries, ranging from more traditional risk assessment systems to algorithms and automated decision-making.

**10. Databases are crucial tools for sharing information but, to date, information system are not very widespread among MSs.** Five of them use these tools to monitor tenderers. Great differences and lack of a comprehensive approach are however observed.

## The Way forward

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- 1. Increase the awareness of legislators and policy-makers.** Corruption and criminal infiltration in public procurement are once again not considered as urgent and even actual issues in several countries.
- 2. Enhance capacity building.** Effective protection of public funds requires understanding of the harmful nature of crimes in public procurement and of the organisational element of these crimes. Training for practitioners, based on case reviews, should be developed.
- 3. Assess the effectiveness of preventive systems.** The conduction of a regular review of the functioning and shortcomings of the system is essential to avoid that a system works only in theory. The new monitoring report on prevention, detection of frauds, corruption, conflicts of interest, and other irregularities – envisaged in the new public procurement directive – could represent a starting point for more consistency across preventive systems, provided that this is not performed by the States as a bureaucratic task.
- 4. Bring detection of red flags into action.** Once a red flag has emerged, the issue is what kind of actions and measures should follow the alert signal. These actions, which should be based on well-defined criteria, and comply with the principle of proportionality, range from further analysis to operational consequences.
- 5. Build information systems on companies.** Information systems on companies for investigative purposes should be built at national level, guaranteeing interconnections between existing databases and putting in place the needed safeguards.
- 6. Overcome the limitations and concerns of debarment systems, and guarantee fairness, accountability, and transparency, as well as redress mechanisms.** To make debarment systems effective in all MSs, coordination mechanisms across countries should be implemented, along with the establishment of clear and common rules. In this regard, a renovated effort for an EU debarment mechanism on EU funds should be considered.
- 7. Strengthen controls on public works execution.** For all public works, in addition to ordinary monitoring on the compliance of executed works with contractual provisions, controls should be performed systematically during works execution on several aspects (e.g. quality of materials, employment conditions of the workforce, duration and volume of works, etc.).
- 8. Raise demand for social accountability.** Legal rules and administrative procedures prove to be weak if citizens do not call for accountability on how public funds are used.



# Annex 1. Questionnaire

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## CHAPTER 1. The Legal Framework

### Q 1. Does your national legislation penalise participation in a criminal organisation?

- Yes
- No

If yes,

Q 1.1. please specify the legal act/article of the criminal code;

Q 1.2. please quote and translate into English the main provision/s of your national law;

Q 1.3. please provide statistics (crimes recorded by the police) on its application since 2001 (or later if not available).

### Q 2. Has the national legislation implemented Article 2 of Council Framework Decision 2008/841/JHA?

- Yes
- No
- Partially

Q 2.1 If no/partially, please briefly explain.

### Q 3. Does your national legislation penalise corruption<sup>58</sup>?

- Yes
- No

If yes,

Q 3.1. please specify the legal acts/articles of the criminal code;

Q 3.2. please quote and translate into English the main provision/s of your national law and briefly explain which kinds of conduct are punished and which are not;

Q 3.3. please provide statistics<sup>59</sup> (crimes recorded by the police) on their application since 2001 (or later if not available).

### Q 4. Does the national legislation distinguish between petty and grand corruption?

- Yes, the sanction is different.
- Yes, the offence is different.
- Yes, the procedure is different.
- No

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<sup>58</sup> In this context, corruption does not include private-to-private corruption. The attention is focused on a private party (a citizen or a corporation) that gives or promises to give money or any other advantages to a public party (e.g. a politician or a public official) in exchange for an advantage or to avoid a disadvantage.

<sup>59</sup> We refer to statistics on bribery and similar offences (e.g. embezzlement of public money, bribery in the exercise of a public function, bribery through an act contrary to official duties, corruption in judicial proceedings, induced bribery, etc.). The availability and level of detail of the statistics change across countries.

**Q 5. Has the national legislation implemented Article 2(1) of Council Framework Decision 2003/568/JHA?**

- Yes
- No
- Partially

Q 5.1. Please briefly explain.

**Q 6. Does the national legislation implement Article 3 of the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union?**

- Yes
- No
- Partially

Q 6.1. If no/partially, please briefly explain.

**Q 7. What is the current state of the transposition process of Directive 2014/24/EU?**

- Not yet started
- Started
- Completed

Q 7.1. If completed, please indicate the date of adoption and the legal act.

Q 7.2. If not completed yet, please explain the current state of the process.

Q 7.3. If available, please summarise the provisions on grounds for exclusion, conflicts of interest, and subcontracting.

**Q 8. As regards soft-law instruments, has your country foreseen integrity pacts<sup>60</sup>, legality pacts, or other forms of agreement between contracting authorities and economic operators, aimed at enhancing transparency and accountability in the public procurement process?**

- Yes
- No

Q 8.1. If yes, please provide a copy and/or summarise the content. In case there are many examples, please choose the one you deem the most relevant (because of its impact or the relevance of the public work). Please specify if any of them has been used for major public works or transnational ones.

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<sup>60</sup> An integrity pact is a tool for preventing corruption in public contracting. It is an agreement between the contracting authority and bidders, whereby they undertake to abstain from bribery, collusion, extortion, and other corrupt practices during contract execution. With a view to ensuring accountability, integrity pacts also include a monitoring system typically led by civil society organisations. For further information, please see: [https://www.transparency.org/whatwedo/tools/integrity\\_pacts/4/](https://www.transparency.org/whatwedo/tools/integrity_pacts/4/) and [http://www.transparency.org/whatwedo/publication/integrity\\_pacts\\_in\\_public\\_procurement\\_an\\_implementation\\_guide](http://www.transparency.org/whatwedo/publication/integrity_pacts_in_public_procurement_an_implementation_guide).

**CHAPTER 2. The Phenomenon**

**Q 9.** According to the available studies and case law, on a scale from 1 (very low) to 10 (very high), how would you define the vulnerability of the public procurement procedure to criminal infiltration and corruption in your country?

1	2	3	4	5	6	7	8	9	10

Q 9.1. Please briefly explain the reasoning behind your answers and quote relevant studies or publications (if any).

**Q 10.** Are there any specific institutions/bodies (e.g. monitoring body, parliamentary commission, Ombudsman, etc.) in your country, at either local or central level, that are designed to monitor and/or prevent organised crime infiltration and corruption in public procurement (i.e. not included in the measures adopted by the contracting authority in the procedure)?

- Yes
- No

Q 10.1. Please explain the role and tasks of this body. Please also quote relevant legal rules, studies, or publications.

Q 10.2. Please explain in which stage of the public procurement process they intervene.

**Q 11.** In your country, on a scale from 1 (not vulnerable) to 10 (very vulnerable), to what extent are the following economic sectors (linked to public procurement/concessions) vulnerable to serious forms of crime (in particular organised crime infiltration and corruption)?

	1	2	3	4	5	6	7	8	9	10
Construction										
Transportation										
Healthcare										
Energy										
Mining										
IT										
Agriculture										
Waste disposal										
Real estate										
Other _____										
Other _____										

Q 11.1. Please briefly explain the reasoning behind your answers.

**Q 12.** The table below shows a breakdown of the pre-tender phase, with some examples of possible situations that suggest a risk of corruption or organised crime infiltration. In your country, to what extent do these situations occur?  
Please rate your answer on a scale from 1 (least frequent) to 10 (very frequent).

Steps of the pre-tender phase	Situations that can occur									
Identification of needs	Manipulation of needs (needs are 'fabricated')									
	1	2	3	4	5	6	7	8	9	10
Allocation of public funding	Manipulation of allocation of funding (funding is allocated for the benefit of someone in particular and not of the public good).									
	1	2	3	4	5	6	7	8	9	10
Choice of the tender procedure	No ceilings for non-competitive procurements									
	1	2	3	4	5	6	7	8	9	10
	Subdivision of large-scale projects into lots in order to be allowed to go through non-competitive procurements									
	1	2	3	4	5	6	7	8	9	10
Drafting of public bidding and tender specifications	Risk of disclosure of confidential information									
	1	2	3	4	5	6	7	8	9	10
	Wrong or inaccurate requirements									
	1	2	3	4	5	6	7	8	9	10
	Too selective eligibility criteria									
	1	2	3	4	5	6	7	8	9	10
	Lack of clarity of tender specifications									
	1	2	3	4	5	6	7	8	9	10
Publication of tender documents	Limited timeframe									
	1	2	3	4	5	6	7	8	9	10
	Low bid price accompanied by extensive possibilities of expanding the contract in the post-award phase									
Publication of tender documents	Limited publicity of, or failure to publish tender notices									
	1	2	3	4	5	6	7	8	9	10

Q 12.1. Please quote relevant sources and explain the reasoning behind your answers.

**Q 13.** The table below shows a breakdown of the tender phase, with some examples of possible situations that suggest a risk of corruption or organised crime infiltration. In your country, to what extent do these situations occur?

Please rate your answer on a scale from 1 (least frequent) to 10 (most frequent).

Steps of the tender phase	Situations that can occur									
Designation of the evaluation board	Manipulation of the evaluation board									
	1	2	3	4	5	6	7	8	9	10
Selection procedure	Non-objective and/or inadequate weighting of selection criteria									
	1	2	3	4	5	6	7	8	9	10
Choice of the tender procedure	Risks of agreement among bidders not to take judicial action									
	1	2	3	4	5	6	7	8	9	10
	Risks of misuse of judicial procedures to threaten/influence the winner									
	1	2	3	4	5	6	7	8	9	10
	Lack of control over the winner									
	1	2	3	4	5	6	7	8	9	10

Q 13.1. Please quote relevant sources and explain the reasoning behind your answers.

**Q 14.** The table below shows a breakdown of the post-award phase, with some examples of possible situations that suggest a risk of corruption or organised crime infiltration. In your country, to what extent do these situations occur?

Please rate your answer on a scale from 1 (least frequent) to 10 (most frequent).

Steps of the post-award phase	Situations that can occur									
Contract execution	Execution of non-existent works									
	1	2	3	4	5	6	7	8	9	10
	Inflated work volume and costs									
	1	2	3	4	5	6	7	8	9	10
	Unjustified differences between tender specifications and executed works									
	1	2	3	4	5	6	7	8	9	10
	Involvement of new subcontractors during works execution									
	1	2	3	4	5	6	7	8	9	10
Contract supervision	Delays in works execution									
	1	2	3	4	5	6	7	8	9	10
Testing and certification of works completion in compliance with legislation	Use of lower-quality materials									
	1	2	3	4	5	6	7	8	9	10
Payment	Lack of supervision									
	1	2	3	4	5	6	7	8	9	10
Testing and certification of works completion in compliance with legislation	Inaccurate testing									
	1	2	3	4	5	6	7	8	9	10
Payment	Delayed payment as a form of bribe solicitation									
	1	2	3	4	5	6	7	8	9	10

Q 14.1. Please quote relevant sources and explain the reasoning behind your answers.

### CHAPTER 3. Prevention Measures

**Q 15.** Has your country adopted special measures to prevent the risk of corruption and/or organised crime infiltration (at either local or central level) in public procurement/concessions (i.e. not included in the measures adopted by the contracting authority in the procedure)?

- Yes
- No

Q 15.1. Please provide examples of these measures. Please also quote relevant legal rules, studies, or publications.

Q 15.2. Please specify which stage of the public procurement process they refer to.

Q 15.3. Please specify whether any of them has been used for major public works or transnational ones.

**Q 16.** Has your country (at either local or central level) developed indicators/red flags for the detection of corruption/organised crime in public procurement/concessions?

- Yes
- No

Q 16.1. Please provide details.

**Q 17.** Has your country developed systems such as white lists or black lists of companies?

- Yes
- Under development
- No

Q 17.1. If yes or under development, what does the list refer to?

- National companies
- Foreign companies
- Both
- Other

Q 17.2. If yes or under development, how do they work? Please quote legal rules (if any).

Q 17.3. If no, please explain the reasons and the source of information.

**Q 18.** Does the legislation in your country recognise a right to appeal in cases where a company has been blacklisted?

- Yes
- No

**Q 19. Has your country developed databases or repositories to store and exchange information on companies?**

- Yes
- Under development
- No

Q 19.1. If yes, could you please specify how many they are, what kind of information they store, and who has access to them?

Q 19.2. If yes, are they (or some of them) effective and functional? Please provide examples of functional and dysfunctional systems.

Q 19.3. If under development, please provide some details.

#### **CHAPTER 4. Control Measures**

**Q 20. Has your country developed control and supervision systems (see table in question 14) on contract execution?**

- Yes
- No

Q 20.1. If yes, could you please specify how controls are carried out, which body is involved, etc.? Please clarify whether there are specific systems in place for major public works or transnational ones.

Q 20.2. If no, could you please explain why and what happened in practice?

**Q 21 Does your country have a special law enforcement body to investigate serious forms of crime (in particular organised crime infiltration and corruption) in public procurement/concessions?**

- Yes
- No

Q 21.1. If yes, could you please specify when it was created, what type of body it is, how it works, and what type of powers it has?

Q 21.2. If no, is the investigation carried out by the ordinary law enforcement body in the same way as an investigation of other crimes?

- Yes
- No

### CHAPTER 5. Case Law

Please provide national case law relating to criminal infiltration and corruption in public procurement (first, second, and third-instance decisions). Please include a minimum of 5 and a maximum of 15 decisions for 2010–2015, depending on the size of your country. Both administrative and criminal case law could be included according to the system in place in your country.

1.3.1. Case title	
1.3.2. Decision date	
1.3.3. Reference details (type and name of the court/body in original language and in English –please include the official translation, if available).	
1.3.4. Key facts of the case (maximum 500 words)	
1.3.5. Main reasoning/argumentation (maximum 500 words)	
1.3.6. Key issues (concepts and interpretations) clarified by the case (maximum 500 words)	
1.3.7. Results (sanctions) and key consequences or implications of the case (maximum 500 words)	

### CHAPTER 6. Academic and other publications and reports on your country

Please provide a list of reports and publications by the government, parliament, academia, NGOs, or other bodies in relation to corruption and other forms of serious crime in public procurement. Please include a minimum of 5 and a maximum of 15 publications.

1.4.1 Title (in original language and in English), author, publisher and year of publication, and web link (or soft copy attached)	1.4.2 Main topics dealt with	1.4.3 Research methods (desk research, qualitative research, or quantitative research) and design (e.g. comparative design – comparing countries/groups – or case study). Briefly explain the methodology.



## Annex 2. Methodological remarks

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Most of the questionnaire is based on the analysis of secondary sources and on interviews with key experts. A specific remark is needed for questions 9 and from 12 to 14. In this questionnaire a certain degree of subjectivity of the author cannot be avoided. The researchers involved based their answers on their knowledge, collected sources, and interviews. However, the final choice is personal in nature and it may reflect the points of view of the researchers themselves.

For the abovementioned questions, we chose a numerical scale (from 1 to 10) in order to have a wider distribution of responses, which allowed us to better process data.

We grouped responses into classes (low, medium, and high risk) by observing the frequency distribution of question 9 by quartiles (0%–25%, 25%–50%, 50%–75%, and above 75%)<sup>61</sup> and by percentiles (0–33%, 33%–66%, and above 66%)<sup>62</sup>, and then the same frequency distributions for questions 11, 12, 13, and 14.

The qualitative and quantitative information supporting the answers to question 9 made us opt for the percentile distribution (33%–66%) and we consequently built three groups of answers: the first group includes answers from 1 to 5, the second one from 6 to 7, and the third one from 8 to 10.

We maintained the same groups for questions 11, 12, 13, and 14 in order to facilitate comparison.

This guarantees higher consistency throughout the analysis. This choice was also underpinned by the quantitative and qualitative information that supports the choice of responses. See below for the answers to questions 9, 12, 13 and 14.

Table Annex 2.1. **Overall vulnerabilities of the tender procedure (Q 9)**

According to the available studies and case law, on a scale from 1 (lowest) to 10 (highest), how would you define the vulnerability of the public procurement procedure to criminal infiltration and corruption in your country?			
Austria	8	Lithuania	7
Bulgaria	8	Luxemburg	3
Croatia	8	Malta	5
Czech Republic	7	Netherlands	6
Denmark	1	Poland	7
Estonia	6	Portugal	8
Finland	6	Romania	8
France	9	Slovakia	6
Germany	2	Slovenia	4
Hungary	8	Spain	8
Ireland	3	Sweden	4
Italy	9	United Kingdom	5
Latvia	7		

61 Quartiles were at score 4, 7, and 8.

62 Percentiles were at score 5 and 8.

Table Annex 2.2. **Pre-tender vulnerabilities (Q 12)**

The table below shows a breakdown of the pre-tender phase, with some examples of possible situations that suggest a risk of corruption or organised crime infiltration. In your country, to what extent do these situations occur? Please rate your answer on a scale from 1 (least frequent) to 10 (most frequent).											
	Manipulation of needs (needs are 'fabricated').	Manipulation of allocation of funding (funding is allocated for the benefit of someone in particular and not of the public good).	No ceilings for non-competitive procurements	Subdivision of large-scale projects into lots in order to be allowed to go through non-competitive procurements	Risk of disclosure of confidential information	Wrong or inaccurate requirements	Too selective eligibility criteria	Lack of clarity of tender specifications	Limited timeframe	Low bid price accompanied by extensive possibilities of expanding the contract in the post-award phase	Limited publicity of, or failure to publish tender notices
Austria	5	10	3	10	5	10	10	10	5	5	2
Bulgaria	7	9	9	8	9	8	9	8	7	8	9
Croatia	7	6	3	8	3	9	9	9	7	7	8
Czech Republic	7	7	1	7	8	3	9	1	5	8	7
Denmark	5	3	2	3	2	1	3	7	7	4	1
Estonia	8	4	9	10	9	7	9	4	4	5	2
Finland	2	2	5	7	4	7	7	7	2	5	3
France	2	2	4	5	8	9	4	9	2	6	3
Germany	3	2	2	2	1	1	3	3	2	1	1
Hungary	8	8	8	8	8	8	8	8	8	9	9
Ireland	5	3	2	2	3	5	5	5	5	4	2
Italy	5	5	1	8	10	9	10	9	5	10	5
Latvia	6	6	2	5	2	8	8	3	3	5	2
Lithuania	8	8	2	2	8	3	4	2	5	3	2
Luxemburg	4	4	4	4	4	3	5	4	3	3	3
Malta	7	7	3	8	2	2	2	4	1	7	6
Netherlands	8	4	4	7	8	5	4	3	4	7	2
Poland	3	5	7	7	7	7	5	7	3	6	1
Portugal	7	5	1	3	5	8	7	7	5	8	6
Romania	6	7	8	5	8	8	8	8	6	7	2
Slovakia	5	6	6	5	4	4	3	3	4	5	7
Slovenia	1	2	2	2	4	4	4	4	3	3	2
Spain	2	2	10	10	2	10	6	10	6	8	1
United Kingdom	5	5	7	7	5	5	7	5	5	5	5

Table Annex 2.3: **Tender vulnerabilities (Q 13)**

	The table below shows a breakdown of the tender phase, with some examples of possible situations that suggest a risk of corruption or organised crime infiltration. In your country, to what extent do these situations occur? Please rate your answer on a scale from 1 (least frequent) to 10 (most frequent).				
	Manipulation of the evaluation board	Non-objective and/or inadequate weighting of selection criteria	Risks of agreement among bidders not to take judicial action	Risks of misuse of judicial action to threaten/influence the winner	Lack of control over the winner
Austria	10	10	3	3	3
Bulgaria	8	9	4	9	10
Croatia	4	9	2	3	7
Czech Republic	7	7	9	2	8
Denmark	1	8	1	3	1
Estonia	7	2	6	9	5
Finland	2	7	2	5	5
France	4	3	7	3	1
Germany	2	2	2	2	2
Hungary	9	8	9	9	8
Ireland	4	4	2	2	2
Italy	8	8	8	6	5
Latvia	7	4	7	7	7
Lithuania	3	2	4	7	2
Luxemburg	3	4	3	3	3
Malta	6	5	5	4	7
Netherlands	3	4	9	2	5
Poland	8	8	5	5	5
Portugal	6	7	3	1	5
Romania	6	6	7	7	5
Slovakia	7	6	6	5	6
Slovenia	6	6	5	5	4
Spain	3	5	10	1	10
United Kingdom	7	7	7	7	7

Table Annex 2.4. **Post-tender vulnerabilities (Q 14)**

	The table below shows a breakdown of the post-award phase, with some examples of possible situations that suggest a risk of corruption or organised crime infiltration. In your country, to what extent do these situations occur? Please rate your answer on a scale from 1 (least frequent) to 10 (most frequent).								
	Execution of non-existent works	Inflated work volume and costs	Unjustified differences between tender specifications and executed works	Involvement of new subcontractors during works execution	Delays in works execution	Use of lower-quality materials	Lack of supervision	Inaccurate testing	Delayed payment as a form of bribe solicitation
Austria	8	10	10	8	10	10	10	7	3
Bulgaria	4	7	8	8	6	8	8	4	4
Croatia	5	8	8	8	8	8	8	7	1
Czech Republic	8	9	10	7	6	7	5	3	6
Denmark	1	1	1	5	5	5	1	1	1
Estonia	9	9	9	8	8	9	8	7	2
Finland	7	6	7	8	8	5	8	4	1
France	2	9	9	5	2	8	9	9	1
Germany	3	4	3	2	4	2	3	2	2
Hungary	8	8	8	8	7	8	8	9	9
Ireland	3	4	4	4	4	3	4	4	2
Italy	7	10	9	10	10	10	6	9	3
Latvia	7	7	6	7	7	7	7	7	8
Lithuania	5	6	5	3	7	8	8	7	2
Luxemburg	3	3	3	3	3	3	3	3	3
Malta	8	8	9	6	8	9	10	8	6
Netherlands	9	8	5	7	8	5	7	4	3
Poland	5	6	3	3	3	9	8	9	8
Portugal	2	5	6	6	8	5	8	8	1
Romania	6	6	5	8	8	10	5	8	9
Slovakia	7	6	5	6	6	6	5	7	6
Slovenia	6	6	7	6	8	8	7	6	5
Spain	1	10	10	8	10	10	5	5	1
United Kingdom	5	5	7	7	5	5	7	5	7

## Shrnutí

CZ

Projekt 'Warning on Crime' (WOC; [www.warningoncrime.eu](http://www.warningoncrime.eu)) se uskutečnil za finanční podpory Generálního ředitelství pro migraci a vnitřní věci (DG HOME) Evropské komise v rámci Programu prevence a boje proti zločinu (ISEC).

