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# **BOOSTING INTEGRITY IN ROMANIAN PUBLIC PROCUREMENT**

*- policy paper -*

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## Siemens Integrity Initiative

### Policy paper

# BOOSTING INTEGRITY IN ROMANIAN PUBLIC PROCUREMENT

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## Executive summary

Despite the significant importance and large amount of funds involved in public procurement in Romania, which accounts for approximately 8% of the GDP or €50 billion, there remains a considerable risk of corruption and irregularities within the system. Corruption is perceived to be high by both the general public<sup>1</sup> and the private sector, and this reflects the numerous situations when corruption was detected in procurement procedures in Romania<sup>2</sup>. Irregularities can happen either as an abuse of power or as an accident due to limited administrative capacity to manage complex procurements.

Overall, **the most common typologies of corruption in public contracting observed in Romania**, according to the Romanian oversight authorities and other research<sup>3</sup>, are:

- Bribery or conflicts of interests associated with tailored terms of references or unfair evaluation of tenders;
- Using emergency procurement to limit the competition, without proper cause;
- Collusion between bidders (often without the involvement of the contracting authority);
- Collusion and bribery at delivery (of goods, services or works), even if the awarding process for the contract was not corrupt.

Other **significant risks for the integrity of Romanian public procurement are related to:**

- The low capacity of public buyers;
- The low quality of provided information and lack of use of the data generated by the procurement system for risk management;
- The low development of business integrity practices in Romania;
- Overall, there is a limited capacity for civil society to be effective watchdogs for the procurement process, coupled with the relatively small number of cases in which contracting authorities and civil society organisations collaborate to mitigate integrity risks in public procurement.

In this context, **several policy measures are recommended to the Romanian Government to improve the integrity of public procurement:**

- **Formal recognition and systematic use of Integrity Pacts**, by including them in the legislation and using them for procurement processes with high corruption/integrity risks;
- Raise awareness and train civil servants dealing with public procurement on anti-corruption and integrity;

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<sup>1</sup> In the Corruption Perception Index Romania scored 46 out of 100 in 2022 and 74% of business think corruption prevented them from accessing a contract in a public procurement procedure according to the Eurobarometer from 2020.

<sup>2</sup> See reports and communications of the National Anti-Corruption Directorate.

<sup>3</sup> See the reports of the National Anti-Corruption Directorate: <http://www.pna.ro/obiect2.jsp?id=342> and <http://www.pna.ro/obiect2.jsp?id=309>. See also:

- Research conducted by Transparency International Romania: [https://www.transparency.org.ro/proiecte/proiecte\\_incheiate/2010/proiect\\_3/Riscuri%20de%20coruptie%20in%20achizitii%20publice.pdf](https://www.transparency.org.ro/proiecte/proiecte_incheiate/2010/proiect_3/Riscuri%20de%20coruptie%20in%20achizitii%20publice.pdf);
- R2G4P initiative, 2022, "Public Procurement Integrity in Southeast Europe: Mechanisms, Red Flags, and State-Owned Enterprises in the Energy Sector", available at: <https://seldi.net/publications/public-procurement-integrity-in-southeast-europe-mechanisms-red-flags-and-state-owned-enterprises-in-the-energy-sector/>.

- Develop a training programme for public buyers, the civil servants dealing with public procurement, to allow them to better learn about the market;
- Assess and amend legal provisions to widen the scope and definition of conflict of interests;
- Implement an integrity risk management system for public procurement;
- Issue general guidelines for direct procurement and model procedures for the required institutional procedures excepted from Directive 2014/24;
- Ensure the quality of published public procurement data ;
- Use standard costs (as recommended by some European funded projects) in price estimations for public procurement.

Integrity Pacts piloted in Romania between 2016 and 2021 represent a valuable instrument to raise trust in public procurement in order to facilitate decision making and implement the necessary reforms. Raising trust in procurement procedures is one of Transparency International Romania's objectives, as it's a crucial step in breaking the negative feedback loop in which the lack of capacity and integrity undermines trust, and the lack of trust fosters an environment for irregularities and corruption to thrive.

Moreover, Integrity Pacts are a Collective Action mechanism and they are supporting the capacity building, based on mutual learning, of all involved stakeholders: contracting authorities, the companies that represent the potential bidders and contractors and the civil society. Collective Action initiatives can support public buyers to better understand the markets and formulate realistic and non-discriminatory requests on behalf of contracting authorities. They can also support the avoidance of unintended irregularities raising the perception about corruption and diminishing trust due to misunderstandings and different communication styles. Moreover, Collective Action can allow early detection of integrity problems with financial consequences (for the budget and the private sector), including early detection of corruption if occurring.

**Transparency International Romania proposes a four steps model for more trust in public procurement and for addressing the above-mentioned reforms:**

1. **By using big data analyses, public institutions, the private sector and civil society can identify projects/public procurement procedures/contracts that are exposed to corruption / have a high corruption risk;**
2. **A variety of stakeholders should mobilise to monitor the projects/public procurement procedures/contracts exposed to corruption risks;**
3. **Using Integrity Pacts to monitor the projects/public procurement procedures/contracts exposed to corruption risks and involving the stakeholders;**
4. **Based on the experience of Integrity Pacts, both capacity building activities for institutional strengthening and policy reforms can be better planned and implemented.**

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## Introduction: importance of public procurement integrity in Romania

Public procurement as a key area of government spending is heavily regulated in order to ensure value for money, fair competition, and transparency. However, it is also exposed to corruption risks due to the large amount of money spent, technical and legal complexity, and the public discretion with which the details of spending decisions are set.

