



TENDERS.GURU

RECOMMENDATIONS FOR EU PROCUREMENT

ABOUT TENDERS GURU

Tenders Guru is a pan-European project that aims to reduce the risk of corruption in public procurement by collecting and analysing contracting data. With this analysis, the project produces evidenced-based legal and policy recommendations, directed at the national and EU level, on how to increase transparency of procurement in order to avoid corruption and tackle inefficient spending of public funds.

The Tenders Guru Consortium is made up of leading transparency and anti-corruption organisations across Europe: Access Info Europe (Spain), Civio (Spain), ePaństwo Foundation (Poland), Funky Citizens (Romania), and K-Monitor (Hungary).

The Tenders Guru Consortium carries out the following activities:

- » Analysis of corruption risks in national and local-level procurement in Hungary, Poland, Romania, and Spain;
- » Training of journalists and civil society on how to monitor public procurement, how to use data to identify problems, and how to engage in advocacy to address those problems;
- » Managing an open-source IT Tool, the Tenders Guru Platform, that can be used to detect structural weaknesses and behaviour patterns likely to facilitate corruption, allowing local governments, civil society, and journalists to monitor procurement processes;
- » In-depth research into international standards on public procurement transparency in order to formulate specific recommendations for the EU and national legislators on how to increase transparency and reduce corruption risks;
- » Production of micro-learning materials, designed to help public officials, policy makers, journalists and civil society organisations gain a more in-depth understanding of how to identify and combat corruption in public procurement.

Information on the project, its recommendations and analysis of local-level procurement data can be found on the website: <https://tenders.guru/>



CONTENTS

- Introduction 1
- Tenders Guru Recommendations to the European Commission..... 4
 - Recovery and Resilience Facility spending..... 4
 - More transparency to monitor national-level spending of RRF funds..... 4
 - Data mining tool to monitor spending of RRF funds should be compulsory..... 7
 - Early Exclusion and Detection System should apply to RRF spending..... 8
- The Open Data Directive..... 8
 - Public procurement data as a high-value dataset..... 9
 - Company Registers fully open under the Open Data Directive..... 10
- Public procurement..... 12
 - EU wide implementation of Open Contracting Data Standards..... 12
 - More transparency on below-the-threshold procurement..... 14
 - Centralised, interoperable procurement portals..... 14
 - Proactive transparency of Evaluation Committee members and decisions..... 15
 - Public Exclusion Lists..... 16
 - Independent and specialised oversight institutions to monitor procurement..... 18
 - A procurement system that is open by default..... 18
- Open Government Partnership..... 19
 - Open procurement within Open Government Partnership Action Plans..... 19
- Annex 21

INTRODUCTION

Procurement is currently considered as a government's number one corruption risk.¹ Each year public authorities in the EU spend around 14% of GDP on public procurement, and it is estimated that public procurement corruption alone costs the EU €5 billion per year.² The question therefore is not if corruption exists in procurement, but rather what policy changes and control mechanisms can we implement to detect and prevent corruption?

There is a resounding consensus at the international level that to tackle corruption in procurement, more transparency is needed. The **Council of Europe** has stated that the key principle for reducing the risks of corruption is maximum transparency in all stages of the procurement cycle,³ echoed by **GRECO** affirming that greater transparency is key to preventing corruption in public procurement.⁴ The **OECD** Recommendation on Public Procurement calls on Member Countries to ensure visibility of the flow of public funds, from the beginning of the budgeting process throughout the public procurement cycle.⁵

The secrecy around emergency procurement contracts in response to the pandemic, and the subsequent corruption scandals that followed, reinforce this need for more transparency in procurement.⁶ The OECD has stated that the application of this Recommendation throughout the whole procurement cycle, is "essential for adequately responding to the COVID-19 pandemic, especially for the emergency contracting of critical goods and services and the management of critical infrastructures",⁷ and the **UN FACTI Panel** recommended that all countries strengthen public procurement and contracting transparency, including transparency of emergency measures taken to respond to COVID-19.⁸

At the EU level, the **European Commission** has recognised that better and more accessible data on procurement should be made available.⁹ In support of this, a separate study found that if EU Member States published five (5) more items of information about tendering opportunities, savings are estimated

¹ The Open Contracting Partnership, 'The Idiot's Guide to Looting Public Procurement to Get Rich Quick' (2018)

² Ryan Collins, 'Corruption costs EU 'up to €990 billion a year' (Politico, March 2016) <<https://www.politico.eu/article/corruption-costs-eu-990-billion-year-rand-study-fraud-funding/>>

³ Council of Europe, 'Making public procurement transparent at local and regional levels' Governance Committee (October 2017) p4

⁴ GRECO, 'Corruption Risks and Useful Legal References in the context of COVID-19' (2020)

⁵ OECD, 'Recommendation of the Council on Public Procurement' (2015)

⁶ OCCRP, 'Crime, Corruption and Coronavirus' (2020) <<https://www.occrp.org/en/coronavirus/>>

⁷ OECD, 'OECD Legal Instruments; Recommendation of the Council on Public Procurement' <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0411?_ga=2.1831665.1173274081.1621593361-1546465595.1618773545>

⁸ Report of the High Level Panel on International Financial Accountability, Transparency and Integrity for Achieving the 2030 Agenda

⁹ Communication from The Commission to The European Parliament, The Council, The European Economic and Social Committee and The Committee of the Regions: Making Public Procurement work in and for Europe COM/2017/0572 final

to be between €3.6-6.3 billion per year.¹⁰ Tenders Guru has carried out an analysis on the current EU procurement rules and subsequent transparency levels demanded in practice in procurement at national level. Various structural problems have been identified, including:

- » Unstructured, unverified and missing data across the life cycle of a procurement process;
- » Disaggregated procurement data spread across various e-procurement portals;
- » Lack of interoperability of procurement data with other public datasets;
- » Lack of transparency of below-the-threshold procurement;
- » Lack of open company ownership data.

