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LIST OF ACCRONYMS

BKA	Federal Criminal Police Office
BMWi	Federal Ministry for Economic Affairs and Energy
CAN	Contract Award Notice
CoC	Control of Corruption
CPI	Corruption Perception Index
DVA	German Committee for Public Procurement and the Award of Contracts in Construction
EC	European Community
EU	European Union
GG	German Basic Law
GWB	German Act Against Restraints on Competition
IfM	Institut für Mittelstandforschung
OECD	Organisation for Economic Co-Operation and Development
RVA	Imperial Committee for Public Procurement
SektV	Sector Regulation
TED	Tenders Electronic Daily
TI	Transparency International
VgV	Public Procurement Rules
VOB	Contracting Rules for Public Construction Contracts
VOF	Rules on Public Procurement and the Award of Contracts for Freelance Services
VOL	Contracting Rules for Services
WB	World Bank

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I. INTRODUCTION

The present report takes a look at Germany's legal system and analyses the available data in order to provide an inside view of the inner workings of the German public procurement system. Doing this for the particular case of Germany is highly relevant given the size of the German economy and the size of its procurement sector. According to National Accounts Statistics from the Organisation for Economic Co-Operation and Development (OECD), government procurement represents around a third of Germany's general government expenditure. The size of the sector is not the only reason why Germany is a highly interesting case. Transparency International's (TI) Corruption Perception Index (CPI) and the World Bank's (WB) Control of Corruption (CoC) indicator usually rank Germany among the least corrupt countries in the world. The ANTICORRP project first policy report, *Anticorruption Report Vol. 1* (Mungiu-Pippidi et al. 2013), also ranks Germany as a country with low resources to fuel corruption and high constraints to control it, but recent events have drawn the public eye to Germany's construction sector and its procurement system.

In past years, scandals related to big infrastructure projects exploding in costs and not being ready on time have emerged in a country that was previously praised for its efficiency and punctuality. Some of the most memorable examples include the Berlin-Brandenburg Airport (BBI) set to open in June 2012 and now delayed until at least 2016 and the *Elbphilharmonie*, Hamburg's shot at building an iconic concert hall that was supposed to be completed in 2010, but remains unfinished five years after the deadline and has more than doubled in cost. On top of the delays and the escalating costs in some major projects, the official statistics of the German Federal Criminal Police Office (*Bundeskriminalamt*- BKA) also show that obtaining public contracts is the number one reason for offering bribes since 2009. 64% of all bribery cases in 2013 were linked to this purpose and another 5% were intended to buy competitive advantages (Bundeskriminalamt 2013).

Putting the current scandals aside, studying Germany's public procurement system and assessing its potential risks for corruption and government favouritism is a particularly relevant task given the amount of public money involved. Germany has the highest public procurement expenditure in the EU, which averaged 370 billion euros a year between 2009 and 2013. Despite having relatively similar-sized economies, this figure is 30% higher than in France and 40% higher than in the United Kingdom, Europe's second and third biggest economies after Germany. German procurement spending, however, is particularly hard to track. The lack of available data makes it very difficult to answer even some of the most basic questions about the sector, such as the composition of the spending, the number and value of contracts awarded or even the number of contracting authorities in the country. A study by the *Institut für Mittelstandsforschung* (2008) estimates that there are around 30,000 contracting authorities in Germany, but the EU's Annual Review of Public Procurement estimates that there are only between 15,000 and 20,000 contracting entities in the country.

These reasons make Germany an interesting case study and emphasise the need to look deeper into its procurement system and gather evidence that can help reveal its inner workings in order to determine whether the stories of Berlin's airport and Hamburg's concert hall are simply isolated cases or the visible symptoms of a deeper problem. The main objective of this report is to provide a general overview of the procurement sector in Germany, its development, current trends and potential risks for corruption. The report is divided into four sections: the first part offers a short summary of the German legal framework, its origins and the influence of the European Union (EU) on it. The second section provides an overview of the current public procurement trends in the country. It relies on different sources of data to quantify the size of the procurement spending in the country, the manner in which it is allocated and the most commonly used awarding procedures in the country. This section also discusses the quality of the data available and its problems. The third part of the report assesses the potential risks of corruption and government favouritism in the procurement process by considering the strengths and weaknesses identified in the previous sections. The final section offers a summary of the findings in the report.

1. Legal Framework

This section provides a short historical overview of the origin and development of public procurement regulation in Germany. The purpose of this section is to explain how the current system came to be and how the EU has affected Germany's public procurement system. This part also describes how Germany has adapted its legal framework to comply with European legislation.

1.1 *Historical development of procurement laws*

The regulation of public procurement has a long-standing tradition in Germany. The first laws in the sector date back to the 16th century and include the "Instruction on the fortress Ingolstadt" of 1542, the "Construction Order for Hamburg" from 1617, the "*Submissionspaketen of Mannheim*" from 1699 and the "Prussian building regulations" of 1724. The first comprehensive procurement directives, however, were issued in the 1830s for public buildings in Bavaria and Württemberg and in 1885 for Prussia (Rechten & Rübke 2014). The first draft for a unified contracting law dates back to 1913 and was prepared by a parliamentary commission. The draft included important innovations such as the obligation to assess the suitability of candidates and the adequacy of the proposed prices. These measures were intended to put an end to the often-predatory price-competition. This legislation never saw the light due to the beginning of World War I and a second attempt to adopt the imperial framework law on public procurement after the war also deemed fruitless. However, given the practical importance of the topic, the then Imperial Government of Germany set up the Imperial Committee for Public Procurement (*Reichsverdingungsausschuss- RVA*), which published the Contracting Rules for Public Construction Contracts (*Verdingungsordnung für Bauleistungen- VOB*) in 1926 and the related Contracting Rules for Services (*Verdingungsordnung für Leistungen- VOL*) in 1936 (Rechten & Rübke 2014).

