



**DEVELOPING THE RULE OF LAW AND STRENGTHENING ANTI-CORRUPTION
IN THE PUBLIC PROCUREMENT SECTOR IN MOLDOVA**

**Tackling corruption through eProcurement –
legal constraints and technical challenges in the implementation of MTender**

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EXECUTIVE SUMMARY

Corruption in Moldova is endemic and widespread. Given the significant share of public spending in the Moldovan GDP, corruption in public procurement procedures is a particularly important issue. High levels of public procurement corruption hamper a competition-based, thriving and prosperity-generating market economy, have a significantly negative impact on the business and investment climate and present a serious obstacle to achieving the United Nations Sustainable Development Goals (UN SDGs). To counteract the devastating effects of corruption, in recent years, the use of electronic means in public procurement (eProcurement) has become a key instrument to increase transparency and accountability, reduce maladministration risks and strengthen businesses' and citizens' trust in public administrations.

Against this backdrop, this study examines the legal constraints for the implementation of MTender – the eProcurement system in Moldova – and identifies the most up-to-date technical deficiencies of the system presenting challenges for its day-to-day use by the Moldovan business community. This study argues that, despite significant improvements particularly in terms of transparency in public procurement in Moldova, MTender suffers from a variety of legal constraints hindering the system to unfold the full range of its functionalities as well as system-inherent technical deficiencies. The study shows that (i) the Moldovan legal framework regulating MTender is incoherent and contradictory, non-compliant with EU requirements and creates barriers for economic operators, (ii) MTender has technical limitations that need to be addressed to increase contracting authorities' and economic operators' user-friendliness and trust in the system and (iii) the degree of success of the establishment of a modern and digitalised public procurement system is highly dependent on the regulatory environment in which it operates and the community's trust in its public institutions.

Drawing on key experts' and users' assessments concerning the current state of the public procurement system in Moldova, this study offers some policy recommendations aimed at eliminating current legal constraints hampering the functioning of MTender and its system-inherent technical deficiencies. It suggests that a definite answer to whether MTender presents a viable instrument to enhance a functioning digitalised public administration in Moldova should follow a phase where the system operates at its full capacity.

KEY WORDS

Anti-corruption; rule of law; public procurement; Moldova; eProcurement; European integration; EU-Moldova Association Agreement.

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List of Abbreviations

AA: Association Agreement
APP: Agency for Public Procurement
B2G: Business to Government
BBG: Bundesbeschaffung GmbH
BI: Business Intelligence
CA: Contracting Authorities
CAPCS: Centre for Centralised Public Procurement in the Health Sector
CDU: Central Data Unit
CPV: Common Procurement Vocabulary
CSOs: Civil Society Organisations
CTIF: Centre of IT of the Ministry of Finance
CV: Curriculum Vitae
DCFTA: Deep and Comprehensive Free Trade Area
EaP: Eastern Partnership
EBRD: European Bank for Reconstruction and Development
ED: European Dynamics
ESPD: European Single Procurement Document
EU: European Union
FDI: Foreign Direct Investment
GDP: Gross Domestic Product
ICTs: Information and Communications Technologies
IOs: International Organisations
MDL: Moldovan Lei
MEAT: Most Economically Advantageous Tender
NAPIAA: National Action Plan on the Implementation of the Association Agreement
NASC: National Agency for Solving Complaints
OCDS: Open Contracting Data Standards
PP: Public Procurement
PPPI: Public Procurement Promoting Innovation
RPQ: Request for Price Quotation
RSAP: State Register of Public Procurement
SDGs: Sustainable Development Goals
SOEs: State-owned enterprises
TED: Tenders Electronic Daily
TI-CPI: Transparency International Corruption Perception Index
UN: United Nations
WTO GPA: World Trade Organisation Agreement on Government Procurement