Tenders Guru found that the lack of strict, uniform rules on exactly what procurement data has to be published and how at the national level, leads to **format and accessibility** of public procurement data varying greatly across Europe. When data is provided, there are often problems with the **structure and verification**, which greatly hampers monitoring and analysis. This lack of transparency around procurement data was made evidently clear with the arrival of the Covid-19 pandemic, with some EU countries being described as “black holes” of procurement information.¹¹

Another major problem found in EU procurement is the **lack of transparency of company ownership and beneficial ownership**. Again, the pandemic has shown just how vital it is to have information on economic operators in order to carry out proper due diligence before awarding a public contract. As emergency contracts were awarded quickly, away from public oversight and without proper due diligence of suppliers, subsequent corruption scandals emerged of government officials offering contracts to well-known associates in the UK,¹² or offering large contracts to companies without experience in health-care in Slovenia,¹³ middle men profiting over the sale of ineffective PPE in Romania,¹⁴ or a company unknown in the medicine retail industry importing vaccines in Hungary.¹⁵ From this it can be seen that not only is

¹⁰ M Bauhr & others, 'Greater transparency in calls for tenders could save Europe billions' <<https://www.open-contracting.org/2017/12/06/greater-transparency-calls-tenders-save-europe-billions/>>

¹¹ Adriana Homolova and Dada Lyndell, 'Europe's COVID-19 Spending Spree Unmasked' (2020) <<https://www.occrp.org/en/coronavirus/europes-covid-19-spending-sprees-unmasked>>

¹² David Conn and Peter Geoghegan, 'Firm with links to Gove and Cummings given Covid-19 contract without open tender' (2020) <<https://www.theguardian.com/politics/2020/jul/10/firm-with-links-to-gove-and-cummings-given-covid-19-contract-without-open-tender>>

¹³ Anuška Delić, Matej Zwitter, 'Opaque Coronavirus Procurement Deal Hands Millions to Slovenian Gambling Mogul' (2020) <<https://www.occrp.org/en/coronavirus/opaque-coronavirus-procurement-deal-hands-millions-to-slovenian-gambling-mogul>>

¹⁴ Ana Poenariu, 'The Convict and Coronavirus: Romania's Million-Mask Mess' (2020) <https://www.occrp.org/en/coronavirus/convict-and-coronavirus-romania-million-mask-mess>

¹⁵ Wirth Zsuzsanna, Pethő András, 'Company with murky background is at the center of Hungary's Chinese vaccine deal' (2021) <<https://www.direkt36.hu/en/csak-egy-bukdacsolo-cege-volt-eddig-annak-az-amator-jeghoki-edzonek-aki-most-feltunt-az-55-milliardos-kinai-vakcinauzlet-mogott/>>

procurement and company ownership data lacking across the EU, but the data that is there is **not being combined and utilised effectively**.¹⁶

Emergency procurement procedures in response to the pandemic have shed a spotlight on the cracks and pitfalls within the EU procurement system and made evident the obvious need for more transparency through reliable and complete procurement data and information on suppliers. We must take the lessons learned from pandemic spending and apply them to recovery spending. The EU **Recovery and Resilience Facility (RRF)** will see €672.5 billion being made available to Member States in loans and grants to mitigate the economic and social impact of the coronavirus pandemic. The EU Commission is currently analysing Member States' recovery and resilience plans to access the funds under the RRF, and these reforms and investments should be implemented by 2026.¹⁷ With such large amounts of money to be invested, and with the requirement for funds to be spent before 2026, there is an increase in the risk of fraud and corruption.

We are aware of the systemic problems that exist in our procurement systems. We must look to long term reform of our procurement systems in order to combat corruption. As a result of its findings, the Tenders Guru Consortium has come up with EU wide recommendations to improve transparency and avoid corruption within EU procurement. These recommendations focus on:

- » Recovery and Resilience Facility spending;
- » Directive 2019/1024 on Open Data and the Re-use of Public Sector Information;
- » Directive 2014/24 on Public Procurement;
- » Open Government Partnership.

¹⁶ Ivana Rossi 'International Monetary Fund Annual Meetings 2020' (November 2020) <[Facebook Watch](#)>

¹⁷ European Commission 'Recovery and Resilience Facility' <https://ec.europa.eu/info/business-economy-euro/recovery-coronavirus/recovery-and-resilience-facility_en>

TENDERS GURU RECOMMENDATIONS TO THE EUROPEAN COMMISSION

1. Recovery and Resilience Facility spending

1.1 More transparency to monitor national-level spending of RRF funds

Finding: The Commission is currently in the process of reviewing Member States' recovery and resilience plans that set out how the RRF funds will be used.¹⁸ The management of RRF spending will happen at the national level, with the Commission stating that Member States' national control systems will serve as the main instrument for safeguarding the financial interests of the Union.¹⁹

According to Annex V of Regulation 2021/241 establishing the Recovery and Resilience Facility, the Commission will assess the recovery and resilience plans under the criteria of relevance, effectiveness, efficiency and coherence.

