Transparency International Anti-Corruption Helpdesk Answer

Foreign bidders in public procurement: corruption risks and mitigation strategies

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On the heels of a global push to open public procurement markets to foreign bidders and after several high-profile corruption cases involving multinational corporations and public procurement contracts, there is growing interest in the influence of foreign bidders in domestic public procurement processes. But so far, little research is available on the specific corruption risks that opening up public procurement markets may entail, or whether open or closed public procurement markets hold qualitatively or quantitatively different levels of risk.

This Helpdesk Answer provides an overview of the different approaches taken to allow foreign bidders to compete for domestic public procurement contracts, including explicit and implicit market access restrictions as well as efforts to open procurement to foreign firms via free trade agreements. It then considers various corruption risks that come with each approach, including conflicts of interest, nepotism, bribery and issues surrounding beneficial ownership transparency.

No specific mitigation measures have been put forward to explicitly tackle corruption risks related to the involvement of foreign bidders in public procurement processes. But some measures intended to reduce corruption in public procurement more broadly may also help contain corruption related to the involvement of foreign companies. This includes e-procurement, beneficial ownership registers, as well as broader transparency measures.

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Query

Please provide an overview of corruption risks related to the involvement of foreign bidders in public procurement processes, listing examples from Latin America where possible.

Caveat

Information regarding the extent of corruption in a given setting is notoriously hard to come by. As such, quantitative information regarding the degree of corruption when foreign bidders are involved in public procurement compared to when all bidders are domestic is scarce.

Similarly, there is little research available on whether the types of corruption differ qualitatively when procurement markets are open to foreign bidders as opposed to when they are only open to domestic firms.

Contents

Main points

- Recent decades have seen both a general push to liberalise public procurement markets as well as a rise in protectionism in some countries.
- Measures to restrict foreign bidders from public procurement (such as joint venture requirements) can give rise to significant corruption risks, including conflicts of interest and nepotism.
- Opaque corporate structures and inadequate beneficial ownership transparency increase corruption risks surrounding foreign bidders.
- Transparency (especially beneficial ownership transparency) and e-solutions are promising tools to reduce corruption risks in public procurement, both domestically and internationally.

Introduction

Public procurement constitutes a substantial share of most economies, developed and developing alike. In the EU, it makes up 14 per cent of GDP (European Commission 2019a) and about 13 per cent in the US (Carboni et al 2018), and it is estimated to generally make up between 15 to 30 per cent of GDP in many countries (UNODC 2013). It is also a crucial component of economic growth, development and public welfare, and plays a central role in the construction of public infrastructure (including energy and telecommunications) and the provision of public services such as health and education (Anderson et al. 2016).

However, public procurement processes are highly susceptible to corruption due to certain inherent characteristics, namely the volume of contracts and money involved, the complexity and political sensitivity of many public projects, the industries

involved, the close interaction between public and private sectors, and often high levels of discretion.

The Construction Sector Transparency Initiative (CoST) estimates that by 2030 US$6 trillion could be lost annually in the construction industry alone due to corruption, mismanagement and inefficiencies, with devastating effects on the environment, people's livelihoods and safety (Transparency International et al. 2017). According to Transparency International's calculation, around US$2 trillion may be disappearing from public procurement budgets annually (Transparency International 2014), and the UNODC estimated that corruption and fraud may amount to 20 to 25 pe cent of procurement budgets (UNODC 2013).

The nature of corruption risks in public procurement, their root causes and potential mitigation strategies to reduce these risks have been widely researched and documented (Heggstad & Frøystad 2011; OECD 2014a; OECD 2016; OECD 2007; Schoeberlein 2019; Søreide 2002; UNODC 2013; Wickberg 2013).

But against the background of a concerted push to open domestic public procurement processes to the global market, the increasingly important influence of foreign bidders is poorly understood. This is despite the fact, that according to the OECD (2007), international procurement may be particularly susceptible to corruption due to the size of contracts and the possibility to conceal bribes across borders.

This problem is compounded by increasingly complex corporate ownership structures, which can make it difficult to identify whether a firm qualifies as a domestic or foreign bidder.

Given how vulnerable to corruption procurement processes have been shown to be, and given the increasing internationalisation of public procurement, there is a need to better understand how the entry of foreign firms into procurement markets might bring increased risks, or how international firms might expose themselves to risks of corruption.

According to Transparency International (2020b) this risk may be compounded in the wake of the COVID-19 pandemic. Multinational companies may be more eager to win international contracts in the face of shrinking profits and governments may be less keen to enforce anti-bribery laws on economic grounds (Transparency International 2020b).

This Helpdesk Answer thus looks at the specific role of international bidders in domestic procurement processes and how their role has evolved in response to international and regional trends, particularly in the form of trade agreements. It then considers the specific corruption risks that are associated with the internationalisation of public procurement or attempts to restrict it, before looking at some potential mitigation efforts.

Background

Overview of corruption risk factors in public procurement

Bidding on, and winning, public procurement contracts is crucial for many companies, not least as the volume of the contracts is often large, both in terms of financial returns and project size. According to Transparency International (2018) an average of US$9.5 trillion is spent by governments annually on public procurement projects. Due to their size and political relevance, public procurement projects are highly important to a firm's commercial success and reputation.

But their desirability can also make these projects susceptible to corruption. Integrity risks are often exacerbated by tight timelines, project complexity, a close proximity between private and public entities and high levels of discretion (Heggstad & Frøystad 2011; OECD 2016; Søreide 2002; UNODC 2013). Additionally, despite an increasing

acknowledgement that transparency is key for curbing corruption in public procurement, very few tenders are publicised. According to the Open Contracting Partnership (2020), published public procurement contracts make up only 2.8 per cent of total global public procurement value, which stood at US$13 trillion in 2018.

Moreover, industries typically associated with high levels of corruption are the ones most often involved in public procurement, adding to the elevated corruption risks of the process. These include extractives, construction, transportation and storage, and telecommunications, which made up two thirds of foreign bribery cases in OECD countries as of 2014 (OECD 2016; OECD 2014; Søreide 2002).

Corruption risks across the stages of the procurement process

Corruption can occur at all stages of the public procurement process: in the pre-tendering phase, (during needs assessment and tender design); in the tendering phase (as part of the bidding and awards process); and in the post award phase (during implementation and monitoring).

In the pre-tendering phase, potential bidders may exert undue influence or pay bribes to influence the needs assessment or contract requirements to ensure tender specifications are tailored in their favour. During the tendering phase, procurement information and invitations to bid may be distributed selectively; bid rigging and collusion may occur on the part of bidders; and conflicts of interest, bribery, undue influence, nepotism, trading in influence and other forms of corruption may influence the bid evaluation and award decision. Following a procurement award, corruption may manifest during project execution, including through false invoicing, kickbacks, product substitution, sub-standard delivery and so on. (OECD 2016; Schoeberlein 2019; UNODC 2013).