Based on recent estimates, **public procurement in Romania makes up around 8% of the GDP, corresponding to more than 20% of the public budget or about €50 billion** (as government spending in Romania was last recorded at 39.9% of GDP in 2021).<sup>4</sup>

However, **Romania's public procurement system is perceived as vulnerable to corruption and irregularities**. Companies perceive bribes and irregular payments to be widely exchanged in return for obtaining public contracts (over half of businesses report they encountered unclear evaluation criteria and conflicts of interest in public procurement). Moreover, licenses and procurement officials are strongly perceived to show favouritism when deciding on contracts according to the Business Anti-Corruption Portal.<sup>5</sup>

In this context, 74% of business think corruption prevented them from accessing a contract in a public procurement procedure, according to the Eurobarometer from 2020 on businesses' attitudes towards corruption.

In the Corruption Perception Index (CPI) Romania scored 44 out of 100 in 2012, and 46 out of 100 in 2022<sup>6</sup>. Therefore, despite efforts to improve the situation and the implementation of two National Anticorruption Strategies (2010-2015 and 2016-2020), there is still much work to be done to improve the integrity system and reduce perceptions of corruption. In 2020 alone, 20% of Romanians admitted paying a bribe during the previous 12 months (Global Corruption Barometer - GCB 2021). Although there is a progress from the 29% of Romanians admitting paying a bribe in 2015, Romania remains the EU member state with the most widespread petty corruption, a sign of systemic corruption<sup>7</sup>. 51% of Romanians consider that most or all members of the Parliament are corrupt and 40% consider that the national government officials are corrupt, indicating that citizen perceptions of grand corruption are also high. Local administration, including mayors, are considered corrupted by 33% of Romanian citizens.<sup>8</sup> Romanians perception about the corruption

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<sup>4</sup> See: Bosio et al., 2020, "Public Procurement in Law and Practice", NBER Working Paper Series. See also; Institute for Public Policy, 2021, "Public procurement in Romania 2019-2020".

<sup>5</sup> European Union Anti-Corruption Report, 2014, cited by <https://www.ganintegrity.com/portal/country-profiles/romania/>.

<sup>6</sup> Complete data available on the website of Transparency International: <https://www.transparency.org/en/cpi/2022/index/rou>.

<sup>7</sup> There is data inconsistency between the Global Corruption Barometer: 20% public service users paid a bribe in the previous 12 months and the Eurobarometer on corruption in 2020, when 9% of respondents in Romania reported they experienced or witnessed any case of corruption and the Eurobarometer on corruption in 2020. However, in both cases 18% (2021) and 19% (2020) of respondents reported they gave an extra payment or a valuable gift to a nurse or a doctor, or they made a donation to the hospital, when looking for medical services. Therefore, the low level of directly experience petty corruption reported by the Eurobarometers seem to be the expression of Romanian misrepresentation of what corruption is. Often, in Romania, giving gifts or money for services apart from the usual fees is considered a sign of gratitude, and only extortion is recognised as corruption.

<sup>8</sup> Complete data available on the website of Transparency International: <https://www.transparency.org/en/gcb/eu/european-union-2021/results/rou>.

among politicians, in the national and local government is reported in similar ways by the GCB and the Eurobarometers on corruption.

While there are no extensive studies comparing how corruption affects different institutions, surveys such as the Eurobarometers and the GCB have revealed that Romanian citizens perceive the healthcare system, police, customs, Parliament, and Government as among the most corrupt institutional systems. On the other hand, small municipalities and public institutions have low capacity to undertake public procurement processes and therefore they are under high risks of irregularities due to a lack of institutional control and oversight mechanisms.

A study published in 2022 on public procurement integrity in Southeast Europe<sup>9</sup> underlines a **clearly definable set of corrupt techniques** that are actively used in Southeast Europe, including Romania to siphon out public money for private gain: **favouritism and clientelism linked with other serious irregularities**. These irregularities include: the overpricing of contracts, tailored tender specifications, conflict of interest in the tendering process, a high share of non-open procedures and contract modification in the implementation phase. **Bribery can and has been associated with most of the above-mentioned irregularities** and the most illustrative cases of bribery in public procurement investigated in the Southeast Europe are from Romania. Therefore, both **bribery and favouritism/clientelism are the most important corruption risks for Romanian public procurement**.

The health and education system, as well as large infrastructure and IT projects have been affected by corruption in public procurement according to communications and reports made by the National Anti-corruption Directorate<sup>10</sup> and the media. In addition, small infrastructure projects at local level have been affected by corruption because of the lack of oversight and media investigations show these vulnerabilities.<sup>11</sup>

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<sup>9</sup> R2G4P initiative, 2022, "Public Procurement Integrity in Southeast Europe: Mechanisms, Red Flags, and State-Owned Enterprises in the Energy Sector", available at: <https://seldi.net/publications/public-procurement-integrity-in-southeast-europe-mechanisms-red-flags-and-state-owned-enterprises-in-the-energy-sector/>

<sup>10</sup> <http://www.pna.ro/obiect2.jsp?id=342> and <http://www.pna.ro/obiect2.jsp?id=309>

<sup>11</sup> <https://recorder.ro/video-dumnezeul-achizitiilor/>

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## Overview of public procurement in Romania

Romania transposed the new EU Directives in the field of public procurement in 2016. Four laws were adopted by the Parliament in May 2016: Law no. 98/2016 on public procurement, Law no. 99/2016 on sectorial procurement, Law no. 100/2016 on concession contracts for works and services and Law no. 101/2016 on remedies (appeals processes). However, the laws have been amended several times since and legal instability represents one of the weaknesses of the public procurement system.

### **Overall organisation of the public procurement processes**

The Romanian procurement system is very decentralised with each public institution representing a contracting authority. This is superposed on the administrative structure of Romania, including over 3 000 municipalities (most of them very small) and a large number of specialised institutions present at the level of each of the 41 counties. In total, there are over 10 000 contracting authorities in Romania.