Under effectiveness, the Commission will assess whether Member States will ensure effective **monitoring and implementation of the recovery and resilience plans**. This will include ensuring that the overall arrangements proposed by the Member States, in terms of organisation of the implementation of the reforms and investments, are credible.

Under efficiency, the Commission will assess the arrangements proposed by Member States to **prevent, detect and correct corruption, fraud and conflicts of interests** when using the funds provided under RRF, including the arrangements that aim to avoid double funding from RRF and other Union programmes. This will include assessment of the internal control system described in the RRF plan and other relevant arrangements, including for the collection and making available of data on final recipients.

Yet regarding what exactly has to be put in place for monitoring at the national level, Regulation 2021/241, establishing the Recovery and Resilience Facility, only lays out minimum standards required to regulate RRF spending. In addition, while Article 22 states that Member States will have to collect data on the final recipient of the funds, including data on contractor and sub-contractors

¹⁸ European Commission 'Recovery and Resilience Facility' <https://ec.europa.eu/info/business-economy-euro/recovery-coronavirus/recovery-and-resilience-facility_en>

¹⁹ European Commission, 'Questions and answers: The Recovery and Resilience Facility' <https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_481>

and their beneficial owners, this information is for audit and control and Member States are not obliged to release this information. OLAF, the Court of Auditors, the European Public Prosecutors Office and the Commission itself may access relevant data and investigate the use of funds if necessary.²⁰

The Open Procurement EU Coalition analysed the national RRF plans first submitted to the European Commission. It found that in general there was a very poor commitment to transparency across Member States' RRF plans. While there is a strong focus among the plans on communicating information on the RRF investments to the wider public, there are no clear commitments to go beyond routine government control mechanisms and allow wider stakeholder groups to monitor the RRF spending. This is evident through the lack of information on final recipients, audit reports and reports submitted to the Commission being made public by Member States.²¹

Governments must not overlook the importance of civil society contribution to society, especially in terms of monitoring the spending of EU Recovery Funds. In fact, the European Economic and Social Committee has adopted a resolution stating that civil national Recovery and Resilience Plans would be more efficient and effective if civil society organisations were involved.²²

Currently, disclosure requirements for spending of other EU funds are inadequate. A study published in January 2021 by the European Parliament points out the difficulties in finding the ultimate beneficiaries of European funds, due to lack of data, data fragmentation and format of data.²³ Improved control and transparency is needed over spending of EU funds. In not obliging Member States to release complete and open data on recipients of the RRF funds, civil society and investigative journalists will not be able to monitor spending. This means that monitoring will be left solely to national authorities. While this may be sufficient in some Member States, we have seen in the past how low levels of oversight in the spending of EU funds can lead to high-level corruption scandals.²⁴

Regulation No 1306/2013 on the financing, management and monitoring of the common agricultural policy **recognises the role played by civil society**, including by the media and non-

²⁰ European Commission, 'Questions and answers: The Recovery and Resilience Facility' <https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_481>

²¹ Open Procurement EU 'The need for transparency over Europe's Recovery and Resilience Facility' (June 2021) <https://www.open-contracting.org/wp-content/uploads/2021/06/RRF_accountability.pdf>

²² European Economic and Social Committee, 'EU recovery – Involvement of organised civil society is key' (February 2021) <<https://www.eesc.europa.eu/en/news-media/press-releases/eu-recovery-involvement-organised-civil-society-key>>

²³ Willem Pieter et al, 'Largest 50 beneficiaries in each EU Member State of CAP and Cohesion Fund, European Parliament' (January 2021)

²⁴ Dariusz Kalan, 'How EU Fraud Schemes Work in Orban's Hungary' (December 2020) <<https://balkaninsight.com/2020/12/08/how-eu-fraud-schemes-work-in-orbans-hungary/>>

governmental organisations in their contribution to the monitoring for fraud and any misuse of public funds. It states that the publication of the name of the beneficiaries of the funds provides a means of reinforcing the public control of the use of the funds and is necessary to ensure an adequate level of protection of the Union's financial interests: *"If the objective of the public control of the use of the money from the funds is to be achieved, a certain level of information about beneficiaries needs to be brought to the attention of the public. That information should include data on the identity of the beneficiary, the amount awarded and the fund from which it comes and the purpose and the nature of the measure concerned."*²⁵

Regulation No 1306/2013 also recognises that access upon request is less effective, and mandates the proactive publication of names and other relevant data of beneficiaries of funds. The information of beneficiaries obtaining farm subsidies over a certain threshold is to be made available online for two (2) years; after that it can be requested using access to information laws and there is nothing to prevent Member States from ensuring that the information continues to be proactively published as open data beyond the two year minimum.

Recommendations for the European Commission:

- » Ensure that in its assessment of national RRF plans, Member States have robust and transparent plans in place for monitoring and anti-corruption measures under RRF spending;
- » Mandate that all Member States create an interoperable public portal where information on spending, implementation and control of RRF spending is proactively published in open data and interoperable with other public datasets;
- » Mandate that national RRF plans proactively publish information on RRF spending, implementation and control. This should specifically include:
 - Information on final recipients of funds including data on contractor and sub-contractors and their beneficial owners;
 - All public procurement contracts that are funded by RRF, covering the whole process from planning to implementation. These contracts should be clearly identifiable as RRF contracts;

²⁵ Regulation No 1306/2013 on the financing, management and monitoring of the common agricultural policy, paragraph 79

- Reports on both implementation of milestones/targets and on monitoring and control to prevent corruption, this should at least include audit reports and reports submitted to the European Commission;
- Information on the public consultation held with citizens and stakeholders on the creation of the RRF plan.