Bribery and collusion

Among the most common forms of corruption in public procurement are bribery and kickback payments to public officials. The purpose of such illegal payments can be to influence a needs assessment or tender design, to sway decision-making in awarding a contract, or to otherwise gain advantages in the pre-tendering and tendering phase (Anderson et al. 2016; Heggstad & Frøystad 2011; UNODC 2013).

Collusion (or bid rigging) is another common corruption risk in public procurement processes. This refers to the case of all or several bidders coming together in an agreement that eliminates competition and fixes the outcome of a tender. The group predetermines who is to win the bid, with the others refraining from tendering (bid suppression) or handing in over-inflated or otherwise unacceptable bids (complementary bidding). In return, the predetermined losers will receive some form of compensation, either as a direct financial reward, in the form of subcontracts, or as the promise to win the next time around (bid rotation) (Heggstad & Frøystad 2011).

Collusion may occur only among bidders or with the involvement of public officials who facilitate or support the collusion, for example, by sharing classified information (Heggstad & Frøystad 2011). Anderson et al. (2016) estimate that collusion raises the cost of procurement contracts by 20 per cent or more compared to competitive prices.

Corruption risks vary according to procurement modality

The procurement modality chosen can also affect the degree of corruption risk. Single-source procurement (or direct award), by which the procuring entity choses the contractor without a prior bidding process, is generally considered to carry the highest corruption risk and should only be resorted to in exceptional circumstances. An open procedure (sealed bidding) on the other hand, where anyone can submit a bid, is considered to be

the least risky, and thus ideally the method of first resort. Other methods are restricted procedures, where only pre-qualified entities can submit bids and negotiated procedures. Both may be necessary or appropriate under specific circumstances but carry higher corruption risks than open procedures (UNODC 2013).

While methods other than open procedures can sometimes be warranted, procurement law should state clearly under which circumstances negotiated, restricted or single-source procedures may be permitted and what approval processes are required, to limit their inherent corruption risk. Procurement law should also explicitly ban the splitting up of contracts with the purpose of avoiding an open competition (Martini 2015).

In the defence sector, for example, procurement processes are often restricted to safeguard national security interests (Transparency International UK 2015). However, this is one reason the sector is especially prone to corruption. According to the OECD (2007), procurers of defence contracts will often solicit bidders and make direct requests. But such processes can be vulnerable to sham procedures, such as pro forma tenders conducted to conceal the fact that a supplier has already been chosen.

Given that the nature of corruption risk varies according to the procurement modality, the next section considers whether procurement markets that are "open" to foreign bidders encounter corruption in a quantitatively or qualitatively different manner to those procurement processes that are "closed" to or place restrictions on foreign firms.

It is worth noting that sometimes protectionist measures are only applied to specific industries. In the defence or utilities industries, for example, countries often aim to maintain sovereignty for political and/or security reasons. Or, at times, countries aim to build or protect underdeveloped or nascent industries, such as technology, or protect small and micro enterprises that are crucial in providing domestic jobs (Ssennoga 2006). Public procurement markets may thus often be neither fully open nor entirely closed but rather positioned on a sliding scale with certain areas of public procurement liberalised and others restricted to varying degrees.

Towards liberalisation or protectionism in procurement markets?

The last few decades have seen both an internationalisation and harmonisation of public procurement processes, as well as steps towards more protectionism in certain countries and sectors of the economy.

Developments and trends: initiatives to remove barriers to foreign firms

The United Nations Convention against Corruption (UNCAC) calls for "the establishment of appropriate systems of public procurement based on the fundamental principles of transparency, competition and objective criteria in decision-making" (UNODC 2013: v).

According to the United Nations Office on Drugs and Crime (UNODC 2013), states party to the UNCAC have made some progress on this front in recent years by making their procurement processes more transparent, implementing and strengthening rules regarding the ethical behaviour or procurement officials and bidders, building capacity of procurement agencies and personnel, and sanctioning fraudulent contractors.

The UNCAC was also a driver in the further development of the United Nations Commission on International Trade Law's (UNCITRAL) Model Law on Public Procurement, which is being used by some countries as a template for the development of their own procurement legislation (UNODC 2013).

Agreement on government procurement

Chief among the international procurement mechanisms is the World Trade Organisation's Agreement on Government Procurement (GPA), which was established in 1979 to liberalise and mutually open international procurement markets, foster competition and discourage the discrimination of foreign bidders in domestic procurement tenders (Carboni et al. 2018; Mungiu-Pippidi 2018; Ssannoga 2006).

The agreement has seen several revisions as well as subsequent growth and now covers 47 WTO members and US$1.7 trillion in annual procurement value. The latest revision, signed in 2014, includes new commitments requiring procuring entities to act in a manner that avoids conflicts of interest and prevents corrupt practices (Anderson et al. 2010; Kutlina-Dimitrova 2018; Mungiu-Pippidi 2018).

GPA signatories commit to a set of requirements regarding their procurement processes, including (Carboni et al. 2018; Jenkins 2018a; Mungiu-Pippidi 2018):

- non-discrimination against foreign bidders and national treatment, meaning that parties to the treaty may treat suppliers or products of other parties "no less favourably" than domestic ones
- transparency regarding tendering information (both pre and post award)
- the implementation of measures allowing for a post award review and monitoring by the WTO Committee on government procurement
- establishing independent national review bodies
- submission to the WTO's binding dispute settlement system

However, despite references to transparency and trade facilitation, the WTO's system lacks concrete measures to address regulatory issues, including transparency and corruption. This is argued to be due to the large size of the WTO, which makes agreement difficult, and due to many countries' hesitancy to commit to any "deep provisions" that may be perceived as affecting their sovereignty (Jenkins 2018a and Mungiu-Pippidi 2018).

Other issues remain. For one, no Latin American or African country forms part of the agreement at this stage (European Commission 2019a), although as of December 2021 some have observer status (see here). Moreover, while a reference to UNCAC is made in the GPA's preamble, it is nonbinding. Similarly, transparency requirements in the procurement process and commitments to avoid conflicts of interest are merely encouraged rather than mandatory. Finally, while the agreement addresses corruption risks in procurement award decisions, it does not cover corruption risks surrounding the tender design or execution (Jenkins 2018a).

Regional and bilateral trade agreements

Several regional and bilateral free trade agreements (FTA) have been signed in the years since the GPA's establishment.

Partly in response to the absence of effective measures in the WTO system, anti-corruption and governance provisions have started to be included in more recent bilateral and regional free trade agreements (RTAs), in which consensus regarding more far-reaching requirements can be easier to achieve (Jenkins 2018a).

Indeed "over 40% of RTAs concluded since the millennium have incorporated anti-corruption and anti-bribery commitments which have no precedent under the WTO regime" (Jenkins 2018a:2). Thus, unlike the GPA, recent bilateral trade agreements entered into by the US, Canada and the EU, have included specific transparency and anti-bribery commitments, including requirements to abide by and implement international anti-corruption conventions, to criminalise bribery through national legislation and

a requirement to establish procedures enforcing criminal and non-criminal sanctions along with whistleblower protection (Jenkins 2018a and Lejárraga 2013).

