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Opinion of the European Economic and Social Committee on Corruption in public procurement and its impact on the internal market

(own-initiative opinion)

(C/2024/2095)

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1. Conclusions and recommendations

1.1. The successive crises which have hit the planet since 2020 have led to an increase in public authority intervention in the economy at both national and European level, and consequently to an increase in public investments intended to protect European common goods (such as health, safety, the environment, climate and peace). European and national financial resources are important instruments to guarantee Europe's prosperity and competitiveness and result from taxation on European citizens. Therefore, they must not be used for private and illicit interests; this also applies to money spent on public procurement.

1.2. The EU has taken a major step forward by linking rule of law protection, including effective anti-corruption efforts, to the imperative of protecting its financial interests. This approach needs to be further developed because breaches of the rule of law do not only affect the EU's financial interests; they also have an impact on the core policies governing the single market. The 3 May 2023 Anti-Corruption Package, which addresses corruption across the board and not only in relation to EU funds, should be reinforced.

1.3. Corruption is considered a serious crime with a cross-border dimension, as defined by Article 83(1) TFEU. In order to ensure a minimum level of coordination and harmonisation in the legal and institutional practices of the Member States, the EESC considers that the European Parliament and the Council should adopt the Commission's proposal for a directive on the matter as soon as possible during this parliamentary term.

1.4. The European Economic and Social Committee (EESC) considers that the Commission must reinstate the EU Anti-Corruption Report: this was instituted by the communication on Fighting Corruption in the EU in 2011, but discontinued after the first report in 2014. The report could be used to shine a spotlight on and integrate various dimensions of the fight against corruption that are currently given too little or no attention by the rule of law framework.

1.5. There should be a focus on public procurement, with all its complexity and consequences. The EU must prioritise evaluating the legislative framework on the integrity of public procurement and its implementation in practice in order to verify whether this framework is consistent with the needs of the fight against corruption. This will enable the Commission to decide whether and how to exercise its right of initiative.

1.6. The EESC considers that the regulatory framework established by the directives on this subject is still valid and appropriate and does not need to be reviewed. What is necessary however is a focus on redirecting the regulatory framework to the new values underpinning the EU's social, economic and environmental strategy.

1.7. Recognising the EU's significant responsibility to fight corruption worldwide, the EESC supports the European Parliament proposal asking the Commission to prepare an EU global anti-corruption strategy, addressing corruption as a global phenomenon requiring effective anti-corruption institutions, prevention mechanisms and an international regulatory framework, as well as asset recovery and criminal prosecution within the EU.

1.8. Corrupt practices can offer political actors illegal gains and resources to campaign and maintain their clientelism-based support system, destroying the level playing field. Foreign actors can use illegal financing to support various political movements and candidates, giving them unfair advantages and compromising electoral integrity and pluralism in the process. In this respect, efforts to fight corruption should be better aligned with efforts to safeguard and develop democracy in the EU, which currently come under the umbrella of the EU Democracy Action Plan.

1.9. The EESC believes that the Commission could adopt a communication confirming the 2014 directives on public procurement. The Commission could take this opportunity to enhance a number of procedures and tools envisaged by those directives which have not yet been developed, confirm the six strategic priorities listed in 2017 and gear them to sustainability.

1.10. The European public procurement market should have been digitised years ago, as digitisation is an instrument of knowledge, transparency, speed and integrity of the entire lifecycle of public procurement. It is therefore essential that the Commission keep providing national authorities with technical support throughout this difficult process.

1.11. The Commission could assign greater importance to the integrity pacts, especially after the EUCJ has ascertained the compatibility between them and the European legislation on public procurement.

1.12. The cross-debarment system (between European authorities/national institutions/private banks) could be useful for protecting the internal market from misuse of public resources allocated to tenders, regardless of whether those resources are European or national.

1.13. The EESC encourages the European Commission and other EU and national institutions to consider worker representation, collective bargaining and social dialogue as key instruments to make anti-corruption effective at all levels.

1.14. The EESC encourages all businesses / employers' associations and social partners to actively pursue an integrity culture and adhere to the best standards available at national and international levels; examples would be EN 17687:2022 on Public procurement — Integrity and accountability — Requirements and guidance, ISO 37001 (Anti-bribery management systems), and those stemming from the development of the Environmental, social, and governance (ESG) investments.

1.15. As public procurement is decentralised in all the Member States, instruments must be developed to support the integrity of the procurement procedure at regional and local levels. The Committee of the Regions can provide the proper insight into pursuing this objective.

1.16. The EESC looks forward to the institutionalisation and development of the EU network against corruption and is willing to participate in its work. The EESC encourages the European Commission to make available funding for public awareness campaigns on corruption and encourage good practices on socially responsible public procurement (SRPP).

