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# PUBLIC PROCUREMENT REGULATION: FOSTERING MARKET ACCESS AND SIMULTANEOUSLY PREVENTING CORRUPTION – A SWISS PERSPECTIVE

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*Abstract:*

Much like in German legal thinking, the initial and predominant position in Switzerland during the late nineties of the last century was that public procurement is only about market access, internal market, competition and money. Therefore, the GPA 1994 was interpreted accordingly by the majority of scholars. The revised GPA 2012 explicitly addresses sustainability, good governance and corruption, topics which are from the point of view of classical trade-officials "unrelated to the benefits of international trade". The WTO nowadays more or less officially shares the view of Transparency International, according to which few government activities create greater temptations or offer more opportunities for corruption than public sector procurement. That is why the aims and purposes of public procurement regulations have been or are about to be redefined.

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## 1 Introduction

In the preamble to the OECD Convention on Bribery, it is held that bribery is a widespread phenomenon in international business transactions, including trade and investment, which [...] undermines good government [...] and distorts international competition conditions. Nicholas C. Niggli, a former chairman of the WTO Government Procurement Committee, summarizes the current situation on the interplay between trade and good governance as follows: "*Addressing the links between trade, foreign direct investment, transparency and good governance at the WTO was yielding infrequent results just over a decade ago, but now such associations are much more widely accepted, highlighting the rapidly-shifting perceptions of the strategic importance of government procurement as a key policy-making instrument not just to promote trade and support economic development, but also to tackle corrupt practices.*"[1] The strategic importance of public procurement is, at least in so far obvious as its volume in 2014, was estimated close to $78 trillion in nominal terms according to the World Bank. This merely represents between 10 and 15 percent of the world economy, if we follow the estimation of the World Trade Organization. So what is basically argued by Niggli is that more than a decade ago market access was - put in a slightly simplified manner - perceived as the only purpose of international regulation on public procurement. Every other (national) purpose of public procurement regulation and policy was understood to be a potentially dangerous non-tariff barrier to trade. This could be said not only about the WTO Government

[1] Nicholas C. Niggli, Helping Nations, Businesses and People to Succeed: How Government Procurement Influences Institution Building, Good Governance, Economic Growth and Sustainable Development, in: Trade, Law and Development VII, p. 17

Procurement Agreement [GPA] 1994, but also about the first European directives on public procurement.

The second argument Niggli makes is that there has been a paradigm change, especially when it comes to good governance, avoiding conflicts of interest and preventing corruption. This is due to the fact that, particularly during the last decade, corruption has become a more and more internationally perceived topic. Therefore, ignoring this issue would question the international regulations on public procurement (such as the WTO GPA) as part of a – to a certain extent – coherent legal system and therefore also their legitimacy. The same phenomenon can be seen when dealing with sustainability topics. Ignoring them does not only entail problems with the European Union, respectively its members as parties of the GPA, but also conflicts with the United Nations Environmental Programme UNEP and the International Labour Organization ILO[2]. This integrated view of the international landscape is the basis of the United Nations Sustainable Development Goals (SDGs). It is therefore not surprising, that the SDG 16 (promoting peace, justice and strong institutions) comprises as associated targets the points 16.5 (substantially reduce corruption and bribery in all their forms) and 16.6 (develop effective, accountable and transparent institutions at all levels)[3]. The earlier spread message was that this is only needed in developing countries; whereas developed countries were supposed to be more or less safe (as long as money laundering is not taken into account).

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2 See on the sustainability issues for instance Marc Steiner, The WTO Government Procurement Agreement: Assessing the scope for green procurement (http://www.ictsd.org/bridges-news/biores/news/the-wto-government-procurement-agreement-assessing-the-scope-for-green, last visited 25 August 2016).

3 Niggli, loc. cit. (footnote 1), p. 9.

Meanwhile, this has changed for two reasons. In Switzerland, which used to be judged as a little paradise miraculously spared from any imaginable lack of governance (except when it comes to the financial market), there were some incidents like the SECO-case[4] and the INSIEME-case[5], both concerning IT-procurement. There is some irony in this, because the SECO is responsible for the implementation of the GPA in Switzerland and points out the importance of combatting corruption when dealing with international economic relations and the respective OECD instruments[6].

This does not mean that Switzerland has become more corrupt, but that awareness has risen and tolerance therefore decreased. At the same time, it has been accepted that developed economies need to implement credible tools on corruption and good governance if they want to convince emerging economies and developing countries to act likewise. The idea of the UK and Germany expressed when it came to the regulation on concessions within the EU, that – to put it in slightly simplified terms – the EU Commission should not bother the UK and Germany if there is a problem in Romania, proved not to be selling; the result was the Directive 2014/23/EU on the award of concession contracts[7].

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4 SECO = (Federal) State Secretariat for Economic Affairs (www.seco.admin.ch, last visited 25 August 2016).

5 Involving the Federal Tax Administration (www.estv.admin.ch [last visited 25 August 2016]), which lost its highest official in this context.

6 See, https://www.seco.admin.ch/seco/en/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/ Korruptionsbekaempfung.html, last visited 25 August 2016.

7 Cf. on our topic recitals 61 and 69; articles 35, 39 and 45.

The authors try on the one hand to inquire whether and where the alleged change of mind-set can be traced, in particular in analysing the WTO Government Procurement Agreement.

On the other hand, they undertake to discuss the Swiss legal framework, the SECO- and INSIEME-cases and the consequences thereof. This article does not address the distinct issue of anti-competitive collusion.

## 2 The revised Government Procurement Agreement as a good governance tool

### *2.1 The significance of the revised Government Procurement Agreement in general*

Since the entry into force of the Government Procurement Agreement (GPA 1994) on January 1, 1996, the GPA has gained great momentum, culminating in the adoption of the revised GPA in March 2012[8] and its subsequent entry into force on 6 April 2014[9]. Already in February 2010, former WTO Director-General Pascal Lamy had stated that "the GPA appears to be in the process of taking on relatively greater importance in the constellation of WTO Agreements".[10] Interestingly enough, the (provisionally) revised text of the GPA was agreed on long before the negotiations on coverage could be concluded. Accordingly the Committee insisted on the fact that "nothing is agreed

[8] https://www.wto.org/english/news_e/news12_e/gpro_30mar12_e.htm; last visited November 2016 (GPA/113); based on the ministerial-level meeting of the Committee on Government Procurement on 15 December 2011 (GPA/112).

[9] https://www.wto.org/english/news_e/news14_e/gpro_07apr14_e.htm; last visited November 2016.

[10] https:/www.wto.org/english/news_e/sppl_e/sppl147_e.htm; last visited November 2016.

until everything is agreed".[11]

The revision extended GPA coverage by between US$80 and US$100 billion annually, the revised GPA now covering public purchasing valued at US$ 1.7 trillion a year. The revision of the GPA and the WTO Symposium of 17-18 September 2015[12] were driven by the view that the GPA should be understood not only as a trade facilitating instrument, but also as an instrument relevant beyond the circle of the treaty members fostering a coherent common international understanding of public procurement regulation. Equally significantly, the new text sharpens – as will be shown immediately in more detail – the WTO's attention to governance issues related to public purchasing.

### *2.2 Is the fight against corruption a trade topic?*

Not every public procurement lawyer back home in Switzerland knows that besides the plurilateral WTO Government Procurement Agreement, there was also a postponed, but hopefully not definitely abandoned, WTO initiative aimed at reaching a multilateral agreement on transparency in government procurement.[13]

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[11] Report of the Committee on Government procurement 2006 of 11 December 2006 (GPA/89; the text itself was issued under the document-number GPA/W/297).

[12] https://www.wto.org/english/tratop_e/gproc_e/gpa_symp 092015_e.htm; last visited August 2016.

[13] Cf. on the mandate notably the Singapore Declaration (Ministerial Conference First Session, 13 December 1996 (WT/MIN(96)/DEC, paras 21-22, and the Doha Declaration (Ministerial Conference Fourth Session, 14 November 2001, WT/MIN(01)/DEC/W/1), paras 20-26; see also https://www.wto.org/english/tratop_e/gproc_e/GPmand_e.htm, last visited August 2016; see on this 'Singapore' issue for instance Anderson/Arrowsmith, The WTO Regime on Government Procurement, in: Arrowsmith/Anderson (ed.), The WTO Regime On Government Procurement: Challenge and Reform, Cambridge 2011, p. 8.