The VOB and the VOL standards gained importance after the end of World War II (Rechten and Rübke 2014), particularly in the early post-war years, as they constituted the basis for the reconstruction of Germany. Since then, the German Committee for Public Procurement and the Award of Contracts in Construction (*Deutscher Vergabe- und Vertragsausschuss für Bauleistungen*- DVA) has the task to revise and amend the public procurement regulations in Germany. The DVA is an unincorporated association, whose members include representatives from the public sector (federal ministries, provincial ministries and municipal associations) and from the private sector, including the construction industry. This committee is supposed to keep a fair balance between the interests of the contracting authorities and of the service providers. Similar bodies exist in order to revise the VOL, as well as the Rules on Public Procurement and the Award of Contracts for Freelance Services (*Vergabe- und Vertragsordnung für freiberufliche Dienstleistungen*- VOF) issued in 1997.

1.2 The influence of the EU on the German public procurement system

The influence of the EU on the German public procurement sector began in the 1970s. The then European Community (EC) introduced several measures to harmonise the legal public procurement framework across its member states: The procedures for awarding public supply contracts were co-ordinated with Directive 77/62, which introduced three fundamental principles: contracts had to be advertised community-wide, discriminatory technical specifications were prohibited and tendering and award procedures had to be based on objective criteria. Similar principles of transparency and non-discrimination were applied to the awarding of public works contracts with Directive 71/305. These directives, however, did not replace national tendering procedures and practices with a set of common rules.

Directive 88/295 amended all previous public supplies directives and made open tendering procedures the norm and negotiated procedures were allowed only in exceptional circumstances. Moreover, purchasing authorities were required to publish advance notices of their annual procurement programmes as well as details of each award decision. Moreover, with the first Remedies Directives, 89/665 (relating to public works and goods contracts) and 92/13 (relating to public utilities), Member States were required to ensure rapid and effective judicial review of decisions by contracting authorities. The directives also introduced the "attestation procedure" as a way for contracting authorities to certify the compliance of their purchase procedures and practices with procurement law.

The harmonisation of Member States' public procurement procedures was completed with the introduction of directive 2004/18/EC regarding the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. The EU public procurement directives only apply for contracts above a certain threshold, which is why it is more appropriate to speak of a codified EU public procurement law rather than a German one in these cases. However, the National legal framework still applies to public contracts that are under the applicable threshold. The adjustments made to the German legal system in order to

accommodate the EU directives occurred using a somewhat unusual procedure: The German Federal Government initially met the changes requested by the EU through a purely budgetary approach: Public procurement was regulated from a budgetary perspective. The principles of economy and efficiency in public spending included in the Budget Law, would translate into the necessity of guaranteeing competition among bidders, as well as the selection of the cheapest and best offers. The details regarding the procurement procedures were laid down in the VOB, VOL and VOF. As a result, additional legislation was not deemed necessary. This is the so-called "budgetary solution" ("*Haushaltsrechtliche Lösung*"). However, since the contracting rules established in the VOB, VOL and VOF did not have legal value, bidders were not able to derive any legal protection from them.

As one of the main objectives of the EU directives was to reduce the room for discretion in the award of public contracts and to protect the bidders' rights, the European Court of Justice (ECJ) and the European Commission considered Germany's "budgetary solution" insufficient given that bidders did not have the right to take the contracting authority to court the case of a breach of the procedures outlined in the VOB, VOL and VOF (Dauelsberg 2009). This led Germany to reform its public procurement system in 1999 and adopt what is known as the "anti-trust solution" ("*Kartellrechtliche Lösung*"). The new procurement system was created through the modification of the German Act Against Restraints on Competition (*Gesetz gegen Wettbewerbsbeschränkungen- GWB*) and the creation of the Public Procurement Rules (*Vergabeverordnung- VgV*). The GWB was changed to include general principles that would guarantee transparent award procedures, equal treatment for all bidders and the obligation to accept the economically most advantageous bid, but most importantly, it granted bidders the right to demand the contracting entities to observe the relevant procurement rules. Since the GWB does not contain specific procedures to regulate the procurement process, these were introduced by the VgV, which on top of establishing a few specific procedures for the procurement process, turned the VOB, VOL and VOF into legally binding regulations.

Since 1999, the GWB and the VgV together with the VOB, VOL and VOF, constitute the core of the German public procurement system. They have been subject to various modifications in response to more recent EU directives, such as the 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts and the Public Procurement Remedies Directive (2007/66/EC) with regard to improving the effectiveness of review procedures concerning the award of public contracts. In order to implement the Directive 2004/17, the German government also enacted the Sector Regulation (*Sektorenverordnung- SektV*) (Authority for the Supervision of Public Contracts 2010).

1.3 *Legal framework for domestic procurement*

As shown in the previous section, the EU has had a big impact on the German legal public procurement framework. It is important to mention, however, that most of the reforms apply only to contracts that need to be advertised at EU level, i.e. those tenders above a certain threshold (around 130,000 euros for goods and service contracts and five million euros for public

construction contracts). For the case of Germany, the rules that apply for contracts below the EU thresholds are very different from EU laws and therefore need to be explained separately. The large differences in the systems are the result of the origin and historical development of the procurement legislation, as well as of Germany's strong federal structure. These elements combined resulted in two parallel systems of awarding public contracts and a complex national legal framework that can vary from state to state and from one municipality to the next (Rechten & Rübke 2014).

The main difference between the European and the domestic procurement systems in Germany is that the GWB and the VgV do not only apply for contracts below the EU-defined thresholds. In these cases the Budget Laws of the federal, state or local governments become the legal framework regulating the procurement process. Budget laws in Germany include the principles of transparency, economy and cost-effectiveness as the main guidelines for public spending, but the specific procedures regarding the awarding of public contracts are not described here and therefore vary greatly across the country: federal and state financial regulations stipulate that the award of contracts must be preceded by an open tender and that they must be conducted in accordance to the rules stated in the VOL, VOB and VOF.