Introduction

Moldova is one of the most corrupt countries in the world (World Bank, 2019; TI, 2021). Widespread, endemic high-level corruption and ‘state capture’ (Hellmann et al., 2000:p.4) represent major internal shocks with ongoing repercussions for the country. In 2016, between 8% and 13% of Moldovan GDP was lost due to corrupt practices, amounting to more than €611 million (Budianschi, 2017), which is a sum higher than the cumulative expenses for social security and pensions in the same year (Ibid.). In 2017 the estimated volume of bribes paid by Moldovans was higher than the investments in the country’s road infrastructure (Ibid.). Beyond these devastating socio-economic effects, corruption also attacks the very core of democracy and the rule of law. 75% of Moldovans think that their elected officials are “very corrupt” (TI, 2016:p.10), while 90% declared to have “very little” or “no trust” in the judiciary (TI, 2017:p.15). More than 50% of Moldova’s population would emigrate if it could (IPP, 2018:p.61), citing corruption among the primary reasons (Center for Insights in Survey Research, 2019:p.9,15). Moreover, corruption is a serious obstacle in Moldova’s aspirations to become a European-style democracy with a functioning rule of law system, as well as a competition-based, thriving and prosperity-generating market economy.

Public procurement is one of the sectors most vulnerable to corruption and fraud schemes, which significantly diminish the capacity of the Moldovan state to deliver collective goods and services (World Bank, 2017). In recent years, academic contributions, practitioners and International Organisations (IOs) have explored the effects of electronic means in public procurement (eProcurement), understood as ‘the integration of digital technologies in the replacement or redesign of paper-based procedures throughout the procurement process’ (OECD, 2015:p.6), in the fight against corruption. Cross-country analyses provided evidence for the correlation between eProcurement, higher degrees of transparency and efficiency and lower levels of corruption in public procurement (EC, 2013; OECD, 2015; Open Contracting Partnership, 2019a; Neupane et al., 2012; Armstrong, 2005). At the same time, a link between reduced corruption risks and an improved business and investment climate has been established (Rose-Ackerman, 2002; Mungiu-Pippidi, 2013:pp.11-20). As a consequence, a growing number of contributions focused on the prerequisites that ensure the proper functioning of eProcurement systems. The system currently in

place in Moldova – MTender – has not been exempted from this exercise (Pirvan & Enachi, 2019; TI, 2020; Covalciuc, Diaconu & Stamate, 2020; Expert-Grup, 2017; Atomate, 2020).

This study draws on this research and, given high-speed developments in the area of eProcurement in Moldova, is exploratory in nature. The main objective of this study is to identify the most up-to-date challenges encountered by practitioners and the Moldovan business community when using MTender. In doing so, it examines the quality, functionality and user-friendliness of the Moldovan electronic procurement system. Indirectly, proceeding from the assumption that an increased use of MTender leads to a higher degree of transparency in public procurement, less corruption and more competition, it also sheds light on the business and investment climate in Moldova. This study argues that, despite significant improvements over the past years in terms of transparency in public procurement in Moldova, MTender suffers from a variety of legal constraints and technical deficiencies, which are both inherent to the system and system-independent:

- (i) the Moldovan public procurement legal framework regulating MTender is incoherent and contradictory, non-compliant with EU requirements and creates barriers for economic operators,
- (ii) besides these legal constraints that hamper MTender to unfold the full range of its functionalities, the system currently has inherent technical limitations, which mainly refer to the non-coverage of the whole procurement cycle, lacking support of important procurement procedures, non-availability of encryption of procurement documents (in particular the price) until the opening of bidders' offers and the absence of advanced Business Intelligence (BI) and preventive data-driven control tools, and
- (iii) the degree of success of the establishment of MTender as a modern and digitalised public procurement system is highly dependent on the regulatory environment in Moldova and its community's trust in public institutions.

In the context of negotiations between the Moldovan Ministry of Finance and the EU Delegation to Moldova on one hand and European Dynamics (ED) on the other hand, this study hopes to contribute to the debate on the future of MTender and eProcurement in Moldova. After the European Bank for Reconstruction and Development (EBRD) has implemented MTender since

2016, in December 2019, ED was awarded a contract ‘to re-design and develop MTender, a reliable, secure and highly configurable Electronic Procurement platform to support the management of all public procurement processes automating all national processes and the requirements of Contracting Authorities’ (ED, 2019).

