



TENDERS.GURU

# PROCUREMENT RECOMMENDATIONS TO THE OECD

## 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/>



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## INTRODUCTION

With public procurement representing 13% of GDP in OECD countries and 1/3 of overall government expenditures, procurement is an important corruption risk. The OECD recognises that procurement remains largely bureaucratic, inefficient and highly vulnerable to corruption.<sup>1</sup> In its Recommendation on Public Integrity, the OECD highlighted that corruption was reported as the number one concern by citizens, causing more concern than globalisation or migration, and that 10-30% of the investment in a publicly funded construction may be lost due to mismanagement and corruption.<sup>2</sup>

In order to tackle corruption within public procurement, there is a resounding consensus at the international level that more transparency is needed. 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.<sup>3</sup> This is echoed by the **Council of Europe** stating that the key principle for reducing the risks of corruption is maximum transparency in all stages of the procurement cycle,<sup>4</sup> and **GRECO** affirming that greater transparency is key to preventing corruption in public procurement.<sup>5</sup>

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, with the **UN FACTI Panel** recommending that all countries strengthen public procurement and contracting transparency, including transparency of emergency measures taken to respond to the COVID-19 pandemic.<sup>6</sup>

At the EU level, the **European Commission** has recognised that better and more accessible data on procurement should be made available.<sup>7</sup> 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 to be between €3.6-6.3 billion per year.<sup>8</sup> Tenders Guru has carried out an analysis on the current EU procurement rules and subsequent transparency levels demanded in practice procurement at national level.

Various structural problems have been identified, including:

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<sup>1</sup> OECD, 'Recommendation of the Council on Public Integrity' (2017)

<sup>2</sup> OECD, 'Recommendation of the Council on Public Integrity' (2017)

<sup>3</sup> OECD, 'Recommendation of the Council on Public Procurement' (2015)

<sup>4</sup> Council of Europe, 'Making public procurement transparent at local and regional levels' Governance Committee (October 2017)

<sup>5</sup> GRECO, 'Corruption Risks and Useful Legal References in the context of COVID-19' (2020)

<sup>6</sup> Report of the High Level Panel on International Financial Accountability, Transparency and Integrity for Achieving the 2030 Agenda

<sup>7</sup> 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

<sup>8</sup> 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/>>

- » 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 the **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.<sup>9</sup>

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,<sup>10</sup> or offering large contracts to companies without experience in health-care in Slovenia,<sup>11</sup> middle men profiting over the sale of ineffective PPE in Romania,<sup>12</sup> or a company unknown in the medicine retail industry importing vaccines in Hungary.<sup>13</sup> From this it can be seen that not only is procurement and company ownership data lacking across the EU, but the data that is there is **not being combined and utilised effectively**.<sup>14</sup>

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<sup>9</sup> Adriana Homolova and Dada Lyndell, 'Europe's COVID-19 Spending Spree Unmasked' (2020) <<https://www.occrp.org/en/coronavirus/europes-covid-19-spending-spree-unmasked>>

<sup>10</sup> 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>>

<sup>11</sup> 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>>

<sup>12</sup> 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>

<sup>13</sup> 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/>>

<sup>14</sup> Ivana Rossi 'International Monetary Fund Annual Meetings 2020' (November 2020) <[Facebook Watch](#)>

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.<sup>15</sup> 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 procurement in order to combat corruption.

As a result of its findings, the Tenders Guru Consortium has come up with recommendations aimed at the OECD on how to improve transparency and avoid corruption within procurement. The Tenders Guru recommendations are in line with, and complement, the OECD Recommendation on Public Procurement (composed of 12 integrated principles: Transparency, Integrity, Access, Balance, Participation, Efficiency, E-procurement, Capacity, Evaluation, Risk Management, Accountability, and Integration).

The Tenders Guru Consortium invites the OECD to push for the implementation of its recommendations within its Member Countries to increase transparency and tackle corruption within procurement.

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<sup>15</sup> European Commission 'Recovery and Resilience Facility' <[https://ec.europa.eu/info/business-economy-euro/recovery-coronavirus/recovery-and-resilience-facility\\_en](https://ec.europa.eu/info/business-economy-euro/recovery-coronavirus/recovery-and-resilience-facility_en)>

# TENDERS GURU RECOMMENDATIONS TO THE OECD

## 1. ACCESS: OECD wide implementation of Open Contracting Data Standard

*Findings:* Under the principle of **Access** within the OECD Recommendation on Public Procurement, the need for having standardised documentation is recognised. It is stated that “complex public procurement rules and the use of non-standardised bidding documents impede broad participation from potential competitors, including new entrants and SMEs.”<sup>16</sup>

There is still no official, international or European standard format in which 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 from country to country, leading to varied formats, different templates, and gaps in data sets, which creates barriers for data analysis and reuse.<sup>17</sup>

Each member organisation of the Tenders Guru Consortium carried out an analysis of the format of procurement data available in their country. It was found that Hungary, Poland, Romania, and Spain all have concerns relating to data availability and format.<sup>18</sup> This is a recurring issue throughout the EU, which was emphasised by the pandemic.