Each contracting authority must plan its procurement and procurement processes, develop terms of references, plan the calendar of procurement according to the legal terms and deadlines and conduct the bidders offers evaluation.

Beside the procurement laws, transposing the EU Directives, a large number of regulations, mandatory procedures and guidelines have been issued by the National Agency for Public Procurement (NAPP). Moreover, training programmes for the procurement specialist in public institutions have been organised by the NAPP and other authorities. However, because the entire implementation of procurement processes is separately managed by each public authority or institution, the capacity challenges for public procurement are easily emerging.

In line with the EU Directives in the field of public procurement in 2016, public contracts above a certain threshold are subject to competitive bidding. Moreover, contracts under the threshold value provided by the EU Directive 24/2014 on public procurement are required to apply a competitive bidding procedure if their value is about €54 000 for supplies and services, and approximately €180 000 for works. For direct procurement, under this second threshold, competitive bidding is not required, but contracting authorities must compare offers. On the other hand, procurement procedures as described by the law are not applicable to procurement mentioned on Annex no. 2 of the Romanian procurement law<sup>12</sup>. Overall, a large number of contracts are not covered by the European and national regulation and procedures should be established and managed by the contracting authorities, often small institutions with limited capacity both to manage procurements and to manage corruption/integrity risks.

Centralised procurement was introduced to Romania fairly recently. The possibility to organise centralised procurement is included in the Law no. 98/2016 on public procurement, but the National Office for centralised procurement only started procurements in 2018 and it focusses on basic products used by all (or most of) the contracting authorities. The first contract for the centralised procurement was for office paper. There is no intention to extend the centralised

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<sup>12</sup> Health-care, social and education services, hotel and restaurant services, legal services.

procurement system for complex services, like consultancy. Therefore, except for the most commune staple products for the administration, there is no integrated/centralised way for procurement to be organised in the country, there is no integration or even coordination of procurement among Government institutions (ministries, national authorities and agencies), or among other institutions across governance levels.

### **Transparency of public procurement**

The laws on public procurements, concessions and remedies, in conjunction with Law no. 544/2001 on the access to public interest information, ensure robust transparency of key aspects of the public procurement process (planning, bidding, evaluation, implementation and monitoring). The information of interest for the procurement process and needed by bidders in order to prepare their tenders is published for all interested bidders on the electronic public procurement platform: *SEAP*, available at [e-licitatie.ro](http://e-licitatie.ro). The entire “public procurement folder”, including all documents regarding the procurement, the bidders offers and the proceedings and minutes of the bidding evaluation committees, can be requested and is made public only after contract awarding, based on Law no. 544/2001 on the access to public interest information.

In the past several years, Romanian authorities made substantive efforts to improve transparency, integrity and curb corruption in public procurement. A key step in this process was to provide detailed open data on the tendering and award phases of the procurement process, offering free access to data users and other third parties to large administrative files both on *SEAP* and on the governmental platform dedicated to open data. Such publicly available data allow for real time and systematic monitoring of corruption risks by civil society, intergovernmental actors and different levels of the national government. The ready availability of data allows for spotting notable changes in public procurement market risks, for example as a result of regulatory changes. Government-wide data also allows for comparing across a wide range of organizations and identifying high risk entities and transactions even when average risks are acceptable.

However, in this respect progress is still needed, as presented in the following section dedicated to the systemic weaknesses.

### **Procedures limiting the scope of discretionary decision-making in public procurement**

The administrative procedures described by the law on public procurement are effective in limiting the scope of discretionary decision-making. Detailed procedures and steps are described by the law.<sup>13</sup> Moreover, the Criminal Code includes a criminal offence related to bid rigging in public procurement, including collusive tenders. It is a crime to “*remove, by constraint or corruption, a participant from a public auction*”. The agreement between the participants to distort the award price is also a criminal offence<sup>14</sup>.

The transparency provided by the electronic public procurement system is one of the main tools to monitor and control decision-making in public procurement. Furthermore, a new system called *PREVENT* was established in late 2016 allowing the imposition of ex-ante checks on public

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<sup>13</sup> Government Decision no. 395/2016 with subsequent amendments.

<sup>14</sup> Art. 246 of the Criminal Code.



procurement processes concerning conflicts of interest between the decision makers within the contracting authorities and the bidders.<sup>15</sup>

However, legal provisions regarding conflicts of interest have been pared down in the last 10 years in Romania. Public officials and all civil servants need to publicly and regularly declare their assets and interests, including financial investments, gifts, benefits and hospitality received from private sector entities and any income from positions held in the private sector. However, there are some shortcomings related to elements in the declarations that are not disclosed according to the law (e.g.: beneficial ownership, unpaid positions, disguised assets – owned in practice, but not on paper). Moreover, the law only defines conflicts of interests in relation to decisions benefiting first-degree relatives. Conflict of interest does not cover decisions that generate a non-financial benefit for a public official or generate benefits for relatives beyond spouses, children, parents and siblings.

Moreover, by law, conflicts of interest are monitored by a specialized administrative agency, the National Integrity Agency (NIA). The mandate of the institution is broad, and its responsibilities have been assessed by the European Commission (through the CVM) as appropriate for the control of conflicts of interests<sup>16</sup>. However, there are about 300 000 public officials who fill in asset and private interest declarations every year<sup>17</sup> and NIA does not have the capacity to check all declarations.

### **External oversight for public procurement in Romania**

The Romanian Court of Accounts is the main oversight body for public spending, including public procurement in Romania. The Court conducts regular audits covering all public institutions and analyses their procurement procedures. However, it is not possible to cover all activities of an institution during regular audits, therefore only a sample of the procurements and contracts are usually verified. If irregularities are observed, the Court formulates mandatory remedial recommendations. However, each institution has the right to challenge the report in the judiciary court and the findings of the Court of Accounts. The remedial recommendations are enforceable only after the judiciary decision on the report of the Court of Accounts and maintains it.