According to Lejárraga (2013), transparency provisions have also seen a rise in RTAs. With the goal of reducing opacity of domestic trade measures and thus opportunities for discretion and costs to foreign companies and consumers, recent RTAs have seen a greater focus on transparency, introducing measures that deepen multilateral commitments made in the GPA and expand them into new areas (Lejárraga 2013). Of 124 RTAs reviewed in an OECD study by Lejárraga (2013), 72 included transparency provisions as core to the trade partnership, with 53 including comprehensive separate chapters on transparency.

Some of these more specific commitments may be particularly useful to make domestic procurement markets more legible to foreign bidders, such as "electronic transparency" and "English transparency", referring to the online publication and translation of regulations Lejárraga (2013).

Since the turn of the millennium, bilateral FTAs have also increasingly featured standalone public procurement provisions (Kutlina-Dimitrova 2018). Agreements entered into by the US, for example, generally aim to ensure that US goods and services will be given "national treatment" in public procurement processes in the countries with which an FTA is entered into (Office of the United States Trade Representative 2021).

Similarly, the trade agreement between the EU and the MERCOSUR bloc (Brazil, Argentina, Paraguay, Uruguay) is set to open the regions' public procurement markets to EU firms and grant them "national treatment" in domestic bidding processes (Hansen-Kohn 2020). Bilateral FTAs and RTAs have thus opened a host of new procurement markets to international bidders as they cover more jurisdictions and stakeholders than the GPA.

This process of opening domestic procurement markets to international bidders has not been without criticism, especially in developing and emerging markets. According to Hansen-Kohn (2020), for example, the annex to the MERCOSUR-EU treaty, which lists which sectors are to be opened and which ones would remain exempted, is not publicly available. In addition, there is some concern that liberalisation of procurement markets could potentially undermine existing provisions protecting local farmers and local jobs, as well as minority "set-asides", which assign a certain proportion of procurement contracts to firms owned by disadvantaged groups (Hansen-Kohn 2020).

While bilateral and regional FTAs, including the now defunct transatlantic partnership agreement (TPP), generally include provisions to liberalise the signatories' domestic procurement markets, they do sometimes include protectionist exemptions, such as monetary thresholds or exemptions for SMEs (Bandele 2016).

Finally, although some FTAs and RTAs have gone further and "deeper" than the GPA in their commitments to open up domestic procurement markets to foreign bidders, unlike the multilateral system under the WTO, they lack the enforcement of the WTO's dispute settlement. So, ultimately, the effectiveness of the bilateral agreements' transparency and anti-corruption provisions depends on the participating governments' willingness and commitment to implement such provisions at the national level (Jenkins 2018a and Lejárraga 2013).

Government-to-government agreements

Another specific measure sometimes resorted to in international procurement is that of government-to-government agreements (G2G). These refer to agreements entered into between two countries over the purchase of a particular service or good, the delivery of which is often accompanied by training, maintenance, knowledge transfer and other support functions. The supplying government

then does the purchasing internally (or supplies from its own stock), meaning the procuring government does not deal with the contractor directly (European Commission 2016). This is a process often used in the defence sector but has recently seen some popularity in infrastructure projects as well, where it was hailed as being more efficient than conventional procurement or public private partnerships (Sumar 2020). In Peru, for example, a G2G agreement with the UK was chosen as the approach to rebuild from the damage from El Nino, including the construction of schools and hospitals (UK Department for International Trade 2020).

In addition to being seen by their supporters as more efficient, G2G agreements have also been said to reduce the risk of corruption and fraud as they cut out the middlemen and the lengthy corruption prone tendering processes (Canadian Commercial Corporation 2020). However, too few analyses of G2G processes are available outside of the defence sector, which has some unique characteristics, to verify that claim.

Where at least one of the countries entering the G2G agreement exhibits high levels of corruption, it could be argued that corruption in the G2G process is also likely. This is especially true as negotiations between governments can lack the oversight and transparency a regular procurement process should have. G2G processes also do not follow an open bidding process and may therefore be less competitive, which in turn has been linked to higher risks of corruption (Anderson et al. 2010).

More research is needed on G2G processes and their associated corruption risk to ascertain their potential as a “cleaner alternative” to other international procurement methods.

Developments and trends: recent introduction of protectionist measures

While recent years have seen a general trend of further liberalisation of procurement markets via FTAs and the revised GPA, protectionism has also been a fairly widespread policy response to recent financial and economic crises (Kutlina-Dimitrova 2018). Indeed, broadly speaking, it appears that public procurement remains a largely national endeavour.

Even in the EU, with its highly integrated market, large public tenders in construction, for example, rarely go to foreign bidders. In 2017, only 4.5 per cent of construction procurement tenders went to foreign firms, and where they did, it was by and large bidders from directly neighbouring countries and from the same linguistic region (Berglind et al. 2018).

According to Berglind et al. (2018), the competitive advantage of domestic firms in (international) public procurement tenders is partly due to domestic companies’ greater local expertise, language advantages, knowledge about local conditions on the ground, established supplier and subcontractor contacts, as well as contacts at the contracting agency.

On the other hand, some observers have argued that explicit or implicit trade barriers and favouritism of domestic firms is largely to blame (Carboni et al. 2018 and Ssennoga 2006). Public procurement, as well as public concessions and public private partnerships, are often “politically sensitive levers in the governments’ hands”, and as such are “often used for raising political consensus rather than achieving value for money for public purchases” (Carboni et al 2018: 86). It is thus maybe unsurprising that, despite the growing trend towards procurement liberalisation as part of regional or bilateral free trade agreements (FTA), public procurement is subject to a wide array of protectionist measures and home bias in favour of domestic firms and/or production. In fact, the number of protectionist measures in place across the globe has been growing steadily between 2009 and 2017, peaking at 500 protectionist interventions counted by Kutlina-Dimitrova (2018) in 2017. Similarly, the European Commission’s

2019 Report on Trade and Investment Barriers (European Commission 2019) counted 483 active trade and investment barriers in 58 countries at the end of 2019, a record number that the European Commission interprets as indicating increasing protectionism.

The perceived benefits of protecting the domestic public procurement market from foreign involvement include the wish to create or protect jobs, ensure sustainability, foster underdeveloped regions or protect sensitive or nascent industries, and ensure that environmental and social standards are followed (European Commission 2019a; Gourdon et al. 2017; Ssenoga et al. 2018).

Trade liberalisation has also been shown to come with social costs, such as potentially substantial adjustment costs for workers in industries competing with new imports and foreign bidders (Carboni et al. 2018).