In order to ensure timely, complete and uniform open format in publication of procurement information, the Open Contracting Data Standard (OCDS) should be used. OCDS is an open data standard for publication of structured information on all stages of a contracting process: from planning to implementation. Publication that is fully compliant with the OCDS 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.

At present, none of the Tenders Guru Consortium countries are publishing their procurement data using OCDS, and only eight (8) out of the 37 OECD countries are doing so, these being Australia, Canada, Chile, Colombia, France, Mexico, Portugal, and the UK.

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<sup>16</sup> OECD, 'Public Procurement Toolbox' <<https://www.oecd.org/governance/procurement/toolbox/principlestools/access/>>

<sup>17</sup> Tenders Guru, 'National Procurement Recommendations: Hungary, Poland, Romania and Spain' (June 2021)

<sup>18</sup> Tenders Guru, 'National Procurement Recommendations: Hungary, Poland, Romania and Spain' (June 2021)

**Recommendations to the OECD:**

In order to ensure that data is published in accessible formats, the OECD should:

- » Recommend that all Member Countries publish their public procurement data using the OCDS to ensure the release of uniform, timely, publically accessible information across the entire cycle of the procurement process - from planning to tender to award to implementation of contracts;
- » Provide guidance and encouragement to Member Countries to publish procurement data using the OCDS, pending regulatory revisions.

## 2. TRANSPARENCY: More transparency on below-the-threshold procurement

**Findings:** Under the principle of **Transparency** within the OECD Recommendation on Public Procurement, the importance of having an adequate degree of transparency in all stages of the procurement is recognised, in order to ensure visibility of the flow of funds.<sup>19</sup> It specifies that the risks of lack of transparency include fraud, corruption, distortion of competition and subsequent lack of public confidence in the government.<sup>20</sup>

The EU Directive 2014/24 on Public Procurement states that procurement over a certain monetary threshold, 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. Yet, in practice, 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 remains non-transparent. This causes an incentive for the artificial splitting of contracts, where one large contract is split into several smaller contracts, falling just below the threshold and therefore 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, this was flagged as a problem in Poland and Spain, causing a significant part of public spending remains 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

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<sup>19</sup> OECD, 'Recommendation of the Council on Public Procurement' (2015)

<sup>20</sup> OECD, 'Public Procurement Toolbox' <<https://www.oecd.org/governance/procurement/toolbox/principlestools/transparency/>>



contracts for goods, 3,793 service contracts and 856 works contracts, together amounting 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.<sup>21</sup>

### ***Recommendations to the OECD:***

In order to ensure that Member Countries achieve sufficient levels of transparency, including of below-the-threshold procurements, the OECD should:

- » Recommend more transparency and increased levels of proactive publication of procurement data throughout the procurement processes.
- » Work with Member Countries to identify and agree upon best-practice publication measures.

## 3. TRANSPARENCY: Open by default

***Findings:*** Under the principle of **Transparency**, the OECD calls for an adequate and timely degree of transparency in each phase of the public procurement cycle, while taking into account the legitimate needs for protection of trade secrets and proprietary information and other privacy concerns, as well as the need to avoid information that can be used by interested suppliers to distort competition in the procurement process.<sup>22</sup>

At EU level, 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.

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<sup>21</sup> 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/>>

<sup>22</sup> OECD, ‘Recommendation of the Council on Public Procurement’ (2015)

It was found through Tenders Guru analysis, that while national laws 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 sufficient examples of confidential information being used as an excuse to withhold entire contracts that it is a matter of concern. With Poland, while the law does state that confidential information should be redacted and the rest of the contract published, it is not a legal obligation to publish contracts in the first place.<sup>23</sup>

### ***Recommendation to the OECD:***

In order to ensure that information is not withheld on spurious grounds of confidentiality, the OECD should:

- » Encourage Member Countries to implement an open-by-default procurement system and issue guidance on what is considered to be confidential and comparative examples of best practices.