Předkládaný výzkum je komparativní studií infiltrace zločinem a korupcí ve veřejných zakázkách, která pokrývá všechny členské státy Evropské unie s výjimkou Belgie, Kypru a Řecka. Cílem studie je porovnání zranitelnosti veřejných zakázek, stejně jako legislativy a opatření přijatých k prevenci a potlačování zločinu v této věci v 25 členských zemích EU. To má vést k objasnění co dělá z veřejných zakázek úrodnou půdou spolupráce zločinců v bílých límečcích, nečestných úředníků a členů kriminálních organizací. Zvláštní pozornost je přikládána velkým a přeshraničním veřejným zakázkám. Zpráva je rozdělena do čtyř kapitol. První kapitola reflektuje dostupný právní rámec pro postihování nezákonných aktivit při zadávání a realizaci veřejných zakázek; druhá kapitola se zabývá odhadem zranitelnosti veřejných zakázek vůči infiltraci zločinem; třetí kapitola popisuje preventivní opatření přijatá jednotlivými členskými zeměmi k redukci takového jednání; a čtvrtá kapitola analyzuje kontrolní opatření namířená na fázi po dokončení veřejných zakázek.

### Právní rámec

Postihování nezákonného jednání ve veřejných zakázkách zahrnuje nejen tvrdá, ale i měkká právní opatření. Projekt se zaměřuje na čtyři oblasti: působení zločineckých skupin, úplatkářství, zákon o veřejných zakázkách a na pakty integrity.

Ve shodě s Rámcovým rozhodnutím Evropské rady 2008/841/JHA z 24. října 2008 o boji proti organizovanému zločinu, všechny studované země kriminalizují zločinecké skupiny a ve většině z nich by měl trestný čin účasti na zločinecké skupině představovat také jeden z nástrojů k potrestání těchto skupin, které provozují nezákonné aktivity včetně korupce ve vztahu k veřejným zakázkám.

Italský právní systém navíc rozpoznává specifický trestný čin, který samostatně nezákonnou činnost organizací mafiánského typu vůči veřejným zakázkám pokrývá. Rakouská legislativa pro změnu zahrnuje trestný čin postihující aktivity zločinecké organizace při korupčním jednání. V každém případě je nutno říci, že judikatura v této věci napříč všemi členskými zeměmi značně omezená. Právní rámec týkající se úplatkářství a obchodování s vlivem (trading in influence) se v průběhu posledních let napříč jednotlivými zeměmi postupně vyvíjel a zpřesňoval. Přes některá přetrvávající bílá místa a nesrovnalosti je celkový dojem v této věci mnohem příznivější než v minulosti.

Nové evropské direktivy k veřejným zakázkám soustředí svou pozornost na prevenci, transparentnost a odpovědnost, jež mají nezákonné jednání namířené vůči veřejným zakázkám výrazně redukovat. Výzkum ale ukazuje, že transpozice pravidel k vyloučení z možnosti soutěžit o zakázku a subkontraktování jednotlivých částí zakázky se stát od státu výrazně liší. To je dáno částečně tím, že veřejné zakázky jsou považovány za specifický národní trh, který čelí lokálním hrozbám na které je nutno lokálně reagovat, v potaz je pak nutno brát i spíše technické hledisko zodpovědnosti ve věci posuzování rizikivosti, které musí zákonodárce přenechat veřejnému zadavateli.

Stále větší relevanci v potlačování nezákonného jednání ve veřejných zakázkách získávají měkká právní opatření. Pakty integrity – nástroj vyvinutý Transparency International (TI) sestávající z dohody podepsané zadavatelem veřejné zakázky, příjemcem a nezávislým dohlížitelem, která podepsané zavazuje k předcházení jakýchkoliv forem korupce nebo tajných dohod – má být testována v 11 zemích na 17 projektech dotovaných EU. Itálie má s pakty legality, které smluvní strany zavazují k přijetí a implementaci právních opatření proti korupci a organizovanému zločinu stejně jako k posilování integrity a transparentnosti veřejných zakázek, dlouholeté zkušenosti. Podobná měkká právní opatření (reglements des contracts) byla v nedávné době využita při stavbě vysokorychlostní železniční trati Turín-Lyon a sloužila k tomu, aby stanovila společná pravidla nezávislá na národnosti příjemců zakázky. Především pak tato opatření rozšířila již existující italské mechanismy proti infiltraci mafií na všechny příjemce, kteří se na zhotovení zakázky podílejí.

Podobně jako u všech měkkých opatření je i při přijetí shora uvedených nástrojů největším problémem vymahatelnost dohody v případě, že by problémy spojené s dokončením veřejné zakázky musel řešit správní soud.

### Zranitelnost veřejných zakázek v různých fázích jejich životního cyklu

Veřejné zakázky jsou vůči nezákonnému jednání náchylné prakticky v každé fázi svého životního cyklu. Zatímco některá odvětví jako je stavebnictví nebo zdravotnictví jsou ve všech zkoumaných zemích obecně považovány za zranitelnější, jiná odvětví jako je doprava, energetika, odpadové hospodářství nebo IT a komunikační služby oscilují mezi středním a vyšší rizikovostí v závislosti na konkrétních podmínkách v jednotlivých zemích. Vysoké riziko zranitelnosti platí i pro státy se stále přetrvávajícím důlním průmyslem. Veřejné zakázky spojené s obranným sektorem jsou tradičně považovány za nejméně transparentní, sociální služby a vzdělávání se pro změnu stávají sektory, kde riziko zneužívání veřejných zakázek nově vzrůstá. Rizikovost je v některých ze zkoumaných zemí obecně v této věci spojena s vysokou mírou korupce a nezákonného jednání spojeného s výkonem místní samosprávy nebo řízením státem vlastněných společností.

Samotný životní cyklus veřejných zakázek (před-tendrová, tendrová a post-tendrová fáze) je ve všech zkoumaných zemích označován za zranitelný. Předtenderová (pre-tender) fáze, stadium plánování, které předchází celé další proceduře veřejné zakázky, je považována za vysoce zranitelnou v téměř polovině studovaných zemích. Tato fáze vykazuje také největší problémy v rámci zavádění různých konkrétních protiopatření. To je připisováno jak manipulacím s potřebami a přidělováním finančních prostředků, tak i rizikům úniku informací o detailech plánované zakázky.

Nejasné a nekonkrétní podmínky tendrů, kritéria nízké nabídkové ceny s možností jejího extenzivního navýšení po určení příjemce, byly identifikovány ve většině zkoumaných zemí.

Samotná tendrová fáze (tender phase) je vysoce regulovaná. Proces výběru příjemce byl však v 60 % zemí označen za středně až vysoce rizikový, a to z důvodu mnohdy neobjektivních nebo neadekvátních vážení kritérií pro výběr příjemce a manipulací s hodnotícími výbory. Ve většině zkoumaných zemí je také rizikem i (záměrně) nesprávný výklad soudních rozhodnutí a s ním související průtahy v nápravě škody.

Celkově nejrizikovějším stadiem životního cyklu veřejné zakázky je její post-tendrová fáze (post-tender phase). Zadavatel zakázky obvykle zapomene na smlouvu ihned po jejím podepsání, což podporuje i fakt, že ve většině zemí pak neexistuje žádný orgán, který by průběh plnění veřejné zakázky monitoroval. U zakázek na veřejné stavby pak právě z tohoto nedostatku vyplývají opakované problémy s použitím nekvalitních materiálů, nečekaným nárůstem množství práce nebo průtahy v předání vyhotoveného díla.

### Systém prevence ve veřejných zakázkách

Vzhledem k rizikům ovlivňujícím životní cyklus veřejných zakázek, se měkká opatření neustále vyvíjejí, a to směrem ke komplexnímu systému prevence. Součástí tohoto systému jsou jak zodpovědné orgány, tak samotné nástroje předcházení korupce a zločinu. Mimo důležitou roli, kterou v monitoringu zacházení s veřejnými dotacemi hrají různé účetní dvory, existuje ve zkoumaných členských zemích bohaté spektrum orgánů zaměřených na prevenci korupce a organizovaného zločinu včetně prevence takového jednání při zadávání a realizaci veřejných zakázek.

Přestože se jejich význam často liší, některé členské země disponují orgány, jejichž hlavním úkolem je boj proti zločinu a ilegalitě přímo ve veřejných zakázkách. V některých zemích jako je Nizozemsko nebo Itálie jsou dokonce přijata taková opatření, jejichž podstatou je monitoring společností, které se o zakázku ucházejí, jejich majitelů a zástupců. V Itálii je toto prověřování ukotveno v rámci speciální legislativy namířené proti mafii.

Indikátor korupce "red flag" má původ v různých nástrojích ustavených k monitorování nezákonného jednání ve veřejných zakázkách. "Red flags" je tak možno chápat jako signály včasného varování o potenciálních možnostech spáchání trestných činů jako je korupce, podvod a podobně. Přestože jsou

indikátory "red flags" obecně považovány za užitečné prediktory korupčních rizik, v nějaké konkrétní formě je využívá pouze osm ze zkoumaných států.

O něco častěji, ve 14 zemích, jsou používána různá vylučovací opatření. Zatímco bílá listina funguje jako preselektivní podmínka pro konečný výběr příjemců zakázky, černá listina způsobuje vyloučení z možnosti podílet se na realizaci veřejné zakázky. Ve všech zemích kromě Rumunska jsou tyto nástroje koordinovány veřejnými orgány. Přestože i tyto nástroje jsou pokládány za užitečné (s ohledem na možné poškození reputace uchazeče jsou v souladu s právními opatřeními), jejich rozšíření brání praktická úskalí při jejich řízení, jako jsou rizika manipulace a obtíže s definicí jasných kritérií a pravidel pro odvolání se proti zařazení na černou listinu.

Dalším preventivním opatřením je využívání databází pro sdílení informací s donucovacími orgány státní správy (zejména policie). S výjimkou Itálie a Nizozemska však není využívání databází příliš obvyklé. Vzhledem k nedostatkům ve společných pravidlech na úrovni EU a vzhledem k omezenému přístupu zahraničních zájemců na jednotlivé národní trhy s veřejnými zakázkami není navíc ustavení společného mechanismu pro sdílení informací o společnostech aktuálním tématem.

### **Kontrolní opatření v post-tenderové fázi**

Kontrolní opatření v post-tenderové fázi (post-tender phase) mohou být rozdělena do dvou velkých skupin a jsou společná pro všechny členské země:

- Vnitřní monitoring, většinou zajišťovaný zadavatelem veřejné zakázky;
- Vnější monitoring, zajišťovaný nezávislými a externími institucemi (jako jsou účetní dvory, finanční nebo daňové úřady, pracovní inspektoráty apod.), které zaměřují svou pozornost na ekonomické a finanční aspekty zakázky, transparentní účetnictví, dodržování pracovního práva apod.)

Jedinou výjimkou je Itálie, která mimo uvedená opatření disponuje i kontrolním systémem zaměřeným na nekalé praktiky zaregistrované v průběhu plnění veřejné zakázky. Itálie navíc také jako jediný členský stát EU zřídila speciální policejní složky zodpovědné za monitoring a vyšetřování nezákonných aktivit ve vztahu k velkým veřejným stavbám. Všechny ostatní členské státy, respektive jejich kontrolní a/nebo monitorovací orgány, nedělají ve vztahu k výši a důležitosti zakázky žádné rozdíly

Dvě třetiny členských států disponuje speciálními policejními orgány k potlačování korupce v různých ekonomických odvětvích včetně veřejných zakázek. V polovině těchto zemí navíc existuje i speciální státní zastupitelství, které je zodpovědné za vyšetřování závažných zločinů týkajících se (nejen) veřejných zakázek.

# Zusammenfassung

DE

Das Projekt „Warning on Crime“ (WOC) ([www.warningoncrime.eu](http://www.warningoncrime.eu)) wurde mit finanzieller Unterstützung der Europäischen Union (Generaldirektion für Migration und Inneres) im Rahmen des Programms zur Prävention und Bekämpfung von Kriminalität (Programme Prevention of and Fight against Crime, ISEC) durchgeführt.

Das Projekt hat eine vergleichende Studie von krimineller Infiltrierung und Korruption in der öffentlichen Auftragsvergabe zum Gegenstand, die alle Mitgliedsstaaten der Europäischen Union mit der Ausnahme Belgiens, Zyperns und Griechenlands einschließt.

Das Ziel des Projekts ist der Vergleich der Anfälligkeit öffentlicher Auftragsvergabe in 25 EU-Mitgliedsstaaten sowie der Gesetzgebung und daran anschließender Maßnahmen, um kriminelle Infiltrierung und Korruption zu verhindern und zu bekämpfen. Insbesondere soll geklärt werden, wodurch die öffentliche Auftragsvergabe zu einem attraktiven Betätigungsfeld für Wirtschaftskriminelle, untreue öffentliche Beschäftigte und Mitglieder krimineller Organisationen wird. Besondere Aufmerksamkeit wird auf große und grenzübergreifende öffentliche Bauprojekte gelegt. Der Bericht ist in vier Kapitel gegliedert. Kapitel 1 reflektiert den bestehenden rechtlichen Rahmen zur Bekämpfung illegaler Aktivitäten in der öffentlichen Auftragsvergabe. Kapitel 2 ist einer Bewertung der Vulnerabilität öffentlicher Auftragsvergabe gewidmet. In Kapitel 3 werden die präventiven Maßnahmen der Mitgliedsstaaten beschrieben und in Kapitel 4 werden die Kontrollmaßnahmen in der Phase nach der Auftragsvergabe analysiert.

## Der Rechtsrahmen

Die Bekämpfung illegaler Praktiken in der öffentlichen Auftragsvergabe mit rechtlichen Maßnahmen umfasst sowohl rechtliche Regelungen als auch Instrumente unterhalb der Ebene von Rechtsvorschriften (Soft Law). Das Projekt fokussiert hier vier thematische Gebiete: kriminelle Organisationen, Bestechung, öffentliches Vergaberecht und Integritätspakte.

Alle in der Studie untersuchten Länder haben kriminelle Organisationen in Übereinstimmung mit dem Rahmenbeschluss zur Bekämpfung der Organisierten Kriminalität (2008/841/JHA) vom 24. Oktober 2008 kriminalisiert. In den meisten dieser Staaten bilden die entsprechenden rechtlichen Maßnahmen ein Instrument zur Verfolgung von Gruppierungen, die den entsprechenden rechtlichen Definitionen entsprechen und kriminellen Aktivitäten wie Korruption im Kontext öffentlicher Auftragsvergabe nachgehen. In Italien sehen die entsprechenden Regelungen im Zusammenhang mit öffentlicher Auftragsvergabe explizit den Straftatbestand einer mafia-ähnlichen Organisation vor. Im österreichischen Recht ist auch die Bildung krimineller Vereinigungen im Zusammenhang mit Korruption unter Strafe gestellt. Die Anzahl tatsächlicher Ermittlungen gegen kriminelle Organisationen ist jedoch in allen Mitgliedsstaaten gering.

Der rechtliche Rahmen zur Bekämpfung von Bestechung und Einflussnahme wurde in den Mitgliedsstaaten einer Evaluation unterzogen und nähert sich zunehmend an. Obwohl hier Schlupflöcher und widersprüchliche Regelungen bestehen bleiben, sind die Regelungen wesentlich umfassender als noch vor wenigen Jahren.

Neue Direktiven zur Reduzierung illegaler Aktivitäten in der öffentlichen Auftragsvergabe sind auf Prävention, Transparenz und Verantwortlichkeit gerichtet. Unsere Ergebnisse zeigen, dass die Umsetzung von Regeln zum Ausschluss aus Vergabeverfahren und zur Vergabe von Unteraufträgen deutlich von Land zu Land variiert. Dies hängt zum einen mit der Konzipierung öffentlicher Auftragsvergabe als nationalem Markt zusammen, der lokalen Bedrohungen durch illegale Aktivitäten begegnen muss. Zum anderen sind die Unterschiede einem technischen Verständnis des Grades an Ermessensspielräumen geschuldet, die der Gesetzgeber den Vergabebehörden einräumt. Instrumente unterhalb der Ebene von Rechtsvorschriften gewinnen in der Bekämpfung illegaler Aktivitäten bei der öffentlichen Auftragsvergabe an Bedeutung. Integritätspakte – ein Instrument, das von Transparency International entwickelt wurde – werden in naher Zukunft in 17 EU-



geförderten Projekten in 11 Mitgliedsstaaten getestet. Die Pakte bestehen aus einem Abkommen, zwischen den Vergabebehörden, Bietern und einem unabhängigen Monitor zur Unterlassung jeglicher Form von Korruption und Absprache. In Italien konnten schon seit einigen Jahren Erfahrungen mit sogenannten Legalitätspakten gemacht werden, welche von den Beteiligten die Umsetzung von Maßnahmen zur Befolgung rechtlicher Vorschriften zur Bekämpfung von Korruption und organisierter Kriminalität sowie zur Verbesserung der Integrität und Transparenz im öffentlichen Vergabekreislauf verlangt. In einem Fall grenzüberschreitender öffentlicher Bauvorhaben, der Hochgeschwindigkeitsstrecke Turin-Lyon, wurde das Instrument des *reglement des contracts* eingesetzt, um gemeinsame Regeln für das Bauvorhaben, unabhängig von der Nationalität der Partner festzulegen. Dadurch wurden insbesondere Anti-Mafia Maßnahmen auf alle Bieter ausgedehnt. Wie bei allen Instrumenten unterhalb der Ebene von Rechtsvorschriften ist jedoch der Bestand der Regeln vor Verwaltungsgerichten umstritten.

### Die Verwundbarkeit des öffentlichen Vergabekreislaufs

Der öffentliche Vergabekreislauf ist anfällig für Kriminalität. Einige Geschäftsfelder erweisen sich als besonders anfällig: Der Bau- und der Gesundheitssektor sind besonders verwundbar. Die Transport-, Energie-, Abfall- sowie die IT- und Telekommunikationswirtschaft sind Sektoren mittleren bis hohen Risikos, hier zeigen sich große Unterschiede zwischen den Mitgliedsstaaten. In Ländern mit einer bedeutenden Bergbauwirtschaft gilt dieser Sektor ebenfalls als sehr anfällig für Korruption. Bei der öffentlichen Auftragsvergabe im Verteidigungsbereich herrscht mangelnde Transparenz vor. Soziale Dienstleistungen und Bildung sind aufkommende neue Sektoren, in denen die öffentliche Auftragsvergabe als zunehmend verwundbar erweist. Die Verwundbarkeit einiger Mitgliedsstaaten ist eng mit der Korruption und anderen illegalen Aktivitäten von lokalen Regierungsbehörden und staatlichen Unternehmen verbunden.

Der gesamte Vergabekreislauf (vor, während und nach der Auftragsvergabe) ist verwundbar. Insbesondere die Phase vor der Auftragsvergabe, in der Planungen vor dem Beginn des formellen Vergabeprozesses stattfinden, gilt in etwa der Hälfte der Länder als besonders anfällig. Hier bestehen auch einige Probleme hinsichtlich der Umsetzung von Gegenmaßnahmen. Ausschlaggebend dafür sind vor allem Delikte wie die Manipulation von Anforderungen und die Vergabe von Mitteln, sowie das Risiko der Offenlegung von Informationen. In den meisten Ländern wurde oft ein Mangel an Klarheit der Ausschreibungsbedingungen und die Einreichung eines niedrigen Angebots, einhergehend mit umfangreichen Möglichkeiten zu Vertragserweiterungen in der Phase nach Zuschlagserteilung beobachtet.

Die Ausschreibungsphase ist stark reguliert. Das Auswahlverfahren ist, jedoch, durch hohes/ mittleres Risiko in 60% der Länder gekennzeichnet, bedingt durch unsachliche oder inadäquate Gewichtung der Auswahlkriterien, sowie durch Manipulation des Bewertungsgremiums. Der Mißbrauch von juristischen Maßnahmen seitens der Bieter scheint ebenfalls ein konkretes Risiko in den meisten Ländern zu sein.

Insgesamt stellt sich die Phase nach der Zuschlagserteilung als die risikoreichste heraus. Es scheint, der öffentliche Auftraggeber habe den Vertrag nach der Unterzeichnung vergessen und in den meisten Ländern gibt es keine Instanz, die die Vertragserfüllung überwachen würde. Die Verwendung von Material niedriger Qualität, überhöhte Arbeitsvolumen und Kosten, Verzögerungen bei der Arbeitsausführung sind alles weitverbreitete Probleme, besonders, aber nicht ausschließlich, bei öffentlichen Arbeiten.

### Das präventionssystem in der öffentlichen Auftragsvergabe

Aufgrund unterschiedlicher Risiken, die den öffentlichen Vergabekreislauf betreffen, ist das Präventionssystem recht komplex und entwickelt sich konstant weiter. Es schließt präventive Organe und Instrumente mit ein.

Neben der Rolle, die die Rechnungshöfe bei der Kontrolle der Verwendung von öffentlichen Mitteln

spielten, gibt es in den Mitgliedsstaaten eine breite Palette von Organen, die sich auf Prävention von Korruption und organisierter Kriminalität richten und deren Handlungen die öffentliche Vergabe betreffen. Manche Mitgliedsstaaten haben spezialisierte Organe, deren Aufgabe es ist, Straftaten und Gesetzeswidrigkeiten bei öffentlichen Vergaben entgegenzuwirken, wenn auch mit großen Unterschieden zwischen den Ländern selber.