At the local level, however, the respective municipal regulations or municipal budget regulations provide only rudimentary principles for public contracting: some municipalities also apply the VOB for construction projects, the VOL for goods and services and the VOF for professional services, but others apply partial or modified versions of them or do not apply them at all and allow contracting authorities to develop their own awarding policies. According to Rechten & Rübke (2014), however, since the VOB, VOL and VOF were developed by representatives of both the contracting authorities (federal, state and local authorities) and the bidders (business associations and chambers of commerce), the rules contained in them are largely consented and accepted and therefore are used in public procurement across the country even where the law does not oblige the parts to apply them. Nevertheless, since the use of the procurement rules contained in the VOB, VOL and VOF is based on internal decrees and on the Budget Law, which are simply internal public administration laws, violations against them cannot be taken to court unless they infringe the principle of equality before the law, which is embedded in article 3 of the German Basic Law (*Grundgesetz*- GG). This means that an incorrect choice of procurement procedure does not necessarily lead to an infringement of the award rights of an unsuccessful bidder. The chosen procurement procedure must diminish the chances to get the award for a bidder's rights to have been infringed and for litigation to be possible.

The situation described above presents obvious challenges when assessing potential corruption risks, especially at the national level. Germany's method of awarding contracts below the EU thresholds has sparked criticisms from several fronts: The European Commission and the German chapter of TI, for example, have warned against several risks, such as the insufficient legal protection for bidders and the lack of transparency in the award process. Moreover, as explained before, in the case of national contracts, the rules of the game change from state to state and sometimes even from one municipality to the other and the observation of the

procedures contained in VOB, VOL and VOF, which are legally binding at European level, can become a non-binding, informal agreement when awarding contracts within the domestic market. Whether Germany will replace its complex procurement law system with a unified procurement law as many other EU Member States have done, is still an open question.

2. Public procurement trends in Germany

As revealed in the previous section, the German public procurement system is characterized by a strong degree of fragmentation due to the country's strong federal character and the influence of the EU, which has re-shaped the manner in which contracts are awarded above a certain threshold. The procurement process for contracts underneath these thresholds, however has been left behind and as a result Germany's "budget" and "antitrust solutions" now have to co-exist and the legally binding procurement rules that apply at the European level are not applicable at the domestic one. This could be a source of concern for many, but Rechten and Röbbke (2014) claim that since the contracting rules were formulated and agreed upon by representatives of the public and the private sectors, they are widely applied and respected across the country. This section analyses the available data in order to assess whether or not the implementation of the European and the national procurement frameworks leave room for the occurrence of corruption or favouritism in the country. It is necessary to note, however, that data quality and availability constituted a major obstacle to do this.

One of the objectives of this section is to collect empirical evidence to assess the extent of corruption and government favouritism in the German public procurement system, particularly for the case of the construction sector. But before this, it is necessary to discuss some of the data gaps and data quality issues mentioned above. This section is therefore divided in three parts, the first one is about data quality and the current data gathering procedure that prevails in Germany. The second part presents an analysis of the procurement trends above EU thresholds derived from the Tender European Daily (TED) Database and the third part relies on diverse sources to paint a picture of what happens in the awarding process underneath the threshold.

2.1 Data quality and availability for Germany

After gathering all the available statistical data on procurement from the BMWi and the European Commission some of the challenges of analysing the trends of the German public procurement system became apparent. Answering basic questions such as the total value or volume of procurement in the country was not possible since the official procurement figures from the Federal Ministry for Economic Affairs and Energy (*Bundesministerium für Wirtschaft und Energie*- BMWi) are incomplete. The data published by the BMWi are simply aggregated values of contracts awarded by sector (goods, services and works) and level of government (central and local). Moreover, the BMWi tables report mostly tenders above the EU thresholds. As a result, EU and OECD estimations had to be used to calculate the total volume of procurement.

Despite great effort, no tender-level data could be obtained for contracts below the thresholds. Further research revealed, however, that the failure to obtain this data was simply due to the fact

that Germany lacks an appropriate procedure to compile and publish this information and that such data does not currently exist. An evaluation conducted by Kienbaum (2014) on the current data collection practices in the framework of public procurement confirms that the information on contract awards below the EU thresholds do not currently exist in a TED-like database that would allow for their analysis. Moreover, this study also finds that the current data collection process is overly complex and inefficient, which results in low quality data.

According to Kienbaum (2014), the current data collection system is labour-intensive and error-prone (Kienbaum 2014). In the current top-down collection process, the BMWi has to request the information from each federal and state ministry to put together the aggregated statistics, which generates excessive workloads for all parties involved. The results of the study conducted by Kienbaum (2014) on request of the BMWi, reveal that the Ministry usually contacts state and local contracting authorities one by one in order to obtain their data. On top of this being a labour-intensive task, the quality of the data submitted by the state and local authorities is often poor. Time and personnel constraints do not allow for an extensive verification of the data and most of the time only obvious mistakes or omissions are spotted. In case of errors, the BMWi has to contact the local and state authorities again and wait for an answer. Moreover, there is no information regarding how many contracting authorities submit their reports to the BMWi, as there is no monitoring mechanism for non-response rates (Kienbaum 2014).

This data collection process has been widely criticized as inadequate (Transparency International Deutschland 2011; European Commission 2013; Kienbaum 2014) because it has negative effects on the data compiled and makes it virtually impossible to gather the information on contracts underneath the EU thresholds, which constitute the bulk of the procurement value and volume. A simple indicator captures the low quality of the German public procurement data: the number of contract award notices (CAN) in the TED database that includes the value of the contract. In 2011, according to the 2013 Annual Public Procurement Implementation Review of European Commission, Germany ranked among the bottom five countries in this indicator, with less than half of the CANs including their value. Although the quality of the TED data for Germany seems to have improved over the past couple years, more than a third of the 115,000 CANs included in the TED still do not include information regarding their value.