2. Context

2.1. The Commission recently came to the same conclusion that 'Every year in the EU, over 250 000 public authorities spend around EUR 2 trillion (around 13,6 % of GDP) on the purchase of services, works and supplies' ⁽¹⁾.

2.2. The injection of a vast amount of financial resources into the public procurement market attracts **crime** (organised and otherwise) and is also a challenge for public administrations called upon to organise urgent procedures in extraordinary, emergency situations. The Commission has declared that 'No sector or area of activity is safe from **corruption risks**, but common high-risk areas deserve particular attention — usually those involving management of significant **public funds**' ⁽²⁾. According to some estimates, the total cost of corruption risk in public procurement contracts involving EU funds in the EU-27 between 2016 and 2021 is estimated to be EUR 4.3 billion ⁽³⁾.

⁽¹⁾ OJ C 98 I, 16.3.2023, p. 1.

⁽²⁾ COM(2023) 800 final, p. 16 and p. 18.

⁽³⁾ European Parliament, Stepping up the EU's efforts to tackle corruption. Cost of Non-Europe Report, 2023, p. 2.

2.3. The EESC acknowledges the significant progress made in terms of fighting corruption in the EU and the Member States. Including anti-corruption efforts in work to safeguard the rule of law and drafting the *Rule of Law Report* both align anti-corruption efforts with other key aspects of democratic, trusted and effective governance (Article 2 TEU). As stated by the Commission, 'The fight against corruption is essential to maintain the rule of law and preserve citizens' and companies' trust in public institutions. A comprehensive approach to fighting corruption must rely on a combination of preventive and punitive measures' ⁽⁴⁾.

2.4. The EUCJ stated that Article 2 TEU 'is not merely a statement of policy guidelines or intentions, but contains values which (...) are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing legally binding obligations for the Member States' ⁽⁵⁾. These values must therefore permeate the common policies and behaviour of public authorities and economic players involved in the internal market ⁽⁶⁾.

2.5. The EU has taken a major step forward by linking rule of law protection, including effective anti-corruption efforts, to the imperative of protecting its financial interests. In the event of major breaches of the principles of the rule of law, the EU can take action against a Member State, such as suspending payments and commitments, suspending the disbursement of instalments or the early repayment of loans, reducing funding under existing commitments, and banning any new commitments with recipients or new agreements on loans or other instruments guaranteed by the EU budget ⁽⁷⁾.

2.6. The European Commission, following the 3 May 2023 Anti-Corruption Package, has also instituted the EU network against corruption. The network is intended to be an umbrella forum where all stakeholders in the EU can exchange good practices, opportunities, ideas and plans for further work. It is inclusive, including independent civil society organisations, based on the strong belief that sharing different perspectives produces better results and a more effective anti-corruption policy ⁽⁸⁾.

3. General comments

3.1. However, this approach needs to be taken further. The current procedural provisions of the Rule of Law Conditionality regulation ⁽⁹⁾ limit its scope. Currently, only one Member State is subject to the measures laid down by it. Given the high threshold for triggering this instrument, it cannot function as an incentive for all the Member States to fight corruption. Other limitations are also built into the instrument. Breaches of the rule of law do not only affect the EU's financial interests; they also have an impact on the core policies governing the single market, again limiting the aforementioned regulation's scope.

3.2. With regard to the fight against corruption in the EU, corruption is considered a serious crime, as defined in Article 83(1) TFEU. There are many aspects to prevention and repression, defying a single categorisation in terms of Union competences, Treaty base, policy sectors and instruments. The EESC emphasises the need to do more to integrate various dimensions of the fight against corruption in order to make that fight more effective across all levels of governance across the EU. There are several ways of tackling this.

3.3. Firstly, the EESC considers that the European legislative framework is fragmented, with the rules aimed at combating corruption (such as those on organised crime and laundering of the proceeds of crime) scattered across various unconnected instruments, including in the field of public procurement (see point 3.6) ⁽¹⁰⁾. Moreover, an attempt is being made to remedy this situation with the Commission's regulatory initiative of 3 May 2023 ⁽¹¹⁾. The EESC considers that the European Parliament and the Council should adopt the Commission's proposal for a directive as soon as possible, during this parliamentary term: the directive stipulates a common definition and framework to combat corruption at EU and Member State level. This is the most important step in ensuring a minimum level of coordination and harmonisation in the legal and institutional practices of the Member States.

⁽⁴⁾ COM(2023) 800 final, paragraph 2.2.

⁽⁵⁾ EUCJ judgments, cases C-156/21, paragraph 232 and C-157/21, paragraph 264.

⁽⁶⁾ Pitruzzella, *L'integrazione tramite il valore dello 'Stato di diritto'*, www.federalismi.it, No. 27/2022.