## **4. E-PROCUREMENT: Centralised, interoperable procurement portals**

**Findings:** Under the principle of **E-procurement** the OECD recommends that Member Countries employ recent digital technology developments that allow integrated e-procurement solutions covering the public procurement cycle.<sup>24</sup>

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. In Hungary and Spain, on the other hand, rather than having all procurement information in one central procurement portal, procurement data is spread across multiple platforms. In fact, procurement information in Spain is heavily fragmented across tens of portals at different levels (national, regional, local).<sup>25</sup> This fragmentation of data makes monitoring public spending extremely difficult.

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<sup>23</sup> Tenders Guru, 'National Procurement Recommendations: Hungary, Poland, Romania and Spain' (June 2021)

<sup>24</sup> OECD, 'Public Procurement Toolbox' <<https://www.oecd.org/governance/procurement/toolbox/principlestools/e-procurement/>>

<sup>25</sup> Tenders Guru, 'National Procurement Recommendations: Hungary, Poland, Romania and Spain' (June 2021)

**Recommendations to the OECD:**

In order to ensure that public procurement data is easily findable, the OECD should:

- » Encourage Member Countries to ensure that all public procurement data is available via one national, central e-procurement portal or database;
- » Recommend that this central portal is interoperable with other public administration databases including company registers and beneficial ownership registries.

## 5. INTEGRITY: Proactive transparency of Evaluation Committee members as a procurement specific safeguard against corruption

**Findings:** Under the principle of **Integrity** the OECD recommends that Member Countries preserve the integrity of the public procurement system through general standards and procurement-specific safeguards.<sup>26</sup>

The European Commission has identified conflicts of interest within the selection, evaluation, and award stage as one of the most common errors in public procurement,<sup>27</sup> and recommends that contracting authorities require that all members of the evaluation committee sign a declaration of absence of conflicts of interest and of confidentiality, and that contracting authorities should have “guidelines or protocols to deal with conflicts of interest, in particular concerning members of evaluation committees.”<sup>28</sup> The Commission does not, however, recommend that the names of the evaluation committee members be made public.

If the names of evaluation committee members were to be public, then civil society watchdogs 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. Our research found that, in Hungary, Poland, Romania, and Spain, the names of Evaluation Committee Members are not made known to the public through proactive publication.

The disclosure of the members of the evaluation committee is indeed a procurement-specific safeguard, one that has been previously welcomed by the EU Ombudsman, stating that it would

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<sup>26</sup> OECD, ‘Recommendation of the Council on Public Procurement’ (2015)

<sup>27</sup> European Commission, “Public Procurement Guidance For Practitioners” (February 2018)

<sup>28</sup> European Commission, “Public Procurement Guidance For Practitioners” (February 2018) 93

constitute good administrative practice and that such disclosure at the conclusion of the evaluation process should be considered a condition of appointment.<sup>29</sup>

***Recommendation to the OECD:***

In order to ensure that measures are in place to avoid conflicts of interest, the OECD should:

- » Encourage Member Countries to further the transparency of the evaluation of tenders by making Evaluation Committee Members proactively known to the public.

## 6. INTEGRITY: Transparent Company Ownership data that is interoperable with procurement data

***Findings:*** Under the principle of **Integrity**, the OECD calls on Member States to develop requirements for internal controls, compliance measures and anti-corruption programmes for suppliers, including appropriate monitoring.<sup>30</sup>

In order to ensure that public procurement contracts are being awarded to appropriate, non-fraudulent suppliers, proper due diligence must be carried out on economic operators involved in the procurement process. To facilitate this, OECD Member Countries should make company ownership information transparent.

Significant progress has been made at the international level to address the problems caused by lack of transparency of beneficial ownership. At the EU level, the Directive 2018/843 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (the IV Anti-Money Laundering Directive) mandates that Member States should have established publically available, centralised beneficial ownership registers for companies by 10 January 2020. All national registers within the EU are to be interconnected to facilitate the exchange of information, and have information verification mechanisms to improve the accuracy and reliability of information. Yet implementation on the national level is lagging behind. While the Anti-Money Laundering Directive attempts to create unanimity across the EU with respect to beneficial

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<sup>29</sup> 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>

<sup>30</sup> OECD, 'Public Procurement Toolbox' <<https://www.oecd.org/governance/procurement/toolbox/principlestools/integrity/>>

ownership registers, substantial differences between Member States remain in the extent of public access and the reliability of information available.<sup>31</sup>