To make such an agreement more acceptable to non-members of the GPA, it was explicitly stated that the negotiations should be limited to the transparency aspects and therefore not restrict the scope for countries to give preference to domestic supplies and suppliers.[14] More than ten years later, it is difficult to understand the reflections on whether the corruption or the prevention of it may have a sufficient trade impact to justify a transparency agreement as being covered by the mission of the WTO, the trade impact of lacking governance being so obvious. As Arrowsmith stated already in 2003, many contracts awarded within corrupt circumstances are not available to foreign suppliers, and such covert policies may also have a significant effect in deterring participation (in particular from abroad).[15] It is nevertheless true that in the WTO, transparency was normally understood as a mean to improved market access,[16] which fact even led to the assumption of some WTO-members that the transparency agreement was part of a hidden agenda to force market access later based on it. At the same time, it has always been obvious that the transparency also plays "a major role in achieving national objectives in most procurement systems".[17]

Nonetheless, meanwhile, from an international perspective, the transparency principle is also understood as being of

14 Doha Declaration (footnote 6 above), para 26.

15 Sue Arrowsmith, Transparency in Government Procurement: The Objectives of Regulation and the Boundaries of the World Trade Organization, Journal of World Trade 37(2), p. 301.

16 Peter Trepte, Regulating Procurement, Oxford 2004, p. 394; Sue Arrowsmith, The Revised GPA: Changes to Procedural Rules, in: Arrowsmith/Anderson (ed.), The WTO Regime on Public Procurement (footnote 13), p. 289.

17 Sue Arrowsmith, Government Procurement in the WTO, The Hague 2003, p. 173. From a Swiss perspective it is clear that the transparency requirements are more than part of a market access concept; cf. for instance Martin Beyeler, Ziele und Instrumente des Vergaberechts, Zurich 2008, p. 15.

dual-use. As early as 1998, Cottier argued that the World Trading System is not confined to prescribing substantive rules on market access.[18] Since trade relations depend on good governance, it is logical from this perspective that the WTO contributes to the realisation of good governance (which means inter alia controlling corruption) as a matter of treaty law. And it is no surprise that one example quoted in this context are the rules on publication of tender procedures according to the GPA. This is of course also true for the initiative aiming at a multilateral agreement on public procurement. Assuring transparency helps to avoid problems such as fraud and corruption.[19]

Although a multilateral transparency agreement would not eliminate corruption (more sophisticated practices will be used), it would certainly reduce it.[20] On the other hand, the fact that the European Communities contribution dealt with corruption - even if in an indirect way[21] – was also expressly regretted and it was mentioned that the mandate of the WTO would not cover such a regulation's purpose (or even side-effect?) of a transparency agreement.[22]

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[18] Thomas Cottier, Emerging Doctrines of Good Governance: The Impact of the WTO and China's Accession, Abbott (ed.), China in the World Trading System: Defining the Principles of Engagement, The Hague 1998, p. 119

[19] APEC non-binding principles on government procurement 1998, as communicated by Hong Kong (W/WGTGP/W/24, 21 September 1999), para. 48.

[20] Positive effects of transparency in government procurement and its implementation, Communication from the European Union (WT/WGTGP/W/41, 17 June 2003), paras 6-7, and very similar the proposal of the United States for a work plan to build on the progress of the Working Group (WT/WGTGP/W/35, 30 September 2002), para. 3

[21] Report on the meeting of 9 January 2003 (WT/WGTGP/M/15), para. 61.

[22] Report on the meeting of 18 June 2003 (WT/WGTGP/M/18), para. 39.

When the negotiations were stopped, it was however apparent that there were important GPA members in favour of the dual-use understanding of transparency standards, whereas the sceptics were found rather outside the circle of the GPA members. From an UNCAC-perspective, it is very clear that transparency is one of the main means to achieve integrity in the procurement process. Therefore "it is hoped" that the work on a transparency agreement will be resumed in the future.[23]

### *2.3 Good governance and prevention of corruption as elements of the revised GPA – a mind-set change.*

Besides the WTO Secretariat, eminent scholars also lead a kind of an advertising campaign for joining the WTO's Government Procurement Agreement. One of their arguments is that a GPA accession would reaffirm the commitment to the rule of law and the rejection of corruption. Being a party to the GPA can – according to this view – be seen by foreign investors as a "stamp of approval", indicating that the domestic public procurement regime is consistent with international best practice.[24]

[23] UNODC (ed.), Technical Guide to the United Nations Convention against Corruption, New York 2009, p. 30.

[24] Christopher Yukins/Johannes S. Schnitzer, GPA Accession: Lessons Learned on the Strengths and Weaknesses of the WTO Government Procurement Agreement, Trade Law & Development Journal VII (2015), p. 98 s.

Similarly, Robert Anderson states, that the revised GPA manifests the Agreement's increasing importance as an instrument for the promotion of good governance in emerging markets "in addition to market access".[25] In a classical trade officials' view, the revision of the GPA brought new objectives that are "unrelated to the benefits of international trade".[26] From an Indian perspective, this is no surprise since the importance of the corruption issue justifies dealing with it "even under a trade agreement".[27]

What is it then that makes the revised GPA so spectacular? The classical GPA rationale is that the "need for an effective multilateral framework for government procurement, with a view to achieving greater liberalization", as it is said in the preamble, at the same time acknowledging that "the integrity and predictability of government procurement systems are integral to the efficient and effective management of public resources, the performance of the Parties' economies and the functioning of the multilateral trading system".

Moreover, the importance of transparent measures regarding government procurement, of carrying out procurements in a transparent and impartial manner and of avoiding conflicts of interest and corrupt practices, in accordance with applicable international instruments, such as the United Nations Convention Against Corruption, is

[25] Robert Anderson/Anna Caroline Müller, The Revised WTO Agreement on Government Procurement as an Emerging Pillar of the World Trading System: Recent Developments, Trade Law & Development Journal VII (2015), p. 43.

[26] Arie Reich, The new text of the agreement on government procurement: An analysis and assessment, Journal of International Economic Law 12/4 (2009), p. 996.

[27] Chang-fa Lo, Making the Anti-Corruption Provisions in the New Government Procurement Agreement under the WTO Operable, Trade Law & Development Journal VII (2015), p. 21.

also recognized. According to the WTO, the revised GPA is "the first WTO agreement to explicitly address corruption".[28] The authors will not indulge into the well-known discussion on the significance of a preamble to a WTO-treaty, since there is more than the cited preamble. But what can be said specifically is that the WTO's promotion slogan "Opening markets and promoting good governance"[29] expresses the view that this preamble is aimed to be part of a new regulation goal[30]. According to Art. IV (4) entitled "Conduct of Procurement", a procuring entity shall conduct covered procurement in a transparent and impartial manner that is consistent with this Agreement (using methods such as open tendering, selective tendering and limited tendering), that avoids conflicts of interest and prevents corrupt practices. This clear wording is also definitely a paradigm shift. Therefore, international economic regulation is not only about market access, but tends to be understood as an integrated part of a to a certain extent coherent legal order. One might also argue that due to the intensive international focus on ensuring integrity in public procurement processes during recent years it is "perhaps not surprising" that the revised GPA contains – already in the provisionally agreed text adopted in December 2006 – a new substantive provision in addition to

[28] https://www.wto.org/english/thewto_e/20y_e/gpa_brochure2015_e.pdf last visited 16 August 2016.

[29] https://www.wto.org/english/thewto_e/20y_e/gpa_brochure2015_e.pdf last visited 16 August 2016.

[30] See on this also https://www.wto.org/english/tratop_e/gproc_e/overview_e.htm, last visited 16 August 2016, Arrowsmith, The Revised GPA: Changes to Procedural Rules, loc. cit. (footnote 16), p. 289, and Nadakavukaren Schefer/Gebre Woldesenbet, loc. cit. (footnote 13), p. 1148 s.

related references in the preamble.[31] But yes, there has been a considerable change of mind-set!

### *2.4 Good governance and prevention of corruption as elements of the revised GPA: How tangible is the new regime?*

The first remark on the significance of the preamble might be that not only the UNCAC is acknowledged as being relevant. It is written literally: "applicable international instruments such as" UNCAC, which means, that pertinent OECD instruments are also to be considered.[32] In this context, it is fortunate that the GPA offers domestic review according to Art. XX of the GPA 1994 and to Art. XVIII of the revised GPA respectively. In a WTO-context this is not at all obvious. This regulation is in particular due to the experience that only domestic review provides foreign bidders with the necessary protection including the possibility of timely interim measures being granted[33]. It is not a surprise that Art. 9 UNCAC requires an appropriate system of procurement including an "effective system of domestic review". Therefore, not only the transparency requirement is dual-use in terms of the market access purpose and good governance, but also the remedies

[31] Robert Anderson/William Kovacic/Anna Caroline Müller, Ensuring integrity and competition in public procurement markets: a dual challenge for good governance, in: Arrowsmith/Anderson (ed.), The WTO Regime on Public Procurement (footnote 13), p. 682; see also http://e15initiative.org/publications/promoting-competition-and-deterring-corruption-in-public-procurement-markets-synergies-with-trade-liberalisation/, last visited 5 December 2016.

[32] Anderson/Kovacic/Müller, Ensuring integrity, loc. cit. (footnote 31), p. 682.