Especially when looking at developing countries with a commercial power imbalance vis-à-vis more developed economies, opening trade and procurement to international bidders may increase poverty and damage or destroy local industries due to a lack of reciprocity. In other words, the loss of domestic contract opportunities to foreign bidders cannot be counterbalanced by winning other tenders abroad due to a lack of capacity, expertise or experience (Ssennoga 2006).

When opening the domestic procurement market to foreign bidders, countries need to evaluate and balance a variety of factors, including ensuring quality, value for money, sustainability of projects, a level playing field for domestic companies, consumer protection, safeguarding national security and competition rules, as well as environmental, labour and other relevant social standards (European Commission 2019a).

Procurement corruption and foreign bidders

Thus, while concerted attempts have been made to open up public procurement markets to foreign bidders through the establishment of international trade agreements and regional economic integration, most public procurement remains largely national (Berglind et al 2018). This is due to both explicit as well as implicit barriers faced by international firms in public procurement tenders (Berglind et al 2018; Carboni et al 2018; Ssennoga 2006).

At the same time, the growth of complex international corporate structures that facilitate corruption, money laundering and tax evasion poses potentially novel integrity challenges to procurement markets (Transparency International 2020a). According to the OECD (2007) transnational business transactions may be particularly prone to corruption risk, partially due to potentially lower scrutiny applied abroad, and partially due to complex transnational corporate structures, with incorporations in several countries and thousands of employees in different locations, making the identification and traceability of bribery more difficult. Additionally, transnational transactions, including international public procurement, often involve another layer of stakeholders, such as development banks or export credit agencies, both of which may employ individuals susceptible to requesting or demanding bribes (OECD 2007).

Corruption risks surrounding international firms in public procurement could therefore arise as a result of either:

1. a lack of regulation in fully “open” procurement markets that place no restrictions on foreign companies, particularly where bidders are not required to disclose their beneficial owner.

Or

2. protectionist measures that impose restrictions on foreign bidders. The exact nature of restrictions in terms of eligibility criteria for foreign firms is a key determinant of corruption risk. For example, the specific corruption risk may differ between systems where foreign firms who want to bid are required to first establish a local in-country presence, and systems in which foreign bidders are obliged to observe local content rules.

Risks and benefits of open public procurement

The benefits commonly cited for opening the public procurement market to foreign bidders are generally similar to those cited for free trade more broadly, which include increased competition, incentives to innovate, cost reductions, capacity building, higher productivity and access to new markets for domestic firms (Anderson et al. 2010; Carboni et al. 2018; Ssenoga et al. 2018).

Anderson et al. (2010) further argue that a liberalisation of public procurement markets, and the entry of external players, reduces the likelihood of collusion as the more players there are, the harder it will be for a group of them to come together and rig the system for their benefit.

Protectionist measures that favour domestic suppliers are not only a non-tariff barrier to free trade, according to Carboni et al. (2018) they can also be an effect or sign of corruption in the form of state capture by powerful interest groups with an interest in restraining competition.

In a similar vein, Mungiu-Pippidi (2018: 5) has argued that free trade can curb corruption by firstly disrupting privileged connections and corrupt networks, (thereby reducing the influence of domestic rentier companies that seek to "influence domestic regulation in their favour"), and secondly by increasing competition and transparency.

This is not to suggest that corruption risks, such as nepotism and bribery, are non-existent in the absence of market entry restrictions for foreign firms. Even in an open market, companies may bribe public officials to win awards, and public officials can abuse their power to favour companies with which they have familial, political or commercial ties. Thus, while free trade has sometimes been hailed as a means of reducing corruption through increased competition, on its own, trade liberalisation is unlikely to curb corruption if it is not accompanied by adequate transparency, effective regulation and oversight (Anderson et al. 2016 and Mungiu-Pippidi 2018).

In fact, there is some indication that corruption levels are higher where international corporations are involved. A 1999 survey undertaken by the World Bank & EBRD in transition economies of Eastern Europe and Central Asia found that 35 per cent of transnational companies headquartered abroad paid kickbacks during procurement bids, whereas only 25 per cent of domestic companies reported paying bribes during public procurement tenders (Søreide 2002).

According to the OECD's 2014 Foreign Bribery Report (OECD 2014b), 57 per cent of foreign bribery cases involved attempts to win a public procurement contract. Moreover, some of the largest sanctions applied under the Foreign Corrupt Practices Act (FCPA) went to companies accused of bribing foreign officials to win procurement deals. In the largest single case until then, the Swedish telecommunications company LM Ericsson had to pay over US$1 billion in 2019 to settle charges from the US Department of Justice and Securities and Exchange Commission for bribing officials in China, Djibouti, Indonesia and elsewhere to win equipment contracts (Totty 2020).

Likewise, while Mungiu-Pippidi (2018) argues that free trade generally helps reduce corruption, she concedes that where free trade deals are struck between countries that are considered clean and

those with high corruption levels, it can actually have a negative spillover effect. In other words, companies based in countries with a relatively low incidence of corruption may engage in corrupt behaviour in foreign countries due to the perception that corruption is the cost of doing business in those markets.

However, the OECD's 2014 Foreign Bribery Report (OECD 2014) found that contrary to the common perception, out of all cases analysed, the majority (67 per cent) of bribes went to public officials from countries with medium to very high human development scores, rather than developing countries. And, as of 2020, out of the 10 largest FCPA settlements, eight companies were headquartered in the EU or the US.

The greater incidence of enforcement actions against companies in developed economies does of course not signify that these markets are more prone to corruption. By and large, developed markets, notably those part of the OECD Anti-Bribery Convention, have stronger legal frameworks and more robust enforcement action, although the latter has decreased since 2018 according to Transparency International (2020b).

This may skew the picture with regards to the prevalence of corruption in different markets. Nonetheless, the enormous size of multiple bribery scandals in recent years involving companies from OECD countries illustrates a complex picture when it comes to corruption and the respective role of companies from supposedly "clean" versus "corrupt" countries, especially when companies are looking to win contracts in foreign markets (Transparency International 2020b).

Corruption risks related to lack of beneficial ownership transparency in international procurement markets

Corporate structures have become increasingly complex in the last few decades, making it more difficult to identify beneficial owners (BO). A beneficial owner refers to the individual(s) who effectively owns or controls a legal entity or arrangement, or on whose behalf a transaction is carried out. This is always a natural person. Where a company's main shareholders are legal entities or arrangements (such as a trust or LLC), the BO will be the individual(s) owning or controlling the legal entities and arrangements and thus the legal owner of the company (in such a scenario, the legal owner and the beneficial owner are not the same). The longer the chain of legal entities between the company and its ultimate beneficial owner(s), and the more jurisdictions involved, the harder it is to identify them (IDB & OECD 2019).