Wenn es um präventive Mittel geht, können die Niederlande und Italien spezifische Maßnahmen zum Monitoring von Unternehmen, ihren Besitzern und gesetzlichen Vertretern aufweisen. In Italien werden diese Kontrollen im Rahmen der Anti-Mafia Gesetzgebung ausgeführt.

Warnzeichen („Red Flags“) rühren aus unterschiedlichen Mitteln der Kontrolle von Fehlverhalten im öffentlichen Vergabewesen her. Red Flags sind Warnsignale für Sachverhalte, die es potentiell anzugehen gilt, wie zum Beispiel Korruption, Fehlverhalten und Betrug. Obwohl diese Indikatoren als nützliche Prädiktoren (Vorhersagefaktoren) für Korruptionsrisiko angesehen werden, benutzen nur acht Länder bestimmte Arten von Red Flags mit nationalen Besonderheiten.

Ausschlussmaßnahmen werden in 14 Mitgliedsstaaten angewendet. Weiße Listen fungieren als Vorauswahlkriterien um Unternehmen, die im Bieterprozess teilnehmen werden, auszusuchen; während schwarze Listen ein Verfahren, das Unternehmen und Einzelpersonen ausschliesst, nach sich ziehen. In allen Ländern, außer Rumänien, liegen diese Instrumente in der öffentlichen Hand. Trotz der allgemeinen Anerkennung der Nützlichkeit dieser Instrumente als Anreiz zur Einhaltung rechtlicher Vorgaben und als Reputationssanktion, ist ihre Verwendung aufgrund praktischer Schwierigkeiten bezüglich ihrer Regelung (Manipulationsrisiko und Probleme bei der Definition klarer Beschwerderegeleln) noch nicht weit verbreitet.

Datenbanken sind ein entscheidendes Instrument, um Informationen zur Strafverfolgung (Rechtsdurchsetzung) zu teilen. Mit der Ausnahme von Italien und den Niederlanden, ist der Gebrauch von Datenbanken zur Kontrolle von Unternehmen noch immer nicht sehr üblich.

Wegen dem Mangel an gemeinsamen Regeln auf EU-Ebene, sowie dem begrenzten Zugang für ausländische Bieter zu nationalen öffentlichen Vergabemärkten, steht die Einrichtung gemeinsamer Datenaustauschmechanismen über Unternehmen nicht hoch auf der Agenda.

## **Kontrollmaßnahmen nach der Zuschlagsphase**

Kontrollmaßnahmen nach der Zuschlagsphase, die in allen Mitgliedsstaaten üblich sind, können in zwei Gruppen unterteilt werden:

- Internes Monitoring, normalerweise vom öffentlichen Auftraggeber durchgeführt;
- Externes Monitoring, ausgeübt durch unabhängige, externe Institutionen (wie Rechnungshöfe, Finanzagenturen oder Steuerbehörden, Arbeitsaufsichtsbehörden, usw.), die ihren Fokus allgemein auf wirtschaftliche und finanzielle Aspekte, Transparenz der Rechnungslegung, Einhaltung von Arbeitsrecht, usw. legen.

Italien rühmt sich eines Kontrollsystems, das auf mißbräuchliche Praktiken, die während der Vertragsabwicklung beobachtet werden können, ausgerichtet ist. Darüber hinaus ist Italien der einzige Mitgliedsstaat mit besonderen Strafverfolgungseinheiten, die verantwortlich für das Ausführen des Monitoring und der Untersuchungstätigkeiten in Bezug auf große öffentliche Arbeiten sind. Alle anderen Mitgliedsstaaten machen keine Unterscheidung zwischen Kontroll- und/oder Monitoring(Überwachungs)instanzen, die sich auf den Typ der öffentlichen Arbeit, und somit auf die Höhe des öffentlichen Auftrags, beziehen würden.

Zweidrittel der Mitgliedsstaaten zeichnen sich durch Strafverfolgungsbehörden aus, die spezialisiert sind, Korruption in unterschiedlichen Wirtschaftssektoren, öffentliche Vergabe eingeschlossen, zu ermitteln. Die Hälfte dieser Länder weist zudem eine auf die Verfolgung von Korruption spezialisierte Staatsanwaltschaft auf.

Neben diesen Instanzen hat ein Drittel der Länder Sondereinheiten der Polizei, die eigens zur Ermittlung schwerer organisierter Kriminalität und/oder wirtschaftlicher und finanzieller Straftaten geschaffen worden sind. Namentlich Slowenien hat eine Sonderstaatsanwaltschaft, die für die Verfolgung schwerer Straftaten im Bereich der öffentlichen Vergabe/Konzessionen verantwortlich ist.

## Resumen ejecutivo

ES

El proyecto "Warning on Crime" (WOC) ([www.warningoncrime.eu](http://www.warningoncrime.eu)) se ha llevado a cabo con el apoyo financiero de la Comisión Europea, en concreto, de la Dirección General de Migración y Asuntos de Interior (DG HOME), en el marco del programa específico "Prevención y lucha contra la delincuencia" (ISEC).

La investigación consiste en un estudio comparativo sobre la infiltración criminal y la corrupción en la contratación pública en el que han participado todos los Estados miembros (en adelante, EEMM), excepto Bélgica, Chipre y Grecia.

El objetivo es comparar la vulnerabilidad de la contratación pública en los 25 EEMM, así como la legislación y las medidas adoptadas para prevenirla y contrarrestarla, con el fin de aclarar qué hace que la contratación pública sea un terreno fructífero para la cooperación entre delincuentes de cuello blanco, funcionarios públicos corruptos y miembros de organizaciones criminales. En el estudio se presta especial atención a las obras públicas de gran dimensión y a las transfronterizas.

El informe se divide en cuatro capítulos. El capítulo 1 reflexiona sobre el marco legal existente en la lucha contra la ilegalidad en la contratación pública; en el capítulo 2 se presenta la evaluación de la vulnerabilidad de la contratación pública; en el capítulo 3 se describen las medidas preventivas puestas en marcha por los EEMM; y en el capítulo 4 se analizan las medidas de control previstas en la fase posterior a la licitación.

### Marco legal

La lucha contra la ilegalidad en la contratación pública a través de las disposiciones legales implica diferentes normas e instrumentos de Derecho indicativo -"soft law"- . El proyecto se centra en cuatro áreas: las organizaciones criminales, la corrupción, la ley de contratación pública, y los pactos de integridad.

Todos los países estudiados criminalizan la participación en organizaciones criminales, de conformidad con la Decisión Marco 2008/841/JAI, del Consejo, de 24 de octubre de 2008, relativa a la lucha contra la delincuencia organizada, y en la mayoría de ellos estos delitos representan una herramienta para castigar a grupos que ejecuten actividades delictivas, incluida la corrupción relacionada con la contratación pública—siempre y cuando se cumplan los requisitos establecidos por la ley-. Además, el sistema jurídico italiano prevé específicamente el delito de asociación de tipo mafioso, mencionando explícitamente la contratación pública. La legislación austríaca incluye un delito de asociación ilícita que también puede abarcar la corrupción. Sin embargo, la jurisprudencia es muy limitada en los EEMM.

El marco jurídico sobre el cohecho y el tráfico de influencias de los EEMM ha sido sometido a un proceso de evolución y de aproximación, y, aunque siguen existiendo lagunas y contradicciones, la respuesta global es mucho más amplia que hace unos años.

Las nuevas directivas sobre contratación pública centran su atención en la prevención, la transparencia y la rendición de cuentas como medios para reducir la ilegalidad en la contratación pública. La investigación muestra que la transposición de las normas relativas a los motivos de la exclusión y a la subcontratación varía significativamente entre países. Esto se debe, en parte, a la idea existente de que la contratación pública es un mercado nacional que necesita hacer frente a las amenazas de ilegalidad en sede local, así como a la intención técnica del legislador de dejar un alto grado de discrecionalidad al órgano de contratación.

Los instrumentos de Derecho indicativo cada vez adquieren mayor relevancia en la lucha contra la ilegalidad en la contratación pública. Los pactos de integridad -una herramienta desarrollada por Transparencia Internacional (TI), consistente en un acuerdo firmado por la autoridad contratante, los licitadores, y un supervisor independiente, en el que se comprometen a abstenerse de toda forma de corrupción y pactos de colusión- están a punto de ser probados en 11 países a través de 17 proyectos financiados por la Unión Europea. Italia tiene una amplia experiencia en este punto

debido a los pactos de legalidad que han sido firmados en los últimos años, en los que las partes se comprometen a adoptar medidas concretas para aplicar las leyes anticorrupción y el crimen organizado y para mejorar la integridad y la transparencia en el procedimiento de contratación pública. En la mayor obra pública estudiada, la línea ferroviaria de alta velocidad Turín-Lyon, se utilizó un instrumento de Derecho indicativo -reglement des contracts- para establecer reglas comunes para esta obra pública, con independencia de la nacionalidad de los postores que participaron. En concreto, se extendieron los controles italianos antimafia a todos los licitadores que participaron en la ejecución de las obras. Sin embargo, como ocurre con la mayoría de los instrumentos de Derecho indicativo, es discutible si podrían tener valor vinculante ante un tribunal administrativo.

### **La vulnerabilidad del procedimiento de contratación pública**

El procedimiento de contratación pública es vulnerable a la delincuencia. Algunos sectores empresariales están más expuestos que otros a la misma: la construcción y la salud son muy vulnerables. Transportes, energía, eliminación de residuos e informática y telecomunicaciones son sectores con riesgo medio/alto, habiendo diferencias entre los distintos países. En aquellos países en los que persiste la industria minera, este sector se considera altamente vulnerable. La contratación pública en relación con el sector de la defensa carece de transparencia. Los servicios sociales y la educación se están convirtiendo en sectores en los que la contratación pública es cada vez más vulnerable. La vulnerabilidad de varios de los países objeto de investigación está estrechamente relacionada con la exposición a la corrupción y a la ilegalidad de los gobiernos locales y de las empresas de propiedad estatal.

Así, todo el procedimiento de contratación pública en conjunto (fases pre-licitación, licitación, y post-licitación) resulta vulnerable. En la fase de pre-licitación, en concreto, la etapa de planificación -la anterior al inicio del procedimiento- se considera altamente vulnerable en casi la mitad de los países, y cuenta con algunos problemas relativos a la adopción de contramedidas. Todo esto es debido a la manipulación de necesidades y de la financiación de la asignación, así como el riesgo de revelación de información.

La falta de claridad del pliego de condiciones y la presentación de un precio de oferta demasiado bajo, acompañado por extensas posibilidades de ampliar el contrato en la fase posterior a la concesión se observan con frecuencia en la mayoría de los países.

La fase de licitación está muy regulada. El procedimiento de selección, sin embargo, cuenta con un riesgo medio/alto en el 60% de los países, debido a la ponderación no objetiva o inadecuada de los criterios de selección y a la manipulación del pliego de condiciones. El mal uso, también, de las acciones judiciales por parte de los licitadores parece ser un riesgo concreto en la mayoría de los países.

En general, la fase posterior a la licitación resulta ser la más arriesgada. El órgano de contratación parece olvidar el contrato después de su firma, y en la mayoría de los países, no hay autoridad para supervisar la ejecución del contrato.

El material de baja calidad, el volumen de trabajo y de costes inflado y los retrasos en la ejecución de las obras son problemas generalizados en particular -pero no exclusivamente- en relación con las obras públicas.

### **Medidas preventivas**

Debido a los diversos riesgos que afectan al procedimiento de contratación pública, el sistema de prevención es bastante complejo y está en constante evolución. En él se incluyen los organismos y herramientas de prevención.

Junto al papel desempeñado por los tribunales de cuentas en el seguimiento del uso de fondos públicos, existe una amplia gama de organismos en los EEMM, centrados en la prevención de la corrupción y del crimen organizado, y cuya acción se refiere a la contratación pública. Algunos EEMM tienen otros cuerpos específicos cuya tarea es luchar contra la delincuencia y la ilegalidad en la contratación pública, aunque con diferencias entre países.

En lo que se refiere a las herramientas de prevención, los Países Bajos e Italia cuentan con medidas específicas encaminadas a la vigilancia de empresas y sus propietarios y representantes legales. En Italia, estos controles se llevan a cabo en el marco de la legislación antimafia. Las banderas rojas están surgiendo como herramienta utilizada para controlar la mala conducta en la contratación pública. Las banderas rojas advierten sobre posibles problemas que deben abordarse, como la corrupción, la mala conducta y los fraudes. Aunque estos indicadores se consideran predictores útiles para el riesgo de corrupción, sólo ocho países utilizan algún tipo de banderas rojas, con las especificidades nacionales. Las medidas de inhabilitación se utilizan en 14 EEMM. Las listas blancas funcionan como una condición pre-selección para elegir las empresas que participarán en el proceso de licitación, mientras que las listas negras implican un procedimiento que excluye a empresas y particulares. En todos los países, excepto en Rumania, estas herramientas son gestionadas por las autoridades públicas. A pesar del reconocimiento general de la utilidad de estas herramientas como un incentivo para cumplir con las disposiciones de la ley y como sanción reputacional, su uso no está aún generalizado debido a dificultades prácticas en la gestión de las mismas (riesgo de manipulación y dificultades en la definición de criterios claros y reglas para la apelación). Las bases de datos son una herramienta crucial para compartir información. Con la excepción de Italia y de los Países Bajos, el uso de bases de datos para supervisar las empresas aún no es tan común. Debido a la falta de normas comunes a nivel de la Unión Europea y a los mercados nacionales de contratación pública con acceso limitado para licitantes extranjeros, la puesta a punto de un mecanismo de intercambio de información común en las empresas no es una prioridad en la agenda.

### **Las medidas de control en la fase posterior a la licitación**

Las medidas de control comunes en todos los EEMM en la fase posterior a la licitación se pueden dividir en dos grupos:

- Control interno, por lo general, realizado por el poder adjudicador;
- Control externo, llevado a cabo por instituciones independientes y externas (como tribunales de cuentas, agencias de financiación o fiscales, inspecciones de trabajo, etc.) que, por lo general, centran su atención en los aspectos económicos y financieros, la transparencia de las cuentas, el cumplimiento de las leyes laborales, etc.

Además, sólo Italia cuenta con sistemas de control centrados en las prácticas abusivas durante la ejecución del contrato. Por otra parte, Italia es el único EM con unidades especiales de las fuerzas del orden responsables de llevar a cabo actividades de investigación de control en relación con grandes obras públicas. El resto de los EEMM no hacen ninguna distinción -entre el control y/o de los órganos de vigilancia- en función del tipo de obra pública y, por lo tanto, del importe del contrato.

Dos tercios de los EEMM cuentan con cuerpos policiales especializados en la detección de la corrupción en diversos sectores económicos, incluyendo la contratación pública. La mitad de estos países también cuentan con una fiscalía especializada encargada de perseguir la corrupción. Junto con estos cuerpos, un tercio de los países cuentan con unidades especiales de policía establecidos específicamente para investigar el crimen organizado grave y/o los delitos económicos y financieros. Eslovenia, en particular, cuenta con una Fiscalía especial encargada de investigar formas graves de delincuencia en la adquisición y concesiones públicas.

# Tiivistelmä tutkimuksen loppuraportista

FI

“Warning on Crime” (WOC) –projekti ([www.warningoncrime.eu](http://www.warningoncrime.eu)) toteutettiin Euroopan komission, Muuttoliike- ja sisäasioiden pääosaston (DG HOME) taloudellisella tuella osana rikosten ennaltaehkäisyä ja torjuntaa koskevaa komission erityisohjelmaa (ISEC).

Kyseessä on oikeusvertaileva tutkimus rikollisuuden soluttautumisesta ja korruptiosta julkisissa hankinnoissa kattaen kaikki jäsenvaltiot Belgiaa, Luxembourgia ja Kreikkaa lukuun ottamatta. Tavoitteena on tarkastella julkisten hankintojen haavoittuvuutta 25 jäsenvaltiossa sekä vertailla lainsäädäntöä että rikollisuuden ja korruption ennaltaehkäisyyn ja torjuntaan suunnattuja toimenpiteitä tarkoituksena selvittää, miksi julkiset hankinnat mielletään hedelmälliseksi maaperäksi “valkokaulusrikollisten”, epäluotettavien virkamiesten ja järjestäytyneiden rikollisryhmien jäsenten yhteistyölle. Tutkimuksessa kiinnitetään huomiota erityisesti suuriin ja rajat ylittäviin julkisiin rakennusurakoihin.

Raportti jakautuu neljään lukuun. Ensimmäisessä luvussa tarkastellaan lainsäädäntöä, jolla pyritään puuttumaan väärinkäyttöihin julkisissa hankinnoissa; toisessa luvussa arvioidaan julkisten hankintojen haavoittuvuutta;

kolmannessa luvussa käsitellään eri jäsenvaltioissa omaksuttuja väärinkäytösten ennaltaehkäisykeinoja ja neljännessä luvussa tarkastellaan tarjouskilpailun jälkeen käytettävissä olevia valvontakeinoja.

## Lainsäädäntö

Julkisissa hankinnoissa ilmeneviin väärinkäyttöihin voidaan puuttua lainsäädännöllä tai eri soft law -keinojen avulla. Tutkimusprojekti keskittyy neljään osa-alueeseen: järjestäytyneet rikollisryhmät, lahjonta, hankintalainsäädäntö ja vastuullisuussopimukset (integrity pacts).

Kaikki tutkimuksen kohteena olevat maat ovat kriminalisoineet järjestäytyneet rikollisryhmät Euroopan neuvoston järjestäytyneen rikollisuuden torjunnasta annetussa puitepäätöksessä 2008/841/JHA, 24 päivänä lokakuuta 2008, edellytetyin tavoin. Useimmissa tarkastelun kohteena olleissa maissa rikoksesta voidaan tuomita myös ryhmiä, jotka syöllistyvät rikoksiin julkisissa hankinnoissa, kuten korruptioon, edellyttäen, että laissa määritelty rikoksen tunnusmerkistö muutoin täyttyy. Lisäksi Italian oikeudessa säädetään erityisesti mafialuonteista toimintaa koskevasta rikkomuksesta, joka sanamuotonsa mukaisesti kattaa myös julkiset hankinnat. Itävallan lainsäädännössä säädetään järjestäytyntä rikollisryhmää koskevasta rikkomuksesta, joka voi käsittää myös korruptiota. Aiheesta on kuitenkin varsin vähän oikeuskäytäntöä jäsenvaltioissa. Lahjontaa ja vaikutusvallan väärinkäyttöä koskeva lainsäädäntö on kehittynyt jäsenvaltioissa viime aikoina ja vaikka porsaanreikiä ja ristiriitaisuuksia on edelleen, ovat tutkimuksessa saadut vastaukset paljon kattavampia kuin vielä muutama vuosi sitten. Uusissa hankintadirektiiveissä pyritään vähentämään laittomuuksia kiinnittämällä huomiota erityisesti väärinkäytösten ehkäisyyn sekä menettelyn läpinäkyvyyteen ja vastuullisuuteen. Tutkimus osoittaa, että eri maiden välillä hankintadirektiivien voimaansaattamisessa on suuria eroja tarjoajan poissulkuperusteiden ja alihankintoja koskevan sääntelyn osalta. Tämä johtuu osittain siitä, että julkiset hankinnat koetaan osaksi kansallisia markkinoita, jolloin hankinnoissa puututaan kansallisesti tyypillisiin lainvastaisuuksiin ja toisaalta siitä, että jotkut lainsäätäjät jättävät paljon harkintavaltaa hankintayksiköille, kun taas toisissa maissa säännöt eivät ole yhtä joustavia.

Soft law -työkalujen merkitys väärinkäytösten torjunnassa julkisissa hankinnoissa on kasvussa. Integrity pact, Transparency Internationalin (TI) kehittämä työkalu, on hankintayksikön, tarjoajien ja ulkopuolisen valvojan allekirjoittama sopimus, jossa osapuolet sitoutuvat pidättäytymään kaikenlaisesta korruptiosta ja kilpailunrajoittamisesta. Integrity pactia tullaan testaamaan 11 maassa 17 eri EU-rahoitteisessa projektissa. Italiassa on pitkä kokemus vastaavista

laillisuus sopimuksia, joissa osapuolet ovat sitoutuneet korruption ja järjestäytyneen rikollisuuden vastaista lainsäädäntöä täytäntöönpaneviin toimenpiteisiin ja edistämään läpinäkyvyyttä julkisen hankinnan koko elinkaaren ajan. Tutkimuksen kohteena olleessa suuressa Torino-Lyon suurnopeusjunan raideyhteyttä koskeneessa rakennusrukassa, soft law työkalua (reglement des contracts) käytettiin urakkaa koskevien yhteisten ja tarjoajan kansallisuudesta riippumattomien sääntöjen luomiseen. Sillä ulotettiin erityisesti Italian mafianvastainen valvonta kaikkiin tarjoajiin, jotka osallistuivat urakan toteuttamiseen. Kuten kaikkien soft law -työkalujen osalta, on kuitenkin tulkinanvaraista, katsottaisiinko tällaisella sopimuksella olevan osapuolia sitovaa vaikutusta tuomioistuimessa.

### **Julkisen hankinnan haavoittuvuus sen elinkaaren aikana**

Julkisia hankintoja voidaan pitää haavoittuvaisina rikollisuudelle. Jotkut toimialat ovat alttiimpia kuin toiset: erityisesti rakentamista ja terveydenhuoltoa pidetään hyvin haavoittuvaisina. Liikenne-, energia-, jätehuolto- sekä IT- ja tietoliikennesektorit ovat kohtalaisen tai korkean riskin omaavia toimialoja. Maissa missä edelleen harjoitetaan kaivostoimintaa, on tätä pidetty hyvin alttiina rikollisuudelle. Puolustushankinnoissa läpinäkyvyys on puutteellista. Sosiaali- ja koulutuspalvelusektorit nousevat esiin uusina toimialoina, joissa julkisten hankintojen haavoittuvuus on kasvussa. Useissa tutkimuksen kohteena olleissa maissa julkisten hankintojen haavoittuvuus liittyy paikallishallinnon ja julkisomisteisten yhtiöiden korruptoituneisuuteen ja lainvastaisiin menettelyihin.