As the Court of Accounts reports are only made public when finalised, and an investigation of the Romanian Court of Accounts can take years, sometimes the information is not made public in a timely manner.

On the positive side, the legislative framework to ensure the accountability and the integrity of the Romanian Court of Accounts provides a special code of conduct for the external auditors forming the staff of the Romanian Court of Accounts. This is a positive element to ensure the integrity in practice.<sup>18</sup>

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<sup>15</sup> Law no. 184/2016.

<sup>16</sup> See results of the European Commission monitoring under the Cooperation and Verification Mechanism for Romania at [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/assistance-bulgaria-and-romania-under-cvm/reports-progress-bulgaria-and-romania\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/assistance-bulgaria-and-romania-under-cvm/reports-progress-bulgaria-and-romania_en)

<sup>17</sup> Report on 10 years of activity of the National Integrity Agency, available at: <https://www.integritate.eu/Home/Brosura-A.N.I.aspx>

<sup>18</sup> Special regulations for the staff of the Court of Accounts are published at <http://www.curteadeconturi.ro/Regulamente.aspx>.

Concerning the effectiveness of the Romanian Court of Accounts in fulfilling its role, there are no data on the implementation of the Court's recommendations, although it is a criminal offence for the civil servant not to put in practice the recommendations of the Romanian Court of Accounts when damages have been identified.<sup>19</sup> The Court of Accounts is following up on the implementation of its recommendations, but this is done separately for each institution. There is no database with all recommendations, their implementation and follow-up that could support a more general risk analysis for the system on procurement irregularities or other issues.

Control can also be exercised by Control Bodies at ministerial level and by the Prime Minister Control Body, but their functioning is less independent, as they are dependent on the ministers and on the Prime Minister. Moreover, their reports are not public and their control does not generate direct legal effects, but they are used to refer irregularities to other authorities, including the Romanian Court of Accounts and the Prosecution Office.

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<sup>19</sup> Art. 64 of Law no. 94/1992 on the Court of Accounts, with subsequent amendments.

## Key weaknesses and gaps in safeguard against corruption and bad governance in public contracting

### Integrity and corruption risks in Romanian public procurement

An analysis conducted by the Government Transparency Institute for Transparency International Romania and the Romanian Academic Society in 2021 shows that, as a result of the COVID-19 pandemic and crisis, corruption risks associated with Romanian public procurement increased. The misuse of procedure types, especially the use of emergency procedures, for non-crises related products (products not related to the protection from the virus and the medical response) in 2020 and 2021, contributed to the increase of corruption risks.

The most common typologies of corruption in public contracting observed in Romania, according to the Romanian oversight authorities and other research<sup>20</sup> are:

- Conflicts of interests: conflicts of interest regulated by the law are identified by the National Integrity Agency and prevented in a large measure by an electronic system, but conflicts of interests among friends and distant relatives are identified by investigative journalists and can generate a special treatment for a client bidder;
- Bribery for tailored terms of references (often) or qualification requirements (less often);
- Using emergency procurement to limit the competition, without proper cause, mainly as a result of favouritism or clientelism;
- Collusion between bidders (often without the involvement of the contracting authority);
- Bribery or conflicts of interest visible in the evaluation of tenders, when not all bidders are treated equally, especially in the procedure of requesting and analysing clarifications to offers;
- Collusion and bribery at delivery (of goods, services or works), even if the awarding process for the contract was not corrupt. This is visible in contracts amendment during the implementation stage (changing technical parameters of the delivery) or even the existence of intentionally wrong, false or negligent receipt of deliveries.

### Capacity of Romania public buyers

Regular training of employees in the public sector is regulated. However, in practice, it is not provided in all institutions. Good results in ensuring training on anti-corruption and integrity of employees working within contracting authorities are generated by the European funded projects under the Operational Programme Administrative Capacity, which allocated funds for the implementation of the National Anti-corruption Strategy 2016-2020 at local and central level. A total of 42 institutions are beneficiaries of funding for this purpose, and projects often include

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<sup>20</sup> See the reports of the National Anti-Corruption Directorate: <http://www.pna.ro/obiect2.jsp?id=342> and <http://www.pna.ro/obiect2.jsp?id=309>. See also:

- Research conducted by Transparency International Romania: [https://www.transparency.org.ro/proiecte/proiecte\\_incheiate/2010/proiect\\_3/Riscuri%20de%20coruptie%20in%20achizitii%20publice.pdf](https://www.transparency.org.ro/proiecte/proiecte_incheiate/2010/proiect_3/Riscuri%20de%20coruptie%20in%20achizitii%20publice.pdf);
- R2G4P initiative, 2022, "Public Procurement Integrity in Southeast Europe: Mechanisms, Red Flags, and State-Owned Enterprises in the Energy Sector", available at: <https://seldi.net/publications/public-procurement-integrity-in-southeast-europe-mechanisms-red-flags-and-state-owned-enterprises-in-the-energy-sector/>.

training as well as other interventions, such as the development of specific anti-corruption procedures.<sup>21</sup>

Although welcomed, this is insufficient compared to the need of Romanian public buyers. As mentioned, the entire implementation of procurement processes is separately managed by each public institution - and there are over 10 000 institutions - in its capacity of contracting authority. The poor capacity of contracting authorities represents an important issue for the integrity and correctness of public procurement procedures. Small institutions and small municipalities often face the risk of being unduly influenced by companies, especially when establishing technical specifications for procurement.