[33] See "on the weakness of ... inter-governmental procedures" before Peter Trepte, The Agreement on Government Procurement, in: Macrory/Appleton/Plummer (ed.), The World Trade Organization: Legal, Economic and Political Analysis, Volume I, New York 2005, p. 1132 s.

requirement. There is, in addition to that, a link between transparency and review. Transparency is not only necessary to clarify the rules of the game before the procurement starts and to urge the procuring entity to stick to these rules, but also to allow the review body to make the procurement process verifiable, which is evidently an aspect related to good governance. In that sense, the Swiss Federal Audit Office stated a few months ago that none of the procurement files from a specific federal office had been complete and could therefore not be verified.[34] In a famous court case, it was held that since the negotiations with the bidders were not duly recorded, the award decision could not be upheld even if there should be nothing wrong about the result of the procurement process.[35] The requirement to make the procurement process verifiable is called transparency ex post[36], whereas the rule that determines according to which procurements information must be published, and clarifies, what needs to be published, serves a transparency ex ante purpose. This concept does in our view confirm that transparency and legal review are in a similar way dual-use, also according to the new concept of the revised GPA.

According to Art. IV (4) GPA, a procuring entity shall conduct procurement in a transparent and impartial manner that avoids conflicts of interest and prevents corrupt practices. One specific source of conflicts of interest is the fact that – especially in markets where there are fewer

34 http://www.nzz.ch/schweiz/meteo-schweiz-gravierende-maengel-im-beschaffungswesen-ld.111677, last visited 19 August 2016.

35 Decision of the Federal Appeals Commission for Public Procurement (BRK) of 23 July 2003, published in the Administrative Practice of the Federal Authorities (VPB) as nr. 67.108; see on the lack of documentation as a ground for successful appeal the decision B-307/2016 of the Federal Administrative Court of 23 March 2016.

36 Martin Beyeler, Ziele und Instrumente des Vergaberechts, loc. cit. (footnote 17), p. 10 and p. 12.

bidders for a specific demand - the procuring entity might be tempted to use an enterprise as a helping hand when designing the project (especially the tender documentation) without renouncing from allowing the same enterprise to submit a bid later during the same procedure. Therefore, in Art. X (5) GPA it is stated that a procuring entity shall not seek or accept, in a manner that would have the effect of precluding competition, advice that may be used in the preparation or adoption of any technical specification for a specific procurement from a person that may have a commercial interest in the procurement.[37] Even without this problem, which is specific to the procurement process, the possible conflicts of interest are very relevant for public procurement regulation. So what Art. IV (4) GPA says in terms of administrative law, is in our view, that the applicable rules on administrative impartiality according to the domestic legal framework must be strictly observed. It has been argued that Art. IV (4) GPA is rather vague and might be interpreted as a "soft" provision in the sense that is not in general intended to be legally enforceable und possibly does not even have any binding quality.[38] Even if this is generally true, there must be something like a legally binding core element of Art. IV (4) GPA when it comes to the rules concerning administrative impartiality.[39] This means that if domestic rules against bias are violated during a procurement process, there is at the same time a contravention against Art. IV (4) GPA subject to enforcement under the WTO Dispute Settlement and

[37] See on the transposition of this provision Art. 21a OPP and the decision B-1172/2011 (on the suspensory effect) of the Federal Administrative Court of 31 March 2011 cons. 5.

[38] Arrowsmith, The Revised GPA: Changes to Procedural Rules, loc. cit. (footnote 16), p. 291; see also Chang-fa Lo, Anti-Corruption Provisions, loc. cit. (footnote 27), p. 34.

[39] Whether the same reasoning applies on obligations under the UNCAC and the OECD Anti-Bribery Convention is discussed by Chang-fa Lo, Anti-Corruption Provisions, loc. cit. (footnote 27), p. 39.

national challenge procedures. This is confirmed by Art. XV GPA, according to which a procuring entity shall treat all tenders under procedures that guarantee the fairness and impartiality of the procurement process. On the other hand, there is probably no enforceable obligation to have "an anti-corruption mechanism in place" in addition to the transparency mechanisms of the GPA.[40] However, true is that if we accept the fact, that there is besides the market access purpose a new regulation goal, Art. IV (4) GPA can be used to illustrate this goal. This is relevant because especially the transparency requirements are to be interpreted as serving also the (new) objective and purpose of the treaty. The most conflicts of interest between the two purposes of market access and good governance can be detected when it comes to the exclusion of bidders. From a market access perspective, one would try to limit the exclusion of bidders. The eligibility to place bids should basically only be restricted relying on conditions that "are essential to ensure that a supplier has the legal and financial capacities and the commercial and technical abilities" to fulfil the contract (Art. VIII (1) GPA). A classical trade official hates all other grounds of exclusion, such as the disrespect of labour law or environmental law standards. That is why Art. 18 (2) of the EU directive 2014/24/EU dealing with those standards is so spectacular. There is nevertheless a need for legal certainty advocating for more examples for suitable exclusion grounds[41], even if the wording using a "such as"-formula makes clear that the list is not exhaustive. On the other hand, the new regulation purpose of the GPA necessarily implies that corrupt bidders can (or rather shall) be excluded. There are two types of reaction of the public entities. Serious fact-based suspicions

[40] Cf. (possibly dissenting on this) Nadakavukaren Schefer/Gebre Woldesenbet, loc. cit. (footnote 13), p. 1154.

[41] Arrowsmith, The Revised GPA: Changes to Procedural Rules, loc. cit. (footnote 16), p. 309.

of misconduct are enough "supporting evidence" to exclude a bidder from the procurement process affected by corruption as a kind of precautionary measure ("polizeiliche Massnahme") aiming at keeping the process clean and not designed as a sanction.[42] It is obvious that corruption has to be seen as professional misconduct and as an act that adversely reflects on the commercial integrity of the supplier in the sense of Art. VIII (4)(e) GPA.[43] More is necessary to justify a debarment as a sanction which can last for years: here we need a legal basis for the sanction, and it has to comply with the proportionality principle. To make the long story short: The respect of good governance-standards is a precondition for participation which justifies limitations of market access. According to the new concept of the GPA, this is not a pragmatic concession to member states and international organisations striving for a – to a certain extent – coherent legal order considering aspects of the general public interest, but the result of the balancing of interest between the GPAs own purposes.

## 3 Good governance and the EU public procurement directives

The EU regulation on public procurement is more comprehensive than the WTO Government Procurement Agreement, but generally follows the same logic, as according to the concept of the 1990s: the single market purpose was the overarching idea, whereas other aspects of the general public interests prevailing in the Member States

[42] Less clear on this Arrowsmith, The Revised GPA: Changes to Procedural Rules, loc. cit. (footnote 16), p. 310.

[43] Nadakavukaren Schefer/Gebre Woldesenbet, op. cit. (footnote 13), p. 1156.

were rather not taken into consideration.[44] National measures liable to prohibit, impede or render less attractive the exercise by EU-nationals of the freedom of establishment and the freedom to provide services were (and still are) precluded. Notably, from this point the exclusion of bidders is problematic, because it may "compromise the widest possible participation by tenderers in a call for tenders".[45] According to this view, favoritism and considerations not related to the contract in question were not primarily a problem from a good governance perspective, but because they encourage favours for local suppliers in terms of unwanted protectionism.

When adopting the new classical directive 2014/24/EU, the same paradigm change was able to be observed as described above concerning the WTO legal framework on public procurement. Good governance is now one of the answers to the question on what EU public procurement regulation is about. Nonetheless, this new objective is not only a result of the need to "meet international rules, standards and objectives", which means first and foremost the revised WTO Government Procurement Agreement.[46]

As explained in the EU Anti-Corruption Report, the financial crisis and the budgetary austerity caused by it put additional pressure on Europeans and their governments. This "high level of suffering" (in German "Leidensdruck") led to policy adjustments not only concerning tax fraud, but also in dealing with public procurement. According to the Commission, "research suggests that the success of the Europe 2020 strategy also depends on institutional factors

[44] Peter Trepte, Regulating Procurement, op. cit. (footnote 16), p. 252; Chryssoula P. Moukiou, The Principles of Transparency and Anti-Bribery in Public Procurement: A Slow Engagement with the Letter and Spirit of the EU Public Procurement Directives, EPPPL 2016, p. 73.
[45] Decision C-358/12 of the CJEU of 10 July 2014 para. 28 s.
[46] Moukiou, loc. cit. (footnote 44), p. 78.

such as good governance, rule of law, and control of corruption".[47] The Commission concludes that fighting corruption contributes to the EU's competitiveness in the global economy. The aim of "ensuring the most efficient use of public funds" is no longer just seen as a possible national policy objective, but as an EU public procurement regulation goal, necessary to guarantee the key role public procurement shall play in the Europe 2020 strategy.[48] As a logical consequence of this view, conflicts of interest have now been addressed within the classical directive, or according to Rhodri Williams, even "for the first time defined in EU legislation".[49] Article 24 of the directive 2014/24/EU provides that Member States shall ensure that contracting authorities take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators. Equal treatment of bidders sounds like a traditional purpose of EU public procurement regulation, but it is obvious that there is much more in this new provision. At the same time, the "dual use" nature of transparency is stressed.