Where bidders are not required to disclose their true ownership, they could hide their identity and business purpose under several layers of legal entities and arrangements with unknown shareholders. This is likely to increase the risks of money laundering and tax evasion as well as allow conflicts of interest, illegal activities or political exposure to remain hidden (IDB & OECD 2019). In addition, where beneficial ownership requirements are weak or absent, this could allow for unchecked investment from high-risk countries.

In the area of public procurement, this means that a winning company may have ties to public officials that are not immediately apparent. As such, unless contracting bodies require entities competing for a tender to disclose their real ownership, this can enable politically exposed persons to use offshore companies to hide their interests in a bidding company and access public contracts for which they are not eligible.

While this can be a risk in restricted as well as open procurement markets, the more complex, global and intertwined the corporate structures, the greater the risk. In the Odebrecht corruption scandal, for example, the Brazilian company "operated a web of shell companies and offshore accounts that were used to pay bribes to Brazilian and foreign officials" (Transparency International 2018: 18), to win public procurement contracts and exert influence over policy-making in Brazil and

abroad. Shell companies have been used in several corruption schemes involving multinational corporations, including SNC Lavalin, Airbus, Fresenius, and Mobile TeleSystems (MTS), who have used the structure to conceal bribe payments and kickbacks (Transparency International 2020b).

Inadequate beneficial ownership transparency also significantly hinders enforcement action, which is a key deterrent to discourage companies from paying bribes to win international contracts (Transparency International 2020b).

Corruption risks arising from protectionist measures in procurement

As has been discussed above, for a variety of reasons, many countries aim to (partially) restrict foreign companies' access to their procurement markets, often either in particular industries or in procurement contracts of a certain size.

This may be done through explicit or implicit market access restrictions. In the case of the former, countries formally require foreign companies to comply with a set of restrictions before bidding in the domestic public procurement market, such as local joint venture requirements, requirements to partially purchase or hire locally and so on. Countries applying implicit market access restrictions do not officially put restrictive requirements on foreign companies but in practice apply certain processes in a way that discriminates against foreign bidders.

Some characteristics of closed markets could facilitate higher levels of corruption. A procurement process with only domestic bidders, with long-standing relationships to the country's political class, may entail a greater risk of collusion, conflict of interest and nepotism. Especially in smaller markets, with close personal or familial links between public officials and private sector stakeholders, (potentially corrupting) networks may be stronger and difficult for incoming bidders to penetrate, which could in turn prompt foreign bidders to try to bribe their way into these markets.

Some scholars, including Anderson et al. (2010) and Mungiu-Pippidi (2018), have thus suggested that the greater internationalisation and foreign competition achieved through free trade agreements, such as the World Trade Organisation's (WTO) Agreement on Government Procurement (GPA), could decrease the risk of collusion and corruption. This would be especially true for economies that had previously been characterised by the power of privileged connections and rentier companies. According to Mungiu-Pippidi (2018) this decreased risk of corruption is due to greater competition and increased fiscal and procurement transparency that (ideally) comes with free trade agreements.

Another factor to consider is that SMEs are often reported to be more likely to pay bribes to gain an economic advantage or win a contract (Pelizzo et al. 2016 and OECD 2016). According to the OECD (2016) this is because they lack the time, resources, capacity and leverage to withstand bribery requests. Moreover, public officials tend to demand fewer bribes from firms with greater bargaining power, of which firm size is a key determinant (Svensson 2003; Jenkins 2018b).

SMEs are also often characterised by a high degree of informality, weak internal integrity management systems, limited bargaining power and a lesser regard for the reputational and long-term negative impacts of corruption, leaving them more susceptible to consider corruption to get ahead (OECD 2016; Serafeim 2014: 21). With SMEs making up around 90 per cent of companies in most economies, this could indicate that a purely domestic procurement market with no foreign or international players may be more prone to corruption (Jenkins 2018b; OECD 2016).

On the other hand, the OECD's 2014 Foreign Bribery Report (OECD 2014) found that 60 per cent of foreign bribery cases involved larger

companies and only 4 per cent involved SMEs, the rest being unknown. However, this may also be due to larger companies' greater propensity for being involved in international business transactions.

Commercial presence or joint venture requirements

A common explicit market access restriction is a prerequisite that foreign firms who want to bid for public contracts have to open a local commercial presence or form joint ventures with local partners.

In some countries, such as Bolivia, foreign companies are only allowed to bid on procurement contracts above a certain threshold and, when doing so, are required to partner with a local company (United States Trade Representative 2021). In Brazil, foreign companies are required to establish a representation in the country to be able to bid in public procurement processes (Transparency International 2018).

Such requirements can carry risks of conflicts of interest, undue influence, favouritism and nepotism (Martini 2014). This could be the case where foreign companies are pushed to partner with a particular company with familial or economic ties to government officials to increase or secure their chances of winning the award. In more egregious cases, the local companies do not provide any meaningful service but merely serve as front companies to enrich individuals within the official's network. The local company with which the international bidder choses to, or is pressured to, partner may also be merely a shell company that exists largely on paper. In the case of Angola, it has been suggested, for example, that international oil and gas companies made illegal payments to local front companies with opaque ownership structures who usually lack the capacity to implement any part of the awarded contract, with the purpose of enriching politically exposed persons (PEPs) or government representatives (Martini 2014).

Entering joint venture agreements, especially in emerging markets, can hold further corruption risks for companies (Alliance for Integrity n.d. and Kwicinski 2017). This is especially true as, according to the Alliance for Integrity (n.d.), countries requiring joint venture agreements for market access tend to be more prone to corruption.

Additionally, where the forming of a local presence is required, risks surrounding licencing may arise. Especially in countries with high corruption rates, bribery and facilitation payments are often a concern when opening businesses or applying for relevant licences. In 2019, Walmart was fined US$282 million in FCPA related charges for bribing officials in Mexico, China, Brazil and India in the process of receiving licences to open new stores (Totty 2020).

Frequently in joint ventures, the local partner is tasked with seeking regulatory approvals and obtaining licences, areas with high corruption risks over which the foreign partner may have limited oversight. Several multinational companies have faced investigations and charges under the FCPA for conduct related to emerging market joint ventures (Kwicinski 2017). This includes the mining company Rio Tinto who faced charges of illegal payments over a joint venture in Guinea, AB InBev who had to pay a US$6 million FCPA settlement linked to a joint venture in India and GSK who settled an FCPA enforcement action for US$20 million over irregular payments linked to their joint venture in China (Kwicinski 2017).

However, globally there is insufficient clarity regarding parent company liability for their subsidiaries when it comes to bribery. Moreover, in most countries parent companies are liable for their subsidiaries only when the parent company participates in or directs the subsidiary's wrongful conduct (Transparency International 2020b). Transparency International (2020b) is thus calling for a general parent company liability for a failure to prevent bribery in subsidiaries or affiliates, where the parent exercises significant control.

Publishing ownership chains in cases of foreign bribery is also expected to function as a deterrent for international parent companies.