A recent report by Transparency International stated that the reasons for the slow and uneven uptake of beneficial ownership registers vary from powerful lobbying by concerned businesses to the lack of political will and the absence of technical capacity.<sup>32</sup> In addition, even when the Anti-Money Laundering Directive has been transposed, it does not guarantee that data within beneficial ownership registers will be accurate or complete. The OpenLux investigation found that 80% of investment funds in Luxembourg did not declare their beneficial owners. In addition, 15% of funds gave conflicting information to different revenue authorities.<sup>33</sup>

Directive 2019/1024 on Open Data and the Re-use of Public Sector Information (the Open Data Directive) has also included companies and company ownership information as high-value datasets. This means that company ownership information will be made available for re-use in machine-readable format, via suitable APIs and, where relevant, as a bulk download. At time of writing (June 2021), decisions are being made as to precisely which level of disclosure of company ownership data the Open Data Directive will require. The Impact Assessment carried out by consultancy firms on behalf of the Commission found that the benefits of opening up company ownership data across the EU outweighs the cost of implementation. Despite this, due to cost concerns of a few countries, the Impact Assessment recommended a low intensity publication option, omitting personal data and insolvency information from being published as open data under the company and company ownership high value dataset.<sup>34</sup>

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

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<sup>31</sup> U4 Helpdesk, 'Beneficial ownership registers: Progress to date' (2020) <<https://www.u4.no/publications/beneficial-ownership-registers-progress-to-date>>

<sup>32</sup> U4 Helpdesk, 'Beneficial ownership registers: Progress to date' (2020) <https://www.u4.no/publications/beneficial-ownership-registers-progress-to-date>

<sup>33</sup> Josh White, 'OpenLux shows failures of beneficial ownership registers' (2021)

<https://www.internationaltaxreview.com/article/b1qgsdrgsnh0fx/openlux-shows-failures-of-beneficial-ownership-registers>

<sup>34</sup> 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)

and readily-accessible company ownership information in order to carry out proper due diligence on potential fraudulent or false companies.<sup>35</sup>

### ***Recommendations to the OECD:***

To ensure effective transparency of beneficial and company ownership across the OECD, Member Countries should be encouraged to:

- » comply fully with international initiatives to promote transparency of ownership data;
- » establish centralised, publicly accessible beneficial ownership and company ownership registers for companies as soon as possible.

## 7. ACCOUNTABILITY: Public Exclusion Lists

***Findings:*** Under the principle of **Accountability**, the OECD calls on Member Countries to develop a system of effective and enforceable sanctions for government and private-sector procurement participants, in proportion to the degree of wrong-doing to provide adequate deterrence without creating undue fear of consequences or risk aversion in the procurement workforce or supplier community.<sup>36</sup>

The Tenders Guru analysis found that under EU rules the distortion of competition through tactics such as bid rigging is a discretionary exclusion, therefore 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 which 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.<sup>37</sup>

The European Commission has its own Early Detection and Exclusion System (EDES) which provides a list of economic operators that have been excluded from participation in EU procurement, and or have been imposed a financial penalty. Therefore, they cannot be awarded any contract financed

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<sup>35</sup> 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>>

<sup>36</sup> OECD, 'Recommendation of the Council on Public Procurement' (2015)

<sup>37</sup> Sanchez, 'Public Procurement and Competition: Some Challenges Arising from Recent Developments in EU Public Procurement Law'

by the EU budget.<sup>38</sup> Among the Tenders Guru Consortium countries, there are differing systems concerning exclusions. Romania is an example of good practice, where distortion of competition is a mandatory exclusion that is enforced by a separate body, not being a discretionary measure for contracting authorities. 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 to the OECD:***

In order to ensure that companies which have violated the rules in the past are not able to evade sanctions imposed and are excluded from bidding during a set time period, the OECD should:

- » Encourage Member Countries to enforce mandatory and uniform exclusions of tenderers who distort competition through practices such as bid rigging;
- » Recommend 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;
- » Call on Member Countries to follow the example of the European Commission and make the exclusion list public;
- » Recommend that public exclusion lists are interoperable with company ownership registers.

## **8. ACCOUNTABILITY: Independent and specialised oversight institutions to monitor procurement**

**Findings:** Under the principle of **Accountability**, the OECD calls for Member Countries to establish clear lines for oversight of the public procurement cycle, and to ensure that internal controls (including financial controls, internal audit and management controls), and external controls and audits are coordinated, sufficiently resourced and integrated.<sup>39</sup>

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<sup>38</sup> 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](https://ec.europa.eu/info/strategy/eu-budget/how-it-works/annual-lifecycle/implementation/anti-fraud-measures/edes_en)>

<sup>39</sup> OECD, 'Recommendation of the Council on Public Procurement' (2015)

Under EU rules, a wide discretion is given to Member States in how monitoring is carried out and by who, with recital 121 of the Directive 2014/24 on public procurement stating that “Member States should remain free to decide how and by whom this monitoring should be carried out in practice”.