Transparency helps to foster access to markets and competition, but at the same time "traceability and transparency of decision-making in public procurement decisions is essential for ensuring sound procedures, including efficiently fighting corruption and fraud".[50] It is therefore not surprising that according to the new directive

[47] EU Anti-Corruption Report COM(2014) 38 final of 3 February 2014 p. 3.
[48] Recital 2 of directive 2014/24/EU.
[49] Rhodri Williams, Anti-Corruption Measures in the EU as They Affect Public Procurement, PPLR 2014 p. NA 95 - NA 99.
[50] Recital 126 of directive 2014/24/EU.

there are more exclusion grounds[51], even if this leads to a less "pure" implementation of the idea of the widest possible participation in a call for tenders. This is due to a policy coherence argument being relevant in our context. The credibility gain of an exclusion ground has to be weighed up against the widest possible participation arguing against exclusion grounds. According to article 57(1)(b) of the directive 2014/24/EU, contracting authorities shall exclude an economic operator [...] for corruption as defined in the national law of the contracting authority or the economic operator. As a consequence, some of the exclusion grounds are not only justified by national public interests, but are also a result of the new regulation purposes of the directive 2014/24/EU. It has however to be mentioned that already the directive 2004/18/EC (art. 45) must be considered as a step in this direction. Since the new exclusion grounds are significantly more robust, the German legislator has changed its strategy on these and decided to implement them in the law itself, not only in an ordinance as before.[52] The more robust the exclusion grounds are, the more important the idea of self-cleaning becomes.

Public procurement doctrine owes this new concept – not only, but to a certain extent – to Siemens (Germany) in the aftermath of a major corruption scandal.[53] For the purpose of self-cleaning, the economic operator shall prove that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, clarified the facts and circumstances in a comprehensive

[51] More or less classical according to public procurement logics is the regulation on prior involvement enshrined in article 41 of directive 2014/24/EU.

[52] Friedrich Ludwig Hausmann/Gerung von Hoff, Kulartz/Kus/Portz/Priess (ed.), Kommentar zum GWB-Vergaberecht, 4th edition, Cologne 2016, para. 2 on § 123 GWB.

[53] See for instance Pünder/Priess/Arrowsmith (ed.), Self-Cleaning in Public Procurement Law, Cologne 2009.

manner by actively collaborating with the investigating authorities and taken concrete technical, organizational and personnel measures that are appropriate to prevent further criminal offences or misconduct.[54] The conclusion might be drawn, that the new approaches of the revised WTO Government Procurement Agreement and the new EU public procurement directives[55] are comparable as international public procurement regulations are no longer only about fostering market access and competition, but are understood rather as a part of a coherent legal order on an international or supranational level. Or, as Chryssoula Moukiou puts it, "a new telos of European public procurement law is set" which goes beyond the approach prevailing before.[56]

## 4 Cases of Corruption in Switzerland

### *4.1 Corruption - even in Switzerland, not an unknown phenomenon*

Total expenditure spent by the Swiss federal government, cantons and communities on the procurement of buildings, goods and services adds up to approximately 25% of total public spending and 8% of gross domestic product in Switzerland. As they are publicly financed, mainly by taxes and other charges, these public contracts are subject to clear

[54] Art. 57 (6) directive 2014/24/EU.

[55] Classical directive 2014/24/EU and directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services.

[56] Moukiou, loc. cit. (footnote 44), p. 86.

legal requirements[57], whose main objectives are to strengthen competition between and equal treatment of suppliers, the economic allocation of public resources and transparency in procurement processes[58]. Although these requirements aim at strengthening public trust in the state and preventing corruption, even in Switzerland, corruption is still one the two largest risks in public procurement besides cartelistic arrangements between suppliers.[59]

Nowadays, the focus of corrupt behaviour is not only on procurement in the field of construction contracts[60], but also in the field of IT and commissioned expert mandates. The number of convictions due to corruption in Switzerland is quite low, although the level of corrupt conduct is most likely much higher.[61]This is due to the fact that in corruption there is no direct victim-offender relation, but there are (at

[57] The essential legal foundations for the Federal Government can be found in the Federal Act on Public Procurement (FAPP) from 16 December 1994 (https://www.admin.ch/opc/de/classified-compilation/19940432/index.html) and the Federal Ordinance on Public Procurement of 11 December 1995 (https://www.admin.ch /opc/de/classified-compilation/19950538/ 201504010000/172.056.11. pdf). The Intercantonal Agreement on Public Procurement (IAPP) from 25 November 1994 / 15 March 2001 (http://www.bpuk.ch/bpuk/konkordate/ivoeb/) applies to subcentral authorities in cantons and municipalities. See more extensively on the legal framework and the ongoing reform chapter 6 below.

[58] Art. 1 FAGP; Art. 1 ICPP.

[59] PETER GALLI / ANDRÉ MOSER / ELISABETH LANG / MARC STEINER, Praxis des öffentlichen Beschaffungsrechts, 3rd edition, Zürich/Basel/Geneva 2013, n. 1139 ss. with references.

[60] According to a study from 2001, abuse occurs in about 5% of cases concerning public construction projects (DANIEL BIRCHLER / STEFAN SCHERLER, Missbräuche bei der Vergabe öffentlicher Bauaufträge – Analysen, Beispiele und Lösungsvorschläge, Bern 2001, p. 84.

[61] Korruption und Korruptionsbekämpfung in der Schweiz, Eine Übersicht von Transparency International Schweiz, Aktualisierte und ergänzte Neuauflage 2013 (http://www.transparency.ch/de/PDF_files /Divers/ KorruptionSchweiz_Webversion.pdf), p. 9, 19.

least) two culprits[62] (so called victimless crimes[63]) and both the briber and the bribed person are eminently interested in keeping the deed secret. Discovery is usually quite incidental. Over the past years, a whole string of cases of corruption in public procurement has become known, which attracted a lot of attention in the press and population. Procurement bodies on all three levels have been involved, and a very close connection between contempt and the circumvention of regulations and corrupt behaviour can be detected.

On the federal level, in particular the Secretariat for Economic Affairs (SECO), the Federal Tax Authorities (FTA), the Federal Office for the Environment (FOEN), the Federal Roads Authorities (ASTRA) and the Federal Customs Administration have hit the headlines. Even the Attorney General of the Swiss Public Prosecutor's Office has been confronted with the accusation of awarding tenders due to personal relationships in disregard of public procurement legislation.[64] Subsequently, some light will be shed on two examples of corruption scandals on the Swiss national level.

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[62] Corruption generates public losses and costs; see the study "Public Procurement: costs we pay for corruption. Identifying and Reducing Corruption in Public Procurement in the EU, Available under: https://ec.europa.eu/anti-fraud/sites/antifraud/files/docs/body/pwc_olaf_study_en.pdf (17.10.2016).

[63] DANIEL JOSITSCH / JANA DRZALIC, Die Revision des Korruptionsstrafrechts, in: Aktuelle Juristische Praxis [AJP] 2016, p. 349, 355.

[64] Swiss Federal Audit Office, Management Letter on the examination of selected procurement transactions at the Federal Prosecutor's Office, 24 April 2017: https://www.efk.admin.ch/images/stories/efk_dokumente/publikationen/_wirtschaft_und_verwaltung/beschaffungswesen/16682/16682BE_EndgOltige_Fassung_V04.pdf; http://www.tagesanzeiger.ch/schweiz/standard/filzverdacht-bei-der-bundesanwaltschaft/story/16966965.

## *4.2 The IT-Project INSIEME*

### *4.2.1 Background*

A major IT project in the the Federal Tax Authorities (FTA)[65], launched in 2001, referred to as INSIEME and budgeted for a total of 150 million Swiss francs, was accused of disregarding public procurement legislation and of corruption. The project was intended to replace a number of outdated IT-systems of the FTA by one single entire IT-system. After Unisys (Schweiz) AG had won the bid for carrying out the project (IT-part up to the amount of 41 million Swiss francs) in a WTO-compliant tender procedure in March 2006, the FTA revoked the settlement in 2007, as negotiations had ended without a positive result.[66] There had already been widespread allegations of corruption against the company in connection with the public tender procedure.[67] In 2008 and 2009, the project was relaunched. The FTA decided to continue the project, but no longer as an overall call for one general tender launched within the framework of the WTO, but rather to grant individual contracts without taking large companies into consideration. During the following years, the FTA concluded contracts on IT-services in connection with the INSIEME project with numerous companies without a public invitation to tender, although most of these were above the relevant threshold of

[65] The FTA is the federal centre of competence for tax matters; for details see: https://www.estv.admin.ch/estv/en/home/die-estv/fachinformationen/ein-portraet-der-estv.html (18.10.2016).

[66] Unisys (Schweiz) AG withdrew its complaint against a cancellation of acceptance and discontinuation of the procedure after the parties had agreed on an amount of compensation of 3.9 million Swiss francs (judgments of the Swiss Federal Administrative Court B-6136/2007 of 18 February 2008, B-6136/2007 and B-6137/2007 of 30 January 2008 (www.bvger.ch).