Measures to mitigate such joint venture related risks include adequate due diligence before entering a joint venture, keeping at-risk functions (such as supply chain management and procurement) in house, ensuring anti-corruption programmes apply to joint ventures, creating relevant oversight committees and strengthening audit functions, ensuring access to information, and adjusting voting and senior management appointing rights (Alliance for Integrity, n.d., and Kwicinski 2017).

Risks are exacerbated where regulations and requirements surrounding the disclosure of beneficial ownership (BO) are weak as this allows companies and officials to hide their relationship behind a web of shell companies (Transparency International 2018). Complex corporate structures may have legitimate business purposes (including legal, accounting or operational), but where ultimate beneficial ownership is unclear, these arrangements should be scrutinised to ensure that they are not used to hide political exposure (Sayne et al. 2017). Particular red flags to watch out for, according to Sayne et al. (2017), are chains or networks of shell companies in the corporate structure; the presence of nominee shareholders, bearer shares or trusts with unknown beneficiaries; and shareholders with limited funds and no visible links to the industry.

Domestic price preferences or local content requirements

Other common explicit market access restrictions include domestic price preferences and local content requirements. Under domestic price preference rules or local content requirements, foreign bidders are not restricted from bidding. However, domestic bids are given preference over foreign bids of the same quality up to a certain price difference (domestic price preference), or bidders are required to produce at least partially in-country, use domestic products or hire domestic labour (local content requirements) (Gourdon et al. 2017 and Ssennoga 2006).

Under local or domestic content requirements, procuring entities buy from foreign bidders only if they commit to source a certain amount of products or services locally or hire a certain number of local staff. Offset requirements that mandate a level of technology transfer, investment or other form of economic assistance also fall under this category (Gourdon et al. 2017 and Ssennoga 2006).

Where certain portions of procurement projects, usually those beneath a certain monetary threshold, are explicitly earmarked to a specific group of companies, such as SMEs, that process is referred to as “set aside” programmes (Carboni et al. 2018).

Several countries impose such restrictions on foreign bidders. In the EU, for example, “public buyers operating in the water, energy, transport and postal services sectors may reject tenders for supply contracts, if the proportion of the products originating in a third country exceeds 50% of the total value of the products constituting the tender” (European Commission 2019a: 9).

Argentina employs a domestic price preference and local content requirements. Domestic companies can be given preference over foreign bidders, so long as the domestic price is not more than 5 to 7 per cent higher than the foreign bid. Additionally, foreign bidders that win tenders are required to subcontract at least 20 per cent of work to local suppliers (United States Trade Representative 2021).

In Paraguay, preference is given to bids with at least 40 per cent domestic input or 70 per cent domestic labour, even if the product is up to 40 per cent (national tenders) or 10 per cent (international tenders) more expensive (United States Trade Representative 2021).

In Brazil, procurement preference is given to firms that produce locally and otherwise contribute to the local economy, such as by generating local employment or contributing to technological development. Some counties in Latin America, including Bolivia and Uruguay, also apply preference to local small and micro enterprises (United States Trade Representative 2021).

There can be valid reasons for such measures, for example, to protect nascent or smaller local industries that would otherwise be uncompetitive, transferring technology and capacity, creating jobs, and promoting social and economic development (Martini 2014). But as Martini (2014) has detailed for the oil and gas sector, local content requirements, while sometimes valid, can bring substantial corruption risks. Government officials may abuse their position to benefit local companies with which they have personal or economic ties by extorting international companies to partner with favoured companies. Foreign companies may also (be encouraged to) pay bribes or kickbacks to local businesses to serve as a "front" in bidding processes, while not performing a service at all, a risk noted above in the case of joint venture requirements as well.

In countries where corruption levels are high and links between the government and the business elite are strong (or the former is largely recruited from the latter), there is a risk that the introduction of local content rules is largely a means to enrich the country's business and political elite, rather than promoting development for all (Martini 2014).

Implicit market access restrictions

Implicit market access restrictions refer to steps in the tendering process that are not directly aimed at limiting access to foreign bidders but may be used to that effect in practice.

This may include registration and shortlisting requirements of bidders that are difficult or impossible to fulfil remotely (including in-person signature requirements) or overly limiting qualification criteria (Gourdon et al. 2017).

Specifying qualification criteria and establishing a description of tender requirements can be a balancing act when it comes to corruption risk. Clear and specific tender descriptions and exclusion, selection and award criteria are a useful means of quality control. They can also be used as a legitimate means to ensure abidance with environmental and social standards and to prefer bidders that source sustainable materials or retain relevant environmental or social certification (European Commission 2019a). If executed well, they can also be a way of reducing corruption risk, as they limit discretion (Martini 2015).

However, if overly restrictive, they may also be used in a corrupt manner to tailor a tender to a specific bidder, either due to nepotism or favouritism, or in response to a prior bribe paid or undue influence exerted. This can be done by requiring local licences or qualifications that are immaterial to the tender execution, including overly subjective qualification criteria, setting unrealistic timelines or asking for irrelevant past performance or experience requirements (OECD 2009 and Martini 2015).

Particular scrutiny should also be applied where tender qualifications and contract terms differ significantly (and for no visible reason) from industry norms or past tenders (Sayne et al. 2017). Red flags that may allude to collusion or tailored tenders between bidders and procurement officials include, according to Sayne et al. (2017): several companies linked to the same individual(s) submitting bids; an unusual number of apparently intentionally defective bids; renegotiation of more favourable terms for the winning company post award; and the exclusion of valid bids for no apparent reason.

To mitigate this risk, procurement law should provide for an exhaustive list of assessment criteria to be used for tender qualifications, which

may include necessary professional, technical and environmental qualifications, professional and technical competence, legal capacity, ethical standards, clean criminal record and absence from any debarment lists, among others (Martini 2015).

A way in which corruption manifests in public procurement, without formally violating procurement rules outright, is the withholding or selective distribution of relevant information. This can be done by purposefully only inviting a select number of companies to bid, by inviting a large number of unqualified companies, by releasing tenders with very short timelines or by sharing needed information selectively. All of this can have the effect of creating an undue advantage for individual companies while still being able to claim a competitive bidding process. Excessive confidentiality provisions and information asymmetries will likewise create opportunities to extract bribes. Inadequate information disclosure or a selective circulation of procurement information can thus also constitute an implicit market access restriction (Gourdon et al. 2017 and Søreide 2002).