The decentralisation of the procurement system represents a weakness, as all public/contracting authorities need to develop their capacity, and the lack of trained procurement experts is one of the most important challenges of the Romanian procurement system. This is further complicated by an unstable legal framework, frequent amendments to the law, and numerous secondary and tertiary normative acts that are difficult to manage. These issues are particularly problematic given the existing experts' work overload.

### **Transparency, information disclosure and open contracting in Romania**

Although some progress was made in providing information on Romanian procurement and some data are easily available, there are important gaps related to procurement transparency. Open contracting data standards are not used and in general open data are not fully published or, when published, include a large proportion of errors that make any analysis difficult.

On the one hand, not all documents are published by default, and some are still only available upon request. Bidders offers, as well as the communication between the tenders' evaluation committees and the bidders, are only available upon request. These pieces of information are essential to check the equal treatment applied to all bidders and to exclude the risk of favouritism. Moreover, the use of the legal right to declare parts of the offers as confidential is, apparently, abused in Romania. Extensive research is needed, but the experience of Transparency International Romania shows that in several cases bidders declare their entire offer as confidential, which is not allowed by the law providing that any confidential information should be thoroughly motivated by the bidder.

On the other hand, the quality, completeness and accuracy of data is still problematic. Publishing reliable, high-quality data and updating publication and licensing policies that oblige government officials to improve data completeness and accuracy is an essential requirement for carrying out insightful, comprehensive corruption risk analyses in order to derive evidence-based policy recommendations. If data are missing, incomplete, or outright erroneous, the analysis is incomplete at best, and misguided at worst. Importantly, missing or erroneous information may indicate a deliberate attempt to hide evidence, hence directly impairing accurate corruption risk assessments. Data quality can be improved by directly enforcing data quality standards, for example by refusing to publish incomplete records or imposing fines on recurrent maladministration. However, these assessments should also take into consideration poor or

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<sup>21</sup> Evaluation of the Operational Programme Administrative Capacity, published in 2020.

underdeveloped institutional contexts where data gathering, cleaning and publishing are hindered by weak or missing digital platforms and/ or skills, especially when referring to smaller contracting authorities.

### **Business integrity and Romanian procurement**

According to research done by Transparency International Romania since 2012 until 2019, few companies in the business sector in Romania have adopted international corporate integrity standards. Initiatives to promote integrity of Romanian companies are rare and weak. Most of the national companies operating locally do not have anti-corruption policies and programmes; however, some of the larger companies operating abroad do. In general, even if many entrepreneurs speak out against corruption, this is not reflected in their management strategies. Usually, multinational corporations operating in Romania follow their own anti-corruption policies and standards.<sup>22</sup>

According to article 169 of Law 98/2016<sup>23</sup> an economic operator can be excluded from the award procedure at any time, for reasons of action or inaction related to the motives for exclusion<sup>24</sup> committed before or during the procedure. Therefore, existing contracts (already awarded) can be terminated if corruption comes to light after the contract has been signed. However, article 171 of Law 98/2016<sup>25</sup> provides that the economic operator can provide evidence of having taken measures sufficient to demonstrate their credibility. Therefore, the economic operator cannot be excluded if the contracting authority considers the evidence sufficient and relevant. According to article 168 of Law 98/2016 (art.181 of Law 99/2016 / art.82 of Law 100/2016), the contracting authority has to do so, if evidence, such as certificates, criminal records or other equivalent documents issued by the competent authorities of that country, is provided. There are no criteria provided to actually assess the evidence providing by the companies.

Cases of tax haven supplier registration were also raised as a red flag by the analysis conducted in 2021, though our indicator only captures the suppliers' country of registration without consideration towards their beneficial owners or the whole ownership network. Case evidence as well as quantitative analysis of large-scale datasets have shown the detrimental effects of tax haven-linked companies in public procurement.<sup>26</sup>

**Opaque ownership structure and lack of an integrity programme are not reasons for bidders' exclusion, as they are not part of the limited causes for exclusion provided under Law no. 98/2016 on public procurement.**

**As confirmed by both the desk-based legal research and interviews conducted by Transparency International Romania, there are no legal provisions for incentives offered to**

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<sup>22</sup> See the Business Integrity Country Agenda (BICA) assessment report by Transparency International Romania, published in 2020: <https://www.transparency.org.ro/en/tiropage/business-integrity-country-agenda>.

<sup>23</sup> See also art.182 of Law 99/2016 on sectorial procurement, art.83 of Law 100/2016 on works concessions and service concessions

<sup>24</sup> These motives include: a corruption or money laundering offence committed before the procedure, other type of fraud committed before the procedure, debts to the public budget, tax evasion, false statements, conflicts of interest etc.

<sup>25</sup> See also art. 184 of Law 99/2016 on sectorial procurement; art.84 of Law 100/2016 on works concessions and service concessions

<sup>26</sup> Fazekas, M., and Kocsis, G., 2020, "Uncovering High-Level Corruption: Cross-National Objective Corruption Risk Indicators Using Public Procurement Data" in *British Journal of Political Science*, <https://doi.org/10.1017/S0007123417000461>.

**companies with effective anti-corruption programmes in place (for example, as an eligibility criterion in procurement conditions).**

Overall, according to data collected by Transparency International Romania, only a few companies establish clear, visible and accessible formal policies prohibiting corruption. When they exist, these policies address the most prevalent risks of corruption, such as conflicts of interest, bribes, political contributions, charitable contributions and sponsorships, facilitation payments, gifts, hospitality, expenses, money laundering, and collusion. These policies are visible to all parties within and outside the company. However, in most cases these internal corporate policies are the result of a transfer from other companies, and the ownership of such anti-corruption policies are low – at all the levels and in all departments of a company. When implementing anti-corruption corporate programmes, training of managers and employees takes place, but it is unclear how many of those programmes are based on a risk assessment and their impact on human resources management, internal communication and feedback mechanisms. It is unclear to what extent these programmes are implemented in synergy with other corporate programmes. Concrete existing cases, where important figures in corporations are accused of or confess to corruption, show that these programmes are not fully implemented and companies do not always cooperate appropriately with relevant authorities in connection with corruption investigations and prosecutions.<sup>27</sup>

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<sup>27</sup> Business Integrity Country Agenda (BICA) assessment report by Transparency International Romania, 2020.