1.2 Data mining tool to monitor spending of RRF funds should be compulsory

Finding: Article 22(4) of Regulation 2021/241 establishing the Recovery and Resilience Facility states that the Commission shall make available to the Member States an integrated and interoperable information and monitoring system including a single data-mining and risk-scoring tool to access and analyse the relevant data.

ARACHNE is a data mining tool developed by the European Commission. Its objective is to support managing authorities in their administrative controls and management checks in the area of Structural Funds.²⁶ It is an operation tool that helps detect risky or fraudulent contracts in the spending of EU funds. It assesses particular risk categories with specific indicators to detect fraud.

Yet, the ARACHNE tool is used on a voluntary basis and it relies on Member States to upload the data. It is only applied to projects implemented under the Structural Funds in the EU and it does not aim to assess the particular individual conduct of EU fund recipients. Missing, low quality data that is not interoperable with other datasets impedes big data and AI advancements in the area of detecting corruption within the spending of funds.

Recommendations for the European Commission:

- » Mandate the compulsory use of ARACHNE for Member States;
- » Apply ARACHNE to RRF spending;
- » Make ARACHNE interoperable with other datasets.

1.3 Early Exclusion and Detection System should apply to RRF spending

Finding: The European Commission has its own Early Detection and Exclusion System (EDES) the purpose of which is to protect the Union's financial interests against unreliable persons and entities

²⁶ European Commission, 'Employment, Social Affairs & Inclusion'
<<https://ec.europa.eu/social/main.jsp?catId=325&intPageId=3587&langId=en>>

applying for EU funds or having concluded legal commitments with the Commission, other Union Institutions, bodies, offices or agencies. The EDES provides a list of economic operators that have been excluded from participation in EU procurement, and or have been imposed a financial penalty by the European Commission. Therefore, they cannot be awarded any contract financed by the EU budget.²⁷

The EDES system only covers EU funds under direct or indirect management. As RRF is technically under direct management, it could be covered by the EDES system.²⁸ However, it will be the Member States who are distributing the funds at the national level, not the European Commission (something that is more akin to indirect management). Nevertheless, Member States should use the EDES system and not distribute funds to economic operators who have been black listed by the European Commission.

Recommendation for the European Commission:

- » Oblige Member States to apply the EDES system, as well as similar national exclusion systems, and take all exclusion decisions into account when spending RRF funds.

2. The Open Data Directive

The Directive 2019/1024 on Open Data and the Re-use of Public Sector Information (the Open Data Directive), requires that “high-value datasets” be “made available for re-use in machine-readable format, via suitable APIs and, where relevant, as a bulk download” (Article 5.8). The Directive defines high-value datasets as those:

“the re-use of which is associated with important benefits for society, the environment and the economy, in particular because of their suitability for the creation of value-added services, applications and new, high-quality and decent jobs, and of the number of potential beneficiaries of the value-added services and applications based on those datasets” (Article 2.10).

²⁷ European Commission, ‘Early Detection and Exclusion System (EDES)’ <https://ec.europa.eu/info/strategy/eu-budget/how-it-works/annual-lifecycle/implementation/anti-fraud-measures/edes_en>

²⁸ Jacques Delors Institute, ‘Balancing Urgency with Control’ (April 2021)

In its Annex I, the Directive identifies a series of six categories or thematic areas into which high-value datasets fall. These include the areas of geospatial data, earth observation and environmental data, meteorological data, statistics, companies and company ownership, and mobility data.

2.1 Public procurement data as a high-value dataset

Findings: Under Article 13 of the Directive, the European Commission is empowered to add new categories to Annex 1. Public procurement is currently not considered to be a high-value dataset. Mandating that public procurement be considered as a high-value dataset would increase transparency in procurement spending through the publication of high quality, uniform data, both above and below the EU threshold. This would power better monitoring and analysis of the data, especially when combined with other datasets. Doing so would generate significant socio-economic benefits for the EU as a whole, benefit a high number of users, assist in generating revenue, and be invaluable when combined with other datasets.

In an open letter to Directorate-General for DG CONNECT,²⁹ 80 civil society organisations, companies, universities and individuals called for public procurement data to be included as a high-value dataset under Article 14 of the Open Data Directive, laying out the socio-economic benefits of doing so.

When identifying high-value datasets, the Directive requires that the Commission carry out appropriate consultations and conduct an impact assessment, which will include a *"cost-benefit analysis and an analysis of whether providing high-value datasets free of charge by public sector bodies that are required to generate revenue to cover a substantial part of their costs relating to the performance of their public tasks would lead to a substantial impact on the budget of such bodies."*³⁰

These impact assessments should be transparent and have multi stakeholder input, which is essential to avoid the cost-benefit analysis unfairly favouring corporate interests of continuing to generate revenue by selling data, rather than considering the socio-economic benefits of releasing it as open data.

Recommendations for the European Commission:

²⁹ Open Letter to DG CONNECT (January 2020)
https://docs.google.com/document/d/1ztLa0q4AD9R6_L0Wkr9nJ7n5e0zJJQYWQOQUqQ7kpsI/edit

³⁰ Directive 2019/1024 on open data and the re-use of public sector information, Art 14

- » Include public procurement data as a high-value dataset in Annex 1 of the Open Data Directive;
- » Ensure extensive public consultation and broad public and stakeholder input into the impact assessment so that its cost-benefit analysis and its recommendations take into account all the benefits of open data.
- » Make the subsequent impact assessment process transparent and accessible to the public.