⁽⁷⁾ OJ L 433 I, 22.12.2020.

⁽⁸⁾ EU network against corruption.

⁽⁹⁾ OJ L 433 I, 22.12.2020, p. 1.

⁽¹⁰⁾ Gaglio et al., *Strengthening the fight against corruption; assessing the EU legislative and policy framework*, 2023.

⁽¹¹⁾ See the directive's proposal on combating corruption, etc., COM(2023) 234 final, and the communication quoted in footnote 2.

3.4. Secondly, the EESC considers that the EU should not see corruption as primarily or exclusively relevant when EU funds are involved. Having direct competence and instruments to combat corruption related to EU funds does not mean that this is the only type of corruption which exists and needs to be addressed. Corruption directly affects individuals, businesses and communities which are not themselves receiving EU funding. Member States could end up effectively operating a two-tier system where EU projects and funding are on average less prone to be targeted by corrupt interests and practices than national ones, for which there is less transparency and monitoring. The 3 May 2023 Anti-Corruption Package, which addresses corruption across the board and not only in relation to EU funds, should be reinforced.

3.5. Thirdly, the EESC considers that the Commission must reinstate the EU Anti-corruption Report: this was instituted by the Communication on *Fighting Corruption in the EU in 2011* ⁽¹²⁾, but discontinued after the first report in 2014 ⁽¹³⁾. The report was a comprehensive analysis of the state of play of legislation, policies and data regarding corruption, with 28 Member State sections. The report could be used to shine a spotlight on and integrate various dimensions of the fight against corruption that are currently given too little or no attention by the rule of law framework. It should streamline various strands of policy and legislation to ensure coherence and effectiveness, including both rule of law aspects and economic and internal market ones.

Fourthly, there should be a focus on public procurement, with all its complexity and consequences. The EU must prioritise verifying the adequacy of the legislative and regulatory framework on the integrity of public procurement and its implementation in practice in order to verify whether this framework is consistent with the needs of the fight against corruption. This will enable the Commission to decide whether and how to exercise its right of initiative. The regulatory framework for the fight against corruption in the public procurement market currently consists of the three directives approved in 2014 ⁽¹⁴⁾.

3.5.1. The notion of corruption accepted by the EU legal system is **very broad** and goes beyond the criminal sphere to include conduct that undermines integrity, transparency, ethical responsibility and good management of public affairs. This flows from the established practice of the Commission ⁽¹⁵⁾, confirmed by the Joint Anticorruption Communication ⁽¹⁶⁾: corruption is qualified as ‘the abuse of entrusted power for private gain’.

3.5.2. Finally on this topic, the EESC considers that the regulatory framework established by the directives on this subject is still valid and appropriate and does not need to be reviewed. What is necessary however is a focus on redirecting the regulatory framework to the new values underpinning the EU’s social, economic and environmental strategy, highlighting the links among the Commission’s ongoing legislative initiatives implementing green, social and environmental objectives (see point 4.1). Once again, the EESC would argue that ‘an economic transition from a model driven by growth to one predicated on sustainability is inevitable’ ⁽¹⁷⁾. Moreover, a generalised sustainability is also the cornerstone of the strategy of the three European legislative institutions ⁽¹⁸⁾.

3.6. Fifthly, the EESC would flag up the corrosive effect of corruption on public trust, the legitimacy of representative government and democracy. Corruption does not only affect economic development and public service provision: it strikes at the heart of democratic systems. In this respect, efforts to fight corruption should be better aligned with efforts to safeguard and develop democracy in the EU, which currently come under the umbrella of the EU Democracy Action Plan.

3.7. Lastly, the EESC observes that the EU also has a significant responsibility to fight corruption worldwide, stemming from its founding values and Treaties but also its economic and political interest in global affairs and development. It is no coincidence that strict rules governing the way in which contracts are awarded have been established by the European Commission, to ensure that suitably qualified contractors are chosen without bias and that the best value for money is

⁽¹²⁾ COM(2011) 308 final, 6.6.2011.

⁽¹³⁾ COM(2014) 38 final, 3.2.2014.

⁽¹⁴⁾ EU Directives 2014/23/EU (OJ L 94, 28.3.2014, p. 1), 2014/24/EU (OJ L 94, 28.3.2014, p. 65) and 2014/25/EU (OJ L 94, 28.3.2014, p. 243).

⁽¹⁵⁾ COM(2003) 317, OJ C 89 E, 14.4.2004, p. 110.

⁽¹⁶⁾ JOIN(2023) 12 final.

⁽¹⁷⁾ OJ C 152, 6.4.2022, p. 7, pt. 1(1).