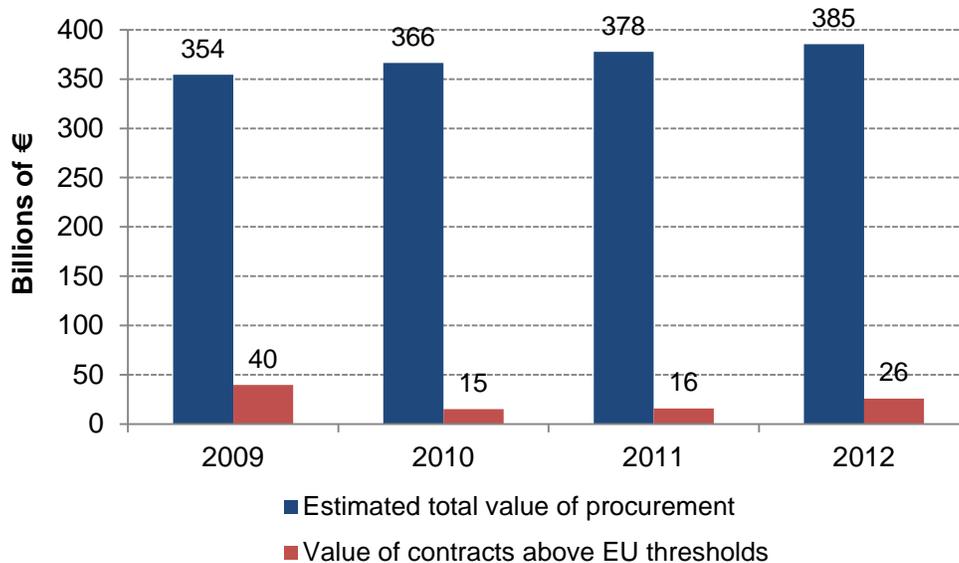
Despite data collection problems and their obvious effects on data quality, the TED database can still offer some insights regarding contract awards above the EU thresholds. The following section provides an analysis of this data and although the results might not be completely accurate, the large number of contracts included in the database is still enough to provide a general depiction of the main trends.

2.2 Trends in procurement spending above the EU thresholds

The level of spending on public procurement in Germany is estimated to be somewhere between 300 and 500 billion euros a year (Kienbaum 2014, European Commission 2014b). Using the EU's estimations as a baseline, the value of the contracts above EU thresholds comprises only a small fraction of total procurement. **Figure 1** shows that, with the exception of

the year 2009, the data provided by the BMWi does not account for more than 10% of the total estimated value of procurement. This implies that the bulk of the contracts awarded in Germany are granted following the national and not the European procurement legislation. Despite this fact, no data is available for contracts underneath the thresholds, as Germany's legal framework does not require contracting entities to keep tender data in a centralized database.

Figure 1 Total value of reported contracts vs. total estimated value of procurement (2009-2012)

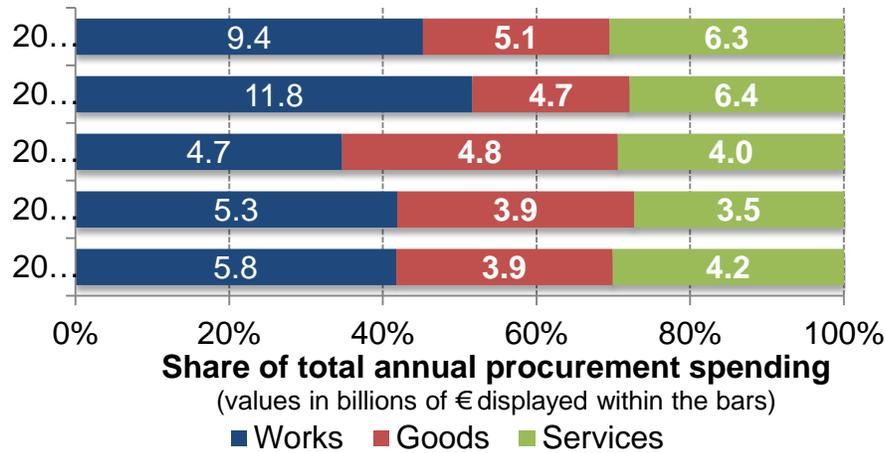


Source: BMWi and EU Public Procurement Indicators 2012

An important characteristic of German procurement spending is that it is highly de-centralised. The available statistics from the BMWi show that the local and state authorities are responsible for two-thirds to three quarters of the procurement spending above EU thresholds (BMWi 2014). This figure is even higher in the construction sector, where central government procurement accounts only for 10% of the total procurement spending.

The data published by the BMWi also reveals that procurement spending goes mostly to infrastructure. **Figure 2** shows that over 40% of the total spending goes to the construction sector. It also shows a dramatic increase in procurement spending in this sector between 2011 and 2012, when it more than doubled by going from 4.6 to 11.8 billion euros. Overall, the value of infrastructure contracts above EU thresholds has tripled since 2005. Although the value of EU-level tenders for goods and services have also grown steadily, infrastructure remains the biggest target for procurement funds in Germany.