Koko hankinnan elinkaari (hankinnan valmistelu, kilpailutusvaihe ja sopimuskausi) on haavoittuvainen. Lähes puolessa tutkimuksen kohteena olleista maista, hankinnan kilpailutusta edeltävää suunnittelu- ja valmisteluvaihetta pidetään hyvin haavoittuvaisena. Tutkimuksen perusteella voidaan nostaa esiin joitain ongelmia väärinkäytösten torjunnassa. Ongelmat liittyvät hankinnan tarveharkintaan tai rahoituksen jakamiseen kohdistuvaan manipulointiin sekä tietojen paljastumiseen liittyviin riskeihin.

Suurimmissa osassa tutkimuksen kohteena olevista maista tehdään hankintoja, joissa tarjouspyynnön ehtojen epäselvyys ja halvimman hinnan mukaan kilpailuttaminen on yhdistetty mahdollisuuteen muuttaa tai laajentaa sopimusta sopimuskauden aikana.

Hankintojen kilpailuttamisvaihe on tarkkaan säänneltyä. 60 % maista hankintamenettelyn valintaan liittyi kuitenkin korkea tai kohtalainen riski tarjousten valintaan osallistuvien henkilöiden manipulointiin ja siihen, etteivät vertailuperusteet tai niiden painotus ole objektiivisia tai riittävän selviä. Useissa maissa vaikuttaa olevan myös todellinen riski oikeussuojakeinojen väärinkäytöstä.

Yleisesti ottaen hankintasopimuskausi näyttää olevan riskialttein kaikista hankinnan elinkaaren vaiheista. Vaikuttaa siltä, että hankintayksikkö unohtaa sopimuksen sen allekirjoittamisen jälkeen eikä useimmissa maissa ole sopimuksen toteuttamista valvovaa viranomaista.

Huonolaatuiset materiaalit, työmäärien ja kustannusten vääristeleminen ja viivästykset ovat kaikki laajalle levinneitä ongelmia erityisesti julkisissa rakennusurakoissa, mutta myös muutoin.

### **Ennaltaehkäisevät toimenpiteet**

Useista hankinnan elinkaareen kohdistuvista riskeistä johtuen ennaltaehkäisevien toimenpiteiden tulee olla moniulotteisia ja jatkuvasti kehittyviä. Toimenpiteet sisältävät paitsi valvontaviranomaisia myös erilaisia ennaltaehkäisykeinoja.

Tilintarkastustuomioistuinten julkisten varojen käyttöä harjoittaman valvonnan lisäksi jäsenvaltioissa on lukuisia korruption ja järjestäytyneen rikollisuuden torjuntaan ja ennaltaehkäisyyn keskittyviä virastoja, joiden toimenkuvaan sisältyy myös julkisten hankintojen valvonta. Joissain jäsenvaltioissa on puolestaan erityisiä, rikosten ja lainvastaisten menettelyiden torjunnasta nimenomaisesti julkisissa hankinnoissa vastaavia virastoja, joskin näiden virastojen välillä on paljon eroja. Alankomaissa ja Italiassa on käytössä erityistoimenpiteitä yritysten, niiden omistajien ja laillisten edustajien valvontaan. Italiassa valvonnasta on säädetty osana mafianvastaista lainsäädäntöä.

Väärinkäytöksistä varoittavia merkkejä ("Red Flags") nousee esiin lukuisten hankintoihin liittyvien valvontatoimien kautta. Red Flags -merkit varoittavat mahdollisista huomiota vaativista ongelmista, kuten korruptiosta, rikkomuksista tai vilpistä. Vaikka merkkejä pidetään käyttökelpoisina viitteinä korruptioriskistä, vain kahdeksassa maassa on käytössä jonkinlaisia kansallisia erityispiirteitä sisältäviä Red Flags -merkkejä.

Osallistumiskieltoimenpiteitä on käytössä 14 jäsenvaltiossa. Valkoisia listoja (white lists) käytetään kelpoisuusehtona valittaessa tarjoajia, jotka voivat jättää tarjouksen tarjouskilpailuun, kun taas mustia listoja (black lists) käytetään yritysten ja yksityisten henkilöiden sulkemiseen pois menettelystä. Romaniaa lukuun ottamatta näitä järjestelmiä hallinnoidaan viranomaisten toimesta. Vaikka osallistumiskieltoja pidetään toimivina, yrityksen mainetta vahingoittavina sanktioina ja niiden on yleisesti katsottu kannustavan yrityksiä noudattamaan sitä velvoittavaa lainsäädäntöä, järjestelmien käyttö ei ole kuitenkaan levinnyt kovin laajalle niiden hallinnoimiseen liittyvistä käytännön haasteista johtuen (manipulointiriskit sekä vaikeudet määrittää selkeitä sääntöjä kieltoistalle päätyemisestä valittamiseen).

Erilaiset tietokannat ovat tärkeitä työkaluja lainvalvontaviranomaisille. Tietokantojen käyttö yritysten valvonnassa ei kuitenkaan Alankomaita ja Italiaa lukuun ottamatta ole vielä kovin yleistä. EU-sääntelyn puuttumisesta ja ulkomaisille tarjoajille rajoitetulla pääsyllä varustetuista kansallisista hankintamarkkinoista johtuen yrityksiä koskevien tietojen jakaminen ja sen yhteinen kehittäminen ei ole noussut kärkihankkeiden joukkoon.

## Valvontatoimenpiteet hankintasopimuskaudella

Hankintasopimuskauden aikana valvontatoimenpiteet voidaan kaikissa jäsenvaltioissa jakaa kahteen ryhmään:

- sisäinen valvonta, suoritetaan yleensä hankintayksikön toimesta;
- ulkoinen valvonta, hoidetaan usein itsenäisten ja ulkopuolisten toimijoiden (kuten tilintarkastustuomioistuimen, rahoitus- tai veroviranomaisten, työsuojelutarkastajien jne.) toimesta, jotka keskittyvät muun muassa taloudellisten seikkojen, kirjanpidon läpinäkyvyyden ja työläinsäädännön noudattamisen valvontaan jne.

Sitä paitsi ainoastaan Italiassa on käytössä valvontajärjestelmiä, joilla voidaan puuttua myös hankintasopimuskaudella ilmeneviin väärinkäytöksiin. Lisäksi Italia on jäsenvaltioista ainoa, jolla on erityisiä, suuriin julkisiin rakennusurakoihin keskittyneitä lainvalvontaviranomaisia. Missään muussa jäsenvaltiossa valvontaviranomaisia ei erotella urakatyyppin tai sen arvon perusteella.

Kahdessa kolmesta jäsenvaltiosta on useilla eri sektoreilla, julkiset hankinnat mukaan lukien, korruption tunnistamiseen erikoistuneita lainvalvontaviranomaisia. Puolessa näistä maista on tämän lisäksi myös korruptiosta vastaava syyttäjänvirasto.

Näiden toimijoiden lisäksi, joka kolmannessa maassa on poliisin erityisyksiköjä, jotka on perustettu vakavien, järjestäytyneeseen rikollisuuteen liittyvien rikosten ja/tai talousrikosten tutkintaa varten. Näin on etenkin Sloveniassa, jossa julkisiin hankintoihin ja käyttöoikeussopimuksiin liittyvän vakavan rikollisuuden tutkinnasta vastaa oma erikoissyyttäjänvirasto.



## Résumé Analytique

FR

« Warning on crime » (WOC) ([www.warningoncrime.eu](http://www.warningoncrime.eu)) est un projet financé par la Direction générale de la migration et des affaires intérieures (DG home) de la Commission européenne, dans le cadre du Programme « Prévenir et combattre la criminalité » (ISEC).

Ce projet de recherche se fonde sur une analyse comparative de la corruption et de l'infiltration criminelle dans les procédures de marchés publics, dans l'ensemble des Etats membres (EM) de l'Union européenne, à l'exception de la Belgique, de Chypre et de la Grèce. Tant le cadre légal que les mesures de prévention adoptées seront présentés afin de comparer la vulnérabilité des procédures de marchés publics dans ces 25 Etats membres. Le but sera d'évaluer en quoi ces procédures constituent le cadre privilégié d'une coopération entre criminels en col blanc, fonctionnaires malhonnêtes et membres d'organisations criminelles. Les travaux d'envergure et transfrontières ont ainsi fait l'objet d'une attention particulière.

Le rapport est divisé en quatre chapitres. Le premier chapitre porte sur le cadre législatif relatif à la lutte contre les infractions affectant les marchés publics. Le second chapitre analyse la vulnérabilité des marchés publics. Le chapitre 3 décrit les mesures préventives mises en place dans les Etats membres et le chapitre 4 présente les mesures de contrôle envisagées dans la phase postérieure à l'appel d'offre.

### Le cadre légal

La lutte contre les infractions affectant les marchés publics s'appuie non seulement sur des règles légales mais aussi sur des instruments de soft law. Le cadre légal se concentre sur quatre questions : les organisations criminelles, la corruption, le droit des marchés publics et les pactes d'intégrité. Tous les Etats concernés par le projet incriminent les organisations criminelles en tant que telles, conformément à la décision-cadre du Conseil 2008/841/JAI du 24 octobre 2008 sur la lutte contre le crime organisé. Dans la plupart d'entre eux, cette infraction permet de punir les groupes poursuivant des activités criminelles, y compris la corruption dans le cadre de marchés publics. Le droit italien prévoit spécifiquement l'infraction d'association de malfaiteur de type mafia et renvoie explicitement aux marchés publics. De même, l'infraction d'association criminelle en droit autrichien inclut expressément la corruption. Néanmoins, il est à noter que la jurisprudence en la matière est très limitée et ce dans tous les Etats membres étudiés.

L'encadrement légal des infractions de corruption et de trafic d'influence a évolué ces dernières années, marqué par le rapprochement des législations nationales. Si des lacunes et contradictions persistent, les résultats généraux obtenus sont bien plus complets qu'il y a quelques années. Afin de réduire les infractions pouvant affecter les procédures de marchés publics, les nouvelles directives relatives aux marchés publics ont mis l'accent sur la prévention, la transparence et la responsabilité. La présente étude montre que la transposition de règles relatives à l'exclusion des participants et à la sous-traitance varie considérablement d'un Etat membre à un autre. Cette hétérogénéité est en partie liée au fait que les marchés publics sont perçus comme une activité nationale et que les infractions pouvant affecter ces procédures sont essentiellement d'origine interne. Par ailleurs, les différences rencontrées découlent également de la marge de discrétion que la législation envisage de laisser aux autorités contractantes ou pouvoirs adjudicateurs.

Les instruments de soft-law jouent un rôle de plus en plus important dans la neutralisation du phénomène. Des pactes d'intégrité - instruments développés par Transparency International, consistant en un accord entre les autorités contractantes, les soumissionnaires et une autorité de surveillance indépendante, par lequel ils s'engagent à refuser toute forme de corruption ou de collusion - vont prochainement être expérimentés par 11 Etats lors de 17 projets cofinancés par l'Union européenne. L'Italie a une longue expérience en ce qui concerne les « pactes de légalité », aux termes desquels les parties s'engagent à mettre en œuvre les règles légales visant non seulement

à lutter contre la corruption et le crime organisé mais aussi à renforcer la transparence et l'intégrité dans le processus de marché public. Par exemple, dans le cadre du chantier de la ligne haute vitesse Turin-Lyon, les règles communes étaient fixées, pour tous les soumissionnaires, quelle que soit leur nationalité, par un instrument de soft law (règlement des contrats). Plus précisément, cet instrument étend le contrôle anti-mafia italien à tous les soumissionnaires. La valeur contraignante de ce règlement est cependant contestable et pourrait être discutée devant les juridictions administratives.

### **Vulnérabilité des marchés publics dans différentes étapes du cycle**

Le contexte des marchés publics est généralement caractérisé par une vulnérabilité face à la criminalité. Certains secteurs d'activité peuvent s'avérer plus exposés que d'autres. Citons la construction et la santé qui apparaissent extrêmement vulnérables. Les transports, l'énergie, l'élimination des déchets, l'informatique et les télécommunications sont également des secteurs exposés à un niveau moyen/élevé, avec, toutefois, des différences entre les pays. S'agissant des Etats qui disposent encore d'une industrie minière, ce secteur est considéré comme très vulnérable. De même, les marchés publics dans le secteur de la défense manquent de transparence. Les services liés à l'éducation et dans le domaine social deviennent un nouveau secteur où les marchés publics sont de plus en plus soumis à de tels risques. La vulnérabilité dans plusieurs des pays étudiés est étroitement liée à l'exposition à la corruption et à l'illégalité des collectivités locales et des entreprises publiques.

L'ensemble des procédures liées aux marchés publics (avant, durant et après l'adjudication) sont vulnérables. La phase amont de l'adjudication est considérée comme très exposée dans près de la moitié des pays, et illustre certains des problèmes portant sur l'adoption de mesures de lutte. Tout cela est dû à la manipulation des besoins et des allocations de financement ainsi qu'aux risques de divulgation d'informations.

Le manque de clarté du cahier des charges ainsi que la faiblesse du prix de soumission, accompagnés de vastes possibilités d'élargir la phase postérieure à l'octroi du contrat sont souvent observés dans la plupart des pays.

Si la phase d'appel d'offres est très réglementée, la procédure de sélection qui la particularise permet néanmoins d'observer un risque élevée/moyen dans 60 % des pays. Ceci est dû à une évaluation non-objective ou inadéquate des critères de sélection et à la possible manipulation de la Commission d'évaluation. Les hypothèses d'actions judiciaires non fondées engagées par les soumissionnaires apparaissent comme un risque concret dans la plupart des pays.

Globalement, la phase qui suit l'appel d'offres apparaît comme étant la plus risquée. L'autorité contractante semble oublier le contrat après sa conclusion et dans la plupart des pays, il n'existe aucune autorité chargée de surveiller la bonne exécution du contrat. On relève ainsi, à titre d'exemple, certains vices comme un matériel de mauvaise qualité, le volume du travail et son coût exagérés, les retards dans la bonne exécution des travaux publics en général.

### **Mesures préventives**

En raison des risques divers affectant les marchés publics dans leur ensemble, le système de prévention est désormais relativement complexe et en constante évolution. Ce système de prévention comprend à la fois des organes dédiés et des outils.

Parallèlement au rôle joué par les cours des comptes dans le contrôle de l'emploi des fonds publics, il existe un large éventail d'organismes dans les différents Etats de l'UE qui se focalisent sur la prévention de la corruption et sur le crime organisé, et dont l'action concerne les marchés publics. Certains Etats membres ont des organes spécifiques dédiés dont la tâche consiste à combattre le crime et l'illégalité dans les marchés publics, ce bien que des différences puissent être observées entre les pays. S'agissant des instruments de prévention, les Pays-Bas et l'Italie disposent de mesures spécifiques visant à contrôler les entreprises, leurs propriétaires ainsi que leurs représentants légaux. En Italie, ces contrôles sont effectués dans le cadre de la législation anti-mafia.

Les « drapeaux rouges » ressortent parmi une variété d'outils utilisés afin de surveiller des manquements dans les marchés publics. Ils sont des alerteurs permettant de mettre en garde contre l'existence d'éventuels comportements répréhensibles comme la corruption, différents manquements ou encore la fraude. Bien que ces indicateurs puissent apparaître utiles en présence d'un risque de corruption, seulement huit pays utilisent ce type d'outils, avec toutefois des spécificités nationales souvent relevées.

Des mesures de radiation sont utilisées dans 14 Etats membres. Les listes blanches sont utilisées comme instruments de présélection pour choisir des entreprises qui seront autorisées à prendre part à la procédure de soumission, alors que les listes noires interdisent aux entreprises et aux particuliers de participer à ces mêmes procédures. Dans tous les pays européens – à l'exception de la Roumanie – ces outils sont gérés par les pouvoirs publics. En dépit de la reconnaissance de leur utilité comme moyens de renforcer la conformité aux dispositions législatives dans le domaine considéré mais également comme instrument permettant de sanctionner au travers de la réputation, leur emploi n'est pas encore systématiquement répandu en raison de difficultés pratiques liées à leur gestion (risque de manipulation et difficultés à définir des critères clairs ainsi que les modalités d'un appel). Les bases de données sont des outils essentiels afin de partager des informations sur l'application des règles. À l'exception de l'Italie et des Pays-Bas, l'utilisation de bases de données pour surveiller les entreprises n'est pas encore systématique. En raison du manque de règles communes au niveau européen et en raison de l'absence d'ouverture des marchés nationaux aux soumissionnaires étrangers, la mise en place d'un mécanisme commun de partage d'information sur les entreprises n'est pas vraiment à l'ordre du jour.

### **Mesures de contrôle dans la phase postérieure à l'appel d'offres**

Certaines mesures de contrôle dans cette phase sont communes dans les Etats membres de l'UE. Elles peuvent se répartir en deux grands ensembles :

- la surveillance interne souvent assurée par le maître d'ouvrage ;
- la surveillance externe, réalisée par des institutions indépendantes et extérieures (telles que des cours des comptes, des organismes fiscaux, des inspections du travail, etc.), qui généralement concentrent leur attention sur les aspects économiques et financiers, la transparence des comptes, le respect de la législation du travail, etc.

Au-delà, seule l'Italie présente des systèmes de contrôle axés sur des pratiques abusives qui peuvent être observées durant l'exécution des contrats de marché public. En outre, l'Italie est le seul Etat membre doté d'institutions spécialement chargées de mener à bien des contrôles et des enquêtes dans le champ des grands travaux publics. L'ensemble des autres Etats membres ne font pas de distinctions fondées sur le type de travaux publics et donc sur le montant du marché public. Les deux tiers des Etats membres disposent d'organismes spécialisés dans la détection de la corruption dans divers secteurs économiques dont les marchés publics. La moitié de ces Etats dispose également d'un parquet spécialisé dans les affaires de corruption.

En plus de ces organismes, un tiers des pays disposent d'unités de police spéciales, qui ont été spécialement créées pour enquêter dans des grandes affaires de criminalité organisée ou de crimes économiques et financiers. La Slovénie dispose d'un parquet spécial chargé d'enquêter sur des formes graves de criminalité dans les marchés publics ou de concession.

## Sažetak



Projekt „Upozorenje na kriminal“ (WOC) ([www.warningoncrime.eu](http://www.warningoncrime.eu)) izveden je uz financijsku potporu Odjela za migracije i unutarnje poslove Europske komisije (DG HOME) u okviru Programa za prevenciju i borbu protiv kriminala (ISEC).

Istraživanje je obuhvatilo komparativnu analizu korupcije i kriminalnog prodiranja u javnu nabavu na teritoriju svih Država članica (DČ) osim Belgije, Cipra i Grčke.

Cilj je projekta usporedba ranjivost u području javne nabave u 25 DČ, uključujući mjere uređene zakonodavstvom i mjere usvojene za sprečavanje i suzbijanje kažnjivih ponašanja, uz osvrt na osvjetljavanje uzroka koji javnu nabavu čine plodnim tlom za suradnju kriminalaca bijelih ovratnika („white-collar criminals“), nelojalnih javnih dužnosnika i članova kriminalnih organizacija. Posebna pažnja je posvećena važnim prekograničnim javnim radovima.

Izvešće je podijeljeno u četiri poglavlja. Prvo poglavlje odražava dostupni zakonodavni okvir za suzbijanje protuzakornosti u javnoj nabavi; drugo poglavlje predstavlja procjenu ranjivosti javne nabave; treće poglavlje opisuje preventivne mjere koje su usvojene u DČ; četvrto poglavlje analizira kontrolne mjere predviđene u fazi nakon ponuda na javnom nadmetanju.

### Pravni okvir

Suprotstavljanje protuzakornostima u javnoj nabavi kroz zakonske mjere uključuje različita pravna pravila i soft-law mjere. Pravni okvir usmjerava se na četiri područja: kriminalne organizacije, mito, javnu nabavu i sporazume o integritetu.

Sve države su proučavale kriminalne organizacije sukladno Okvirnoj odluci Vijeća 2008/841/PUP od 24. listopada 2008 o borbi protiv organiziranog kriminala i u većini slučajeva kazneno djelo, uz ispunjenje zakonom propisanih pretpostavki, predstavlja sredstvo za kažnjavanje grupa koje se bave kriminalnim aktivnostima vezanim uz javnu nabavu, uključujući korupciju. Dodatno, talijanski pravni sustav posebno predviđa kao kazneno djelo udruženja mafijaškog tipa koji izričito spominje javnu nabavu. Austrijsko zakonodavstvo uključuje kazneno djelo kriminalnog udruženja koji može obuhvatiti i korupciju. Međutim, praksa je veoma ograničena diljem DČ.

Pravni okvir za mito i trgovanje utjecajem bio je podvrgnut procesu razvoja i procjene diljem DČ te, unatoč i dalje prisutnim pravnim prazninama i proturječnostima, ukupni rezultati odaziva mnogo su opsežniji nego prije nekoliko godina.

Nove smjernice za javnu nabavu, kao sredstva za smanjenje nezakornosti u javnoj nabavi, usredotočene su na sprečavanje, transparentnost i odgovornost. Istraživanje pokazuje da se prenošenje pravila na temelju isključenja i podugovaranja značajno razlikuje u državama. Ovo je djelomično povezano s idejom da je javna nabava dio globalnog tržišta koje se mora suočiti s lokalnim prijetnjama u smislu nezakornosti, te također uzeti u obzir razinu diskrecije koji zakonodavci žele ostaviti naručiteljima.