2.2 Company Registers fully open under the Open Data Directive

Findings: The Open Data Directive includes company registers and company ownership information as high-value datasets. At time of writing (June 2021), decisions are being made by the Commission and Member States as to precisely which level of disclosure the Open Data Directive will require, and these requirements will be specified in the Implementing Act for the Directive.

In 2020, in preparation for the development of the Implementing Act, the evaluation of the impacts of opening up certain datasets was carried out by a group of consultancy firms on behalf of the Commission.³¹ The resulting Impact Assessment – which has not yet been made public but was obtained by Access Info following an access to documents request to the Commission – found that the benefits to society and reusers of making company ownership datasets open greatly exceed the costs borne by the data holders *"even when costs of implementing the Directive would be relatively high on data holders and especially for a few of them"*.³² Economic benefits in opening up these datasets include:

- » Business opportunities worth thousands of millions of euros (in the UK opening the company register created business opportunities for reusers worth an estimated €780 million);
- » Significantly reduced time and costs for Europe's 24 million SMEs both in reporting and in checking ownership of other companies;
- » Making it easier to discover and deter money laundering, which, according to Europol, can cost the EU almost €200 billion per year;

³¹ The *Impact Assessment study on the list of High Value Datasets to be made available by the Member States under the Open Data Directive* is based on research conducted by Deloitte, along with the Open Data Institute (ODI), The Green Land, and the Lisbon Council, during the course of January to August 2020.

³² Deloitte et al, 'Impact Assessment study on the list of High Value Datasets to be made available by the Member States under the Open Data Directive' (2020) 143

- » Decrease of corruption in public procurement, which costs the EU around 5 billion euro per year.

Yet, inconsistent with this finding, the study focuses greatly on the fact that the costs of implementation would be particularly concentrated on a small number of countries “*which would then have a lower cost-benefit ratio than the others and would be more strongly affected from the changes.*”³³ Due to cost concerns of a few countries, the Impact Assessment recommended a low-intensity publication option.³⁴ This option requires publication of basic information, company documents and accounts, and non-personal data related to company ownership, excluding personal data and company insolvency status. The only personal data in the low-intensity option is the names of a company’s legal representatives and of directors, but not of owners. With this option, a limited open dataset is provided to the public, while paying customers get access to the full datasets.

Access Info Europe carried out a detailed analysis of this Impact Assessment and found that despite recommending low-intensity publication, the study contradicts itself by stating that this option would greatly limit benefits and be out of line with the spirit of the Open Data Directive concerning high value datasets as it would keep some data fields of high value inaccessible. Following this recommendation would greatly diminish the potential benefits that this high-value dataset can bring to society. Now more than ever, businesses, journalists, and civil society groups need high-quality and readily-accessible company ownership information in order to carry out proper due diligence on potential fraudulent or false companies.³⁵

Recommendation for the European Commission:

- » Opt for the Implementing Act on high-value datasets under the Open Data Directive to require full publication of companies and company ownership information, under a genuinely open licence without additional restrictions.

³³ Deloitte et al, ‘Impact Assessment study on the list of High Value Datasets to be made available by the Member States under the Open Data Directive’ (2020) 143

³⁴ Deloitte et al, ‘Impact Assessment study on the list of High Value Datasets to be made available by the Member States under the Open Data Directive’ (2020)

³⁵ Access Info Europe, ‘Briefing note: European Commission’s Impact Assessment Study on Openness of Company Data’ (2021) <<https://www.access-info.org/wp-content/uploads/2021-06-03-Commission-Impact-Assessment-AIE-Briefing-Note.pdf>>

3. Public procurement

The Directives that regulate public procurement in the EU are Directive 2014/24 on public procurement, and Directive 2014/25 on procurement by entities operating in the water, energy, transport and postal services sectors. Under Article 92 of Directive 2014/24 the Commission was scheduled to review the Public Procurement Directives and report to the European Parliament and the Council by 18 April 2019. In response to a Parliamentary Question, it was stated that “as the transposition of the directives by Member States was delayed on average by two years, the publication of the report pursuant Article 92 of Directive 2014/24/EU originally foreseen for April 2019 is delayed accordingly”.³⁶ In the upcoming review of the Procurement Directives, the Tenders Guru Consortium urges the European Commission to take into consideration the below recommendations.

3.1 EU wide implementation of Open Contracting Data Standards

Findings: For transparency through publication to be effective, it needs to be standardised. Notably, the European Commission (DG GROW) recently introduced the new Tenders Electronic Daily (TED) e-forms allowing Member States to collect better quality, and structured procurement information. However, e-Forms only capture a small portion of the information about public procurement (mainly tender and award notices of large contracts). There is currently no official, international or European standard format in which all procurement data should be published. This, coupled with the lack of strict, extensive rules on what has to be published and how, means that, currently, the format and accessibility of public procurement data varies greatly across Europe, leading to varied formats, templates and gaps in data sets, which creates barriers for data analysis and reuse.