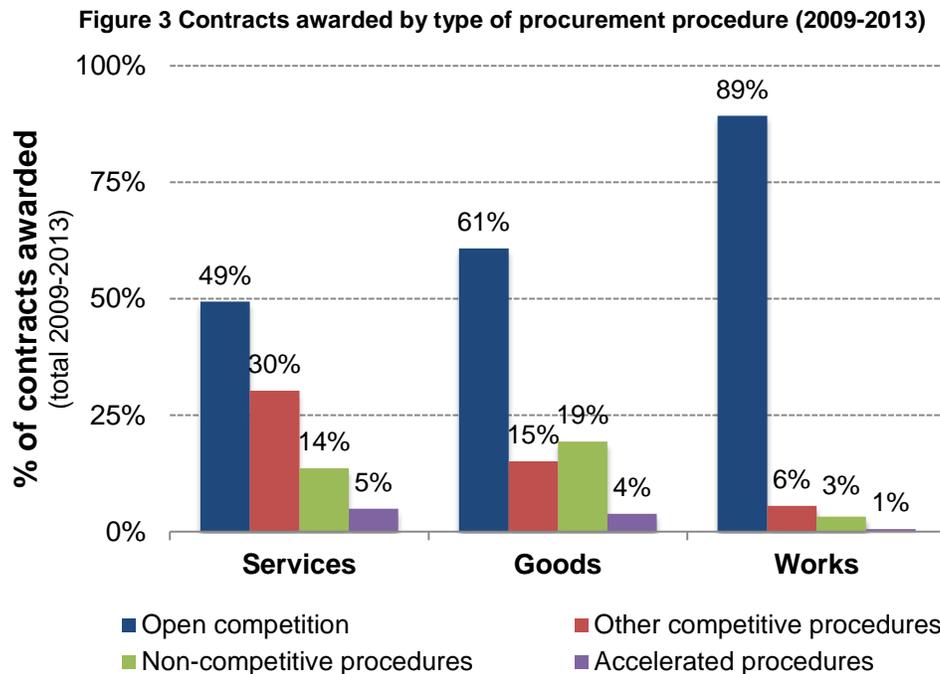
Figure 2 Composition of total procurement spending (2009-2013)



Source: BMWi

One of the objectives of this report is to take a closer look at the way in which contracts are awarded in order to detect risks of corruption and possible cases of government favouritism. The overall assumption here is that open or competitive procedures are less prone to corruption than non-competitive ones, as the latter make it easier to favour some bidders over others. The TED Database can be used to get an overview of the awarding procedures most commonly used in Germany. This allows checking whether or not a restricted or other non-competitive awarding procedures are being commonly used, thus opening the door for discretionary allocation of public funds.

Figure 3 shows that most of the contracts contained in the TED database are assigned through competitive mechanisms. However, there are differences across sectors: 89% of all infrastructure contracts awarded between 2009 and 2013 were assigned through open competition and another 6% through a competitive dialogue or a competitive negotiation. In the case of the purchase of goods, 61% of contracts were awarded through open competition and 15% through other competitive methods. Open tendering is least used for the award of professional service contracts: open tenders were used in only 49% of the cases, other competitive methods such as competitive dialogue or a competitive negotiation were used for another 30% of contracts.



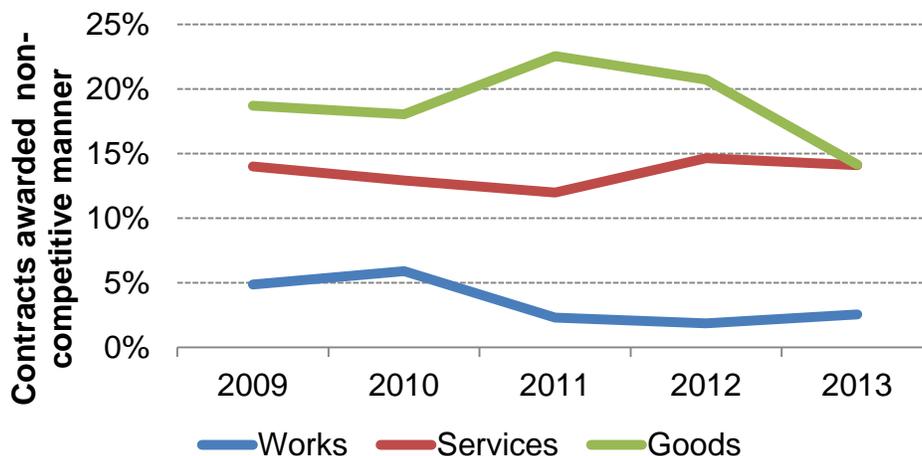
Source: TED Data

These results portray Germany under a positive light in terms of the type of procurement procedure chosen. The fact that almost 90% of all infrastructure contracts between 2009 and 2013 were awarded through an open tender would suggest that the risks of government favouritism in this particular sector are fairly low. These risks seem to be higher among the purchase of goods and the hiring of professional services, where 20 and 14% of contracts, respectively, are awarded through restricted or non-competitive procedures. The results from the TED database also reveal that the infrastructure sector has consistently had the lowest levels of non-competitive awarding procedures since the data is available (See **Figure 4**).

The practice of giving unfair preferential treatment to one person or group at the expense of another is the definition of favouritism. Bribes are usually the currency used by companies to buy political connections that will grant them preferential treatment. In comparison to smaller firms, large companies possess more financial resources to do this. According to the 2014 OECD Foreign Bribery Report, for example, big companies are more likely to bribe than SMEs (OECD 2014: 8). The same OECD report also reveals that more than half of the cases of international

bribery documented were intended to secure public contracts (OECD 2014: 8). Given that over 40% of the total spending in public procurement above the EU thresholds in Germany goes to the construction sector, it is worth analysing whether this sector presents symptoms of favouritism.