Applying a methodological mix of desk research and semi-structured interviews, the study combines the most up-to-date academic research with practical hands-on experience. This study draws on primary and secondary sources in English and Romanian, including reports, analyses and studies, as well as 22 semi-structured stakeholder interviews. The interviews were conducted in English and Moldovan/Romanian between November 2020 and February 2021 over the phone and Zoom with a view to obtain data and information that was not accessible elsewhere and to triangulate data, i.e. to cross-check information from multiple sources in order to establish regularities. Interviewees include: EBRD consultants, EU and World Bank officials, Moldovan policymakers, members of the Moldovan and international expert community and representatives from eight companies of different sizes operating in different sectors with both Moldovan and foreign capital (Austria, Germany and Sweden) doing business in Moldova and having differing user experience with regard to MTender (from “never used it but heard about it from others” to “using it on a daily basis”). The interviewed stakeholders are:

- Austrian GRAWE Insurance
- DONARIS Vienna Insurance Group S.A.
- EBRD
- ELECTEH S.R.L.
- EU Delegation to the Republic of Moldova
- Global Data Barometer
- I.C.S. Raiffeisen Leasing S.R.L.
- IDIS “Viitorul”
- Medpark
- Merjan, Serghei (freelance expert)
- Ministry of Finance of the Republic of Moldova
- Moldcell
- Moldovan Public Procurement Agency
- Moldovan-German joint venture Südzucker Moldova S.A.

- Open Contracting Partnership
- Rikipal S.R.L.
- Union of private healthcare institutions in the Republic of Moldova (Uniunea Instituțiilor Medico-Sanitare Private din Republica Moldova)
- World Bank

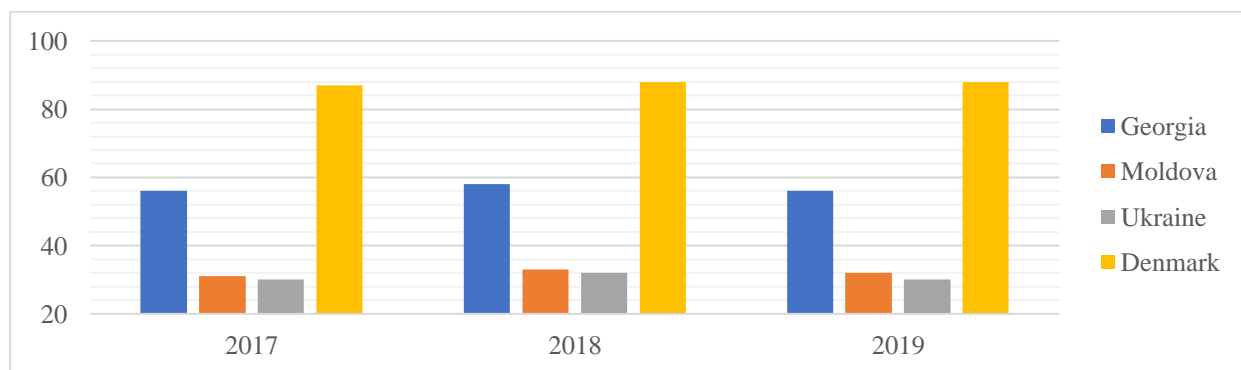
The study is structured as follows. The first section offers some contextual reflections on (1.1) the extent of public procurement corruption in Moldova, (1.2) the specific nature of public procurement which explains its vulnerability towards illicit behaviour and forms of and indicators for corruption in this area, and (1.3) the impact of public procurement corruption on the economy, business environment and investment climate. The second section provides some considerations on the correlation between the use of electronic means in public procurement and lower levels of corruption with a particular focus on Austria's experience with eProcurement. The third section maps out the existing (3.1) legal challenges and (3.2) technical opportunities and constraints for the implementation of MTender in Moldova. The respective tables elaborated by the authors are the main output of this study. The study concludes with a synthesis of MTender deficiencies and offers policy recommendations aimed at improving eProcurement for the business community in Moldova. The latter have been formulated as a result of the contributions made by participants during the online presentation of this study on 17.02.2021 titled "The legal and technical challenges for the implementation of the eProcurement system MTender".