Each member organisation of the Tenders Guru Consortium carried out an analysis of the procurement data available in their country. It was found that Hungary, Poland, Romania and Spain all have concerns relating to data availability and format.³⁷ This is a recurring issue throughout the EU, which was emphasised by the pandemic. The Organized Crime and Corruption Reporting Project mapped the availability of Covid-19 contracts across the EU and found that while some countries showed good levels of transparency (for instance Portugal), some were “black holes” of

³⁶ European Parliament, ‘Parliamentary Questions’ (Question reference: P-000287/2020 March 2020) <https://www.europarl.europa.eu/doceo/document/P-9-2020-000287-ASW_EN.html>

³⁷ Tenders Guru, ‘National Procurement Recommendations: Hungary, Poland, Romania and Spain’ (June 2021)

information, with Belgium, the Netherlands, and Denmark rejecting journalists' access to information requests outright, and Norway providing some details on contracts, such as company names, but no price information.³⁸

In order to ensure timely, complete and uniform open format in publication of procurement information, the Open Contracting Data Standard (OCDS) should be used across Europe. OCDS is an open data standard for publication of structured information on all stages of the contracting process: from planning to implementation. Fully compliant OCDS publication involves providing a release of standardised data for every event or change that occurs in the life of a contracting process (e.g. when a tender is issued, an award made, and a contract signed), and then combining these into a summary record. This is important to enable tracking of change over time. Currently, the only Member States publishing procurement data using OCDS are Croatia, France, Portugal and Slovenia.

Recommendation for the European Commission:

- » Recommend that all Member States publish their public procurement data using the OCDS to ensure the release of timely, publically accessible information across the entire cycle of the procurement process - from planning to implementation of contracts;
- » Require the Publications Office of the European Union to publish public procurement data on Europe's Tenders Electronic Daily in OCDS;
- » Provide guidance and encouragement to Member States to publish procurement data using the OCDS, pending regulatory revisions.

3.2 More transparency on below-the-threshold procurement

Findings: The procurement Directives state that procurement over a certain monetary threshold,³⁹ or of certain cross-border interest, must be publicly advertised and competitively tendered. For tenders of lower value however, national rules apply, which nevertheless have to respect general principles of EU law. In practice, however, what we see is that a significant part of public spending happens just below the threshold where national publication measures are less strict, meaning that large quantities of procurement remain non-transparent. The existing rules

38 Adriana Homolova and Dada Lyndell, 'Europe's COVID-19 Spending Spree Unmasked' (October 2021) <<https://www.occrp.org/en/coronavirus/europes-covid-19-spending-spree-unmasked>>

39 European Commission 'Thresholds' https://ec.europa.eu/growth/single-market/public-procurement/rules-implementation/thresholds_en

provide an incentive for the artificial splitting of contracts, where one large contract is split into several smaller contracts, falling just below the threshold and thereby avoiding the EU transparency requirements. While this doesn't automatically constitute fraud, it is a red flag where lower controls on spending and lower levels of transparency could create an environment for corruption.

In the Tenders Guru analysis, contract splitting was identified as a problem in Poland and Spain, causing a significant part of public spending to remain non-transparent. An investigation in Spain found that in the first 7 months of 2019, over 6,500 minor contracts were illegally split. These include 1,879 contracts for goods, 3,793 service contracts and 856 works contracts, the total value of which amounted to over €53 million. It also found an instance of 13 minor supply contracts being awarded to the same company in a single day, amounting to a total of €83,000, well above the threshold of €15,000 for this category.⁴⁰

Recommendations for the European Commission:

- » Establish specific transparency requirements for national-level procurement (below the EU threshold) in the EU procurement Directives;
- » Pending future reform of the EU Directives, work with Member States to identify and agree upon best-practice publication measures.

3.3 Centralised, interoperable procurement portals

Findings: The EU procurement Directives called for the mandatory electronic submission of tenders by October 2018. This resulted in the creation of a multitude of e-tendering platforms across Europe at national, regional and local levels, causing the disaggregation of data across various portals.

In the Tenders Guru analysis, it was found that Poland and Romania have one national, central e-procurement portal where, in theory, all procurement data should be published. Yet in practice in Poland, below-the-threshold procurement data is often published on the website of specific public institutions. In Hungary and Spain, rather than having all procurement information in one central procurement portal, procurement data is spread across multiple platforms. In fact, procurement

⁴⁰ Eva Belmonte, 'Thousands of public contracts fail to comply with the law to avoid competitive tendering' (January 2020) <<https://civio.es/quien-cobra-la-obra/2020/01/22/illegal-division-of-below-threshold-contracts/>>

information in Spain is heavily fragmented across tens of portals at different levels (national, regional, local).⁴¹ This fragmentation of data makes monitoring public spending extremely difficult.

Recommendations for the European Commission:

- » Encourage Member States to ensure that all public procurement data is accessible via one central e-procurement portal or database;
- » Mandate that this central e-procurement portal be interoperable with other public administration databases including company registers and beneficial ownership registries, and that it records both above and below the EU threshold for tenders.

3.4 Proactive transparency of Evaluation Committee members and decisions

Finding: As per Directive 2014/24/EU Annex V Part D (16), the name and address of the body responsible for review of the contract awards must be included within the information in the contracts award notice. It does not, however, specifically state that the names of the experts must be included. The European Commission has asserted that a conflict of interest within the selection, evaluation and award stage is one of the most common errors in public procurement,⁴² and recommends that contracting authorities should require that all members of the evaluation committee sign a declaration of absence of conflicts of interest and confidentiality, and that contracting authorities should have “guidelines or protocols to deal with conflicts of interest, in particular concerning members of evaluation committees.”⁴³ The Commission does not, however, recommend that the names of the evaluation committee members be made public.