## Civil society engagement and monitoring of public procurement and corruption

Although anti-corruption has been the overarching theme of the Romanian activism in recent years and it generated impressive public mobilisation and protests, the attention of civil society organisations and the media is on public corruption, and much less on business corruption and integrity.

In a vicious cycle, existing corruption has a large impact on the freedom and quality of media and undermines the capacity of the press to generate effective momentum for integrity, especially in the business sector. On the other hand, using the internet and social media, some NGOs have been able to raise awareness against corruption, including corruption in public procurement.

### Romanian media role in curbing corruption

According to Reporters Without Borders, Romania is the 56th country in the 2022 World Press Freedom Index with a score of 68.46 out of 100 where scores between 55 and 70 reveal a problematic situation. Although very close to a satisfactory score (over 70), the trend, when it comes to media freedom, is not a positive one.

Media is legally free from the government and free from censorship<sup>28</sup>, but Reporters Without Borders stress that “a lack of government consideration for journalism and the media, growing political censorship and an increase in self-censorship are the main features of the current media landscape.”<sup>29</sup> Equally concerning is that the National Broadcasting Council does not really fulfil its regulatory role and does not condemn abuses.<sup>30</sup> “The authorities are constantly pressuring journalists to reveal their sources and try to silence any criticism of the system. Government agents posing as journalists have recently started infiltrating news organisations. A few independent media outlets manage to survive alongside the big media groups, but they are subject to arbitrary tax and finance inspections whenever they criticise powerful politicians.”<sup>31</sup>

Concerning the media track record of successfully uncovering corruption, Romanian investigative journalists focus on corruption in the public sector rather than the corruption in the private sector. For example, in several corruption cases regarding public procurement, privatisations or other

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<sup>28</sup> Art. 30 of the Romanian Constitution

<sup>29</sup> Reporters Without Borders, 2019 World Press Freedom Index, <https://rsf.org/en/romania>. For more details on the World Press Freedom Index: <https://rsf.org/en/world-press-freedom-index>

<sup>30</sup> See also the ActiveWatch reports on the freedom of press “FreeEx (2017-2018)”: <https://activewatch.ro/ro/freeex/publicatii/lansarea-raportul-freeex-2017-2018-libertatea-presei-in-romania> and “FreeEx (2018-2019)”: <https://activewatch.ro/ro/freeex/publicatii/lansarea-raportul-freeex-2018-2019-libertatea-presei-in-romania/>

<sup>31</sup> Ibid. Also see: <https://www.theatlantic.com/ideas/archive/2019/06/europes-gdpr-elevated-privacy-over-press-freedom/590845/>, June 3<sup>rd</sup> 2019.

aspects where public officials and private companies were involved, the media reported extensively on the investigation of the public officials and a lot less on the private involvement.<sup>32</sup>

### **The role of non-governmental organisations**

Civil society has been one of the most important Romanian stakeholders in promoting anti-corruption policies. Since the 1990s, NGOs have been active in convening initiatives in key areas for the private sector, such as public procurement and cooperation with law enforcement. More recently, in 2014-2015 and in 2017, numerous civic movements have emerged in the country, and a broad-based anti-corruption movement has grown in society, especially among youth.<sup>33</sup> However, most of these newer anti-corruption civic movements act more as watchdogs, and less as partners for the other stakeholders in the public and private sector. Moreover, the capacity of new civic movements to promote systematic anti-corruption initiatives is limited.

On the other hand, more experienced NGOs are involved in extensive and strategic partnerships with anti-corruption stakeholders from the public sector, private sector and other civil society organisations.

### **Integrity Pacts in the Romanian public procurement system**

#### **The National Anti-corruption Strategy 2021-2025 encourages civic oversight over public procurement, which represents the first step in formulating a comprehensive policy based on an effective partnership for Collective Action for procurement integrity in Romania, using the Integrity Pacts.**

The Integrity Pacts (IPs) have been developed in 1990s by Transparency International movement, perfected during the last 10 years and piloted in Romania previously with very good results. The IP is a type of project-based collective action initiative bringing together public authorities, civil society, and private sector, whose overarching goal is to contribute to the open, accountable, effective, and inclusive implementation of a contracting project. It includes four core elements: (i) a binding agreement; (ii) a set of activities aiming at rising capacity for integrity and anticorruption and early detection of risks; (iii) an independent monitoring mechanism led by civil society and (iv) mechanisms and/or procedures to report, address, and punish corruption, irregularities, and non-compliance with the initial IP commitments (as reflected in the binding agreement).

IPs have been implemented in a pilot initiative in Romania, with EU support, between 2016 and 2022. Transparency International Romania and the Institute for Public Policy (IPP) monitored three projects of importance for Romanian development and strategy in the EU funding period 2014-2020 where IPs have been signed. The three projects are: the project of cadastre in rural areas (officially: The increase of coverage and registration of real estate in Romania's rural areas on the Integrated Cadastre and Land Register System) implemented by the Romanian Agency for Cadastre and Land Registration, the project: Integrated School Management System, implemented by the Ministry of Education and the project: E-culture: the digital library of Romania, implemented by the Ministry of Culture. The Romanian Academic Society was the independent monitor for IPs signed by the Managing Authority for the Operational Programme Administrative Capacity for the

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<sup>32</sup> Information provided in interviews.