[67] http://www.blick.ch/news/politik/neuer-verdacht-im-insieme-skandal-es-geht-um-schicke-boote-und-leichte-maedchen-id1952776.html.

230,000 Swiss francs. Up to 35 identical contracts were concluded with some of the companies.

### *4.2.2 Administrative investigation and prosecution*

During its audit tasks, the Swiss Federal Audit Office (SFAO)[68] had discovered some inconsistencies and filed a complaint against unknown persons with the Swiss Federal Attorney's Office on 25 January 2012 on suspicion of false management and corruption in the procurement for INSIEME. An administrative investigation, which had been initiated by the former head of the Federal Department of Finance shortly before, had discovered serious offenses against public procurement legislation by the FTA.[69] Apparently, connected orders had been consciously divided into subcontracts, and by circumventing public procurement provisions mandatory law had been violated. The offences had been committed on the basis of a deliberate decision of the director of the FTA, to avoid delay in implementing the project, and despite repeated demands by the head of the FDF, to comply with the public procurement laws. However, it was not taken into account that the public procurement laws do not grant any scope for a balancing against foreseeable time pressure. Furthermore, it had obviously not been recognized, that the objective of the public tender was to promote competition between the providers and thereby ensure an optimal price-performance relationship of the orders and to avoid the risk of corruption. In addition, note was taken of a close personal relationship between the head of the section for IT Performance-Relation (hereinafter head ITPR) of the FTA

[68] The SFAO is the supreme audit institution of the Confederation. It assists parliament and the Federal Council, is independent and is bound only by the Constitution and the law (http://www.efk.admin.ch/).

[69] The Federal Department of Finance (FDF), Administrativ-untersuchung Beschaffungswesen INSIEME from 13 June 2012 (https://www.newsd.admin.ch/newsd/message/attachments/35781.pdf).

and two supplier companies as well as of unusual contract constructions with extraordinarily high profit margins for the benefit of both of the companies. 'On 11 May 2012, the FDF brought charges against the head ITPR. Subsequently, the Swiss Public Prosecutor's Office opened a criminal investigation against the head ITPR and unknown offenders on suspicion of misconduct in public office and bribery of public officials. After the report of the administrative investigation became known, the director of the FTA was released from his duties by the Minister of Finance, and he retired from his office. No criminal investigation against him was initiated - for whatever reasons. However, on 23 February 2013, after an investigation had been going on for years, the Swiss Public Prosecutor's Office filed a suit against the head ITPR, who was responsible for the procurement of IT-services, before the Swiss Federal Criminal Court because of misconduct in public office[70], forgery of a document by a public official[71], acceptance of bribes[72] and

[70] Art. 314 Swiss Criminal Code (SCC) of 21 December 1937 (Misconduct in public office): Any member of an authority or public official who, in the course of a legal transaction and with a view to obtaining an unlawful advantage for himself or another, damages the public interests that he has a duty to safeguard is liable to a custodial sentence not exceeding five years or to a monetary penalty. A custodial sentence must be combined with a monetary penalty.

[71] Art. 317 SCC (Forgery of a document by a public official): 1. Any public official or person acting in an official capacity who willfully forges or falsifies a document or uses the genuine signature or handwriting of another to produce a false document, any public official or person acting in an official capacity who willfully falsely certifies a fact of legal significance, and in particular falsely certifies the authenticity of a signature or handwriting or the accuracy of a copy, is liable to a custodial sentence not exceeding five years or to a monetary penalty. 2. If the person concerned acts through negligence, the penalty is a fine.

[72] Art. 322 SCC (Acceptance of bribes): Any person who as a member of a judicial or other authority, as a public official, officially-appointed expert, translator or interpreter, or as an arbitrator demands, secures the

acceptance of advantages[73]. He was accused of having violated public procurement laws by not having conducted calls for tenders in compliance with WTO law, but in unpublished tender invitation procedures. Concerning the award of service contracts, he was supposed to have filled in so called checklists (internal forms) untruthfully and to some extent dated back, so the checklists gave other departments the impression that the public procurement procedure had been conducted in a manner pursuant to the relevant public procurement legislation. He had also allegedly repeatedly accepted invitations to meals in restaurants, to events and to hotel accommodation from two IT-providers; in return, he had concluded service contracts with them within the INSIEME project. The Swiss Public Prosecutor's Office accused the owner / executive directors of the two IT-companies of bribery of public officials[74] and granting advantages[75].

promise of or accepts an undue advantage for that person or for a third party in order that he carries out or fails to carry out an act in connection with his official activity which is contrary to his duty or dependent on his discretion, is liable to a custodial sentence not exceeding five years or to a monetary penalty.

[73] Art. 322 SCC (Acceptance of an advantage): Any person who as a member of a judicial or other authority, as a public official, officially-appointed expert, translator or interpreter, or as an arbitrator, demands, secures the promise of, or accepts an undue advantage for himself or for a third party in order that he carries out his official duties is liable to a custodial sentence not exceeding three years or to a monetary penalty.

[74] Art. 322 SCC (Bribery of Swiss public officials): Any person who offers, promises or gives a member of a judicial or other authority, a public official, an officially-appointed expert, translator or interpreter, an arbitrator, or a member of the armed forces an undue advantage, or offers, promises or gives such an advantage to a third party in order to cause the public official to carry out or to fail to carry out an act in connection with his official activity which is contrary to his duty or

### *4.2.3 Judgement of the Swiss Federal Criminal Court of 15 September 2015*

The Swiss Federal Criminal Court sentenced the former head ITPR to a conditional imprisonment of 16 months and a conditional fine of 27,000 Swiss francs for repeated misconduct in public office and repeated acceptance of advantages. It held him not guilty of forgery of documents by a public official and the (passive) acceptance of bribes. The two IT-providers were sentenced to conditional fines of 15,000 respectively 40,000 Swiss francs for repeated granting of advantages.[76]

In its reasons for the judgement, the Court confirmed an administrative irregularity of the head ITPR in the non-implementation of WTO calls for tender. As competent specialist unit for IT-procurement matters within the FTA, he was responsible for the correct procurement of the required IT-services. He possessed the necessary legal knowledge in the field of procurement and if necessary would have been able to access more information from Federal Competency Center for Public Procurement at the Federal Office for Buildings and Logistics (BBL).

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dependent on his discretion, is liable to a custodial sentence not exceeding five years or to a monetary penalty.

[75] Art. 322 SCC (Granting an advantage): Any person who offers, promises or gives a member of a judicial or other authority, a public official, an officially-appointed expert, translator or interpreter, an arbitrator or a member of the armed forces an undue advantage for that person or for a third party in order that the person carries out his official duties is liable to a custodial sentence not exceeding three years or to a monetary penalty.

[76] Judgement of the Swiss Federal Criminal Court (Strafkammer, SK.2015.12) of 15 September 2015 (http://bstger.weblaw.ch /pdf/20150915_SK_2015_12.pdf).

The head ITPR also had a comprehensive advisory function towards the management of the FTA in all IT-related matters. Without closer inspection – e.g. of the duration of WTO tenders – he repeatedly reported that in his opinion WTO tenders would endanger the whole project; this was the main reason for the management's decision to abstain from WTO tenders. The Court continued that by not conducting public WTO tenders, the head ITPR was responsible for Switzerland having violated principles of competition and transparency originating from the GPA and anchored in the FAGP and therefore not only violating international obligations, but also trust amongst suppliers in the order and legality of Swiss federal public procurement. By concluding service contracts without observing the predetermined procedures, he had not only nearly eliminated competition, but also undermined the trust of citizens in the objectivity and independence of the federal procurement authorities. As various indications showed, it had obviously been rumored within and outside of the FTA that strange things were happening in the awarding of contracts for INSIEME. It could be considered a fact that the impression in the public arena had been created that having a personal contact with the head ITPR led to unfair advantages in procurement. A ***moral damage*** had to be affirmed in all of the procurements.

On the other hand, the Federal Criminal Court found that material damage had not been proven. From a subjective point of view, the Court also affirmed a ***willful act***: The head ITPR was familiar with the relevant provisions and had known about the threshold being exceeded and the requirement of a public tender. The fact that it was the management who decided to abstain from a WTO tender could not absolve him from blame. As head of the section for IT Performance-Relation, he was aware of the fact, that by conducting the procurement in unpublished tender invitation procedures, he had almost eliminated free

competition, and in doing so, undermined the trust of citizens and private suppliers in the equal treatment under procurement law and in the law and order of federal procurement. The two IT-provider companies had received contracts thanks to the head ITPR without having to compete in free competition. As there is no entitlement to receive public contracts without following the legal proceedings, this means an unfair advantage. Moreover, the advantages were also financial, as the two companies would have been able to obtain significant turnover and profits from the concluded service contracts. The head ITPR had acted with the intention of unlawfully granting advantages to the two companies or their management.[77]

The judgement revealed that the former civil servant had been invited to meals and events in total 45 times worth 5,250 Swiss francs between June 2008 and January 2012 by the two companies. However, concerning the raised charge of active and passive bribery, the Court did not find the necessary direct connection between the invitations and the respective conclusion of service contracts proved, neither in regard to the timing nor the value of the advantages.[78] Nonetheless, as the advantages went beyond the minor and socially customary benefits such as coffee during a meeting or a pocket calendar, which are granted according to rules of courtesy and are allowed under public service law, the Court subsequently examined the raised charge of granting and accepting advantages. It came to the conclusion that the granted and accepted advantages exceeded rules of politeness. They were also unlawful in the context of procurement proceedings, as both of the accused companies had known that in the further course of the INSIEME project - after the withdrawal of the settlement with Unisys – there would continually be orders to be placed or extended.