1. Setting the Scene: Public Procurement Corruption in Moldova

1.1 The extent of corruption in Moldovan public procurement procedures

The public procurement sector has a significant weight in the Moldovan economy. The share of public procurement in the GDP over the last decade varied between 5% and 10% and constituted around one third of the national public budget revenues (PPA, 2019:p.19). With 4.66 % of GDP, in 2019, 13,800 contracts were awarded through 5,179 procedures with a total volume of 8,939,886,172.34 MDL (Moldovan lei) (~ €462,806,078.26) (Ibid.:p.17).¹ At the same time, public procurement is one of the sectors most vulnerable to corrupt and fraudulent practices. This poses significant challenges for the Moldovan state's capacity to deliver collective goods and services (World Bank, 2017; Mungiu-Pippidi, 2013:pp.11-20). Perception-based indicators (Tables 1 and 2) and indicators that ask more precise and varied questions on the prevalence of corruption (Table 3) indicate that corruption in general and in the sector of public procurement in particular is endemic and wide-spread (World Bank, 2017; TPPR, 2020; EBRD, 2011; PEFA, 2015). Public money management is the sector that is perceived to have the lowest degree of transparency (Centre for Social Surveys and Marketing "CBS-Research", 2020:p.129).

Table 1: The Transparency International Corruption Perception Index (TI-CPI) 2019 (0 = highly corrupt; 100 = very clean)



¹ The number refers to contracts above the threshold of 200,000 MDL.

Table 2: “CBS-Research” National Integrity and Anticorruption Strategy Impact Monitoring Survey – Moldova 2019

| | 2017 | | | 2019 | | |
|--|----------|------------|---------------|----------|------------|---------------|
| | Business | Population | Public Agents | Business | Population | Public Agents |
| The Public Procurement Agency is pretty corrupt / very corrupt. | 30% | 34% | / | 32% | 36% | / |
| The level of transparency of central level public institutions in the process of public procurement is not transparent at all / quite non-transparent. | 64% | 61% | 39% | 74% | 73% | 31% |
| The level of transparency of local public institutions in the process of public procurement is not transparent at all / quite non-transparent. | 64% | 61% | 35% | 70% | 66% | 25% |
| The main difficulty that I face as an economic agent is fraud and corruption in public procurement. | 5% | / | / | 11% | / | / |
| When dealing with public agents my enterprise / organisation most often faces the phenomenon of corruption in public procurement processes. | 5% | / | / | 5% | / | / |

Table 3: World Bank Enterprise Survey Moldova 2019

| | Bribery incidence (% of firms experiencing at least one bribe payment request) | Bribery depth (% of public transactions where a gift or informal payment was requested) | % of firms expected to give gifts to secure government contract | Value of gift expected to secure a government contract (% of contract value) | % of firms expected to give gifts to public officials ‘to get things done’ | % of firms identifying corruption as a major constraint |
|----------------|--|---|---|--|--|---|
| Moldova | 11.9 | 9 | 11.5 | 0.1 | 12.5 | 27.4 |

These indicators are confirmed by the Moldovan and international expert community. Despite recent significant legal (Parliament of the Republic of Moldova, 2015; Ungureanu, 2019) and technological² improvements in the Moldovan public procurement sector, relevant studies point to a still underdeveloped and inconsistent public procurement normative framework, insufficient dissemination of public procurement data, inefficient procurement procedures and the lack of a

² See <https://mtender.gov.md/> (consulted on 18.08.2019).

consistent and comprehensive monitoring mechanism (Covalciuc, Diaconu & Stamate, 2020; Covalciuc & Diaconu, 2019; TPPR, 2018). These deficiencies are mentioned in the same breath as the fact that Moldova is lacking a centralised, functioning, easy to use and fully transparent electronic public procurement system that covers the whole procurement cycle and all public procurement procedures (TI, 2020; Turcan & Enachi, 2019:p.7; Expert-Grup, 2017; Rahman, 2017:p.10).

This assessment indicates that significant challenges exist with regard to the very principles that ensure ‘good’ public procurement: integrity, accountability, transparency and efficiency (OECD, 2007; Arrowsmith, 2010:p.4-23; TI, 2014:pp.48-52). Integrity refers to the notion that procurement procedures should be lawful, open, non-discriminatory and free of conflicts of interest. Accountability ensures that all actors involved in the public procurement process are held responsible for the lawful conduct of the procurement process and that public buyers do not abuse their margin of discretion to take illicit decisions. It is guaranteed by objective administrative, civil and criminal monitoring mechanisms. Transparency, a precondition for the functioning of these monitoring mechanisms, implies that in each procurement cycle all relevant information must be made public to the participating bidders, the monitoring actors and the wider public. Finally, efficiency means that public procurements should be economically efficient and efficient in their implementation. The winning bidder should be able to perform the procured work or service at the best quality, for the lowest price matching the public buyer’s needs and published specifications (MEAT – most economically advantageous tender), regardless of other factors, such as nationality, kinship, friendship, commercial organisation of the bidding company or the particularistic interests of the public employer. Additionally, public procurements should be ‘carried out without unnecessary or disproportionate delay or waste of resources for the procuring entity, and also without unreasonable costs for suppliers’ (Arrowsmith, pp. 19-20).