<sup>33</sup> #rezist - Romania's 2017 anti-corruption protests: causes, development and implications. Quadriga University of Applied Sciences, [http://eprints.bournemouth.ac.uk/29647/1/romanian\\_protests\\_2017\\_publication\\_FINAL\\_nk.pdf](http://eprints.bournemouth.ac.uk/29647/1/romanian_protests_2017_publication_FINAL_nk.pdf).



communication campaigns of the Operational Programme and other promotion activities of the programme.

The monitoring work had benefits across all stages of the process. In the planning and pre-tendering phase, the monitor contributed to the inclusion of better selection criteria in the tendering documents and penalties for delays in implementation in the draft contract. Moreover, observing low participation in the tenders and a lack of interest from companies, the monitor helped the contracting authority carry out a comprehensive market consultation that resulted in a marked increase in the number of bidders.

The IP piloted in Romania also had benefits in the tendering and awarding phase, made particularly sensitive by the high risk of conflict of interest and revolving doors among land administration officials and private firms working in the field. To mitigate these risks, the monitors recruited an investigative journalist to check the bidders' and public officials' backgrounds for potential cases of favouritism. In addition, as land registration in Romania is subject to the approval of local mayors, the monitors participated in meetings between these and the cadastre agency to protect the process from political biases.

The IP monitors also helped revise potentially restrictive and ambiguous terms of reference in the tender. In the implementation phase, the monitor helped smooth disagreements regarding the quality of the work, ensuring a no-cost extension to complete the project.

The pilot has shown that mutual understanding among different actors about the social and economic benefits of a specific project and the IP itself, as well as genuine willingness by contracting authorities to ensure integrity and to engage with citizens, are essential preconditions for the successful implementation of future IPs.

On the other hand, an important result and lesson from the project is that the civic independent monitor was an important stakeholder in the contracts implementation, ensuring a good dialogue of the contracting authorities (especially the Ministry of Culture) and contractors. This existence of the IP and the presence of the civic independent monitor allowed the parties to focus on the public interest and not to be blinded by legalistic issues in their contract and working relationship. This allowed for a better implementation of contracts and less conflicts between parties.

After seven years of advocacy activities, we are confident that Romanian institutions are now more open to civic monitoring of public procurement in order to ensure their relevance for the general/public interest and their integrity. Moreover, the communication and activities conducted by Transparency International Romania with representatives of the business sector allow us to be confident that bidders are open to the use of more integrity standards (governance standards).

The 2021 study of the Government Transparency Institute (GTI) shows that, at least in Romania, IPs performed as intended based on the corruption indicators used. GTI tested the differences between public entities that participated in IP and the ones, that did not. Specifically, IP participants rank, on average, lower on several corruption risk indicators compared to others. This finding could have policy relevant consequences in extending the scope of the IP towards other public entities in order to reap the benefits of increased external oversight that may lead to improved procurement results for the public, especially during times of emergency.

In the last months, additional recommendations have been formulated at the end of the project, concerning the use of Open Contracting Data Standards<sup>34</sup> in order to ensure better transparency during the contract implementation phase and the reform of the performance guarantee system to ensure better accountability of contractors. The advocacy related to these recommendations is continued by Transparency International Romania.

We must add the fact that the National Agency for Public Procurement is promoting IPs as a good practice and the Agency, itself, signed a Memorandum of Understanding and a Monitoring Agreement with Transparency International Romania. The National Anticorruption Strategy and the National Agency for Public Procurement represent important starting points in extending the use of Integrity Pacts.

However, there are some limits to the Integrity Pacts piloted in Romania: they are not mandatory for bidders, and they do not cover subcontractors. The access to the tender evaluation phase of the independent monitor in the Integrity Pact is also limited, being allowed only after contract awarding. The independent monitor has direct access to procurement and tender preparation and contract execution, but it can only assess ex-post the tender evaluation process.<sup>35</sup> This limits the monitor capacity to raise early the flags on risks or irregularity and limits the IP preventive impact.

### **Business engagement for procurement integrity**

On the other hand, business integrity initiatives are rare in Romania. According to Transparency International Romania's experience, anti-corruption is not a priority of companies in Romania, despite increasing awareness of the business risks of corruption. Therefore, companies do not regularly collaborate with stakeholders from the public sector and/or civil society to strengthen anti-corruption practices. Cooperation between businesses, but also between the private sector, the public one and civil society organisations is limited, rare and undertaken by a small number of companies.<sup>36</sup>

The Ministry of Justice has a dedicated cooperation platform with the business sector under the National Anti-corruption Strategy, including 22 members (e.g. four embassies, three chambers of commerce, the Foreign Investors Council, the Romanian Bank Association and ten major companies). The platform has met twice a year since 2012 to discuss topics of common interest for the business community and the public administration. Topics discussed include compliance systems, anti-bribery programs in companies, use of anti-corruption clauses in relationships with suppliers and distributors, public procurement procedures, transparency of lobbying activities and open data. The OECD states that these "discussions have prompted the adoption of preventive measures such as ex-ante control of conflicts of interest in the public procurement and opening of contracts as part of the Open Government commitments."<sup>37</sup>

The Centre for Integrity in Business (CIB) is a centre for resources through which Transparency International Romania promotes sustainable solutions for strengthening good governance based

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<sup>34</sup> <https://standard.open-contracting.org/latest/en/>

<sup>35</sup> Ibid.

<sup>36</sup> Information based on interviews conducted for the present report.

<sup>37</sup> OECD, *"Business Integrity in Eastern Europe and Central Asia"*, 2016. It is worth mentioning that Romania has been a part of the Open Government Partnership since 2011.

on ethical principles and seeks to develop partnerships between the public sector, private sector and civil society.<sup>38</sup>

Another initiative has been initiated by Romanian Business Leaders in partnership with the Romanian Centre for European Policy and with support from Raiffeisen Bank as part of the project Partners for Integrity. This resulted in the creation of the Romanian Clean Business Coalition, which aims to develop an institutionalized partnership between Romanian businessmen who in turn will contribute to the significant reduction of corruption in the Romanian private and public environment.<sup>39</sup> Unfortunately, however, the project seems to have been idle since 2016, as funding and involvement of the key stakeholders did not continue.