Figure 4 Share of non-competitive procurement methods in EU-level contracts (2009-2013)



Source: TED Data

Since public contracts are supposed to be awarded competitively, finding a reduced number of companies constantly benefiting from them can indicate that there are underlying factors affecting open and free competition in the sector. **Table 1** displays the total value of public contracts obtained by some of Germany's top ten biggest construction companies between 2009 and 2013. As can be observed, the total value of these contracts does not exceed 5% of the total procurement spending in the sector. Even when expanding the list to include the contracts obtained by the top 15 companies in the sector, their market share only amounts to a maximum of 11% of the spending. This evidence therefore suggests that there is a healthy, competitive market for construction contracts above the EU thresholds in Germany. It is also worth mentioning that none of the 100 richest Germans obtained their fortunes by competing in the construction sector: Families Goldbeck and Bauer – owners of the companies of the same names listed in **Table 1** – are among Germany's wealthiest, but not even close to the top positions. The top positions in the list of wealthiest people in the country are occupied by people from a variety of sectors such as the pharmaceutical, automotive, insurance, software, transportation, retail and fashion industries, but there is no mention of construction moguls.

The findings derived from the TED data portray the procurement process in Germany as a relatively low-risk environment for corruption with the majority of contracts being awarded competitively, declining trends in the use of non-competitive procurement methods and with the biggest enterprises in the country taking only less than five percent of market in the construction

sector. Nevertheless, it is necessary to bear in mind that the results reported in this section originate from contracts that exceed the EU thresholds, which make up for only a small fraction of the full picture. Due to this reason and the fact that the legal public procurement framework that applies below the EU threshold is significantly different these results cannot be transposed to the national level. The following section analyses the procurement system for contracts below the EU thresholds and checks for potential red flags.

Table 1. Total value of contracts awarded to German top construction companies by year

Company	2009	2010	2011	2012	2013
Bauer	4,864,941	-	1,748,238	3,519,454	281,425,339
Bilfinger	105,547,243	24,984,947	47,956,809	24,014,326	25,606,515
Ed Züblin	32,423,624	17,948,613	20,783,096	1,908,264	33,720,799
Goldbeck	28,087,907	13,752,882	24,200,000	2,763,757	16,652,333
Hochtief	35,469,892	15,386,859	-	330,442,016	90,447,355
Siemens	28,679,976	26,801,434	25,873,181	103,466,749	8,397,717
Share of total obtained by top construction companies	4.04%	1.87%	2.58%	3.93%	4.84%

Source: TED Data

1.3 Trends in procurement underneath the EU thresholds

Evaluating the public procurement system below the EU thresholds is a challenge for the case of Germany since there is no database containing similar information to what can be found in the TED data. The lack of reliable statistics is a known problem and stems from the fact that contracting authorities are not legally bound to keep a publically accessible record for contracts underneath the thresholds. As a result of this, it is currently impossible to replicate the methodology used in the previous section to identify potential risks of corruption. As an alternative approach to the analysis of raw procurement data, this section will try to shed some light on what goes on behind the scenes of the domestic awarding processes by looking at a different type of evidence that, despite not being based on factual data, might at least point at red-flags in the sector.

The first source of information that can help draw a picture of the inner workings of the public procurement system in Germany is the Flash Eurobarometer 374 survey “Businesses’ attitudes towards corruption in the EU”. This survey was carried out between February and March of 2013 with the primary objective of understanding the level of corruption perceived by businesses in different sectors. To do this, companies were asked about corruption in a range of areas

including the management of public tender and public procurement processes. Given that Germany is consistently ranked by TI's CPI and the WB's CoC indicator as one of the least corrupt countries in Europe and around the world – both TI and the WB rank Germany in position 6 in the EU and among the top 15 globally – one would expect the business community in the country to perceive illegal practices in procurement to be rare. However, this is not the case: according to Eurobarometer results, Denmark, Finland, Estonia and the United Kingdom are always among the countries with the lowest levels of perceived corruption in public procurement, but Germany is nowhere near these four countries.

Table 2 below shows the percentage of respondents that believe that the listed illegal procedures such as conflict of interest in the evaluation of bids, unclear evaluation or selection criteria or abuse of certain procedures to either accelerate the awarding procedure or use non-competitive procedures are widespread in Germany. Just to provide some additional perspective, the average for the EU27 as well as the position that Germany occupies within the 27 EU Member States are also reported. As can be seen from the results in **Table 2**, the German business community is critical of the manner in which contracts are awarded in the country: a majority of the respondents believe that collusive bidding and the involvement of bidders in the design of contract specifications are widespread practices in Germany. 44% of respondents also believe that amendments to the contracts terms often occur after the conclusion of the procurement process. This figure coincides with the EU average and places Germany in the worst performing tercile in the region. It is also worth noting that almost half of the respondents in Germany also believe that tailor-made specifications and conflict of interest in the evaluation of bids are widespread practices in the country.

Table 2 Percentage of respondents who perceive illegal practices in procurement to be widespread in Germany (2013)

Illegal practices	Germany	EU27 average	Rank
Specifications are tailor-made for particular companies	48%	57%	9
Conflict of Interests in the evaluation of bids	47%	54%	11
Collusive bidding	54%	51%	15
Unclear selection or evaluation criteria	43%	51%	9
Involvement of bidders in the design of specifications	52%	48%	20
Abuse of negotiated procedures	28%	47%	6

Abuse of emergency grounds to justify use of non-competitive or fast track procedures	42%	46%	14
Amendments of the contract terms after conclusion of the contract	44%	44%	19

Source: Flash Eurobarometer 374

Despite showing that the procurement might not be as risk-free as suggested by the evidence derived from the EU TED database in the previous section, business surveys such as the Eurobarometer used above are often criticised for their subjectivity and measurement errors: if respondents have not had a personal experience with corruption in the past, their answers will be purely “attitudinal” and their opinions will be mostly determined by individual factors such as their level of education, political beliefs, etc. In order to avoid this, it is desirable to combine perception data with more objective evidence. Luckily, the Courts of Auditors from Berlin, Saxony and Thuringia have conducted in depth procurement audits in the past three years. Evidence of systematic breaches of the procurement rules and procedures by the contracting authority or other type of misconducts in the awarding process could help validate the evidence provided by the perception indicators.