[77] SK.2015.12, Cons. 2.
[78] SK.2015.12, Cons. 4.

It was unnecessary to decide whether any of the invitations on its own - in particular those in the lower value range or in connection with the successful completion of a project - might have been allowed. The advantages had been granted by the companies with a view to the position of the head ITPR, and the invitations in question were likely to influence his decisions. He had been able to decide by himself, within the framework of invitations and free-lance procedures, which companies he wanted to request for procurement. It is a fact that the invitations were made knowingly and willingly with a view to the position of the head ITPR and that they had been accepted by him in this spirit. The stakeholders were well aware that these were not appropriate advantages. After reading the integrity clause in the IT service contracts, they knew that the advantages and benefits were not allowed to be granted in connection with the conclusion of contracts. Thus, the accused were found guilty of having granted and accepted advantages in the meaning of the Swiss Criminal Code.[79]

### *4.3 The SECO-scandal*

Following a criminal complaint by the Swiss Secretariat for Economic Affairs (SECO), at the beginning of 2014, the Swiss Public Prosecutor's Office opened a criminal investigation against the head of System Operations and Technology ASAL-ALK (hereinafter head TCSB[80]) in SECO and unknown persons because of the suspicion of misconduct in public office and the acceptance of bribes in connection with the conclusion of IT-contracts by SECO. The suspicion was that the allegedly fallible federal official had accepted bribes and advantages worth millions of Swiss

[79] SK.2015.12, Cons. 5.

[80] TCSB: Resort System Operation and Technology ASAL-ALK (disbursement system of the unemployment insurance funds) of the service area labor market and unemployment insurance.

francs over a number of years in connection with the handling of major IT projects in SECO and might have favoured the conclusion of SECO contracts with various suppliers at excessively high prices in return. The main proceedings were extended because of suspicion of bribery and granting of advantages. A separate criminal investigation was opened against another allegedly fallible supplier of SECO.[81] The investigations are still under way, and once the action is filed, the Federal Prosecutor's Office does not provide any further details[82].

It was a newspaper journalist who initiated the whole investigation. According to a media report which appeared in Swiss daily newspapers on 15 January 2014, SECO had awarded 43 contracts worth 34 million Swiss francs between 2009 and 2011 without a public tender. This, in spite of the fact that the value of the single contracts lay between 230'000 and 4 million Swiss francs and therefore exceeded the WTO threshold for unpublished invitations to tender. The contracts were in connection with the IT-system of the unemployment insurance scheme. The newspapers "Tages Anzeiger" and "Der Bund" published the list of the contracts against the will of SECO by means of a demand according to the Federal Act on Freedom of Information in the Administration.[83] Almost half of the contracts worth a total of 26 million Swiss francs were concluded with the same company. Another press article claimed on 30 January

[81] Tätigkeitsbericht 2014, Bericht der Bundesanwaltschaft über ihre Tätigkeit im Jahr 2014 an die Aufsichtbehörde, p. 13 (http://www.bundesanwaltschaft.ch/dokumentation/00024/index.html?lang=de).

[82] See: http://www.aargauerzeitung.ch/schweiz/koepferollen-beim-zoll-wurde-beim-kauf-von-roentgenstationen-bewusst-zu-viel-bezahlt-130631293, where the SECO-case is also mentioned.

[83] Freedom of Information Act (FoIA) of 17 December 2004 (SR 152.3; https://www.admin.ch/opc/de/classified-compilation/20022540/index.html).

2014 that corrupt business had been going on in SECO for years and that in particular one head of a SECO department was suspected of corruption. Shortly thereafter, the Federal Prosecutor's Office had the head of the department concerned and a representative of the involved IT companies arrested, and other persons were subsequently arrested as well. In July 2016, the press announced that - according to an insider - SECO had apparently paid six million Swiss francs too much for hardware and that one of the charged IT companies had sold SECO IBM products as an intermediary without passing on discounts and had charged bills for fictitious services.[84]

In February 2014, the head of the Federal Department of Economic Affairs, Education and Research (WBF) commissioned an external law firm to investigate irregularities and deficiencies in the procurement of SECO's labour market and unemployment insurance sector. At the end of July 2014, the investigation officer submitted a report on the administrative examination.[85]

The observation made at the beginning of the report, that irregularities in unemployment insurance in the context of procurement had already been investigated earlier on in the same department, but had apparently remained without consequences, is already very remarkable. Back in 1997 - 2000, inadequate procurement procedures and financial irregularities - such as gifts for suppliers, so-called "black accounts" and financial transactions in connection with the

[84] http://www.computerworld.ch/news/it-branche/artikel/seco-affaere-bund-soll-rund-6-millionen-franken-verloren-haben-70549/.

[85] SECO-Administrativuntersuchung, Mandatsvergaben im IT-Bereich und Überprüfung der Rechtsmässigkeit der Beschaffungsprozesse der Ausgleichskasse der ALV, Bericht des Untersuchungsbeauftragten Prof. Dr. Urs Saxer LL.M, Rechtsanwalt, Zürich, of 26 July 2014 (http://www.news.admin.ch/NSBSubscriber/message/attachments/36190.pdf).

purchase of real estate in Spain by the later accused head TCSB and his wife - had been discussed and investigated in an administrative investigation, but had had no consequences. In 2005, a criminal investigation was launched against the head TCSB by the Federal Prosecutor's Office because of the suspicion of misconduct in public office and acceptance of bribes. The question was whether the head TCSB had personally received money from IBM for the conclusion of contracts in the course of his work at SECO. Suspicion of criminal action arose because he had always worked with the same companies. Some money deposits into his and his partner's private bank accounts looked suspicious. After barely two years, the process was formally discontinued without success.[86] Based on his examination, the investigating officer stated in his report that the former head TCSB had received a considerable amount of money from the managements of two IT companies over a long period of time. These benefits were partly cash payments, and partly, the head TCSB had charged various services to the involved IT companies, which then charged them to SECO as fictitious working debts. Thus, the head TCSB himself, but also the department or other colleagues received services like electronic equipment (TVs, computers), financing of workshops and other events, attending concerts and sporting events, invitations to festivals, support (e.g. clothing, sponsoring of prizes for lotteries) for the head TCSB's music club, as well as the donation of iPads to employees and so on. The deputy of the department received a stereo set.[87] The investigation report also revealed that not a single tendering procedure between 2006 and 2012 had been conducted in an open or selective manner, nor had any private contract been concluded with explicit reference to a legal exception such as the exemption clause for private-

[86] Bericht SECO-Adminstrativuntersuchung, p. 3.

[87] Bericht SECO-Adminstrativuntersuchung, p. 21.

sector proceedings in Art. 13.1 FOGP, nor had a bid been officially published. Between 2006 and 2012, the procurement provisions had been systematically ignored, or rather negated. In addition, further irregularities had occurred: the head TCSB had attempted to carry out procurement worth millions without any second signature, in clear violation of the usual procedures and by circumventing all internal controls. The head TCSB's main focus had been sticking to the financial budget and seeing that the systems were functioning, compliance with public procurement was at best ***cura posterior***. Alleged urgency and the maintenance of functioning systems were the repeated arguments for not having published tenders. The investigating officer was under the impression that the urgency had in part been consciously artificially induced and that the non-consideration of further providers was used as a pretext to protect the functioning systems. Internal controls and audits had regularly pointed out irregularities in procurement, disregard of procurement requirements and the need for published tenders. TCSB's and in particular its head's approach had been the object of criticism and investigations, but also of (rather imprecise) rumours for many years. In spite of all these indications, the people responsible had not taken appropriate measures. It was not until 2011 that the management of the labour market and unemployment insurance, under the pressure of continuous criticism, began taking the first hesitant steps and decided that as of then a tendering procedure for services and products had to be introduced. They decided on a phased tender of the contracts over several years.[88]

In his report, the investigating officer noted a close link between the lack of calls for tenders and / or the publication of direct awards and the discovered serious misconduct, in particular of the head TCSB, as these awards were the basis

[88] Bericht SECO-Adminstrativuntersuchung, p. 22.