Table 1: Overview of corruption risks by type of procurement market restrictions on foreign bidders

Type of procurement market	**Feature of the procurement market**	**Corruption risk**
Closed / protectionist	Commercial presence/joint venture requirements	▪ conflicts of interest ▪ nepotism/favouritism ▪ undue influence ▪ creation of front companies (by PEPs) that generate income without providing services ▪ bribery and facilitation payments in licencing and approval processes
Closed/protectionist	Domestic price preferences/local content requirements	▪ conflicts of interest ▪ nepotism/favouritism ▪ bribery ▪ embezzlement/enrichment ▪ creation of front companies (by PEPs) that generate income without providing services
Closed/protectionist	Implicit market access restrictions	▪ conflicts of interest ▪ nepotism / favouritism ▪ bribery ▪ undue influence ▪ collusion
Open	No restrictions	▪ conflicts of interest/political exposure, hidden through inadequate beneficial ownership transparency ▪ money laundering ▪ shell companies being used to hide bribe payments and kickbacks

Mitigation measures

With international agreements giving increasing weight to corruption in procurement, various organisations have been issuing standards and principles to promote integrity in procurement more broadly. Chiefly among these are the OECD's Principles for Enhancing Integrity in Public Procurement (OECD 2009). Here, the OECD lays out overarching rules and values countries and procuring entities should abide by and implement to reduce corruption and foster integrity in procurement. These include transparency across the entire procurement cycle, ensuring competitive tendering, good management of public funds, ensuring high professional standards of procurement officials, preventing misconduct, encouraging cooperation between stakeholders, monitoring compliance, and implementing accountability and control measures.

Based on these broader standards, more operational mitigation measures to reduce corruption risks in public procurement have been put forward and discussed widely (see for example Heggstad & Frøystad 2011; Martini 2013; OECD 2014a; OECD 2016; Wickberg 2013). This includes, among others, codes of conduct, integrity pacts, clear and transparent bidding processes, civil society and citizen oversight, effective complaint and reporting mechanisms, capacity building of public officials, conflict of interest laws, whistleblower protection, supplier/bidder debriefings and keeping accurate procurement records. Underlying any such measures should be a comprehensive procurement law, the key components of which have been detailed by Martini (2015).

These mitigation measures serve to curb corruption risks in procurement more broadly and positively affect procurement processes involving foreign bidders.

The following section provides a brief overview of measures which, while applicable to procurement generally, are particularly relevant when opening public procurement to international bidders.

Transparency and information disclosure

Equal access to tendering information (such as qualification and selection criteria as well as the evaluation and award process) is key to ensure a level playing field and fair competition.

To counter the risks surrounding selective information disclosure, freely and easily accessible communication of tenders and the resulting procurement process is thus crucial (Gourdon et al. 2017).

Transparency in procurement is addressed and encouraged by several international standards, including the UNCITRAL Model Law on Procurement of Goods, the OECD Principles on Enhancing Integrity in Public Procurement and the APEC Transparency Standards on Government Procurement (OECD 2014a). Establishing a standardised process, in which procurement regulations, opportunities and tender documents are publicly and easily available, and where information on the evaluation and selection process is disclosed, reduces discretion, increases accountability, enables oversight (including by civil society) and increases trust in the process (Gourdon et al. 2017; OECD 2014a; Søreide 2002; Wickberg 2013).

Access to information provisions and transparency initiatives, including open contracting, are thus key features to reduce corruption risk in procurement – both domestic and international. Under the open contracting data standard, the entire procurement process, from planning through implementation and monitoring, is published online. This allows citizens, journalists, policymakers and other interested parties to scrutinise the process and the allocation of funds, making procurement more transparent and accountable (Schoeberlein 2019 and Transparency International et al. 2017).

However, according to the OECD (2016), to be effective, and to enable oversight by civil society and other stakeholders, data quality needs to be ensured, data needs to be published in a timely manner, reporting lines need to be in place and effective to report misconduct to relevant agencies, and processing capacity and whistleblower protection need to be guaranteed. Argentina and Mexico have both established procurement websites, Argentina Compra and Compranet, that publish relevant regulations, institutional information, procurement statistics, information on past tenders and bidding requirements, and present and past suppliers (OECD 2014a).

Additionally, Mexico instituted the concept of social witnesses, which is mandatory for public procurement contracts above a certain threshold or of significant impact, where representatives from civil society or other trusted individuals or organisations take part in the procurement process as external observers (UNODC 2013).

Digital solutions and e-procurement

Digital solutions have the opportunity to vastly facilitate transparency efforts and make them more cost efficient and accessible to a wider set of stakeholders.

E-procurement is one such effort, which includes the electronic publication of contract opportunities, the electronic distribution of tender documents and the electronic submission of bids (UNODC 2013). It can reduce administrative costs, facilitate monitoring and access to tenders, encourage cross-border competition, and allow for an easier detection of bid rigging, collusion or other irregularities. It also reduces interactions between bidding companies and public officials, which is considered to be one of the main opportunities for corrupt behaviour (OECD 2016; OECD 2014a; Schoeberlein 2019; UNODC 2013; Wickberg 2013).

While efforts at digitising procurement processes, as well as measures designed to increase transparency are useful means to mitigate corruption risk in procurement more broadly (Gourdon et al. 2017 and Wickberg 2013), they may be of particular relevance in transnational bidding, which relies more heavily on remote processes and is characterised by increasing complexity.

Compranet in Mexico includes such an e-procurement process, the use of which has been mandatory for Mexico's federal public administration since the country's procurement reform in 2009 (OECD 2014a). Similarly, Guatemala's Guatecompras and Costa Rica's Sistema Integrado de Compras Públicas (SICOP) e-procurement processes constitute single purchasing platforms, the use of which is mandatory for government agencies (United States Trade Representative 2021).

Beneficial ownership transparency

Beneficial ownership transparency has become an increasingly prominent in recent years, with international organisations, including the G20, Extractives Industries Transparency Initiative (EITI), Financial Action Task Force (FATF), and the OECD's Global Forum on Transparency and Exchange of Information for Tax Purposes, calling for greater transparency, the commitment to establish beneficial ownership registers, and putting greater cooperation and alignment on their agendas (IDB & OECD 2019 and Van der Merwe 2020).

A first step to identify conflicts of interest and political exposure on the part of public officials are usually clear guidelines, codes of conduct and requirements for public officials to disclose any outside (personal or professional) interest they may have, and to recuse themselves from respective procurement decisions to avoid (a perception of) impropriety or partial decision-making (Martini 2013).

In recent years this has been extended to call for centralised registers that hold the ownership information of all legal entities (and arrangements) in a certain jurisdiction to be used by the

authorities and (sometimes) the public if needed (Van der Merwe 2020).

The FATF calls on states to maintain "adequate, accurate, and up-to-date information" on beneficial owners of legal entities and arrangements that can be made available to authorities if required. But it stops short of calling for such registers to be public (IDB & OECD 2019).

But ever more complex corporate structures, as well as recent corruption scandals linked to corporate secrecy, including those revealed by the Panama Papers, Paradise Papers and Luanda Leaks, have led to calls from civil society for publicly accessible, central BO registers with reporting obligations for companies, as well as effective sanctions for companies that fail to disclose their ownership information (Bak 2021; Transparency International 2020a; Transparency International 2020b). This way, interested or affected stakeholders, including civil society and journalists, could identify who the significant shareholders and ultimate owners of a company are, and help uncover conflicts of interest, detect money laundering schemes and track unexplained wealth.