Soft-law instrumenti dobivaju sve veći značaj u borbi protiv nezakornosti u javnoj nabavi. Sporazumi o integritetu – sredstvo razvijeno od strane Transparency Internationala (TI), sastoji se od sporazuma potpisanog od strane vladinih agencija, društava koja se nadmeću i nezavisnog kontrolora koji se obvezuje na suzdržavanje od bilo kakvog oblika korupcije i koluzije - uskoro će biti testirani u 11 zemalja na 17 projekata sufinanciranih od strane Strukturalnih i Kohezijskih fondova EU. Italija ima dugogodišnje iskustvo u sporazumima koji obvezuju stranke na usvajanje posebnih radnji usmjerenih na provođenje pravnih pravila protiv korupcije i organiziranog kriminaliteta i na povećanje integriteta i transparentnosti u sustavu javne nabave. U većini proučavanih javnih radova, soft-law instrument („reglement des contracts“) koristio se kako bi pružio zajednička pravila za ovaj javni rad, ne uzimajući u obzir državljanstvo ponuditelja. Posebice proširuje talijanske antimafijaške mjere kontrole na sve ponuditelje uključene u izvršenje radova. Ipak za većinu soft law instrumenata dvojbena je mogu li imati obvezujuću snagu pred upravnim sudom u slučaju spora.

## Ranjivost ciklusa javne nabave

Ciklus javne nabave podložan je kriminalu. Neki poslovni sektori su ipak izloženiji od drugih: građevinarstvo i zdravstveni sustav su visoko ranjivi. Prijevoz, energija, odlaganje smeća te IT i telekomunikacije su sve srednje do visokorizični sektori, ovisno o pojedinim državama. Za one države koje još uvijek imaju industriju rudarstva, taj sektor se smatra visoko ranjivim. Javnoj nabavi povezanoj sa sektorom obrane nedostaje transparentnosti. Socijalne službe i obrazovanje se javljaju kao novi sektor u kojem javna nabava postaje sve više ranjiva. Ranjivost nekolicine zemalja pod istragom je usko povezana s izloženošću korupciji i protuzakonitostima lokalnih vlasti i poduzeća u državnom vlasništvu.

Cijeli ciklus javne nabave (faza prije nadmetanja, nadmetanje i faza poslije nadmetanja) je ranjiv. Međutim, u fazi prije nadmetanja, faza planiranja – ona na samom početku postupka – smatra se najranjivijom u gotovo polovini država i obuhvaća neke probleme vezane uz usvajanje protumjera. Sve ovo je uzrokovano manipulacijom dobrima i raspodjelom sredstava kao i rizikom od odavanja informacija.

Nedostatak jasne specifikacije ponuda na javnom nadmetanju i podnošenje niskih cijena nadmetanja popraćenih opsežnim mogućnostima širenja ugovora u fazi nakon nagrade predmet su promatranja u mnogim državama.

Faza ponuda na javnom nadmetanju široko je regulirana. Postupak selekcije, s druge strane, podrazumijeva visok/srednji rizik u 60% država zbog neobjektivnih ili neprikladnih kriterija za odabir i raznih manipulacija odbora za procjene. Također zloupotrebe sudskih radnji ponuditelja predstavlja konkretan rizik u većini zemalja.

Sve u svemu, faza poslije nadmetanja pokazuje se najrizičnijom. Čini se da vladine agencije zaboravljaju na ugovor nakon što je potpisan i u većini zemalja ne postoji autoritet koji bi nadzirao izvršenje ugovora.

Materijali niske kvalitete, precijenjen opseg posla i troškova i kašnjenje s izvršenjem radova rasprostranjeni su problemi, posebice – ali ne isključivo – povezani s javnim radovima.

## Preventivne mjere

Zbog raznovrsnih rizika koji utječu na životni ciklus javne nabave, sustav prevencije je veoma složen i stalno se razvija. Uključuje preventivna tijela i preventivne instrumente.

Osim uloge revizijskog suda u nadziranju korištenja javnih sredstava, tu je i širok spektar tijela DČ koja su usmjerena na prevenciju korupcije i organiziranog kriminala i čija se djelatnost tiče javne nabave. Neke DČ imaju posebna tijela čija je zadaća suprotstavljanje kriminalu i nezakonitostima u javnoj nabavi, iako se ona u državama razlikuju.

Što se tiče preventivnih instrumenata, Nizozemska i Italija ističu posebne mjere usmjerene na nadziranje trgovačkih društava i njihovih vlasnika i pravnih zastupnika. U Italiji, ovaj nadzor se provodi u okviru anti-mafijskog zakonodavstva.

Crvene zastave javljaju se među raznim instrumentima za nadziranje protupravnog ponašanja u javnoj nabavi. Crvene zastave su znakovi upozorenja na potencijalne probleme koji se trebaju riješiti poput korupcije, protupravnog ponašanja i prijevara. Iako se ovi pokazatelji smatraju korisnim instrumentima za predviđanje rizika od korupcije, samo se osam država služi nekim oblikom crvenih zastava s nacionalnim posebitostima.

Mjere isključenja koriste se u 14 DČ. Bijele liste funkcioniraju kao uvjet prije odabira za sudjelovanje u postupku nadmetanja, dok crne liste podrazumijevaju postupak koji isključuje trgovačka društva i pojedince. U svim državama osim Rumunjske ovim instrumentima upravljaju državne vlasti. Unatoč općoj svijesti o korisnosti ovih mjera kao poticaja za zakonito postupanje i kao sankcije koje štete poslovnom ugledu, njihova primjena još uvijek nije široko raširena zbog praktičnih problema u upravljanju tim mjerama (rizik manipulacije i teškoće u definiranju jasnih kriterija i pravila za žalbe). Baze podataka su ključan alat za raspodjelu informacija o provedbi zakona. S izuzetkom Italije i Nizozemske, korištenje baza podataka nije učestalo. Zahvaljujući nedostatku zajedničkih pravila na razini EU i nacionalnim tržištima javne nabave s ograničenim pristupom za strane ponuditelje, uređenje zajedničkog mehanizma za dijeljenje informacija o trgovačkim društvima nije tako visoko na dnevnom redu.

### **Kontrolne mjere u fazi poslije nadmetanja**

Kontrolne mjere koje su zajedničke u svim DČ u fazi poslije nadmetanja mogu se podijeliti u dvije grupe:

- unutrašnje nadziranje, obično provođeno od strane vladinih agencija;
- vanjsko nadziranje, izvođeno od strane nezavisnih i vanjskih institucija (poput revizijskih sudova, finansijskih ili poreznih agencija, inspekcija rada itd.), koje su općenito usredotočene na ekonomske i finansijske aspekte, transparentnost računa, usklađenost sa zakonima o radu itd.

Osim toga, jedino Italija ističe kontrolne sisteme usredotočene na protuzakonito postupanje tijekom izvršenja ugovora o javnoj nabavi. Štoviše, Italija je jedina DČ s posebnim jedinicama za provedbu zakona koje su zadužene za provođenje nadzora i istražne radnje vezane uz bitne javne radove. Sve ostale DČ ne čine tu razliku između kontrolnih i nadzornih tijela na temelju vrste javnih radova.

Dvije trećine DČ imaju tijela specijalizirana za otkrivanje korupcije u raznim ekonomskim sektorima, uključujući javnu nabavu. Polovica ovih zemalja također ima i specijalni ured državnog odvjetnika zaduženog za progon korupcije.

Među ovim tijelima, jedna trećina zemalja ima posebne policijske jedinice koje su posebno osnovane kako bi istraživale ozbiljan organizirani kriminal i/ili ekonomska i finansijska kaznena djela. Slovenija se ističe s Posebnim Uredom Tužitelja zaduženog za istragu ozbiljnih oblika kriminala u javnoj nabavi/koncesijama.

## Sommario

IT

Il progetto 'Warning on Crime' (WOC) ([www.warningoncrime.eu](http://www.warningoncrime.eu)) è stato condotto con il supporto finanziario della Commissione Europea, Direzione generale Migrazione e Affari Interni (DG HOME), nell'ambito del programma Prevenzione e contrasto al crimine (ISEC).

La ricerca condotta è uno studio comparativo sulla infiltrazione criminale e la corruzione negli appalti pubblici che coinvolge tutti gli Stati Membri con l'eccezione di Belgio, Cipro e Grecia.

Lo scopo del lavoro è la comparazione del livello di vulnerabilità degli appalti pubblici nei 25 Paesi Membri, la legislazione e le misure adottate per prevenire e ridurre tale vulnerabilità, con l'obiettivo di chiarire cosa rende gli appalti pubblici un terreno di fruttuosa collaborazione tra criminali del colletto bianco, dipendenti pubblici infedeli e membri di organizzazioni criminali. Una attenzione particolare sarà data ai grandi appalti pubblici di opere transfrontaliere.

Il report è diviso in quattro capitoli. Il primo capitolo riflette sul quadro legislativo sul contrasto della illegalità negli appalti; il secondo capitolo presenta un quadro della vulnerabilità degli appalti; il terzo capitolo descrive le misure preventive messe in campo nei diversi Stati e infine il quarto capitolo si concentra sulle misure di controllo della fase successiva alla conclusione della procedura di appalto.

### Quadro legislativo

Il contrasto della illegalità negli appalti attraverso misure legislative coinvolge sia norme di legge che strumenti di soft-law. Il quadro legislativo ha riguardato quattro aree: organizzazioni criminali, corruzione, appalti e patti di integrità.

Tutti i Paesi oggetto di studio prevedono almeno una fattispecie penale sulla organizzazione criminale in conformità con La Decisione Quadro del Consiglio 2008/841/JHA del 24 ottobre 2008 sulla lotta al crimine organizzato e nella maggior parte di essi il reato può rappresentare uno strumento per incriminare i gruppi, aventi le caratteristiche richieste dalla legge, che conducono attività criminali, compresa quelle corruttive, collegate agli appalti pubblici. Inoltre, il sistema legislativo italiano prevede la fattispecie dell'associazione di stampo mafioso, che menziona in modo esplicito gli appalti pubblici. La legislazione austriaca include una fattispecie di associazione criminale che esplicitamente indica il caso in cui l'associazione criminale corrompe altre persone.

La giurisprudenza sul tema si presenta comunque piuttosto limitata.

La legislazione in materia di corruzione e traffico di influenze illecite è stata soggetta a un processo di riforma in tutti i paesi e a un progressivo avvicinamento tra gli Stati Membri e sebbene rimangano contraddizioni e inadeguatezze la risposta complessiva è molto più esaustiva rispetto ad alcuni anni fa. Le nuove direttive in materia di appalti pubblici focalizzano l'attenzione sulla prevenzione, la trasparenza e la accountability come mezzi per ridurre l'illegalità negli appalti pubblici. La ricerca mostra che la trasposizione delle norme sui motivi di esclusione e il subcontratto varia in modo significativo tra i Paesi. Ciò è in parte dovuto all'idea che gli appalti pubblici sono un mercato nazionale che deve affrontare i rischi in termini di illegalità che si producono a livello locale. Secondariamente è dovuto al livello di discrezionalità che il legislatore sceglie di dare alla stazione appaltante.

Gli strumenti di soft-law stanno assumendo sempre maggiore rilevanza nel contrasto alla illegalità negli appalti pubblici. I patti di integrità – uno strumento sviluppato da Transparency International (TI) che consiste in un accordo firmato dalla stazione appaltante, dalle imprese partecipanti alla gara e da un organismo di monitoraggio in cui le parti si impegnano ad astenersi da ogni forma di corruzione o collusione – saranno testati da 11 Paesi in 17 progetti co-finanziati dai fondi strutturali. L'Italia ha una lunga esperienza in Patti di legalità firmati nel corso degli anni che impegnano le parti ad adottare specifiche azioni per implementare norme contro la corruzione e la criminalità organizzata e aumentare l'integrità e la trasparenza nelle procedure di appalto. Nel caso della ferrovia ad alta velocità tra Torino e Lione è stato siglato uno strumento di soft-law (reglement des contracts) volto

a prevedere regole comuni per la realizzazione di questa opera, a prescindere dalla nazionalità delle imprese che vorranno partecipare agli appalti pubblici. In particolare, i controlli anti-mafia italiani saranno estesi a tutte le imprese coinvolte nell'esecuzione dei lavori. Comunque, come altri strumenti di soft-law è da verificare quale valore legale questo strumento potrà avere di fronte a una Corte in caso di ricorso.

### **La vulnerabilità degli appalti pubblici**

Gli appalti pubblici sono vulnerabili alla criminalità. Alcuni settori economici si rivelano maggiormente esposti alle infiltrazioni criminali: sono altamente vulnerabili il settore delle costruzioni e la sanità. I trasporti, l'energia, lo smaltimento di rifiuti, IT e telecomunicazioni sono tutti settori con un rischio di infiltrazione criminale medio/alto, sebbene con alcune differenze tra i paesi. L'industria mineraria è un settore altamente vulnerabile nei paesi in cui l'attività estrattiva è ancora presente. Gli appalti pubblici relativi al settore della difesa risultano essere poco trasparenti. I servizi in ambito sociale ed educativo emergono come un nuovo settore in cui gli appalti pubblici stanno diventando sempre più sensibili alle infiltrazioni criminali. La vulnerabilità di diversi paesi è strettamente legata al livello di corruzione e di illegalità dei governi locali e delle aziende statali.

Ogni fase dell'intera procedura d'appalto (fase precedente alla pubblicazione del bando di gara, procedura, e fase successiva alla aggiudicazione) è soggetta al rischio di infiltrazione criminale. Tuttavia, nella fase precedente l'inizio della procedura di appalto, il momento di stesura del bando è considerato altamente vulnerabile in quasi la metà dei paesi e non risulta semplice adottare delle contro-misure. Questo è dovuto alla allocazione di fondi per rispondere a bisogni non esistenti appositamente 'fabbricati', nonché alla diffusione di informazioni riservate relative al bando di gara allo scopo di favorire alcuni partecipanti.

La mancanza di chiarezza del capitolato d'appalto e la possibilità di favorire offerte economiche basse grazie ad una ampia possibilità di aumentare l'ammontare del contratto in un momento successivo all'aggiudicazione sono spesso osservate nella maggioranza dei paesi.

La fase dello svolgimento dell'appalto è altamente regolamentata. La procedura di selezione, tuttavia, presenta un rischio medio/alto nel 60% dei paesi dovuto a una scelta non-obiettiva e inadeguata dei criteri di selezione e alla manipolazione della commissione di valutazione. Inoltre, l'abuso di azioni legali da parte dei partecipanti a un appalto appare essere un concreto rischio nella maggioranza dei paesi.

La fase di post-appalto si è rivelata essere al più alto livello di rischio. La stazione appaltante sembra dimenticare il contratto una volta che esso è stato assegnato, e nella maggior parte dei paesi non sono previste autorità incaricate di monitorare l'esecuzione del contratto.

La bassa qualità dei materiali usati, l'aumento fittizio del volume dei costi e del lavoro, e i ritardi nell'esecuzione dei lavori sono tutti problemi diffusi, particolarmente - ma non esclusivamente - in relazione ai lavori pubblici.

### **Misure preventive**

In conseguenza ai vari rischi che interessano l'intera procedura degli appalti pubblici, il sistema di prevenzione è piuttosto complesso e in costante evoluzione. Esso include istituzioni e strumenti preventivi.

Oltre al ruolo proprio delle corti dei conti nel monitorare l'uso dei fondi pubblici, esiste un'ampia gamma di istituzioni negli Stati Membri, focalizzate sulla prevenzione della corruzione e del crimine organizzato, le cui azioni riguardano gli appalti pubblici.

Alcuni Stati Membri hanno enti specifici incaricati di contrastare il crimine e l'illegalità negli appalti, sebbene vi siano delle differenze tra i paesi.

Per quanto riguarda gli strumenti preventivi, i Paesi Bassi e l'Italia vantano misure specifiche finalizzate a monitorare le imprese, il loro proprietari e i legali rappresentanti. In Italia, questo genere di controlli sono svolti nell'ambito della legislazione anti-mafia.



I Red flag sono strumenti emergenti tra i vari utilizzati al fine di monitorare le condotte illegali negli appalti pubblici. Consistono in segnali d'allerta su questioni che potenzialmente indicano la presenza di corruzione, condotte illegali, e frodi. Benché questi indicatori siano considerati utili segnali del rischio di corruzione, solo otto paesi usano qualche tipologia di red flag con specificità nazionali. White lists e black lists sono usate in 14 Stati Membri. Le prime funzionano come una condizione di pre-selezione delle imprese che intendono partecipare a un appalto, le seconde comportano l'esclusione di imprese e persone fisiche dalle procedure di gara. In tutti i paesi, ad eccezione della Romania, questi strumenti sono utilizzati e gestiti da autorità pubbliche.

Nonostante vi sia un generale accordo sull'utilità di questi strumenti come incentivi per le imprese a conformarsi ai dettami normativi e come sanzione reputazionale, il loro utilizzo non è ancora molto diffuso a causa delle difficoltà di gestione (rischi di uso distorto e difficoltà nella definizione di chiari criteri e regole per l'esercizio del diritto d'appello).

I database sono uno strumento decisivo per la condivisione di informazioni tra le varie unità delle forze dell'ordine. Con eccezione dell'Italia e dei Paesi Bassi, l'uso dei database come strumento investigativo sulle imprese non è al momento molto comune. La messa a punto di un meccanismo di condivisione delle informazioni comune tra gli Stati Membri non è tra le priorità, a causa della mancanza di regole comuni a livello europeo e di un limitato accesso dei competitors stranieri alle gare d'appalto. Il mercato degli appalti pubblici rimane un mercato nazionale.

### **Misure di controllo nella fase di post-appalto**

Le misure di controllo usate nella fase di post-appalto comuni tra gli Stati Membri possono essere divise in due gruppi:

- misure di monitoraggio interno, generalmente effettuato dalla stazione appaltante;
- misure di monitoraggio esterno, eseguito da istituzioni indipendenti ed esterne (come le corti dei conti, le agenzie delle entrate, gli ispettorati del lavoro, etc.), che generalmente focalizzano la propria attenzione sugli aspetti economici e finanziari, sulla trasparenza dei conti, sulla conformità con le leggi sul lavoro, etc.

Inoltre, solo l'Italia vanta sistemi di controllo focalizzati sulle pratiche illecite che possono essere riscontrate durante l'esecuzione dei contratti pubblici. Oltre a questo, l'Italia è l'unico Stato Membro con unità speciali delle forze dell'ordine incaricate di svolgere i controlli e le attività investigative in relazione alle grandi opere pubbliche. Tutti gli altri Stati Membri non fanno distinzione tra istituzioni di controllo e/o monitoraggio in relazione al tipo di lavoro pubblico.

Due terzi degli Stati Membri hanno forze dell'ordine specializzati nell'investigare e individuare atti di corruzione in vari settori economici, tra cui gli appalti pubblici. Metà di questi paesi hanno anche uffici del pubblico ministero specializzati e incaricati di perseguire la corruzione.

Accanto a queste istituzioni, un terzo dei paesi ha forze dell'ordine istituite specificamente per investigare gravi reati legati alla criminalità organizzata e/o crimini economici e finanziari. La Slovenia, inoltre, vanta un ufficio speciale del pubblico ministero responsabile delle investigazioni di gravi reati commessi nell'ambito degli appalti pubblici/concessioni.

## Kopsavilkums

LV

Projekts „Brīdinājums par noziedzību” („Warning on Crime”) (WOC) ([www.warningoncrime.eu](http://www.warningoncrime.eu)) īstenots ar Eiropas Komisijas Migrācijas un iekšlietu ģenerāldirektorāta (DG HOME) atbalstu programmas „Noziedzības profilakse un apkarošana” (ISEC) ietvaros.

Tas ir salīdzinošs pētījums par noziedzības iefiltrēšanos un korupciju publiskajos iepirkumos un aptver visas dalībvalstis, izņemot Beļģiju, Kipru un Grieķiju.

Projekta mērķis ir salīdzināt publisko iepirkumu neaizsargātību 25 dalībvalstīs, kā arī pieņemtos tiesību aktus un pasākumus tās novēršanai un apkarošanai, lai noskaidrotu, kas padara publiskos iepirkumus par auglīgas sadarbības starp balto apkaklišu noziedzniekiem, neuzticamām valsts amatpersonām un noziedzīgu organizāciju locekļiem pamatu. Īpaša uzmanība veltīta lielajiem un pārrobežu publiskās lietošanas projektiem.

Ziņojums ir sadalīts četrās nodaļās. Pirmajā nodaļā atspoguļots pieejamais tiesiskais regulējums nelikumību apkarošanai publiskajos iepirkumos; otrajā nodaļā sniegts publisko iepirkumu neaizsargātības novērtējums; trešajā nodaļā aprakstīti dalībvalstīs ieviestie profilaktiskie pasākumi un ceturtajā nodaļā analizēti paredzētie kontroles pasākumi pēciepirkuma posmā.

### Tiesiskais regulējums

Nelikumību apkarošana publiskajos iepirkumos, izmantojot tiesību aktus, ietver dažādas tiesību normas un ieteikuma tiesību instrumentus. Projekta uzmanības centrā ir četras jomas – noziedzīgās organizācijas, kukuļošana, publisko iepirkumu tiesību akti un godīguma pakti.

Visās valstīs tika pētīta noziedzīgo organizāciju kriminalizācija saskaņā ar 2008. gada 24. oktobra Padomes Pamatlēmumu 2008/841/TI par cīņu pret organizēto noziedzību, un lielākajā daļā valstu šis noziedzīgais nodarījums varētu būt līdzeklis, lai sodītu grupas, ar noteikumu, ka tās atbilst likumā noteiktajām prasībām, proti, grupa, kas veic noziedzīgas darbības, korupciju ieskaitot, saistībā ar publiskajiem iepirkumiem. Turklāt Itālijas tiesību sistēmā paredzēts tāds noziedzīgs nodarījums kā mafioza apvienība, kurā skaidri norādīti publiskie iepirkumi. Austrijas likumdošanā ir ietverts tāds noziedzīgs nodarījums kā noziedzīga apvienība, kas var ietvert arī korupciju. Tomēr dalībvalstu tiesu prakse ir ļoti ierobežota.