for cooperation between himself and the people responsible for the IT companies. Competitors would have been able to intervene if the awards had been published, and this would have allowed general public control which would definitely have influenced the behavior of the relevant actors and reduced the risk of irregularities. Furthermore, it would most likely have been possible to procure goods and services at better terms. On the other hand, the lack of publication meant that the irregularities were able to be kept secret for years. It was only the intervention of the journalist, based on the PSA, and the subsequent publications, which triggered the administrative investigation and the identification of irregularities. In conclusion, the investigator stated that, had there been a culture of conformity with rules in the field of procurement, the risk of irregularities would have been much lower.[89]

In spring 2014, a criminal investigation against several known and unknown persons because of possible acts of bribery and acceptance of advantages was also opened in the canton of Zürich in connection with the SECO IT grants which affected the Directorate of Justice and the Interior of the Canton of Zurich. The process was dropped on 30 December 2015 by the Zürich Public Prosecutor as the suspicion of acts of bribery was not confirmed within the Directorate, and the period of limitation for the accusations of acceptance of advantages had partly already passed. However, in the course of the investigation, the Zürich Public Prosecutor had obtained information which was of significance for the Swiss Public Prosecutor's procedure and which were made available to him by a procedure transfer. In a different context within the same process, the Public Prosecutor's Office identified the acceptance of unfair advantages in the form of financed trips by a managerial

[89] Bericht SECO-Adminstrativuntersuchung, p. 30, 32.

employee for which he was conditionally fined for 120 daily rates.[90]

## 5 Causes of corruption in Switzerland

### *5.1 Conscious disregard of public procurement law for alleged efficiency and cost reasons*

A study published by the University of Bern in May 2016 showed that about half of Swiss Federal IT-procurement (in central federal administration and local entities) had been awarded directly to companies, meaning without the chance of competition, between 2009 and May 2016.[91] A procurement audit conducted by the Swiss Federal Audit Office (SFAO) in 2015 within the Federal Customs Administration[92] painted a similar picture: The majority of the inspected procurements had not been conducted properly and partly not in accordance with procurement law. The financial control came to the conclusion that the

[90] Communication Oberstaatsanwaltschaft Zürich of 11 January 2016 (http://www.polizeiticker.ch/news/artikel/zuerich-seco-korruptionsaffaere-strafverfahren-abgeschlossen-72627/).

[91] http://www.tagesanzeiger.ch/schweiz/standard/bund-vergibt-itauftraege-in-milliardenhoehe-ohne-wettbewerb/story/22807945. A total of 2600 IT projects with a total value of 8.9 billion Swiss franc were tested. Only 1348 of them were publicly announced (https://beschaffungen.fdn.iwi.unibe.ch/ ). See also: http://www.digitale-nachhaltigkeit.unibe.ch/e273593/e304567/e304570/it_beschaffung_nzz_ger.pdf.

[92] The Federal Customs Administration is one of the largest federal administrative units and spends around 100 million Swiss francs a year. See also the press release from the SFAO under: http://www.efk.admin.ch/images/stories/efk_dokumente/publikationen/medienmitteilungen/Andere%20Berichte/MM-Andere_Berichte%20(94%20-%20101)/Besch_MM_e.pdf (24.10.2016).

necessary conditions did not exist to allow for procurements to be conducted in accordance with the principles of sound financial management, strengthening competition amongst suppliers, transparency and equal treatment. The main reasons were the lack of a standardized procurement process and the absence of necessary requirements as well as a lack of clarity with regard to responsibilities. Further, due to the inappropriate use of the controlling instrument "contract management of the federal administration", the management did not have the necessary information for the effective monitoring and control of procurement. The study concluded that a reorganisation of the procurement system was needed urgently.[93] Contracting authorities, who consciously disregard public procurement law, regularly try to justify their own behavior by claiming that prescribed procedures are far too complicated that the administrative and time-related costs associated with the implementation of public invitations to tender are unacceptably high for them, and in the end no better offers are achieved. The procurement rules, and in particular WTO laws, are often viewed as an unnecessary risk for the respective project and the associated legal remedies of disregarded suppliers are supposed to lead to inacceptable delays. This however overlooks the fact that public procurement law is a ***mandatory law*** whose application and observance is by no means at the discretion of the contracting parties. Members of public procurement authorities who ignore the procurement law risk being confronted with a criminal charge of misconduct in public office.[94] The widespread general conviction of procurement authorities that services and supplies are much more cost-effective when procurement laws are not complied with is wrong as well. In

[93] http://www.efk.admin.ch/images/stories/efk_dokumente/publikationen/andere_berichte/Andere%20Berichte%20(96) /14501BE.pdf.

[94] See ***supra*** section 4.2.

particular, the fact that the dependence on certain suppliers has an impact on pricing is not taken into consideration. On top of that, economists regularly make the mistake of only setting the transaction costs into proportion to possible savings, without considering the public interest in a good reputation, which also justifies transaction costs. The following example – according to a judgement of the administrative court of the Canton of Aargau - shows that a properly and efficiently conducted public submission procedure leads to considerable cost savings: In 2013, the Aargau cantonal police conducted a selective tender procedure for the supply of a new IT system. Two IT companies met the requirements and were allowed to submit an offer. One offer amounted to 752,000, the other one 3.7 million Swiss francs. This offer was from the company that had supplied the previous system which was to be replaced and which they had maintained for years. After a very careful and thorough examination of the offers, the procurement authority awarded the contract to the lower bidder. The previous supplier, who did not get the contract, raised a complaint, asserting this was a dumping offer and the successful bidder was not in a position to provide the services at the offered price. She later withdrew the complaint after recognizing its uselessness.

### *5.2 Small-scale conditions / militia system*

Apart from the often lacking understanding that public contracts have to be awarded according to public procurement law, there is also the fact that Switzerland is generally characterised by small-scale structures and the resulting closeness of politics / administration and economy. The militia system, which predominates at least the local level, leads to having stakeholders also in legislative and executive bodies. Moreover, Switzerland is a small market in which the actors are very often familiar with each other. People generally tend to favour suppliers they already know

and have cooperated with in the case of renewed procurement. Besides, contracts are often not awarded to the economically most advantageous offer after a public tendering procedure, but rather covertly, e.g. to business, party or former student friends because of personal contacts who return the favour on a suitable occasion. According to an estimate made by Transparency International Switzerland, contracts awarded on the basis of favouritism and nepotism are at least 10 % more expensive than contracts awarded on the basis of correctly publicly announced tenders.[95]

### *5.3 Great discretion of the authorities - not only a topic for Switzerland*

Public procurement is a legal field in which the public authorities are given great discretion over a wide range of areas, such as the definition of the object to be procured, the award procedure and the award criteria, but also in the evaluation of the offers and in negotiations. This generally leads to a certain tendency towards abuse and also to a criminally relevant exertion of influence on decision-making. The legal requirements, in particular the requirement of making public procurement procedures transparent in all their stages, and the possibility of having an independent body review the award decisions, cannot totally prevent corrupt conduct even in the case of public tenders. Nonetheless, Transparency International's regular argument that discretionary powers are fundamentally evil falls short. Like the new EU directives, Swiss regulations on public procurement are aimed at fostering competition based on

[95] TRANSPARENCY INTERNATIONAL SCHWEIZ, Korruption und Korruptionsbekämpfung in der Schweiz, Zusammenfassung, November 2003, p. 2.

quality and innovation promotion by demand.[96] These objectives can only be achieved if the contracting authorities are granted – notwithstanding the transparency requirements – a certain leeway. On the other hand, it makes little sense to provide a particularly corrupt polity with a demanding program for innovation promotion by public procurement. The amount of leeway therefore tends to depend on how much discretion the contracting authorities can be granted without actually promoting corruption. The appropriate margin of discretion can be defined by assessing the level of maturity/governance of a country. But even in distinctly corrupt systems, it is hardly appropriate not to grant any discretion at all. Thus, as far as Italian laws on public procurement are concerned, a massive over-regulation is held to be the consequence of the distrust of the Italian legislators towards public administration.[97]

## 6 Good governance and fighting corruption as topics relevant for the ongoing reform of the public procurement regulation in Switzerland

### *6.1 The current legal framework of public procurement in Switzerland*

When discussing the legal framework of public procurement in Switzerland one should be aware of its distinctly federalist governmental structures. The principal legislative acts regulating federal public procurements in Switzerland are: the Federal Act on Public Procurement of

[96] Marc Steiner, Nachhaltige öffentliche Beschaffung, in: Zufferey/Stoeckli (ed.), Aktuelles Vergaberecht 2014, Zurich 2014, p. 165 ss.

[97] Horst Franke/Jakob Brugger, Die Umsetzung der Vergaberichtlinien in Italien, in: Vergaberecht 2016, p. 400 ss., in particular p. 401.