The reason why one economic operator is chosen over another is vital information that should be made public, only subject to certain exceptions. Making the selection process more transparent will help fight against conflicts of interest and corrupt decision making. If the names of evaluation committee members were to be public, then civil society could apply red flag or data mining techniques to the data in order to identify and investigate any possible undisclosed links between members of the evaluation committee and tenderers. Not revealing the names of those on an evaluation board could easily lead to the concealment of conflicts of interest in awarding procurement contracts. In Hungary, Poland, Romania and Spain names of Evaluation Committee Members are not proactively made known to the public. The European Ombudsman has previously

⁴¹ Tenders Guru, ‘National Procurement Recommendations: Hungary, Poland, Romania and Spain’ (June 2021)

⁴² European Commission, ‘Public Procurement Guidance For Practitioners’ (February 2018)

⁴³ European Commission, ‘Public Procurement Guidance For Practitioners’ (February 2018) 93

welcomed disclosure of the members evaluation committee, stating that it would constitute good administrative practice and that such disclosure at the conclusion of the evaluation process should be considered a condition of appointment.⁴⁴

In addition, while contracting authorities are required to accompany their award decision to tenderers with a summary of the relevant reasons, Article 55(2) of Directive 2014/24 states that the contracting authority must give more details on this reasoning upon request. However, as per Article 55(3) this information can be withheld under various reasons, including commercial interests.

Recommendation for the European Commission:

- » Mandate that Member States further the transparency of the evaluation of tenders by making Evaluation Committee members proactively known to the public and proactively publishing their reasons for award decisions.

3.5 Public Exclusion Lists

Findings: Article 57 of Directive 2014/24 lays out mandatory and discretionary exclusion grounds. The distortion of competition through tactics such as bid rigging is, however, a discretionary exclusion, which means that Member States are not obliged to enforce this exclusion. This has led to varying levels of enforcement throughout the EU. Furthermore, according to the Directive it is the contracting authority that decides whether economic operators have distorted competition, something which is of concern as conflicts of interest could cause distorting practices to go unaddressed. The aim should be to create a system where the consequences of distorting competition greatly outweigh the risks and financial interest.⁴⁵

The European Commission has its own Early Detection and Exclusion System (EDES) that provides a list of economic operators that have been excluded from participation in EU procurement, and/or have been imposed a financial penalty. Excluded companies cannot be awarded any contract financed by the EU budget.⁴⁶ Among the Tenders Guru Consortium countries, there are differing

⁴⁴ European Ombudsman, 'Decision in case 393/2015/MDC on the European Commission's refusal to grant full public access to evaluation documents concerning a public procurement process' (December 2016) <https://www.ombudsman.europa.eu/en/decision/en/74238>

⁴⁵ Sanchez, 'Public Procurement and Competition: Some Challenges Arising from Recent Developments in EU Public Procurement Law'

⁴⁶ European Commission, 'Early Detection and Exclusion System' <https://ec.europa.eu/info/strategy/eu-budget/how-it-works/annual-lifecycle/implementation/anti-fraud-measures/edes_en>

systems concerning exclusions. Romania is a good practice example, where distortion of competition is a mandatory exclusion that is enforced by a separate body. The list of economic operators that have been excluded is also made public. This is in stark contrast to Hungary, where distortion of competition is a discretionary exclusion that is for the contracting authorities to impose, and the exclusion list is not made public.

When exclusion lists are made public, they are not always interoperable with other important public datasets. This would greatly improve monitoring of economic operators, for instance, having an exclusion list that is public and also interoperable with company ownership registers would allow the public to see if a previous excluded economic operator has set up another company.

Recommendations for the European Commission:

- » Enforce mandatory and uniform exclusions of tenderers who distort competition through practices such as bid rigging;
- » Ensure that exclusions are not discretionary for the specific contracting authority, rather they should be monitored and enforced by a separate independent authority to avoid conflicts of interest;
- » Instruct Member States to follow the example of the European Commission and make the exclusion list public;
- » Mandate that public exclusion lists are interoperable with company ownership registers.

3.6 Independent and specialised oversight institutions to monitor procurement

Findings: Article 83(2) of Directive 2014/24/EU clarifies that Member States must monitor public procurement and Article 83(3) states that the results of monitoring shall be made available to both the public and the Commission. Member States are, however, given wide discretion, with recital 121 stating “Member States should remain free to decide how and by whom this monitoring should be carried out in practice.”

The research by Tenders Guru, as summarised in Annex A, shows that all four countries (Hungary, Poland, Romania and Spain) have an independent oversight institution that monitors public procurement and issues public reports. Spain, however, is the only country that has an independent oversight body with sanctioning powers.

Recommendations for the European Commission:

- » Ensure that procurement in all Member States is monitored by an independent oversight body made up of trained and specialised staff;
- » Require that this body have sufficient resources and sanctioning powers, and that it work in coordination with contracting authorities;
- » Ensure that monitoring evaluations carried out by the oversight body are made available to the public to enhance public scrutiny.

3.7 A procurement system that is open by default

Findings: Directive 2014/24 addresses the ability to withhold both confidential information, including trade secrets (Article 21) and information that would harm legitimate commercial interests (Article 50). Yet, the fact that a contract contains confidential information does not mean that the rest of the contract cannot be published. Paragraph (51) of the preamble of Directive 2014/24 states that “the provisions concerning protection of confidential information do not in any way prevent public disclosure of non-confidential parts of concluded contracts, including any subsequent changes”.