1.2 Public Procurement and Corruption – a dangerous liaison

Due to the very nature of procurement procedures, the principles of ‘good’ public procurement are constantly under fire. Consequentially, public procurement is the sector most prone to corruption risks (OECD, 2020; OECD, 2012:pp.14-15; UNODC, 2013:p.1; EC, 2014a:pp.31-32). With a

share of 10-15% of global GDP (WTO, 2021) and 14% (€2 trillion) of EU-28 GDP (EC, 2021a), public procurement, defined as ‘all contracts between a government (government department, publicly owned corporation and other types of agencies) and companies (public or private) or individuals’ regarding ‘the acquisition of consumption or investment goods or services’ (TI, 2006:pp.13-14), is one of the most frequent activities of the public sector and the biggest channel of public spending. As illicit advantages resulting from corrupt practices are exchanged as a percentage of the total sum, the amount of money involved in public procurement is directly proportional to the frequency of corrupt behaviour. Furthermore, costly and technically complex equipment, particularly in the security/defence and health sectors, makes it easier to conceal unjustified higher payments. Also, public buyers enjoy a high margin of discretion in specifying the tender documents or taking the final award decision (Arrowsmith, 2010:pp.24-25). The underlying reason is that, particularly within the framework of low-level contracts, small public entities oftentimes know best what needs they have and how and by whom to satisfy them (price and quality of the product or service; track record, capacity and financial situation of the contractor). Finally, the sector is characterised by a high degree of potential interaction between the public and private sector. Public procurement follows a specific and complex procedure, involving a variety of actors – politicians, employers, bidders, sub-contractors, etc. – which intensively interact (TI, 2006:p.27). Additionally, bidders and sub-contractors regularly hire agents or middlemen of sorts, such as ‘consultants’, ‘joint venture partners’ or ‘subsidiaries’, to execute the procurement contract (Ibid.). All these specificities open the gate for various illegal practices and make public procurement a high-risk area for corruption, most commonly defined as ‘the abuse of power for private gain’ (EC, 2003:p.6; Council of Europe, 2015:pp.11-13; World Bank, 1998:Fn.1)³. Corruption in public procurement has three goals: steering procurement contracts to the preferred bidder, sharing the procurement rents and deceiving the corrupt act (Lambert-Mogiliansky & Sonin, 2006:p.884). Accordingly, corruption schemes typically follow a three-step-approach: a demand for or offer of payment, bid rigging and fraud aimed at concealing the scheme. As these steps are pursued along the entire procurement cycle, various so-called red flags, i.e. indicators for corruption, and forms of corruption can be discerned (PPA, 2020; OECD, 2016:p.9).

³ The World Bank provides a more functional definition of corruption as ‘the abuse of public power for private benefit’, where ‘public power’ means discretionary power to decide on the expenditure of public resources.

Typical examples for evident/explicit red flags are goods/services of low quality, bids from supposedly different bidders handed in with the same electronic signature, staff changes and inflated invoices exceeding the contract value (PPA, 2020). More ambiguous red flags include the reception of fewer than the expected number of bids in response to a tender, incomplete or contradictory data on the reasons for the award of the contract and extended deadlines (Ibid.). Red flags may occur on the contracting authorities' side, on the part of the bidders or during contract execution. Whenever red flags are identified they signal that closer scrutiny is needed: analysis of submitted tender documents, identification of correlating red flag indicators, deeper context analysis of the bidder or administrative investigations over the contracting authorities (World Bank, 2017:p.7).