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<sup>38</sup> <https://www.businessintegrity.ro>

<sup>39</sup> [http://www.cleanbusiness.ro/?page\\_id=54](http://www.cleanbusiness.ro/?page_id=54)

## Need for collective action for the integrity of public procurement in

### Romania

**There is a need to improve both the integrity in public procurement and the perception about integrity in public procurement.** Both corruption and the perception on corruption are detrimental to both the public and private sectors. OECD studies show that rising trust in the public administration correlates to decreasing corruption. For contracting authorities' civil servants and officials to do a good job using public procurement, it is important to trust them with this responsibility. Building trust, therefore, is one of the objectives of Transparency International Romania. This is **an important path for escaping the negative feedback loop where the lack of capacity and integrity undermines trust and the lack of trust is also creating the environment for irregularities and corruption.**

**In order to build the needed trust, we strongly believe an initiative of Collective Action will be effective.** In general, Collective Action is a collaborative approach to address corruption challenges and raise standards of integrity in the public and private sector and to ensure fair competition in business. We advocate, thus, for multi-stakeholder collaborations to address common challenges related to procurement and to achieve shared goals on the efficiency and integrity of procurement processes and contracts.

In public procurement the cooperation between the public authorities and the private sector is needed and the quality of this collaboration is contributed to increased quality of the procured goods, services and works. Only this collaboration can generate requests from public buyers that are well adapted to market capabilities and take profit of all the new products and technologies developed. However, the contribution of the civil society is key in monitoring the relationship between the public and private, so that it is based on mutual trust, but never on corruption or secret agreements. Moreover, civil society organisations can play an important role in bringing citizens to the table when public contracts are discussed, therefore leading the planning and implementation of these contracts towards supporting the public interest first and foremost.

For more trust, more dialogue guided by the Collective Action principles, is needed between different public institutions – including contracting authorities and oversight bodies, the private sector and civil society to ensure:

- that public buyers know the market well and can formulate realistic and non-discriminatory requests on behalf of contracting authorities, well adapted to the market: what and how the market can offer;
- the avoidance of unintended irregularities and misunderstandings raising the perception about corruption;
- early detection of integrity problems with financial consequences (for the budget and the private sector), including early detection of corruption if occurring.

**Civil society monitoring can help addressing integrity issues and corruption risks that are not well covered by the law** and prevent irregularities from this perspective (e.g., identifying

conflicts of interests that are not regulated as such, but are the source of other integrity issues, like favouritism).

Civil society monitoring can also help **address integrity issues and corruption risks in the phase of contract implementation**, when there is no preventive oversight, but only the ex-post control of the Court of Accounts.

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## Policy recommendations

### Necessary reforms

The following policy measures should be taken by the Romanian Government to improve the integrity of public procurement in Romania:

- **Recognise formally and use systematically Integrity Pacts**, by including them in the legislation and applying them for the procurement with high corruption/integrity risks, given their proven effectiveness in preventing and mitigating integrity risks related to public procurement, as well as their effectiveness in building trust among stakeholders involved in public procurement (considering that trust is a prerequisite for curbing corruption).
- **Raise awareness and train civil servants dealing with public procurement on anti-corruption and integrity**. A national training programme and partnerships with universities should be created with that purpose.
- **Develop a training programme for public buyers, the civil servants dealing with public procurement, to allow them to better learn about the market**, to formulate realistic and non-discriminatory requests on behalf of contracting authorities, well adapted to the market: what and how the market can offer.
- **Assess and amend legal provisions to widen the scope and definition of conflict of interests** and include all types of interests, not only financial interests generated by family relationships. Currently, according to the Romanian law, there is a conflict of interest when a public official decides on a contract for a close family member, but there is no conflict of interest if the contract beneficiary is a close friend or former business partner.
- **Implement an integrity risk management system for public procurement**, using big data and allowing oversight authorities and civil society, including Collective Action initiatives to focus on the projects/public procurement procedures/contracts most exposed to corruption risks.
- **Issue general guidelines for direct procurement and model procedures for the required institutional procedures excepted from Directive 2014/24** and the transposing law on public procurement (Law no. 98/2016) (especially for the procurement mentioned on Annex II of Directive 2014/24).
- **Ensure the quality of public procurement data publication**, allowing for a more effective civic oversight, by civil society, media and academia.
- For better value for money in procurement, **standard costs (as recommended by some European funded projects) could be used in price estimations for public procurement**.

## Key recommendations

Transparency International Romania proposes a four-step model for more trust in public procurement and for addressing the above-mentioned necessary reforms:

1. **Using big data analyses, public institutions, the private sector and civil society can identify projects/public procurement procedures/contracts that are exposed to corruption / have a high corruption risk indicator.** The development of the corruption risk indicator for public procurement should be based on the variables used by Transparency International in the Red Flags project.
2. **A variety of stakeholders should mobilise to monitor the projects/public procurement procedures/contracts exposed to corruption risks.** Performing civic monitoring based on Collective Action and partnerships between different kinds of institutions is key as a trust-building strategy.
3. **Using Integrity Pacts to monitor the projects/public procurement procedures/contracts exposed to corruption risks and involving the stakeholders,** through Collective Action, in formulating:
  - Monitoring strategies;
  - Recommendations to reduce corruption risks.
4. **Based on the experience of Integrity Pacts, both capacity building activities for institutional strengthening and policy reforms can be better planned and implemented.**