At first sight, the reports by the different state auditing courts reveal that there is a widespread lack of knowledge regarding the procurement rules, which often leads to breaches in the awarding of contracts. This evidence speaks directly against the notion that procurement rules in Germany are widely applied. In the case of Berlin, for example, the Court of Auditors found that contracting authorities often ignore the thresholds that call for open tenders and award contracts through restricted procedures. This was the case in more than 10% of the procedures checked (82 out of 788) (Rechnungshof von Berlin 2014: 114). There were also cases of contracts that due to their value would have had to be awarded competitively, but were divided into smaller ones to be awarded directly or through restricted procedures (Rechnungshof von Berlin 2014: 116). It was also determined that the process of selecting the appropriate awarding procedure or authorizing the providers was not properly documented 35% of the time (Rechnungshof von Berlin 2014: 117).

The 2012 audit for the state of Saxony, for example, revealed that although the municipalities in this state are obliged to publish the results of contracts granted awarded through restricted procedures and to inform about direct awards, 56% of the municipalities failed to do so either because they were not aware of this obligation or because of high workloads and lack of personnel (Sächsische Rechnungshof 2012: 15). The audit also determined that 40% of municipalities lack a directory of providers and therefore award contracts based on recommendations of independent professionals or of neighbouring municipalities (Sächsische Rechnungshof 2012: 14). Finally, the Court of Auditors of Thuringia also noted in 2014 that many municipalities are not familiar with the procurement regulations (Thüringer Rechnungshof 2014: 48): while the bigger municipalities are aware of the applicable legal framework and their

responsibilities, the smaller ones often lack this knowledge. The figures speak for themselves: a fifth of the municipalities in the state are not familiar with the GWB and the majority of them do not know that there are specific regulations for the construction sector.

The irregularities found by the local Courts of Auditors should not be interpreted as cases or symptoms of corruption. Many of the findings listed above might be indeed linked to a lack of knowledge of the legal framework, shortage of personnel to carry out all the necessary tasks to document the procurement process, etc. However, they should be a source of concern as they provide a fertile ground for corruption and favouritism to sprout. It is hard to generalize based only on auditing reports from three states. However, the fact that all of them find that contracting authorities are not familiar with the legal framework and fail to comply with their obligation to keep and publish the necessary information regarding the choice of procuring procedure, as well as the choice of provider confirm the notion that procurement underneath the EU thresholds happens under a high degree of opacity.

II. CORRUPTION AND FAVOURITISM RISK ASSESSMENT

For the purpose of this report, Mungiu-Pippidi's (2011) notion of corruption as an equilibrium between opportunities and constraints will be used as a framework to assess the degree of risk of corruption encountered in the German public procurement system. According to this author's theory, corruption is the result of the existence of power and material resources and the absence of legal and normative constraints. Different levels of resources and constraints therefore result in distinctive levels of corruption. The following section considers the findings of the previous parts and categorizes them in terms of opportunities and constraints in order to assess the potential risks for corruption and government favouritism within the German public procurement system. Since the analysis of the TED data for Germany did not reveal any red flags, the following section focuses mostly on the corruption risks that can be found in the award of public contracts at the national (i.e. below the EU) thresholds.

1. Corruption opportunities and constraints

Opportunities for corruption derive from two main sources: power discretion (how power is distributed among government structures and how competition for access to power takes place) and material resources (potential rents) (Mungiu-Pippidi 2011). Given that public procurement is a sector where the public and the private interests collide, it is particularly attractive for rent-seeking activities. This factor is exacerbated by the amount of money allocated through public procurement. As mentioned before, almost a third of the total German government spending is allocated through public procurement. The temptation to resort to illegal practices to secure government contracts can be high and this is proven by the fact that according to the BKA most of the bribes paid in Germany are indeed intended to secure public contracts or buy competitive advantages.

The section that describes the legal public procurement framework showed that Germany has a strong federal and de-centralized system in which most of the contracts are awarded through the

local and state authorities. In many cases decentralization can be a tool to fight corruption, as it helps reduce power concentration in the decision-making process. In this case, however, the lack of legally binding procurement regulations that apply to all contracting entities across the country gives local and municipal authorities enough leeway to change the rules to favour certain providers. Even if the *Länder* or municipalities are not actively seeking to favour certain providers, fair and open competition can be threatened by the existence of multiple procurement regulations at the national level, as potential bidders will face additional costs to compete for tenders when they have to get acquainted with a different state or local legislation. The Court of Auditors of Saxony, for example, reported that in the year 2012, 60% of the public contracts were awarded to contractors within the same or a neighbouring municipality, another 27% to contractors outside of the municipality, but in the same district and another 9% to bidders outside their district, but with a seat in Saxony. The same Court of Auditors also reveals that there is a rotation of providers in almost 87% of the municipalities (Sächsische Rechnungshof 2012: 13-14). Without more specific data, it is impossible to assess whether this rotation happens in a competitive manner or whether it responds to different criteria.

Other opportunities of corruption hiding behind Germany's fractioned and complex legal framework at the national level is the large room for discretion when choosing the means of tender publication or the procurement procedure itself: Many contracting authorities often favour local newspapers or bulletins over the centralized and more widely accessible government website bund.de (Institut für Mittelstandsforschung 2008) and the selection of procurement method –as pointed out by different local Courts of Auditors– are often biased towards restricted procedures.

Finally, the legal protection for bidders in Germany is weak, which makes it easier for contracting entities to abuse their power: the review system in Germany only applies to contracts above the EU thresholds. Below these thresholds, bidders are generally restricted to administrative complaints or civil claims for compensation against the awarding body. According to the German Chapter of Transparency International (2011), there is no reason not to grant bidders the same rights below and above the thresholds, as is the case in most other European countries.