⁽¹⁸⁾ OJ C 491, 23.12.2022, p. 1.

obtained, with the full transparency appropriate to the use of public funds (PRAG ⁽¹⁹⁾). The EESC supports the European Parliament proposal asking the Commission to prepare an EU global anti-corruption strategy, addressing corruption as a global phenomenon requiring effective anti-corruption institutions, prevention mechanisms and an international regulatory framework, as well as asset recovery and criminal prosecution within the EU ⁽²⁰⁾.

4. Specific comments

4.1. The EESC believes that the Commission could adopt a communication confirming the 2014 directives on public procurement. The Commission could take this opportunity to enhance a number of procedures and tools envisaged by those directives which have not yet been developed, confirm the six strategic priorities listed in 2017 ⁽²¹⁾ and gear them to sustainability.

4.2. In the EESC's view, three issues need to be strengthened and improved ⁽²²⁾:

4.2.1. The Commission recognises the link between sustainability, the digital transition and public procurement. It is no coincidence that in its last communication on the future of the Union, the Commission declared that 'a successful and fair socio-economic transformation is not a given' ⁽²³⁾.

4.2.2. The European public procurement market should have been more advanced in digitisation ⁽²⁴⁾. Digitisation is an instrument of knowledge, transparency, speed and integrity of the entire lifecycle of public procurement: because of all these characteristics, digitisation is helpful in the fight against corruption. However, as the Commission observed, 'the digital transformation of public procurement is slow' ⁽²⁵⁾. It is therefore key to keep providing national authorities with technical support throughout this difficult process.

4.2.3. **Transparency is a crucial tool** for improving the integrity of the European public procurement market.

4.2.4. The Commission could assign greater importance to the integrity pacts, especially after the EUCJ has ascertained the compatibility between them and the European legislation on public procurement ⁽²⁶⁾. It would be useful to incorporate the findings of the pilot project into the application of these pacts ⁽²⁷⁾, doing away with some of the problems encountered ⁽²⁸⁾ by establishing a constructive and collaborative environment for both economic operators participating in the tender and the contracting authorities.

4.2.5. As noted by the OECD ⁽²⁹⁾, any violation of the integrity pact could lead to:

- a bidder being excluded from the bidding process;
- the awarded contract being cancelled if the winner was responsible;
- non-compliant bidders/contractors being barred from future participation in public procurement procedures.

4.2.6. The EU could draw inspiration from this practice and that of the World Bank in lending procedures. The World Bank has four potential responses to improper conduct by the economic operator:

- conditional cancellation of the loan ('debarment with conditional release');

⁽¹⁹⁾ Practical guide PRAG.

⁽²⁰⁾ European Parliament Recommendation on Corruption and Human Rights, 17.2.2022.

⁽²¹⁾ COM(2017) 572 final.

⁽²²⁾ In this regard, the EESC refers to its previous opinions: OJ C 13, 15.1.2016, p. 63, OJ C 318, 29.10.2011, p. 113, OJ C 191, 29.6.2012, p. 84.

⁽²³⁾ COM(2023) 376 final, 6.7.2023, pt. I and III.1-2.

⁽²⁴⁾ Article 33 ff. of Directive 2014/24/EC, cit.

⁽²⁵⁾ COM(2017) 572 final, p. 5.

⁽²⁶⁾ Judgment C-425/14, 22.10.2015.

⁽²⁷⁾ Project on Integrity Pacts — Civil Control Mechanism for Safeguarding EU Funds, Phase 2; for the results, see Aceves, *Safeguarding EU-Funded Investments with Integrity Pacts: a Decision-Maker's Guide to Collaborative Public Contracting Monitoring*, Transparency International, 26.3.2021.

⁽²⁸⁾ Such as recognising the effective political will of the public contracting authority to enter into an integrity pact and its ability to commit.

⁽²⁹⁾ OECD, *Catalysing Collective Action to Combat Corruption in Infrastructure*, 9.12.2022.

- the provision of an *integrity compliance program* to be started following the debarment measure with conditional release;
- permanent ban;
- cross-interdiction, the result of a rule applied by all international banks.

4.2.7. This practice could be applied by the EU with some precautions, primarily a guarantee of compliance with the principle of proportionality between the conduct of the economic operator and the consequences of their exclusion. To achieve this, clear, transparent and accessible rules must be devised and mitigating circumstances identified. The Commission could adopt a communication setting out guidelines on this matter.

4.2.8. The cross-debarment system (between European authorities/national institutions/private banks) could be useful for protecting the internal market from misuse of public resources allocated to tenders, regardless of whether those resources are European or national. Ultimately, this would target corrupt procurement even where EU financial resources are not involved (see point 2.1).

Brussels, 17 January 2024.

The President
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