Evidence from Moldova (Schuster & Merjan, 2016:p.36) and practitioners' insights into corrupt procurement practices (World Bank, 2017:p.7) indicate that typically a government official/public buyer will demand or a bidding company will offer a bribe (direct exchange of a material advantage for an illegal favour) or a 'kickback' (bribe in return for the favour) to the public buyer in direct exchange of the contract award. Alternatively, bribes/kickbacks may also be paid to or requested from individuals/companies which are in a position to exert influence on third persons (trading in influence) (Ibid.). Such illicit arrangements may be brokered by 'independent' agents standing on the side of the corrupting company. In most cases, the public buyer will allow the bidding company to inflate the invoice to deceive the bribe/kickback and to keep the profits (Schuster & Merjan, 2016:p.44). To keep his side of the bargain, the bribe/kickback-receiver will disable fair competition between the bidders and manipulate the bidding process (bid-rigging) so that bribe/kickback-paying company will be awarded the contract, more qualified bidders will be excluded and the corrupt act covered (World Bank, 2017:p.7). For this purpose, the public buyer disposes of several possibilities. In the demand determination phase, the public buyer can intentionally distort the procurement needs and subsequently inflate the actual sum of procurement purchases (Schuster & Merjan, 2016:p.53). During the process design phase, a commonly applied practice involves the so-called "CV based tender", in which the procurement process design is tailored exactly to the specifications of the bidder that paid the bribe (Court of Auditors of the Republic of Moldova, 2019:p.32). The public buyer may also design selection (general admissibility) and award criteria that leave room for bias and a concealed bid evaluation, make the

tender documents unnecessarily complex and confusing and share inside information with the preferred bidder (World Bank, 2017:p.14) or split/bundle the contract to intentionally reduce competition (Court of Auditors of the Republic of Moldova, 2019:p.33). Bid rigging may also occur when a group of companies planning to bid on a tender agree beforehand on the winner and the price (price fixing, collusive bidding, cartelization) (Messick & Gawthorpe, 2018:p.8). In the award phase, contracts may be awarded to bidders that are unqualified or do not fulfil the award criteria. Finally, in the contract execution phase collusion may allow the contracting company to 'spare' expenses or give the public employer the opportunity to charge a higher price or invoice works/goods that have not been performed/delivered. Additionally, supervision consultants can be pressured or corrupted to accept the delivery of 'poor quality' works or goods. Beyond bid rigging practices, diverse conflicts of interest involving all typical actors of public procurement procedures may extend to all phases of the procurement process.

1.3 The impact of public procurement corruption on the economy, business environment and investment climate

As a result of its significant economic impact and vulnerability to corruption, public procurement corruption has a severe effect on the economy, business environment and investment climate. Following a methodology of calculating costs of corruption applied also by the European Commission, the average percentage of costs due to corruption in public procurement is estimated to amount to 25% of the declared public procurement volume (EC, 2013:p.167).⁴ According to the European Parliamentary Research Service, the costs resulting from corruption risks in EU public procurement annually amount to €5 billion (EPRS, 2016:p.58).⁵ Applied to the Moldovan case this means costs in the amount of at least €115,701,520 in the third trimester of 2019.⁶ These

⁴ This methodology of calculating costs of corruption is endorsed by: OECD, 'Implementing the OECD Principles for integrity in Public Procurement. Progress since 2008', *OECD Public Governance Reviews*, 2013, p. 23.

⁵ Note on Methodology: OLS-Regression model, estimating cost of corruption in EU public procurement by corruption risk indicator (CRI) and relative prices of public procurement prices per average number and volume of EU-funded procurement per Member State. General findings: one-unit increase of the CRI index raises prices (or reduces cost savings) on average by about 15 percent.

⁶ This estimation does only include the competitive public procurement procedures whose contract values are above the threshold of 200,000 MDL for goods and services and 250,000 MDL for works, and are therefore published by the APP (stipulated in the Law 131/2015). The APP, however, does not publish statistics on contract values below the legally stipulated threshold, which makes it difficult to estimate the real volume of public procurement contracts.

include short-term monetary costs of corruption which result from artificially inflated contract volumes aimed at recovering the costs of bribes or kickbacks. More significantly, public procurement corruption generates long-term costs for the public budget which directly lead to badly performed infrastructure works (Expert-Grup, 2017) and thereto related security risks for the general public, a weakened rule of law framework and negative implications on citizens' trust in state structures that provide public goods. For this reason, the United Nations (UN) sees corruption 'as one of the biggest impediments to achieving the Sustainable Development Goals (SDGs)' which aim at eliminating poverty, as well as improving education, well-being and infrastructure by 2030 (UN, 2019).