December 16, 1994 as amended (FAPP)[98] and the Federal Ordinance on Public Procurement of December 11, 1995 as amended (OPP)[99]. Whereas the FAPP sets forth the general framework, the OPP contains detailed provisions on executing the FAPP and further stipulates the procedure for public procurements not covered by the FAPP. The main legislative acts for the procurements of regional and local authorities are: the Intercantonal Agreement on Public Procurement of 25 November 1994 (revised on 15 March 2001; IAPP)[100], a general agreement between the 26 Swiss Cantons, and the cantonal public procurement regulations.[101] On the international level, Switzerland is not only a member state of the GPA, but also has a bilateral agreement with the European Union on certain aspects of government procurement.[102] However, this agreement does not mean that the EU Public Procurement Directives are relevant for the legal framework of Swiss public procurement. It may nonetheless be assumed that the new EU directives will have an indirect impact on the development and the interpretation of Swiss procurement law.[103]

### *6.2 Good governance, fighting corruption and collusion as relevant topics for the ongoing reform*

The revised GPA was signed by the Swiss Federal Council on 21 March 2012. It will enter into force once it has been

[98] Swiss Classified Compilation of Federal Legislation - Systematische Sammlung des Bundesrechts (SR) 172.056.1 ; for an unofficial translation see https://www.bkb.admin.ch/bkb/de/home/rechtsgrundlagen/bundeserlasse.html, last visited 6 December 2016.

[99] SR 172.056.11.

[100] http://www.bpuk.ch/bpuk/konkordate/ivoeb/, last visited 5 December 2016.

[101] See for a general introduction Benoît Merkt/Astrid Waser, Chapter "Switzerland", Burrows/McNeill (ed.), International Comparative Legal Guides, Public Procurement 2016

[102] OJEU 2002 L 114/439 ss. = SR 0.172.052.68.

[103] Merkt/Waser, loc. cit. (footnote 101), point 9 "the Future".

ratified by the Swiss Parliament. When implementing the GPA, the Confederation and the cantons aim at simultaneously revising the FAPP, the OPP and the IAPP; harmonization is the keyword of this project. However, the fact that the purposes of the new law will be more than those related to the classical rationale of public procurement regulation is remarkable. This means that the efficient use of public funds shall be guaranteed in the consideration of the concept of sustainability. At the same time, the fostering of effective competition shall newly include measures against anti-competitive collusion and corruption. The implementation of the GPA thereby calls for a special focus on measures against collusion and corruption.[104] Art. 11 of the FAPP draft version provides that the procuring entity shall take measures against conflicts of interest, collusion and corruption considering the relevant international agreements. The explanatory report highlights the fact that the prevention of corruption and conflicts of interest are a core concern of the revised GPA.[105] It has to be noted that Switzerland is a party to the OECD Anti-Bribery Convention as well as to the United Nations Convention Against Corruption. The OECD Recommendation of Further Combating Bribery of Foreign Public Officials in International Business Transactions of 26 November 2009 as well as the specific OECD Recommendation 2015 on Public Procurement[106] both call for a system of effective and enforceable sanctions. Public authorities should therefore be given the possibility to exclude bidders. Invoking the Recommendation of 2009, the Swiss draft version foresees to deal with corruptive behavior in two ways: If there is a

[104] Dispatch of the Swiss Federal Council of 15 February 2017 (Federal Gazette / Bundesblatt [BBI] 2017 p. 1867 and p. 1886.

[105] Dispatch on a new FAPP, loc. Cit. (footnote 104), BBI 2017 p. 1909.

[106] http://www.slideshare.net/OECD-GOV/oecd-recommendation-on-public-procurement2015, last visited 5 December 2016.

reasonable degree of suspicion that a procurement procedure is being affected by corruptive behavior, the relevant bidder can be excluded from this specific procedure based on Art. 44(e). The sanction itself consists of exclusion for up to five years including blacklisting according to Art. 45; the proportionality principle is obviously very important in that context. Self-cleaning is not explicitly addressed, but can most likely be taken into consideration, as the proportionality principle would not be safeguarded otherwise.

### *6.3 Integrity in the public sector, impartiality and stepping down*

After some incidents concerning impartiality, the federal administration has started producing in court cases "impartiality declarations" signed by each official involved in the procurement procedure.[107] As a reaction to this, the Federal Administrative Court held that the federal administration cannot be spared from further review on the impartiality of the officials involved just because they had presented those declarations.[108] However, it found that after a certain time – a kind of a cooling off period – and without (properly alleged) specific contacts of the official to his former employer, the specialized official is no longer unfit to be involved in the procurement process.[109] Incidentally, rules against bias are not only relevant concerning officials, but also when it comes to the question, whether the engineers or councils advising the procuring entity have specific relations to certain bidders or a specific interest in the matter. The impartiality issue can furthermore be particularly delicate

[107] Cf. the decision B-4852/2012 (on the suspensory effect) of the Federal Administrative Court of 15 November 2012 cons. 4.2.

[108] See on this the decision B-4958/2013 of The Federal Administrative Court of 30 April 2014 cons. 5.8.

[109] See on this the decision B-4958/2013 of The Federal Administrative Court of 30 April 2014 cons. 5.8.

when specialists are hired as public procurement officials after a long career within a specialized enterprise which regularly acts as a bidder.

Art. 10 of the Swiss Federal Act on Administrative Procedure[110] provides that persons who are responsible for preparing or issuing a ruling shall recuse themselves from the case if they have a personal interest in the matter. This article is evidently also relevant for public procurement according to the current FAPP. It is also undisputed, that the mere appearance of bias is sufficient in order to trigger the recusal. Not only justice must be seen to be done, but also impartial administration. Nonetheless, the Swiss administration feels that the case law on impartiality of specialists hired as public officials puts too heavy a burden on it and therefore tries to apply a new formula in the context of the draft version for a new Art. 13 FAPP. In the explanatory report it is explicitly stated that impartiality should not be assessed in an abstract manner, but always in consideration of the tasks and functions of the regulation on public procurement.[111] According to the Swiss Federal Council, this means that unlike as foreseen in Art. 10 of the Federal Act on Administrative Procedure, a mere appearance is not sufficient if the lack of impartiality has not had a concrete effect. Needless to say, that this reasoning is in open contradiction with the integrity purpose of the new regulation and does not fit with the concept of Art. IV (4) GPA.[112] Therefore the new approach of the government has been heavily criticized.[113]

[110] SR 172.021.

[111] Dispatch on a new FAPP, loc. Cit. (footnote 104), BBI 2017 p. 1916.

[112] Cf. point 2.4 above.

[113] http://www.nzz.ch/meinung/kommentare/regeln-gegen-die-korruption-1.18696932 (last visited 5 December 2015; Martin Beyeler).

## 7 Concluding remarks

The topics covered by this paper are incredibly rich with relevant issues which are impossible to cover in an exhaustive manner in an article as this. Negotiations between procuring entities and bidders need to be mentioned as an area susceptible to abuse. This is particularly important because in Switzerland the harmonization of public procurement regulation is expected to occur but, according to the current regime, negotiations between bidders and second (normally lower) offers on cantonal and municipal levels are forbidden. According to the authors, in a cantonal or municipal context, contacts between procuring entities and bidders are significantly more dangerous than on the federal level, where there is more centralized procurement, and procuring entities are normally more professional.[114] Another hot topic is the protection of whistleblowers.[115] Also highly relevant is the subject of surveillance of procuring entities[116] and statistics on public procurement, which are not only a great benefit in fostering and monitoring efforts concerning market access, but also an invaluable good governance tool. Nonetheless, the most important take home message is the rethinking of the aims and purposes of public procurement regulations. This presupposes the demonstrated rising awareness on the importance of integrity in the procurement process. There is now an on-going paradigm change towards more consistent regulation, whereas during the 1990s, public procurement regulations had a narrower focus on market access. Whilst the new

[114] See on this the position of Transparency International (Swiss Chapter) concerning the ongoing reform (http://www.transparency.ch/de/themen/Beschaffungswesen/index.php?navanchor=2110015, last visited 5 December 2016).

[115] Cf. Daniel Jositsch/Jana Drzalic, Die Revision des Korruptionsstrafrechts, Aktuelle Juristische Praxis 2016, p. 349 ss.

[116] Very informative on this the history of Art. 83 directive 2014/24/EU, especially when comparing the article with the draft of the Commission.

concept is appropriate to attain broader acceptance, it implies conflicts of objectives which have to be dealt with at the same time. A balance between the different goals needs to be sought. In this respect, the WTO Government Procurement Agreement is a perfect example of what Pascal Lamy calls the 'Geneva Consensus'. He believes that "trade opening is essential for achieving growth and development, but the benefits resulting from open trade depend on the quality of policies in other areas".[117] So the quality of public procurement regulation depends also on suitable interfaces with other (no longer just domestic) public interests and policies, such as sustainability (United Nations Sustainable Development Goals implying a substantive reduction of corruption and bribery in all its forms[118]) and providing good governance.[119]

[117] Pascal Lamy, The Geneva Consensus – Making Trade Work for All, Cambridge 2013, p. viii.

[118] Goal 16 (http://www.un.org/sustainabledevelopment/peace-justice/, last visited 5 December 2016).

[119] See on this Niggli, loc. cit. (footnote 1), p. 9.