An open-by-default public procurement system should work alongside internationally accepted rules for redaction. Redaction of information should be the exception, not the rule and should always be subject to a public interest test. Only information deemed confidential should be redacted, the rest of the contract should be published, with a clear and detailed reason as to why and for how long this information has to be withheld from the public; this information should be disclosed as soon as it ceases to be sensitive.

The Tenders Guru analysis found that, while the law may align with the Directive in stating that confidential information may be redacted with the rest of the contract published, this is often not complied with in practice. In Hungary and Spain, we found multiple examples of confidential information being used as an excuse to withhold entire contracts from publication. In the case of Poland, while the law states that confidential information should be redacted and the rest of the contract published, there is no legal obligation to publish contracts in the first place.

Recommendation for the European Commission:

- » Issue clear guidance to Member States on what is considered to be confidential, along with comparative examples of best practices.

4. Open Government Partnership

4.1 Open procurement within Open Government Partnership Action Plans

Findings: The Open Government Partnership (OGP) is an international initiative between governments and civil society organisations that aims to secure concrete commitments from governments to promote transparency, support civic participation, fight corruption and harness new technologies inside and outside public administration to support innovation.

Founded in 2011, OGP now has 78 country members and 68 local members (subnational governments), which work alongside thousands of civil society organizations. In the EU region, 21 of 27 Member States are part of OGP, as are most EU accession and neighbourhood countries. The following EU Member States are not part of the Open Government Partnership: Austria, Belgium, Republic of Cyprus, Hungary, Poland and Slovenia.

Out of the Tenders Guru partner countries, Romania and Spain are OGP members and both have integrated open contracting commitments into their National Action Plans.

The High Level Panel on International Financial Accountability, Transparency and Integrity for Achieving the 2030 Agenda (the FACTI Panel) recommends that all countries build upon the existing standards of the Open Government Partnership in order to strengthen public procurement and contracting transparency.

Recommendation for the European Commission:

- » Encourage all Member States to be active in involving civil society organisations in their work and also, if they are not already members, to join the Open Government Partnership. New and old members should include ambitious open procurement commitments within their National Action Plans.

ANNEX A

	HUNGARY	POLAND	ROMANIA	SPAIN
National Procurement Law	Act CXLIII of 2015 on Public Procurement.	Public Procurement Law Journal of Laws no. 2019.	Law no. 99/2016 on sectorial procurement. Law 100/2016 on works and services concessions. Law no. 101/2016 on remedies and appeals concerning the award of public procurement contracts, sectorial contracts and of works concession contracts and service concession contracts, and for the organization and functioning of the National Council for Solving Complaints.	Ley 9/2017, de 8 de noviembre, de Contratos del Sector Público.
Procurement data published in OCDS	No	No	No	No
Procurement data falling below the EU threshold – but above national thresholds- is published online	Yes	Yes	Yes	Yes

Procurement data falling below the national threshold is published online	No	Partially - No legal obligation to do so, but common practice to publish this data.	Partially	Partially - Legal obligation to do so, but only info published is the object, the company and the price.
Specify national threshold	Goods & services HUF 15 million (EUR 43k) construction HUF 50 million (EUR 143k)	The national procurement threshold is approx 29000 EUR (PLN 130,000)	National threshold below which contracts can be awarded directly – RON 135,060 (27,429 EUR) supply and services, and RON 450,200 (91,431 EUR) for works contracts.	EUR 40,000 for works contracts and less than EUR 15,000 in the case of supply or service contracts.
There is one central e-procurement portal where all procurement data should be published	No	Yes	Yes	No
Evaluation Committee Members are intentionally made known to the public	No	No	No	No
There is a public list of economic operators who have been	No	Yes	Yes	Yes

excluded from taking part in procurement				
There are mandatory and uniform exclusions for tenderers who distort competition (e.g. through bid rigging)	No	Yes	Yes	Yes
Application of exclusions are enforced by a separate independent authority (rather than being a discretionary measure to be applied by specific contracting authority)	No	No	Yes	Yes
There is an independent and specialised oversight institutions to monitor procurement	<p>Hungary has two bodies responsible for management and coordination of the public procurement system:</p> <p>1) Deputy State Secretariat of Procurement Supervision under the Ministry of the Prime Minister's Office - supervises and controls central procurements</p>	<p><u>The Public Procurement Office</u> is an independent unit within the Polish government</p>	<p><u>The National Agency for Public Procurement (ANAP)</u> is subordinated to the General Secretariat of the Government</p>	<p><u>The Independent Office for the Regulation and Supervision of Contracts</u></p>

	<p>and procurements funded from EU funds.</p> <p>2) The Public Procurement Authority (PPA) is an autonomous body responsible for publishing the Public Procurement bulletin, conducting inspections and operating a repository of public procurement contracts</p>			
<p>The independent oversight body has sanctioning powers</p>	<p>Yes</p> <p>Within the PPA is the Public Procurement Arbitration Board that formally operates independently. It has sanctioning powers. Their reports are public.</p>	Yes	Yes	No
<p>The independent oversight body makes monitoring reports public</p>	<p>Some</p> <p>The PPA operates a Council, which decides on public procurement policy and evaluates the public procurement system (their reports are public).</p>	Yes	Yes	Yes
<p>When a contract contains "confidential"</p>	<p>Yes, according to the law, but not always implemented in practice</p>	Yes (but it is not obligatory to publish the contract)	Yes	Yes, according to the law, but not always implemented in practice

information, that information is blanked out and the rest of the contract is published				
Member of the Open Government Partnership	No	No	Yes	Yes
Has included open procurement commitments within their National Action Plans	N/A	N/A	Yes	Yes