Adequate registers that are publicly available would also facilitate national law enforcement as well as international cooperation and enforcement between jurisdictions. They can further level the playing field for companies and thus enhance competition, and may help deter criminal activity by making it harder to hide the proceeds of crime or illicit financial flows in anonymous companies (Bak 2021; Transparency International 2021a; Van der Merwe 2020).

In Latin America, countries with BO registers include Argentina, Costa Rica, and Uruguay, with several other countries considering their implementation. However, most of these registers are not publicly accessible but rather sit with relevant entities, such as the Central Bank or company registry (IDB & OECD 2019). In Brazil, all foreign companies bidding on procurement contracts need to register with the Brazilian Federal Tax Agency, which maintains a database with ownership information. According to Transparency International (2018), the database is now publicly available, but it does not appear to include beneficial ownership information.

In 2015, the 51 members of the EITI committed to begin requiring all mining, oil and gas companies operating in their territories to disclose their beneficial owners in dedicated registers by 2020, which would include foreign companies competing for contracts in these jurisdictions. But as of 2019, only the UK and Ukraine had established public registers (Van der Merwe 2020). Sectoral registers have also been launched in Nigeria and Kyrgyzstan, among others. But crucial "secrecy jurisdictions", as per the Tax Justice Network's Financial Secrecy Index, have been moving at a much slower pace, according to Van der Merwe (2020).

In addition to or in the absence of central registries, companies should be required to hold accurate information on their BO (IDB & OECD 2019). In a process akin to a KYC/CDD process, as is usually performed by banks and non-banking financial institutions, companies would be required to collect and record information on their shareholders and BO to be made available upon request, with sanctions in place for failure to maintain adequate and updated records. This requirement should be extended to companies incorporated abroad that have a headquarters and/or bank account in-country (IDB & OECD 2019). As yet, while financial institutions and other relevant non-financial entities are now generally required to collect and analyse shareholder and UBO information on their clients as part of anti-money laundering and terrorist financing legislation, most legal entities are not required to hold and document such information on themselves (Transparency International 2018).

A challenge here is that even where countries have beneficial ownership registers in place, they often only apply to domestic companies, or rules

are laxer for foreign firms than for domestic entities (Bak 2021). As such they will not help to increase transparency when foreign bidders enter the domestic procurement market. Consequently, Transparency International (2021b) has been calling on countries to require foreign companies wishing to invest, bid or open bank accounts in their jurisdictions to follow the same ownership disclosure standards as domestic firms.

The UK, which already had one of the stronger beneficial ownership registers, is looking to respond to this challenge by embarking on a process of instituting a beneficial ownership register for foreign companies wishing to invest in UK real estate (Transparency International 2018 and UK Department for Business, Energy and Industrial Strategy 2018).

According to Van der Merwe (2020) further challenges surround effective implementation, with many jurisdictions experiencing delays in implementation as well as a failure to apply effective sanctions for non-compliance, along with challenges surrounding the verification of submitted data. Transparency International (2021b) has thus been urging that ownership registers be given the mandate, power and resources to independently assess and verify information provided by covered companies.

Enforcement of (foreign) bribery laws

To effectively deter bribery by multinational companies when competing for international tenders, including public procurement contracts, clear regulatory frameworks and the enforcement of bribery laws are crucial and the “ultimate deterrent to bribery” according to the OECD (2007: 68).

Likewise, it is also crucial that countries disclose this enforcement information, as well as resulting sanctions, and other bribery statistics (Transparency International 2020b). According to Transparency International (2020b) this will help to better understand whether legal frameworks are effective and a sufficient deterrent. If public officials of third countries have adequate access to information about enforcement actions of other jurisdictions, they will be better able to prevent companies that have been convicted of misconduct elsewhere to continue bidding for procurement contracts in other markets.

While most OECD countries, including Colombia, Brazil and Chile, publish some information on investigations underway and cases concluded, the information provided is often incomplete or only partially accessible, especially in the case of non-trial resolutions and settlements (Transparency International 2020b).

In corruption cases involving international business transactions, international cooperation is generally key for successful enforcement. This includes effective mutual legal assistance (MLA) and other forms of information sharing for evidence gathering. However, according to Transparency International (2020b), MLA in practice often faces challenges including inadequate legal frameworks, limited resources, a lack of coordination and long delays. The OECD (2007) likewise noted that cases of transnational bribery often face challenges due to a lack of harmonisation and cooperation, as well as differences in enforcement procedure and definition of offences.

(International) debarment lists

Debarment, or suspension, refers to the (non-criminal) sanction of suspending an individual or company from participating in procurement processes (Transparency International UK 2015). Debarment lists are maintained by several countries as well as international organisations, such as the World Bank, and can serve to penalise individual wrongdoing as well deter others (Transparency International UK 2015). Debarment also serves to protect state finances and restore or retain trust in government effectiveness and legitimacy (Hjelmeng & Søreide 2014).

At the domestic level, several countries have introduced measures to ban convicted corporate entities or legal persons from participating in public procurement proceedings. In Latin America, Colombia reportedly introduced such a measure in December 2019 (El Congreso de Colombia 2019).

If publicised by the issuer, debarment lists can assist other countries in the investigation of bribery cases or can be used to cross-debar companies that have been sanctioned abroad (Transparency International 2020b). The World Bank and other multilateral development banks debar entities for a range of misconduct, including corrupt practice, fraudulent practice, collusion, coercion and obstruction. In recent years, these lists have become more accessible, and in conjunction with BO registers such blacklists can be effective tools to identify the actual owners of sanctioned companies or connected entities (Rahman 2020).

While cross-debarment agreements exist only between the World Bank and other regional development banks, countries could use the debarment of a company on another country's debarment list as a reason to exclude dishonest firms from participating in procurement processes at the outset, or at least as reason to conduct enhanced due diligence on the company during the bidding stage (Transparency International UK 2015).

According to Hjelmeng and Søreide (2014) debarment decisions against companies require a list of preconditions to be effective in rebuilding trust in the procurement process: external decision-making (that is, the procurement department itself cannot grant exemptions), a length of exclusion that is proportionate to the misconduct, as well as monitoring of the credibility of a company's effort to improve its integrity system ("self-cleaning").

However, while debarment as a sanction has gained significant prominence, existing debarment practices vary considerably.[1] What type of misconduct will lead to a debarment differs between jurisdictions and organisations, for example. While the World Bank lists collusive practices as a reason for debarment, the EU directive does not. Some stakeholders also apply mandatory debarment provisions, by which a debarment follows automatically once certain conditions are met, whereas elsewhere, debarment is discretionary in that decisions are made on a case-by-case basis (Hjelmeng & Søreide 2014).

[1] *In 2020 the World Bank issued the Global Suspension & Debarment Directory, which lists the different suspension systems currently in place across jurisdictions.*

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