From the Tenders Guru analysis, we can see that all four countries 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.<sup>40</sup>

### ***Recommendations to the OECD:***

In order to ensure proper oversight of integrity in procurement, the OECD should:

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

## 9. PARTICIPATION: Open Government Partnership Action Plans

**Findings:** Under the principle of **Participation**, the OECD recommends Member Countries to foster transparent and effective stakeholder participation. It recognises that transparency and openness, while a necessary condition, is not sufficient to ensure public participation (civil society needs specific communication and proper incentives, including trained manpower and sufficient budget to participate in procurement monitoring for instance).<sup>41</sup>

OECD Member Countries should actively involve civil society within the procurement process. One way to push this, is for countries to become members of the Open Government Partnership (OGP) and include open contracting initiatives in their action plans.

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<sup>40</sup> Tenders Guru, 'National Procurement Recommendations: Hungary, Poland, Romania, and Spain' (June 2021)

<sup>41</sup> OECD, 'Public Procurement Toolbox' <<https://www.oecd.org/governance/procurement/toolbox/principlestools/participation/>>



The 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 2011, OGP now has 78 country members and has a growing number of local members that work alongside thousands of civil society organisations. In the OECD region, 27 of 37 Member Countries are part of OGP. The following OECD Member Countries are not part of the Open Government Partnership: Austria, Belgium, Hungary, Iceland, Japan, Korea, Poland, Slovenia, Switzerland and Turkey.

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 to the OECD:***

In order to ensure sufficient civil society participation, the OECD is urged to:

- » encourage all Member Countries 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 of OGP, should include ambitious open procurement commitments within their National Action Plans.

## **10. RISK MANAGEMENT: Strong Whistleblowing Protection**

**Findings:** The OECD has recognised the importance of **Risk Management** within procurement and has recommended Member Countries to publicise risk management strategies, such as whistleblower programmes, and raise awareness and knowledge of the procurement workforce and other stakeholders about the risk management strategies, their implementation plans and measures set up to deal with the identified risks.<sup>42</sup>

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<sup>42</sup> OECD, 'Recommendation of the Council on Public Procurement' (2015)

People who work within the procurement sector are more likely to pick up on corruption, rather than it being detected through anti-corruption control mechanisms. Through their close contact with the procurement system, they can effectively contribute to the detection of unlawful procedures in public procurement by disclosing information that may not be readily available or evident. Therefore, their protection contributes to the fight against corruption.<sup>43</sup>

The European Commission has recognised that enabling the reporting of corruption by setting up effective reporting mechanisms and protecting whistleblowers against retaliation can also contribute to improving the transparency of public procurement and saving public money.<sup>44</sup> In public procurement the link between costs and benefits in terms of public funds is arguably closer and more direct than in other areas. For the EU as a whole, the potential benefits of effective whistleblower protection are in the range of €5.8 to 9.6 billion each year in the area of public procurement exclusively.<sup>45</sup>

Tenders Guru has published a Guide on the EU Directive on Whistleblower Protection, which is based on the main principles of the Whistleblowing Directive. As well as laying out the common minimum standards for a national whistleblowing law, there are recommendations on how national laws can extend the level of protection to close loopholes and ensure comprehensive protection for anyone who exposes corruption or other wrongdoing.<sup>46</sup>

### ***Recommendations to OECD:***

In order to ensure effective whistleblower protection, the OECD should encourage all Member Countries to:

- » Go beyond the Directive to ensure the implementation of strong national whistleblowing laws, creating effective whistleblower reporting channels and subsequent protection, especially in the area of public procurement, in all Member Countries (EU Member States and non-EU countries alike);
- » Issue guidance for both employers on how to set up the systems, and to employees on knowing who they can report to and what protection they can avail of as whistleblowers.

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<sup>43</sup> Milieu Ltd, 'Estimating the Economic Benefits of whistleblower Protection in public procurement' (2017)

<sup>44</sup> 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

<sup>45</sup> Milieu Ltd, 'Estimating the Economic Benefits of whistleblower Protection in public procurement' (2017)

<sup>46</sup> Tenders Guru, 'Guide to EU Directive on Whistleblower Protection: Key Elements relevant to Public Procurement' <https://tenders.guru/publications/whistleblower-protection>