On top of the increased opportunities for corruption that exist in the design and operation of the public procurement system for contracts below the EU thresholds in Germany, the constraints side of the equation also seem weak at the national level. Constraints on corruption can be either legal or normative. The former can be present in the form of specific anti-corruption legislation or oversight and control institutions. These constraints help alter the incentives to corrupt behaviour by making it more costly. The latter, on the other hand, are associated with the level of acceptance of corruption among the actors involved in a political system, especially in the case of civil society, the media and voters (Mungiu-Pippidi, 2010), who can act as anti-corruption watchdogs and increase the costs of corruption in terms of political capital and reputation.

The analysis of the legal framework revealed that there are not particularly strong constraints on corruption for contracts below the EU thresholds. The main problem is the complete lack of

transparency in contract awarding at the national level. The EU encourages Member States to publish tenders underneath the EU thresholds in the TED database as a good practice. Germany, however, has the lowest publication rate across the EU. Between 2009 and 2013, the publication rate did not exceed 1.4% of GDP, while the regional average is consistently above 3%. This also places Germany far behind the leaders of the pack, i.e. Latvia, whose published tenders account for almost 9% of GDP, Estonia (8%) or Hungary (7.5%) (European Commission 2014b). Even the similar sized economies of Europe –France and the United Kingdom– publish three to five times more contracts than Germany. The current data collection and procurement information system might be the reason why Germany is not able to provide more information, but this has an obvious and significant negative impact on transparency and increases the risks of corruption by obstructing bidders, media or civil society organizations to monitor procurement decisions.

The task of scrutinizing the awarding of public contracts seems to fall solely in the hands of the federal and state courts of auditors, which given the nature and the scope of their tasks are not able to conduct systematic, in-depth analysis of the procurement spending on a regular basis. As a result, misconducts or mistakes like the ones identified by the courts of auditors of Berlin, Saxony and Thuringia can only be detected after the contracts have already been awarded and, in many cases, after the goods have already been bought or the projects concluded. The lack of publicly accessible information and documentation supporting the choice of providers or of the procurement procedure also makes it difficult for contractors to assess the lawfulness of the procedure. For this reason, access to public procurement information needs to be improved, particularly for national contracts.

The central website of the public administration (www.bund.de) is the ideal platform to achieve this. However, e-procurement platforms in Germany are severely underutilised, as their usage is not mandatory. According to the 2013 OECD Government at a Glance Report, Germany – together with Greece and Spain– has the lowest level of electronic procurement in the OECD with only 7% of the tendering processes happening through online platforms and less than 20% of firms using the available electronic resources to access documents and specifications (OECD 2013). The use of the e-procurement could bring several advantages, by tackling several issues at the same time: it could enhance competition by ensuring that public tenders reach a maximum number of potential bidders while increasing the transparency of the awarding process by improving the traceability of procurement spending and of the decision-making processes. It is therefore important to promote the use of the heavily underused e-procurement platforms in the country. This could help document procurement procedures and improve the data-collection process, which is currently labour intensive.

III. CONCLUSIONS

Taking advantage of the available data, this report managed to gather some evidence on the potential corruption risks in German procurement sector. However, since the German procurement system is ruled by two different sets of legislations, one for contracts above the EU

thresholds and one for contracts below, each of these two branches has different level of corruption risks associated to them. On one hand, the system in place for the award of contracts at a European level seems to work fine. The evidence gathered from the TED database reveals that most of the contracts in this category are awarded in a competitive manner. The use of restricted or non-competitive procurement procedures are the exception and open tenders remain the rule in infrastructure, as well as in the purchase of goods and services. The national system, however, is not as seamless as one would expect from a country usually regarded as corruption-free by all major corruption indices. Applying the notion of corruption as the equilibrium between opportunities and constraints (see Munigu-Pippidi 2014), the German procurement sector appears to be a particularly high-risk one for contracts below the EU thresholds as opportunities for corruption are high and the existing constraints leave a lot to be desired.

Despite the lack of hard data that could help assess whether corruption risks are widespread in the national procurement system, this report gathered evidence from different sources to assess this. The results show that the current awarding process at the national level operates like a black box: once the bidders submit their proposals, the decision-making process is untraceable and bidders are left with incomplete information and without any legal protection to monitor the process. The lack of legally binding procurement regulations at the national level can be confusing for bidders and contracting entities. The current situation where public procurement is regulated by the state level and through internal administrative laws can damage competition as it imposes additional costs to bidders used to somewhat different procedures. The fact that the best practices contained in the VOB, VOL and VOF are not legally binding at the national level also increases the risks of corruption.

Reports by the local Courts of Auditors of Berlin, Saxony and Thuringia as well as the perceptions of the business community also suggest that there are favourable conditions for corrupt practices to sprout: There is a lack of knowledge of the applicable procurement rules among many contracting entities, which leads to the breach of procedures in many occasions. This situation combined with the lack of transparency in the awarding process of contracts below the EU thresholds might be fuelling the high perceptions of corruption in the procurement process. Unifying the legal framework at the national level, improving the legal protection of bidders, taking advantage of the already existing web portals for procurement and investing in the creation of a centralized database to allow the follow-up and monitoring of awarding procedures could greatly reduce the risks of corruption in the German public procurement system.

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Project profile

ANTICORRP is a large-scale research project funded by the European Commission's Seventh Framework Programme. The full name of the project is "Anti-corruption Policies Revisited: Global Trends and European Responses to the Challenge of Corruption". The project started in March 2012 and will last for five years. The research is conducted by 20 research groups in fifteen countries.

The fundamental purpose of ANTICORRP is to investigate and explain the factors that promote or hinder the development of effective anti-corruption policies and impartial government institutions. A central issue is how policy responses can be tailored to deal effectively with various forms of corruption. Through this approach ANTICORRP seeks to advance the knowledge on how corruption can be curbed in Europe and elsewhere. Special emphasis is laid on the agency of different state and non-state actors to contribute to building good governance.

Project acronym: ANTICORRP

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