Tiesiskais regulējums attiecībā uz kukuļošanu un tirgošanos ar ietekmi dalībvalstīs ir bijis pakļauts evolūcijas un tuvināšanās procesam, un, neskatoties uz to, ka nepilnības un pretrunas joprojām pastāv, vispārējā reakcija ir daudz plašāka nekā pirms dažiem gadiem.

Jaunajās direktīvās attiecībā uz publiskajiem iepirkumiem uzmanība koncentrēta uz profilaksi, caurredzamību un pārskatatbildību kā līdzekļiem nelikumību samazināšanai publiskajos iepirkumos. Pētījums liecina, ka noteikumu pārņemšana par izslēgšanas un apakšuzņēmumu līgumu slēgšanas iemesliem dažādās valstīs būtiski atšķiras. Daļēji tas ir saistīts ar to, ka publiskais iepirkums ir valsts mēroga tirgus, kam nākas saskarties ar vietējiem draudiem nelikumību veidā, kā arī jāņem vērā tehniskāki apsvērumi attiecībā uz to, cik lielu rīcības brīvību likumdevējs plāno atstāt līgumslēdzējam iestādei.

Lielāku nozīmi cīņā ar pretlikumībām publiskajos iepirkumos gūst ieteikuma tiesību instrumenti. Godīguma pakts, kas ir Transparency International (TI) izstrādāts instruments un sastāv no vienošanās, ko paraksta līgumslēdzēja iestāde, pretendenti un neatkarīgs uzraugs, kuri apņemas atturēties no jebkāda veida korupcijas un slepenas vienošanās, drīzumā tiks testēts 11 valstīs 17 ES finansētu projektu ietvaros. Itālijai ir sena pieredze ar likumības paktiem, kas tiek parakstīti daudzu gadu garumā un uzliek pusēm par pienākumu ieviest tiesību normas korupcijas un organizētās noziedzības apkarošanai un godīguma un caurredzamības veicināšanai publisko iepirkumu ciklā. Lielajā publiskās lietošanas projektā – Turīnas-Lionas ātrgaitas dzelzceļa līnija, kura izpēte tikusi veikta, izmantots ieteikuma tiesību instruments (reglement des contracts), lai nodrošinātu kopīgus noteikumus šim publiskās būvniecības projektam, neatkarīgi no iesaistīto pretendentu valstspiederības. It īpaši tas attiecas uz cīņā ar Itālijas mafiju kontroli attiecībā uz visiem darbu

izpildē iesaistītajiem pretendentiem. Tomēr, kā ar lielāko daļu ieteikuma tiesību instrumentiem, tas ir strīdīgs jautājums, vai sūdzību gadījumā tam būs saistoša nozīme administratīvajā tiesā.

## Publiska iepirkuma cikla neaizsargātība

Noziedzība apdraud publisko iepirkumu ciklu. Dažas saimnieciskās darbības nozares ir tai vairāk pakļautas – ļoti neaizsargāta ir būvniecība un veselības aprūpe. Transports, enerģētika, atkritumu apsaimniekošana, IT un telekomunikācijas – tās visas ir vidēja/augsta riska nozares, ar atšķirībām dažādās valstīs. Valstīs, kurās joprojām eksistē iežguves rūpniecība, šī nozare tiek uzskatīta par ļoti neaizsargātu. Publiskajiem iepirkumiem saistībā ar aizsardzības nozari trūkst caurredzamības. Sociālie pakalpojumi un izglītība parādījušies kā jauna nozare, kurā publiskie iepirkumi kļūst aizvien neaizsargātāki. Vairāku izpētāmo valstu neaizsargātība ir cieši saistīta ar korupcijas un nelikumību ietekmi uz pašvaldībām un valsts uzņēmumiem.

Neaizsargāts ir viss iepirkumu cikls (pirmsiepirkuma, iepirkuma un pēciepirkuma posmi). Vienlaikus, pirmsiepirkuma posmā plānošanas stadija pirms procedūras uzsākšanas tiek uzskatīta par ļoti neaizsargātu gandrīz pusē valstu un atspoguļo dažas problēmas attiecībā uz pretpasākumu pieņemšanu. Tas viss ir saistīts ar vajadzību un finanšu līdzekļu piešķiršanas manipulācijām, kā arī informācijas izpaušanas risku.

Lielākajā daļā valstu vērojams skaidru iepirkuma specifikāciju trūkums un zemu piedāvājuma cenu iesniegšana, kam seko plašas iespējas paplašināt līgumu pēc uzvaras iepirkumā.

Iepirkuma konkursa posms ir stingri reglamentēts. Neskatoties uz to, atlases procedūra atspoguļo augstu/vidēju risku 60% valstu, jo nav objektīva vai atbilstīga atlases kritēriju novērtējuma un iespējam manipulācija ar novērtēšanas padomi. Tiesu darbību ļaunprātīga izmantošana, ko īsteno pretendenti, arī ir konkrēts risks vairumā valstu.

Kopumā posms pēc iepirkuma konkursa ir izrādījies visriskantākais. Izskatās, ka līgumslēdzēja iestāde ir aizmirsusi par līgumu pēc tā parakstīšanas, un vairumā valstu nav iestādes, kas uzraudzītu līguma izpildi. Plaši izplatītas ir tādas problēmas kā zemas kvalitātes materiāli, uzpūsts darbu apjoms un izmaksas un kavēšanās darbu izpildē, jo īpaši, bet ne tikai saistībā ar publiskās lietošanas projektiem.

## Profilakses pasākumi

Sakarā ar dažādiem riskiem, kas ietekmē publiskā iepirkuma ciklu, profilakses sistēma ir samērā sarežģīta un nepārtraukti attīstās. Tajā ietilpst profilakses institūcijas un līdzekļi.

Līdztekus revīzijas palātas lomai valsts līdzekļu izmantošanas uzraudzībā, dalībvalstīs eksistē daudz dažādu institūciju, kas vērstas uz korupcijas un organizētās noziedzības novēršanu un kuru darbība skar publiskos iepirkumus. Dažās dalībvalstīs ir īpašas institūcijas, kuru uzdevums ir cīnīties ar noziedzību un nelikumībām publiskajos iepirkumos, lai gan ar atšķirībām dažādās valstīs.

Ciktāl tas attiecas uz profilakses līdzekļiem, Nīderlande un Itālija var lepoties ar konkrētiem pasākumiem uzņēmumu, to īpašnieku un likumīgo pārstāvju uzraudzīšanai. Itālijā šādas pārbaudes tiek veiktas saskaņā ar mafijas apkarošanas likumdošanu.

Sarkani karogi parādās starp dažādiem līdzekļiem, ko izmanto amatpārkāpumu uzraudzībai publiskajos iepirkumos. Sarkanie karogi ir brīdinājuma signāli par iespējamām problēmām, kas gaida risinājumu, piemēram, korupcija, amatpārkāpumi un krāpšana. Lai gan šie rādītāji tiek uzskatīti par noderīgiem korupcijas riska pārgotājiem, tikai astoņas valstis izmanto dažus sarkano karogu veidus ar valstij raksturīgajām iezīmēm.

Aizlieguma pasākumi tiek izmantoti 14 dalībvalstīs. Baltie saraksti darbojas kā priekšatlases nosacījumi, lai izvēlētos uzņēmumus, kas piedalīsies iepirkuma konkursa procesā, savukārt melnie saraksti kalpo par iemeslu kārtībai, kas liedz piedalīties konkursā uzņēmumiem un fiziskām personām. Visās valstīs, izņemot Rumāniju, šo līdzekļus pārvalda valsts institūcijas. Neskatoties uz to, ka šo līdzekļu lietderība, lai stimulētu likuma normu ievērošanu un kā reputācijas sankcija ir vispārāzīta, to izmantošanas vēl nav plaši izplatīta sakarā ar praktiskajām grūtībām to pārvaldīšanā (manipulācijas risks un grūtības skaidri definēt pārsūdzības kritērijus un noteikumus).

Būtisks informācijas apmaiņas instruments likuma piemērošanas jomā ir datubāzes. Izņemot Itāliju un Nīderlandi, datubāzes uzņēmumu uzraudzīšanai vēl netiek bieži izmantotas. Sakarā ar to, ka nav vienotu noteikumu ES līmenī un valstu publisko iepirkumu tirgos ar ierobežotu piekļuvi ārvalstu pretendentiem, vienota informācijas apmaiņas mehānisma par uzņēmumiem izveide nav tuvākajā dienas kārtībā.

### **Kontroles pasākumi pēciepirkuma posmā**

Kontroles pasākumi, kas ir kopēji visas dalībvalstīs pēciepirkuma posmā, var tikt iedalīti divās grupās:

- iekšējā uzraudzība, ko parasti īsteno līgumslēdzēja iestāde;
- ārējā uzraudzība, ko veic neatkarīgas un ārējās institūcijas (piemēram, revīzijas palātas, finanšu vai nodokļu iestādes, darba inspekcijas u.c.), kas parasti koncentrē savu uzmanību uz ekonomiskajiem un finanšu aspektiem, kontu pārredzamību, darba likumdošanas ievērošanu u.tml.

Bez tam, Itālija var lepoties ar kontroles sistēmām, kas vērstas uz ļaunprātīgām darbībām, ko iespējams novērot publiskā līguma izpildes laikā. Turklāt Itālija ir vienīgā dalībvalsts, kurā īpašas tiesībsargājošās struktūrvienības, kas ir atbildīgas par uzraudzības un izmeklēšanas darbībām saistībā ar lielajiem publiskās lietošanas projektiem. Visās pārējās dalībvalstīs netiek šķirots starp kontroles un/vai uzraudzības institūcijām – pamatojoties uz publiskās lietošanas projektu veida un līdz ar to arī publiskā līguma apjoma.

Divās trešdaļās dalībvalstu tiesībsargājošās iestādes ir specializējušās korupcijas atklāšanā dažādās tautsaimniecības nozarēs, publiskos iepirkumus ieskaitot. Pusē šo valstu ir arī specializētās prokuratūras, kas īsteno ar kriminālvajāšanu saistībā ar korupciju.

Līdztekus šīm iestādēm, vienā trešdaļā valstu ir īpašas policijas vienības, kas ir īpaši izveidotas, lai izmeklētu nopietnus organizētās noziedzības nodarījumus un/vai ekonomiskos un finanšu noziegumus. Piemēram, Slovēnija lepojas ar īpašu prokuratūru, kas ir atbildīga par nopietnu noziegumu veidu izmeklēšanu publiskajos iepirkumos/koncesijās.

## Streszczenie

PL

W „Ostrzeżenie o przestępczości” (WOC) projekt ([www.warningoncrime.eu](http://www.warningoncrime.eu)) został zrealizowany przy wsparciu finansowym Komisji Europejskiej, Dyrekcji Generalnej ds Migracji i Spraw Wewnętrznych (DG HOME), w ramach Programu Profilaktyki i zwalczanie przestępczości (ISEC).

Badanie to studium porównawcze na infiltrację przestępczej i korupcji w zamówieniach publicznych, z udziałem wszystkich państw członkowskich (MSS), z wyjątkiem Belgii, Cypru i Grecji.

Celem jest porównanie podatności zamówień publicznych w 25 państwach członkowskich, a także ustawodawstwa i środków przyjętych w celu zapobiegania i zwalczania go, w celu wyjaśnienia, co sprawia, że zamówienia publiczne na podstawie owocnej współpracy pomiędzy przestępców w białych kołnierzykach, niewiernych funkcjonariuszy publicznych oraz członkowie organizacji przestępczych. Szczególną uwagę przywiązuje się do dużych, jak i transgranicznych robót publicznych.

Raport podzielony jest na cztery rozdziały. Rozdział 1 odbija się na dostępnych ram prawnych dotyczących przeciwdziałania nielegalność w zamówieniach publicznych; Rozdział 2 przedstawia ocenę podatności zamówień publicznych; Rozdział 3 zawiera opis środków zapobiegawczych wdrożonych w państwach członkowskich; oraz rozdział 4 analizuje środki kontroli przewidziane w fazie po przetargu.

### Ramy prawne

Przeciwdziałanie nielegalność w zamówieniach publicznych przez przepisy prawa obejmuje różne przepisy prawne i narzędzia prawa miękkiego. Projekt koncentruje się na czterech obszarach: organizacji przestępczych, przekupstwa, prawa zamówień publicznych, i paktów uczciwości. Wszystkie kraje studiował kryminalizacji organizacji przestępczych, zgodnie z decyzją ramową Rady 2008/841 / WSiSW z dnia 24 października 2008 roku w sprawie zwalczania przestępczości zorganizowanej, a większość z nich przestępstwo może stanowić narzędzie do karania grupy - pod warunkiem, że spełniają one wymogi określone przez prawo - które działają działalności przestępczej, w tym korupcji, związanych z zamówieniami publicznymi. Ponadto włoski system prawny przewiduje konkretnie przestępstwa mafijnym stowarzyszenia, które wyraźnie wspomina o zamówienia publiczne. Ustawodawstwo austriackie obejmuje przestępstwo związku przestępczego, który może również obejmować korupcji. Jednak orzecznictwo jest bardzo ograniczona w całej państwach członkowskich.

Ramy prawne w sprawie korupcji i handlu wpływami została poddana procesowi ewolucji i zbliżenia w całej państwach członkowskich, i chociaż luk i sprzeczności pozostają ogólne wyniki odpowiedzi o wiele bardziej wszechstronny niż kilka lat temu.

Nowe dyrektywy dotyczące zamówień publicznych skupić uwagę na profilaktykę, przejrzystości i odpowiedzialności jako środek do zmniejszenia nielegalność w zamówieniach publicznych. Z badań wynika, że transpozycja przepisów dotyczących podstaw wykluczenia i podwykonawstwa różni się znacznie w poszczególnych krajach. Jest to częściowo związane z ideą, że zamówienia publiczne to ogólnopolski rynek, który musi stawić czoła lokalnych zagrożeń w zakresie niezgodności, a także bierze pod uwagę rozważenie bardziej technicznych na stopień uznania ustawodawca zamierza wyjechać do zamawiającego.

Elastyczne instrumenty prawne są coraz większe znaczenie w zwalczaniu nielegalność w zamówieniach publicznych. Integrity paktów - narzędzie opracowane przez Transparency International (TI), składające się z umowy podpisanej przez instytucję zamawiającą, oferentów i niezależnego monitora, które zobowiązują się do powstrzymania się od wszelkich form korupcji i zmywy - to ma być testowane w 11 kraje na 17 projektów finansowanych ze środków UE. Włochy mają wieloletnie doświadczenie w zakresie legalności paktów podpisane w ciągu lat, które zobowiązują strony do przyjęcia konkretnych działań w celu wdrożenia przepisów prawnych, zwalczanie korupcji

i przestępczości zorganizowanej oraz wzmocnienie integralności i przejrzystości w cyklu zamówień publicznych. W głównych prac publicznych studiował, Lyon-w Turynie szybkich linii kolejowych, instrument miękkiego prawa (Reglement des umowy) zostały wykorzystane do zapewnienia wspólnych zasad dla tej pracy publicznej, niezależnie od obywatelstwa oferentów uczestniczących. W szczególności obejmuje włoskie kontroli anty-mafijne do wszystkich oferentów biorących udział w realizacji robót. Jednakże, jak w przypadku większości instrumentów prawa miękkiego, jest wątpliwe, czy to może mieć wartość wiążącą do sądu administracyjnego w przypadku reklamacji.

Podatność cyklu zamówień publicznych

Cykl życia zamówień publicznych jest narażone na przestępstwa. Niektóre sektory działalności okazują się być bardziej narażone do nich: budowa i opieka zdrowotna są bardzo wrażliwe. Transport, energia, utylizacji odpadów, telekomunikacji oraz IT i wszystkie sektory są średnie / wysokiego ryzyka, z różnicami w poszczególnych krajach. Dla tych krajów, które wciąż mają górnictwo, sektor ten jest uważany za bardzo wrażliwy. Zamówienia publiczne związane z sektorem obronnym brakuje przejrzystości. Opieki społecznej i edukacji staje się nowego sektora, gdzie zamówień publicznych staje się coraz bardziej zagrożone. Luka w kilku krajach objętych dochodzeniem jest ściśle spleciona z narażeniem na korupcję i nielegalności samorządów i przedsiębiorstw państwowych.

Cały cykl Zamówień (fazy pre-miękkie, delikatne, a po przetargu) jest zagrożony. W fazie wstępnej przetargu, jednak na etapie planowania - ten poprzedzający początek procedury - jest uważane za bardzo wrażliwe w niemal połowie krajów, a niektóre funkcje problemów dotyczących przyjęcia środków zaradczych. Wszystko to z powodu manipulacji potrzeb i finansowania alokacji, a także na ryzyko ujawnienia informacji.

Brak jasności w specyfikacji przetargowej oraz złożenie niskiej cenie ofertowej towarzyszą obszerne możliwości rozszerzenia umowy w fazie post-nagrody są często obserwowane w większości krajów.

Faza oferta jest ściśle regulowana. Procedura wyboru, jednak charakteryzuje się wysoką / średnim ryzykiem w 60% krajów z powodu braku obiektywnej lub nieodpowiedniej wagi kryteriów wyboru i manipulacji pokładzie oceny. Niewłaściwe, zbyt działań sądowych przez oferentów wydaje się być konkretnym ryzykiem w większości krajów.

Ogólnie faza po przetargu okaże się najbardziej ryzykowne. Zamawiający zdaje się zapominać umowy po jej podpisaniu, a w większości krajów nie ma władzy, aby monitorować wykonanie umowy. Niskiej jakości materiał, napompowane głośności pracy i koszty, a opóźnienia w realizacji robót są powszechne problemy, zwłaszcza - ale nie tylko - w odniesieniu do robót publicznych.

## Środki zapobiegawcze

Ze względu na różne ryzyka związanego z cyklem zamówień publicznych, system zapobiegania jest dość złożone i stale się rozwija. Zawiera ciała i narzędzi profilaktycznych.

Oprócz roli odgrywanej przez sąd kontroli w zakresie monitorowania wykorzystania środków publicznych, istnieje szeroka gama organów w państwach członkowskich, ukierunkowanych na zapobieganie korupcji i przestępczości zorganizowanej, a którego skarga dotyczy zamówień publicznych. Niektóre państwa członkowskie mają szczególne ciała w miejscu, którego zadaniem jest przeciwdziałanie przestępczości i nielegalność w zamówieniach publicznych, choć z różnic w poszczególnych krajach.

Jeśli chodzi o narzędzia prewencyjne są zainteresowane, Holandia i Włochy pochwalić szczególne środki zmierzające do firm i ich właścicieli i przedstawicieli prawnych monitorowanie. We Włoszech, kontrole te przeprowadzane są w ramach przepisów dotyczących zwalczania mafii.

Pojawiają się czerwone flagi spośród różnych narzędzi służących do monitorowania wykroczeń w zamówieniach publicznych. Czerwone flagi są sygnały ostrzegawcze dotyczące potencjalnych problemów do rozwiązania, takie jak korupcja, przestępstwa i oszustwa. Mimo że wskaźniki te są uważane za użyteczne predyktory na ryzyko korupcji, tylko osiem krajów stosuje niektóre rodzaje czerwone flagi z uwarunkowań krajowych.

Środki wykluczenia są wykorzystywane w 14 państwach członkowskich. Białe listy pracować jako warunek preselekcji do wyboru firm, które wezmą udział w procesie przetargowym, natomiast

czarne listy pociąga za sobą procedurę, która wyklucza firm i osób. We wszystkich krajach, ale w Rumunii, narzędzia te są zarządzane przez władze publiczne. Mimo ogólnego uznania przydatności tych narzędzi jako zachęta do przestrzegania przepisów prawa, jak i reputacji sankcji, ich stosowanie nie jest jeszcze powszechne ze względu na praktyczne trudności w zarządzaniu nimi (ryzyko manipulacji i trudności w określeniu jasnych kryteriów i Zasady odwołania).

Bazy danych są istotnym narzędziem w celu wymiany informacji na temat egzekwowania prawa. Z wyjątkiem Włoch i Holandii, korzystanie z baz danych do monitorowania firm nie jest jeszcze tak powszechne. Ze względu na brak wspólnych zasad na szczeblu UE oraz do krajowych rynków zamówień publicznych z ograniczonym dostępem dla zagranicznych oferentów, set-up wspólnego mechanizmu wymiany informacji o spółkach nie jest na porządku dziennym.

### Środki kontroli w fazie po przetargu

Środki kontroli, które są powszechne w wszystkich państwach członkowskich, w fazie po przetargu można podzielić na dwie grupy:

- Monitoring wewnętrzny, zwykle wykonywane przez instytucję zamawiającą;
- Monitorowanie zewnętrznych, prowadzonych przez niezależnych i zewnętrznych instytucji (takich jak trybunały obrachunkowe, agencji finansowych lub podatkowych, inspekcji pracy, etc.), które na ogół skupiają swoją uwagę na aspektach ekonomicznych i finansowych, przejrzystości rachunków, zgodnie z przepisami prawa pracy, itp.

Poza tym, tylko Włochy pochwalic systemów kontroli ukierunkowanych na nieuczciwych praktyk, które można zaobserwować w trakcie realizacji zamówienia. Ponadto, Włochy są jedynym MS z jednostek specjalnych ścigania odpowiedzialnych za przeprowadzanie kontroli i działań śledczych w stosunku do głównych robót publicznych. Wszystkie pozostałe państwa członkowskie nie wprowadza rozróżnienia - między kontrolą i / lub organów monitorujących - w zależności od typu robót publicznych, a tym samym od kwoty zamówienia publicznego.

Dwie trzecie państwach członkowskich dysponują organy ścigania wyspecjalizowane w wykrywaniu korupcji w różnych sektorach gospodarki, w tym zamówień publicznych. Połowa z tych krajów są również wyposażone biuro prokuratora wyspecjalizowanego za ściganie korupcji.

Wraz z tych organów, jedna trzecia krajów ma specjalnych jednostek policji w miejscu, które zostały wyraźnie określone w celu zbadania poważną przestępczością zorganizowaną i / lub przestępstw gospodarczych i finansowych. Słowenia, w szczególności, oferuje do spraw dochodzenia poważnych form przestępczości w publicznych zamówień / koncesji Prokuratury Specjalnego.

## Sumário Executivo

PT

O projeto "War on Crime" (WOC) ([www.warningoncrime.eu](http://www.warningoncrime.eu)) foi realizado com o apoio financeiro da Direcção-Geral da Migração e dos Assuntos Internos (DG HOME) da Comissão Europeia, no âmbito do Programa de Prevenção e Luta contra a Criminalidade (ISEC).

A presente investigação é um estudo comparativo sobre a permeabilidade à criminalidade e à corrupção na contratação pública, envolvendo todos os Estados-Membros (EM) com excepção da Bélgica, Chipre e Grécia.

O objetivo foi comparar a vulnerabilidade dos contratos públicos em 25 Estados-Membros, bem como a legislação e as medidas de prevenção e de combate, com vista à compreensão sobre o que torna a contratação pública um terreno fértil para uma cooperação bem-sucedida entre criminosos de colarinho branco, funcionários públicos desonestos e membros de organizações criminosas. Foi dada especial atenção a obras públicas transfronteiriças e de grande envergadura.

O relatório divide-se em quatro capítulos. O Capítulo 1 debruça-se sobre o quadro jurídico existente no que se refere ao combate contra ilegalidades nos contratos públicos. O Capítulo 2 apresenta uma avaliação da vulnerabilidade dos contratos públicos. O Capítulo 3 descreve as medidas preventivas aplicadas nos Estados-Membros e o Capítulo 4 analisa as medidas de controlo previstas durante a fase de pós-contratação.

### Enquadramento jurídico

A prevenção de ilegalidades nos contratos públicos envolve diferentes normas legais e ferramentas de soft law. O projecto centrou-se em quatro áreas: criminalidade organizada, corrupção na contratação pública e pactos de integridade.

Todos os países estudados criminalizam a associação criminosa em conformidade com a Decisão-Quadro 2008/841/JAI do Conselho, de 24 de Outubro de 2008 sobre o combate à criminalidade organizada. Na maioria dos referidos Estados, a criminalização pode representar uma ferramenta que permite punir grupos que, preenchendo os requisitos estabelecidos por lei, levam a cabo atividades criminosas, incluindo corrupção, relacionadas com contratos públicos. O ordenamento jurídico italiano prevê especificamente o delito de associação mafiosa, que menciona explicitamente os contratos públicos. A legislação austríaca inclui um crime de associação criminosa que também pode abranger a corrupção. No entanto, a jurisprudência é ainda muito limitada entre os Estados-Membros.

O quadro jurídico relativo a corrupção e tráfico de influências tem vindo a passar por um processo de evolução e aproximação entre os vários Estados-Membros e, apesar de se verificarem lacunas e contradições, os resultados globais têm se revelado muito mais abrangentes do que alguns anos atrás.

Novas directivas relativas à contratação pública têm vindo a concentrar a atenção sobre a prevenção, a transparência e a responsabilização como meios para a redução da ilegalidade nos contratos públicos. A investigação demonstra que a transposição das normas relativas aos motivos de exclusão e subcontratação varia significativamente entre os países. Isto deve-se, em parte, à concepção de que a contratação pública é um mercado nacional, que necessita de fazer face a riscos locais, no que se refere a irregularidades legais. Porém, é importante também levar em conta uma consideração mais técnica sobre o grau de discricionariedade que o legislador pretende deixar à entidade adjudicante.

Os instrumentos de soft law têm vindo a ganhar mais relevância na luta contra irregularidades nos contratos públicos. Os pactos de Integridade - uma ferramenta desenvolvida pela Transparência Internacional (TI) que consiste num acordo assinado entre entidade adjudicante, os licitantes e um monitor independente, no qual se comprometem a evitar qualquer forma de corrupção e conluio - estão prestes a ser testados em 11 países através de 17 projectos financiados pela UE. Itália tem



uma longa experiência em pactos de legalidade assinados ao longo de anos, nos quais as partes se comprometem a ações específicas, de forma a implementar regras legais para o combate ao crime organizado e à corrupção, bem como o reforço da integridade e da transparência no ciclo de contratos públicos. Numa das obras públicas estudadas, a linha de alta velocidade ferroviária Turim-Lyon, tem sido utilizado um instrumento de soft law (reglement des contract) que fornece regras comuns a esta obra pública, independentemente da nacionalidade dos concorrentes envolvidos. Mais especificamente, estende o controlo italiano anti máfia a todos os concorrentes envolvidos na execução dos trabalhos. No entanto, como a maioria de instrumentos de soft law, é discutível se deve ou não ter um valor vinculativo perante um tribunal administrativo no caso de reclamações.

### **A vulnerabilidade do ciclo de vida dos contratos públicos**

O ciclo de vida dos contratos públicos é vulnerável ao crime. Alguns sectores de actividade revelam-se mais expostos: construção e saúde, por exemplo, são altamente vulneráveis. Transporte, energia, tratamento de resíduos, bem como as TICs e telecomunicações são todos setores de médio/alto risco, com variações entre os países. Para os Estados que ainda têm indústria minéria, esta é considerada altamente vulnerável. OS contratos públicos relacionados com a indústria de defesa carecem de transparência. Os sectores dos serviços sociais e da educação estão a revelar-se como uma nova indústria onde os contratos públicos se tornam cada vez mais vulneráveis.

A vulnerabilidade de vários dos Estados estudados está intimamente ligada à exposição à corrupção e à ilegalidade dos executivos municipais e empresas estatais.

Todo o ciclo de contratação pública (pré-concurso, concurso, fases pós-concurso) é vulnerável. Na fase de pré-concurso, a etapa de planeamento – a que precede ao início do processo de contratação – é considerada altamente vulnerável em quase metade dos países e apresenta alguns problemas referentes à adopção de medidas preventivas. Tal deve-se à manipulação das necessidades e atribuição de financiamento, bem como ao risco de divulgação de informações.

A falta de clareza do caderno de encargos e apresentação de um preço de partida baixo, acompanhadas pelas fortes possibilidades de expandir o contrato em fase de pós-concurso são frequentemente observadas na maioria dos países.

A fase de contratação é altamente regulada. Contudo, o processo de seleção apresenta riscos médios/altos em 60% dos países, devido a critérios de selecção não adequados ou subjectivos e à manipulação da grelha de avaliação. A má utilização de ações judiciais por parte dos concorrentes também parece ser um risco concreto na maioria dos países.

De modo geral, a fase pós-contratação é a que apresenta mais riscos. As autoridades de supervisão tendem a esquecer os contratos depois destes serem assinados e, na maioria dos países, não existem autoridades de acompanhamento da execução dos contratos.

Material de má qualidade, volume de trabalho e custos inflacionados, assim como atrasos na execução das obras são problemas generalizados, em especial – mas não exclusivamente – no que toca a obras públicas.

### **Medidas Preventivas**

Devido aos vários riscos que afectam o ciclo de contratação pública, os sistemas de prevenção são bastante complexos e em constante evolução, incluindo órgãos e instrumentos preventivos. Para além do papel do Tribunal de Contas, existe um leque alargado de entidades nos Estados-Membros que se concentram na prevenção da corrupção e da criminalidade organizada, cuja esfera de acção se aplica à contratação pública. Alguns Estados-Membros têm entidades específicas cujo papel é combater o crime e o desrespeito da legalidade na contratação pública, apesar das diferenças significativas entre países.

No que se refere a instrumentos de prevenção, os Países Baixos e Itália apresentam medidas específicas destinadas a monitorizar empresas, assim como os seus proprietários e representantes legais. Em Itália, este controlo é levado a cabo no quadro legal da legislação anti-máfia.

A sinalização está a emergir no seio das várias ferramentas usadas de monitorização de má conduta nos contratos públicos. Consiste em sinais de aviso sobre eventuais questões a ser resolvidas, como corrupção, má conduta ou fraude. Apesar destes indicadores serem considerados uma boa forma de prever riscos de corrupção, apenas oito países utilizam algum tipo de sinalização, com variações nacionais.

Medidas de exclusão são utilizadas em 14 Estados-Membros. Listas brancas funcionam como condição de pré-selecção das empresas que podem apresentar propostas, ao passo que listas negras espoletam um processo de exclusão de empresas e indivíduos. Em todos os países, com excepção da Romênia, estes instrumentos são geridos por autoridades públicas. Apesar do reconhecimento dos benefícios destas ferramentas como incentivos para o cumprimento das obrigações legais e como uma forma de sanção reputacional, a sua utilização ainda não está generalizada devido a dificuldades práticas na sua gestão (risco de manipulação e problemas na definição de critérios claros e regras de recurso). Por sua vez, bases de dados são uma ferramenta crucial na partilha de informação sobre a aplicação da lei. Com a excepção de Itália e dos Países Baixos, o recurso a bases de dados para a monitorização de empresas não são ainda muito utilizadas. Devido à falta de regras comuns ao nível comunitário e à existência de mercados nacionais de contratação pública com acesso limitado a proponentes estrangeiros, a criação de um mecanismo comum de partilha de informação sobre empresas ainda não é vista como uma questão prioritária.

### **Medidas de controlo na fase pós-contratação**

As medidas de controlo comuns a todos os Estados-Membros na fase pós-contratação podem ser divididas em dois grupos:

- Monitorização interna, geralmente levada a cabo pela autoridade contratante;
- Monitorização externa, conduzida por entidades externas e independentes (como tribunais de contas, agências tributárias, inspecção do trabalho, etc.), que em geral concentram a sua atenção em aspectos económicos e financeiros, transparência de contas, respeito pelas leis laborais, etc.

Itália promove sistemas de controlo focados em práticas abusivas que só conseguem ser identificadas durante a fase de execução do contrato público. Mais, Itália é o único Estado-Membro com unidades especiais de cumprimento da legalidade relativamente a obras públicas de grande envergadura. Os restantes Estados-Membros não fazem qualquer tipo de distinção entre entidades de controlo e de monitorização, com base no tipo de contratação pública e, conseqüentemente, no valor do contrato público.

Dois terços dos Estados-Membros têm órgãos de execução da lei especializados na deteção de corrupção em diferentes sectores económicos, incluindo contratação pública. Metade estes países têm também um gabinete especializado junto do Ministério Público, encarregado da investigação relativa à corrupção.

Para além destas entidades, um terço dos países apresentam unidades especiais de polícia, criadas especificamente com o objetivo de investigar criminalidade organizada grave e/ou crimes económicos e financeiros. A Eslovénia, em particular, estabeleceu um Gabinete Especial do Procurador para a investigação de criminalidade agravada na contratação e concessão públicas.

## Rezumat



Proiectul "Avertisment privind criminalitatea - corupția și infiltrarea grupărilor infracționale organizate în contractele publice" (WOC) ([www.warningoncrime.eu](http://www.warningoncrime.eu)) a fost realizat cu sprijinul Comisiei Europene, Directoratul General pentru Migrație și Afaceri Interne (DG HOME), în cadrul Programului de Prevenire și Combateră a Criminalității și constă într-un studiu comparativ privind corupția în sistemele de achiziții publice din toate statele membre UE, exceptând Belgia, Cipru și Grecia.

Obiectivul principal al proiectului îl reprezintă compararea vulnerabilităților diverselor sisteme de achiziții publice ale statele membre analizate, dar și a măsurilor legislative adoptate pentru a le combate. Scopul final este de a clarifica ce anume face ca acest domeniu al achizițiilor publice să devină teren propice pentru colaborarea dintre funcționari corupți și membri ai diferitelor grupuri și structuri infracționale. O atenție deosebită a fost acordată lucrărilor publice de anvergură și celor care implică cooperare transfrontalieră.

Raportul cuprinde patru capitole: primul prezintă cadrul legal de combatere a ilegalităților în achizițiile publice; capitolul al doilea evaluează gradul de vulnerabilitate al sistemelor de achiziții publice; cel de-al treilea descrie măsurile preventive aplicate în statele membre analizate, iar ultimul capitol analizează măsurile de control prevăzute pentru etapa post-licitație.

### Cadrul legal

Combaterea infracționalității în achizițiile publice prin intermediul prevederilor legale presupune existența unor norme juridice și a unor instrumente juridice fără caracter obligatoriu (soft law). Proiectul este dezvoltat în patru direcții: structuri infracționale, fapte de corupție, legea achizițiilor publice și pacturi de integritate.

În toate statele analizate în studiu sunt considerate ilegale structurile infracționale, în conformitate cu Decizia – cadru a Consiliului 2008/841/JHA din 24 Octombrie 2008 cu privire la combaterea criminalității organizate, iar în majoritatea dintre acestea există instrumentele legale pentru condamnarea grupurilor care desfășoară activități ilegale, inclusiv fapte de corupție, în achizițiile publice.

În plus, sistemul juridic italian vizează în mod special infracțiunile asociațiilor de tip mafiot, printre care și cele din domeniul achizițiilor publice. Legislația din Austria include la categoria infracțiuni și asocierea ilegală, aceasta cuprinzând și fapte de corupție. Cu toate acestea, jurisprudența în acest domeniu este foarte limitată în statele membre.

În ce privește darea de mită și traficul de influență, cadrul legal a fost supus unui proces de evoluție și armonizare între statele membre și, cu toate că mai există încă lacune și incoerențe, în general reacția la astfel de infracțiuni a devenit mult mai promptă în ultimii ani.

Noile directive privind achizițiile publice atrag atenția asupra prevenției, transparentizării și responsabilizării, ca mijloace pentru combaterea ilegalităților în achizițiile publice.

Din cercetare reiese faptul că transpunerea la nivel național a regulamentului privind motivele de excludere de la licitație și subcontractare variază de la caz la caz. Aceasta se datorează în parte și faptului că achizițiile publice reprezintă o piață națională care trebuie să preîntâmpine potențialele probleme de corupție de la nivel local și în același timp să ia în calcul o abordare mai tehnică a gradului de autonomie pe care legiuitorul intenționează să o lase autorității contractante.

Instrumentele juridice fără caracter obligatoriu capătă, astfel, o importanță din ce în ce mai mare în combaterea infracționalității în achizițiile publice. Pactele de integritate – instrument creat de Transparency International (TI) – constau într-un acord semnat între autoritatea contractantă, furnizor și un terț independent cu rol de supraveghere, prin care semnatarii se angajează să se abțină de la orice formă de corupție sau de la orice înțelegere secretă. Acestea sunt pe punctul de a fi testate în unsprezece dintre statele membre, prin șaptesprezece proiecte finanțate de UE.

Italia, de exemplu, are o experiență îndelungată în privința pactelor de legalitate. Acestea obligă părțile la acțiuni specifice pentru implementarea normelor de drept, cu scopul de a combate corupția

și criminalitatea organizată și de a spori integritatea și transparența pe parcursul realizării achizițiilor publice. Studiul de caz abordat în proiect – construcția căii ferate de mare viteză de la Torino la Lyon - a inclus utilizarea unui instrument juridic fără caracter obligatoriu (reglement des contracts), în vederea stabilirii unor norme comune pentru acea lucrare publică, indiferent de naționalitatea furnizorilor implicați în executarea lucrării. În speță, acest instrument a extins controalele anti-mafia asupra tuturor furnizorilor implicați în executarea lucrării. Cu toate acestea, la fel ca în cazul majorității instrumentelor juridice fără caracter obligatoriu, este puțin probabil ca acesta să dispună de forță legală în fața unei curți administrative în cazul unor plângeri.

### Vulnerabilitatea ciclului de viață a achizițiilor publice

Ciclul de viață al achizițiilor publice este vulnerabil la criminalitate. Anumite sectoare se dovedesc mai expuse: construcțiile și sănătatea sunt deosebit de vulnerabile. Transporturile, domeniul energetic, eliminarea deșeurilor, IT-ul și telecomunicațiile sunt sectoare cu risc mediu, variind de la țară la țară. De asemenea, în statele în care există încă o industrie minieră puternică, aceasta este considerată ca fiind printre sectoarele foarte vulnerabile. Achizițiile publice din sectorul apărării sunt caracterizate adesea prin lipsa transparenței. Serviciile sociale și educația, de asemenea, se dovedesc în mod special vulnerabile în privința achizițiilor publice. Se observă existența unei relații strânse între vulnerabilitatea anumitor state în materie de achizițiilor publice și expunerea la corupție și infraționalitate a guvernelor și a întreprinderilor de stat.

Întregul ciclu de desfășurare a achizițiilor publice (faza inițială, pre-licitație, licitația propriu zisă și faza finală, post-licitație) este vulnerabil. Faza inițială de planificare, care precedă începutul procedurii, este considerată extrem de vulnerabilă în aproape jumătate din țările cuprinse în studiu, și de obicei în această fază sunt întâlnite și probleme privitoare la adoptarea contra-măsurilor. Aceasta din cauza manipulării nevoilor și a alocării fondurilor, precum și a riscului de scurgere de informații. Lipsa clarității caietelor de sarcini, favorizarea criteriului prețului cel mai scăzut, precum și posibilitățile de prelungire a contractului după semnarea contractului reprezintă probleme frecvente în majoritatea țărilor participante la studiu.

Etapă licitației este în general bine reglementată. Cu toate acestea, procedura de selecție prezintă un risc mediu spre mare în 60% dintre țări, datorită evaluării subiective a criteriilor de selecție și a manipulării consiliului de evaluare. De asemenea, recurgera incorectă la instrumente judiciare de către competitori reprezintă un real pericol în majoritatea țărilor.

Etapă post-licitație, însă, se dovedește a fi cea mai riscantă. Autoritatea contractantă de obicei "uită" de contract după ce acesta a fost semnat, iar în multe state nu există o autoritate care să monitorizeze executarea lucrărilor/serviciilor.

Astfel, folosirea materialelor de proastă calitate, umflarea volumului de muncă și a costurilor, precum și întârzieri în executare sunt probleme foarte răspândite, în special – dar nu numai – în ceea ce privește lucrările publice.

### Măsuri preventive

Din cauza riscurilor descrise mai sus, sistemul de prevenție trebuie aibă un grad ridicat de complexitate, să fie în continuă evoluție și să includă organisme și instrumente de prevenție. Dincolo de rolul curților de conturi în monitorizarea utilizării fondurilor publice, în statele membre există și alte organizații al căror scop este prevenția corupției și a criminalității organizate și ale căror acțiuni vizează achizițiile publice. În unele state membre există chiar organizații care se ocupă doar de combaterea ilegalității în achizițiile publice. Totuși, acestea diferă de la o țară la alta.

În privința instrumentelor de prevenție, Olanda și Italia dispun de măsuri specifice pentru monitorizarea companiilor, proprietarilor și a reprezentanților legali ai acestora. În Italia, aceste verificări sunt realizate cu instrumentele oferite de legislația anti-mafia.

Semnale de alarmă în legătură cu potențialele probleme în acest domeniu - corupție, neglijență sau

fraudă - au fost trase prin intermediul instrumentelor utilizate pentru monitorizarea neregulilor din achizițiile publice. Cu toate că acești indicatori sunt considerați folositori pentru detectarea din timp a potențialelor riscuri, doar opt țări folosesc acest tip de semnalizare adaptat la specificul național. Măsurile de excludere sunt folosite în paisprezece dintre statele membre. Listele albe (white list) reprezintă o condiție de preselecție a companiilor care vor lua parte la licitații, iar listele negre (black list) impun o procedură care exclude companiile și persoanele. În toate țările, cu excepția României, aceste instrumente sunt administrate de către autoritățile publice. În ciuda faptului că sunt în general recunoscute ca instrumente utile pentru respectarea legilor sau ca potențiale sancțiuni pentru reputația participanților, acestea nu sunt folosite pe scară largă din cauza dificultăților practice care pot interveni în administrarea acestora (riscul de manipulare și dificultate în definirea clară a criteriilor și regulilor conform cărora funcționează).

Bazele de date sunt, de asemenea, instrumente foarte importante pentru informarea în privința aplicării legii. Cu excepția Italiei și Olandei, folosirea bazelor de date pentru monitorizarea companiilor nu este încă atât de răspândită. Din cauza lipsei unei legislații comune la nivelul Uniunii Europene și pentru că piețele naționale de achiziții publice limitează accesul furnizorilor străini, implementarea unui mecanism comun de informare în legătură cu companiile implicate nu va putea fi realizată prea curând.

### **Măsuri de control în etapa post-licitație**

Măsurile de control din faza post-licitație comune în toate statele membre pot fi împărțite în două categorii :

- monitorizare internă, realizată de obicei de către autoritatea contractantă;
- monitorizare externă, realizată de instituții externe independente (curți de conturi, agenții financiare, inspectorate de muncă etc); acestea se axează în general pe aspecte economice și financiare, pe transparența conturilor, respectarea legislației muncii etc

De asemenea, Italia dispune de sistem de control axat pe practici abuzive observate pe durata executării contractelor publice. Mai mult decât atât, Italia este singurul stat cu unități speciale responsabile cu monitorizarea și investigarea activităților desfășurate în cadrul lucrărilor publice de anvergură.

Niciunul dintre celelalte state membre nu face distincție – în ceea ce privește structurile de control și monitorizare – între diferite tipuri de lucrări publice, respectiv între diferite contracte publice.

Două treimi dintre statele membre au instituții juridice specializate în detectarea corupției în diferite sectoare economice, inclusiv în achizițiile publice. Jumătate dintre aceste state au, de asemenea, o procuratură specializată pe intentarea proceselor de corupție.

Pe lângă aceste instituții, o treime din țările incluse în studiu au unități speciale de poliție înființate pentru investigarea ilegalităților financiare și economice și în general a criminalității organizate.

În special statul sloven se poate lăuda cu o procuratură specială, responsabilă cu investigarea infracțiunilor grave în domeniul achizițiilor publice și a concesiunilor.

## Краткое описание



Проект „Предупреждение преступности“ (WOC) ([www.warningoncrime.eu](http://www.warningoncrime.eu)) был осуществлен при поддержке Европейской комиссии, Генерального директората по вопросам миграции и внутренних дел (DG HOME), в рамках программы по предупреждению и пресечению преступности.

Исследование состоит из сравнительного исследования коррупции в системах публичных закупок всех государств-членов, за исключением Бельгии, Кипра и Греции.

Основная цель исследования заключается в сравнении уязвимости систем государственных закупок исследованных государств-членов, а также законодательные меры, принятые для борьбы с ними, с целью уничтожения что заставляет этих систем стать благодатной почвой для сотрудничества между коррумпированными чиновниками и членами различных структур. Особое внимание было уделено масштабу общественных работ или работ с участием приграничного сотрудничества.

Отчет состоит из 4х глав: первая представляет законодательную базу, доступную для борьбы с незаконностями существующие в государственных закупках, во второй главе оценивается уязвимость систем государственных закупок, третья описывает предупреждающие меры, применяемые в исследованных государствах-членах, а последняя глава анализирует меры контроля, предусмотренные для стадии, которая следует после государственных закупок.

### Правовые рамки

Противодействие незаконной деятельности в государственных закупках на основании положений закона включает в себя различные правовые нормы и инструменты «мягкого права». Проект направлен на четыре области: криминальные организации, взяточничество, закон о государственных закупках, а также пакты целостности.

Во всех изученных странах криминализация преступных организаций осуществляется в соответствии с Рамочным Решением Совета Европейского Союза 2008/841 / JHA от 24 октября 2008 года по борьбе с организованной преступностью, и в большинстве из них преступление может представлять собой инструмент, чтобы наказать группы - при условии, что они отвечают требованиям, установленным законом - которые занимаются преступной деятельностью, включая коррупцию, связанную с государственными закупками. Кроме того, итальянская правовая система предусматривает отдельную категорию преступлений совершаемых объединениями мафиозного типа, где четко упомянуты государственные закупки. Австрийское законодательство содержит такое преступление как создание группировок с целью совершения преступлений, в числе которых также может быть коррупция. Тем не менее, прецедентное право среди ГЧ очень ограничено.

Правовая основа касающаяся взяточничества и злоупотребления влиянием была подвергнута процессу эволюции и приближению среди ГЧ, и хотя лазейки и противоречия остаются, в целом результаты реагирования являются гораздо более всеобъемлющими чем несколько лет назад.

Новые директивы по государственным закупкам заостряют внимание на профилактике, прозрачности и подотчетности в качестве средства для снижения неправомерности в сфере государственных закупок. Исследование показывает, что перестановка правил об основаниях для исключения и субподряда значительно варьируется в разных странах. Отчасти это связано с тем, что государственные закупки являются общенациональным рынком, который будет сталкиваться с местными угрозами с точки зрения незаконности, а также учитывать более техническое рассмотрение степени усмотрения, которую законодатель намерен оставить заказчику. Инструменты «мягкого права» приобретают все большее значение в борьбе с незаконной деятельностью в области государственных закупок. Пакты целостности - это инструмент,

разработанный Transparency International (TI), состоящий из соглашения, подписанного организацией-заказчиком, участниками торгов и независимым наблюдателем, которые обязуются воздерживаться от любой формы коррупции и сговора - скоро будут испытаны в 11 странах на 17 проектах, финансируемых ЕС. У Италии большой опыт договоров законности, подписанных на протяжении многих лет, которые обязывают стороны к принятию конкретных мер по осуществлению правовых норм противодействия коррупции и организованной преступности, а также повышения целостности и прозрачности в цикле госзакупок. В большом общественном проекте, который был исследован - высокоскоростной железнодорожной линии Турин-Лион, инструмент «мягкого права» (reglement des contrats) был использован для обеспечения общих правил в этой общественной работе, независимо от национальности участвующих в торгах. В частности, она распространяет итальянское управление по борьбе с мафией на всех участников торгов, участвующих в осуществлении работ. Тем не менее, как и для большинства нормативных документов рекомендательного характера, вопрос может ли он иметь обязательный характер в административном суде в случае жалоб, остаётся спорным.

### **Уязвимость цикла государственных заказов**

Цикл государственных заказов уязвим для преступности. Некоторые сектора бизнеса оказываются более подвержены ей – например, строительство и здравоохранение являются весьма уязвимыми. Транспорт, энергетика, утилизация отходов, информационные технологии и телекоммуникации – все это сектора со средним/ высоким уровнем риска, в зависимости от страны. В тех странах, где до сих пор существует горнодобывающая промышленность, этот сектор так же считается весьма уязвимым. Государственным заказам, связанным с оборонным сектором во многом не хватает прозрачности. Социальные службы и образование становятся новыми отраслями, в которых государственные поставки становятся все более и более подвержены риску. Подобная уязвимость, расследуемая в нескольких странах - тесно переплетена с разоблачением коррупции и незаконных действий местного самоуправления и предприятий, находящихся в государственной собственности.

Весь цикл заказов (во всех фазах: pre-tender, tender и post-tender) уязвим. Однако на предварительном этапе тендера, на этапе планирования – этапе, предшествующем началу процедуры, этапе, который считается весьма уязвимым почти в половине стран – возникают некоторые трудности с принятием контракта. Все это происходит из-за манипуляций потребностями и распределением финансирования, а также связано с риском раскрытия информации. В большинстве стран часто наблюдается отсутствие ясности в технических характеристиках тендера и изначально низкая предложенная цена, а вместе с тем широкие возможности для расширения контракта после получения гранта.

Фаза тендера строго регулируется. Процедура отбора, однако, имеет высокий / средний риск в 60% стран из-за необъективной или неадекватной оценки критериев отбора, или же подтасовок оценочной комиссии. Злоупотребление юридическими действиями участниками так же является серьезным риском во многих странах.

В целом, фаза post-tender оказывается наиболее опасной. Организация-исполнитель, кажется, забывает про контракт после его подписания, и в большинстве стран не существует никакого органа власти который контролировал бы выполнение контракта. Низкокачественные материалы, завышенный объем работы и затраты, а также задержки в исполнении работ – все это широко распространенные проблемы, особенно (но не исключительно) в отношении госзаказов.

### **Предупредительные меры**

Из-за различных рисков, влияющих на жизненный цикл госзакупок, система предотвращения является довольно сложной и постоянно развивается. Она включает в себя органы и средства профилактики.

Кроме счетной палаты, осуществляющей контроль за использованием государственных средств,

существует широкий круг организаций в ГЧ, ориентированных на предупреждение коррупции и организованной преступности, действия которых касаются государственных закупок. У некоторых ГЧ есть специфические органы, задачей которых является противодействие преступности и незаконной деятельности в области государственных закупок, хотя и существуют различия между странами.

В том, что касается средства предотвращения, Нидерланды и Италия могут похвастаться конкретными мерами, направленными на мониторинг компаний, их владельцев и законных представителей. В Италии эти проверки осуществляются в рамках законодательства по борьбе с мафией.

Предупредительные сигналы появляются из числа различных инструментов, используемых для мониторинга неправомερных действий при государственных закупках. Эти предупредительные сигналы указывают на возможные проблемы, подлежащие рассмотрению, такие как коррупция, неправомερные действия и мошенничество. Хотя эти показатели считаются полезными предсказателями риска коррупции, лишь восемь стран используют некоторые виды предупредительных сигналов с национальными особенностями.

Меры по недопущению используются в 14 ГЧ. Белые списки служат в качестве условия предварительного отбора в выборе компаний, которые примут участие в процессе торгов, в то время как черные списки влекут за собой процедуру, которая исключает компании и частные лица. Во всех странах, кроме Румынии, эти инструменты находятся в ведении государственных органов. Несмотря на общее признание полезности этих инструментов в качестве стимула для соблюдения положений закона и как репутационный санкции, их использование пока не распространено из-за практических трудностей в их управлении (риска манипуляции и трудностей в определении четких критериев и правил обжалования).

Базы данных являются важным инструментом для обмена информацией по вопросам правоприменения. За исключением Италии и Нидерландов, использование баз данных для мониторинга компаний пока не является общепринятым. Из-за отсутствия общих правил на уровне ЕС и на внутренних рынках государственных закупок с ограниченным доступом для иностранных участников, настройка общего механизма обмена информацией о компаниях не находится на повестке дня.

## **Контрольные меры после стадии государственных закупок**

Контрольные меры после стадии государственных закупок, общие для всех государств-членов, могут быть разделены на две категории:

- внутренний мониторинг, как правило, осуществляется заказчиком
- внешний мониторинг осуществляется независимыми внешними институтами (счётные палаты, финансовые учреждения, рабочие инспекции и т.д.), они, как правило, сосредоточены на экономических и финансовых вопросах, прозрачности счетов, соблюдение трудового законодательства и т.д.

Италия имеет системы управления, сосредоточенные на практике злоупотреблений, наблюдаемые во время исполнения государственных соглашений.

Больше того, Италия является единственным государством с особыми подразделениями, ответственными за мероприятия по мониторингу и расследованиями, проведенными в рамках общественных работ.

Ни одна из других государств-членов не делает различие – что касается структур контроля и управления – между различными типами общественных работ, или между различными государственными соглашениями. Две трети государств-членов имеют правовые институты, специализирующиеся на выявлении коррупции в различных экономических секторах, в том числе в государственных закупках. Половина из этих государств также имеют прокуратуру, специализированную на привлечение исследований коррупции.

Кроме этих учреждений, треть опрошенных стран имеют специальные полицейские единицы, созданные для расследования финансовых и экономических нарушений и организованной преступности. В частности, Словения может похвастаться специальной прокуратурой, ответственной за расследование серьезных преступлений в сфере государственных закупок и концессий.



## Povzetek

SI

Projekt 'Warning on Crime' ('Opozorilo o kriminaliteti) (WOC) ([www.warningoncrime.eu](http://www.warningoncrime.eu)) je bil izveden s finančno podporo Evropske komisije, Generalnega direktorata za migracije in notranje zadeve (Directorate-General for Migration and Home Affairs – DG HOME) in v okviru Programa preprečevanja in boja zoper kriminaliteto (Programme Prevention of and Fight against Crime – ISEC). Raziskava je primerjalna študija o infiltraciji kriminalitete in korupcije na področju javnih naročil. V raziskavo so bile vključene vse države članice Evropske unije, razen Belgije, Cipra in Grčije. Cilj študije je primerjati ranljivost področja javnih naročil v 25 državah članicah, kot tudi zakonodajo in sprejete ukrepe za preprečevanje in boj zoper kriminaliteto in korupcijo na področju javnih naročil. Namen študije je pojasniti, kaj na tem področju predstavlja razlog za plodno sodelovanje med kriminalci belega ovratnika, nezvestimi državnimi uradniki in člani kriminalnih organizacij. Posebna pozornost je namenjena večjim in čezmejnimi javnim naročilom. Poročilo je razdeljeno na štiri poglavja. Prvo poglavje govori o razpoložljivih pravnih okvirjih za boj proti nezakonitostim pri javnih naročilih. Drugo poglavje predstavlja oceno ranljivosti javnih naročil. V tretjem poglavju so opisani preventivni ukrepi, vzpostavljeni v posameznih državah članicah, v četrtem poglavju pa so analizirani nadzorni ukrepi, predvideni v t. i. post-razpisni fazi.

### Pravni okvir

Boj zoper nezakonitem ravnanju pri javnih naročilih na podlagi pravnih določb vključuje različne pravne predpise in t. i. 'orodja mehkega prava' (orig. soft-law tools). Projekt se osredotoča na štiri področja: kriminalne organizacije oziroma združbe, podkupovanje, zakon o javnih naročilih in pakte integritete.

Vse v raziskavo vključene države kriminalizirajo organizirane kriminalne združbe v skladu z Okvirnim sklepom Sveta 2008/841/JHA z dne 24. oktober 2008 o boju zoper organizirano kriminaliteto. Prav tako v večini držav prestopok lahko predstavlja orodje za kaznovanje skupin – pod pogojem, da izpolnjujejo z zakonom določene zahteve, in sicer, da izvajajo kriminalne dejavnosti, vključno s korupcijo, povezane z javnimi naročili. Poleg tega italijanski pravni sistem izrecno predvideva kaznivo dejanje mafijskega tipa združevanja, ki izrecno omenja javno naročanje. Avstrijska zakonodaja pa vključuje kaznivo dejanje hudodelskega združevanja, ki lahko obsega tudi korupcijo. Vendar pa je sodna praksa v državah članicah zelo omejena.

V procesu razvoja in približevanja je bil v državah članicah izpostavljen pravni okvir o podkupovanju in trgovanju z vplivom. Čeprav posamezne vrzeli in protislovja še vedno ostajajo, so rezultati celotnega odziva mnogo bolj obsežni kot pred nekaj leti.

Novo direktive o javnih naročilih pozornost osredotočajo na preprečevanje, transparentnost in odgovornost kot sredstva za zmanjšanje nezakonitost pri javnih naročilih. Raziskave kažejo, da se prenos pravil o razlogih za izključitev in podizvajalske pogodbe med državami pomembno razlikujejo. To je delno povezano z idejo, da je javno naročanje vsesplošen trg, ki se mora soočiti z lokalnimi grožnjami v smislu nezakonitosti, in tudi upoštevati bolj strokovno obravnavo glede stopnje diskrecije, ki jo zakonodajalec namerava dopustiti naročniku.

Instrumenti mehkega prava v boju proti nezakonitostim pri javnem naročanju pridobivajo večji pomen. Pakti integritete – orodje, ki jih je razvil Transparency International (TI), je sestavljeno iz sporazuma, ki so ga podpisali naročnik, ponudniki in neodvisni nadzornik, ki se zavežejo, da se bodo vzdržali kakršne koli oblike korupcije in dogovarjanja – bodo preizkušeni v 11 državah, ki so vključene v 17 projektov, ki jih financira EU. Italija ima dolgoletne izkušnje na področju zakonitosti paktov podpisanih v preteklih letih, ki zavežejo stranke, da sprejmejo posebne ukrepe za izvajanje zakonskih pravil zoper korupcijo in organizirano kriminaliteto ter za krepitev integritete in transparentnosti v postopku javnih naročil. V večjem delu javnih del železniške proge visoke hitrosti Torino-Lyon so bili za zagotavljanje skupnih pravil za javna dela, neglede na državljanstvo udeleženih ponudnikov, uporabljeni instrumenti mehkega prava (reglement des contracts). Slednji posebej razširi italijanski

proti-mafijski nadzor nad vse ponudnike, ki sodelujejo pri izvedbi del. Vendar pa je, kot za večino instrumentov mehkega prava, vprašljivo, ali bi v primeru pritožb ta ukrep lahko imel zavezujoč pomen pred upravnim sodiščem.

### **Ranljivost postopka javnih naročil**

Zaradi kriminalitete je ranljiv prav celoten postopek javnega naročanja. Nekateri poslovni sektorji se izkažejo za bolj izpostavljene: zelo ranljiva sta gradbeni sektor in zdravstveno varstvo. Prevoznništvo, energetika, odlaganje odpadkov ter informacijske tehnologije in telekomunikacije so sektorji s srednjo/visoko stopnjo tveganja, s posameznimi razlikami med državami. V državah, ki še vedno imajo rudarsko industrijo, se ta sektor smatra za zelo ranljivega. Javna naročila na področju obrambnega sektorja so pogosto nepregledna. Sektorja socialnih storitev in izobraževanja pa se pojavljata kot nova sektorja, kjer javna naročila postajajo vse bolj ranljiva. Ranljivost več sektorjev v državah, kjer preiskave še potekajo, je tesno povezana z izpostavljenostjo korupcije in nezakonitim ravnanjem lokalnih oblasti in podjetij v državni lasti.

Celoten postopek javnega naročanja (pred-razpisna, razpisna in post-razpisna faza), je 'ranljiv'. V pred-razpisni fazi, ki je dejansko faza načrtovanja – tista, pred začetkom postopka – in se šteje za zelo ranljivo v skoraj polovici držav, se države soočajo s posameznimi težavami kar zadeva sprejetje protiukrepov. Vse to pa zaradi manipulacije potreb in dodelitve sredstev, kot tudi zaradi tveganja razkritja informacij.

V večini držav je pogosto opaziti, da pomanjkanje jasnosti razpisne dokumentacije in predložitve nizke cene ponudbe spremljajo znatne možnosti za razširitev pogodbe v fazi po dodelitvi naročila.

Razpisna faza, ko se zbirajo ponudbe, je močno regulirana. Postopek izbire ima visoko/srednjo stopnjo tveganja kar v 60% držav zaradi neobjektivnega ali neustreznega vrednotenja meril za izbor in manipulacij znotraj ocenjevalnega odbora. V večini držav obstaja tudi velika verjetnost, da ponudniki zlorabijo tudi posamezne sodne ukrepe.

Na splošno se je izkazalo, da je post-razpisna faza najbolj tvegana. Zdi se, da naročnik pozabi na pogodbo, potem ko je le-ta podpisana, in v večini držav ni nobenega organa za nadzor nad izvajanjem določil pogodbe.

Materiali slabe kvalitete, napihnen obseg dela in stroškov ter zamude pri izvedbi del so vedno bolj pogoste in razširjene težave, zlasti – vendar ne izključno – na področju javnih del.

### **Preventivni ukrepi**

Zaradi različnih tveganj, ki vplivajo na postopek javnega naročanja in njegovo izvedbo, je sistem preprečevanja precej kompleksen in se nenehno razvija. Sistem vključuje tako institucije, kot tudi preventivne ukrepe.

Poleg vloge, ki jo pri spremljanju porabe javnih sredstev ima računsko sodišče, v državah članicah obstaja širok izbor organov, osredotočenih na preprečevanje korupcije in organizirane kriminalitete, katerih delovanje se nanaša na javna naročila. Nekatere države članice imajo tudi posebne organe, katerih naloga je boj proti kriminaliteti in nezakonitostim pri javnih naročilih, čeprav se le-ti med državami razlikujejo.

Kar zadeva orodja za preprečevanje kriminalitete, se Nizozemska in Italija lahko pohvalita s posebnimi ukrepi, usmerjenimi v spremljanje podjetij in njihovih lastnikov ter zakonitih zastopnikov. V Italiji se ti pregledi izvajajo v okviru t. i. proti-mafijske zakonodaje.

Rdeče zastave so eden izmed različnih orodij, ki se uporabljajo za spremljanje slabega upravljanja pri javnih naročilih. Rdeče zastave so opozorilni signali o možnih vprašanjih, ki jih je treba obravnavati, kot so korupcija, kršitve in goljufije. Čeprav se ti kazalci smatrajo za koristne napovedovalce tveganja korupcije, zgolj osem držav uporablja posamezne vrste rdečih zastav z določenimi nacionalnimi posebnostmi.

Izločitvene ukrepe uporablja 14 držav članic. Beli sezname delujejo kot pred-izborni pogoj, da izberejo podjetja, ki bodo sodelovala v postopku zbiranja ponudb, medtem ko črni sezname pomenijo

postopek, ki izključuje podjetja in posameznike. V vseh državah, razen v Romuniji, ta orodja upravljajo javni organi. Kljub splošnemu priznavanju koristnosti teh orodij kot spodbude za delovanje v skladu z zakonskimi določbami in kot 'sankcije zoper ugled' (orig. reputational sanction), njihova uporaba zaradi praktičnih težav pri njihovem upravljanju (nevarnost manipulacije in težave pri opredelitvi jasnih kriterijev in pravil za pritožbe) še ni splošno razširjena.

Podatkovne zbirke so ključno orodje za izmenjavo informacij o izvrševanju zakonodaje. Z izjemo Italije in Nizozemske, uporaba baz podatkov za spremljanje družb še ni tako pogosta. Zaradi pomanjkanja skupnih pravil na ravni EU in na nacionalnih trgih javnih naročil z omejenim dostopom za tuje ponudnike, vzpostavitev skupnega mehanizma za izmenjavo informacij o družbah (še) ni med prioritetami dnevnega reda.

### **Nadzorni ukrepi v post-razpisni fazi**

Nadzorne ukrepe, ki so v vseh državah članicah splošno uporabljani, lahko v post-razpisni fazi razdelimo v dve skupini:

- notranji nadzor, ki ga običajno izvaja naročnik;
- zunanji nadzor, ki ga izvajajo neodvisne in zunanje institucije (kot so računsko sodišča, finančne ali davčne agencije, inšpektorati za delo itd.), ki na splošno svojo pozornost osredotočajo na gospodarske in finančne vidike, preglednost računov, ravnanje v skladu z delovno zakonodajo itd.

Poleg tega se samo Italija lahko pohvali z nadzornimi sistemi, ki se osredotočajo na primere zlorab, ki so bile opažene med izvajanjem javnih naročil. Poleg tega je Italija edina država s posebnimi enotami pregona, pristojnimi za izvajanje nadzora in preiskave večjih javnih del. Vse ostale države članice ne delajo nobenih razlik – med nadzorom in/ali nadzornimi organi – glede na vrsto javnih del in s tem višino zneska javnega naročila.

Dve tretjini držav članic ima organe odkrivanja in pregona, specializirane za odkrivanje korupcije v različnih gospodarskih sektorjih, vključno z javnimi naročili. Polovica od teh držav ima tudi specializirano tožilstvo, pristojno za pregon korupcije.

Skupaj s temi organi, ima ena tretjina držav specializirane policijske enote, ki so bile ustanovljene posebej za preiskovanje resnejših oblik organizirane kriminalitete in/ali gospodarske in premoženjske kriminalitete. Slovenija se posebej ponaša s specializiranim tožilstvom, pristojnim za preiskovanje hudih oblik kriminalitete pri javnih naročilih oziroma koncesijah.

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