Other long-term costs of procurement corruption include decreased market competition levels. The business environment is one of the most important determinants of national competitiveness and sustainable long-term economic growth. However, it is largely beyond the control of the firms and their management. Government has a vital role in creating a stable and healthy socio-economic environment for businesses. Lower transaction costs and simpler regulations allow individuals and firms to operate more efficiently. High levels of corruption, on the other hand, lead to higher costs, overall lower productivity and more obstacles in operation and growth for businesses without links to ruling elites. The result of such preferential treatment is the overall lower competitiveness of market participants and lower efficiency of resource allocation in the economy.

In its latest Transition Report for 2019-20, entitled 'Better Governance, Better Economies', the EBRD shows that corruption and lack of good governance cause unpredictability, which discourages investment (EBRD, 2019a:p.8). These findings are affirmed in the Moldovan case. The 2020 Index of Economic Freedom ranks Moldova 87th in the world (Heritage Foundation, 2020). The level of foreign direct investment (FDI) in the country is among the lowest per capita in Europe (.⁷ A corrupt economy does not provide open and equal market access to all competitors. Price and quality become less relevant than access, as bribery takes place in secret. Since payments to host country officials do not have a market value, the cost of goods is higher than it would normally be in a competitive market. The logistical and operational pitfalls related to corruption

⁷ World Bank TC data 360, available at: https://tcdata360.worldbank.org/countries/MDA?indicator=1541&countries=BRA&viz=line_chart&years=1970,2019&country=MDA (consulted on 20.01.2021).

significantly disincentivise foreign investors (Habib & Zurawicki, 2002). In 2019, the value of informal payments in Moldova varied between 50 MDL and 20,000 MDL (between €2.4 and €953), both for business entities and the general population (Centre for Social Surveys and Marketing „CBS-Research”, 2020:p.56).

This situation is particularly devastating for the Moldovan economy since Moldova needs FDI in its export-oriented sectors and industries to increase its own competitiveness and achieve economic growth. Currently, a network of free economic zones offers tax and administrative advantages to greenfield or brownfield investments. In recent years, the European automotive supply industry, textile and clothing industry, as well as electrical engineering facilities have settled in Moldova, representing a significant influx of FDI. The German company *Dräxlmaier*, for example, which is active in the manufacture of automotive parts, opened its third plant in the *Cahul* Free Economic Zone (30 million euros; 1,500 jobs) in 2019 (Germany Trade and Invest, 2020). As a consequence, in 2019 Moldova's GDP grew by 4.7 per cent in real terms, according to preliminary data. These numbers emphasise the overwhelming importance of a healthy business environment and investment climate.

The successful cases of FDI in Moldova demonstrate that tackling corruption is also in the best interest of foreign investors. In addition to the DCFTA, foreign investors can profit from the economic free zones, in addition to the DCFTA, to consolidate supply chains in the country with full access to the EU's market. In this sense, business-driven advocacy is key to trigger institutional changes in public procurement, which means greater access for (foreign) and honest-trading investors to a larger share of economic activity, bringing innovation into the domestic economy. Challenging decision-makers and officials in the host country to render their procurement procedures “corruption-proof” by making use of their bargaining power holds considerable potential. In addition, foreign companies may connect to local companies and subsidiaries in their respective branches and create joint business advocacy networks. These would represent platforms through which the respective companies could not only promote their own interests, but also advance ethical behaviour and training of local staff aimed at raising awareness, as well as avoid illegal acts and personal harm as a matter of employers' duty of care and corporate social responsibility.

2. eProcurement as a key weapon against corruption – perspectives from Austria

The eGovernment Action Plan 2016-2020 (EC, 2016:p.12) and the Tallinn Declaration (Council of the EU, 2017) reflect the EU's conceptualisation of 'eGovernance' as the new panacea of public, economic and social policies of the 21st century. Defined as 'the use of information and communications technologies (ICTs), and particularly the Internet, to achieve better government' (OECD, 2003), eGovernance is expected to modernise public administrations and make them more transparent, increase internal public sector efficiency and improve the access, quality and cost-efficiency of public services (Council of the EU, 2017). As the procurement of goods and services constitutes a considerable amount of public sector services, eProcurement, as 'the replacement, throughout the procurement process, of paper-based procedures with communications and processing that are based on information technology' (Hill, 2016:p.2), is a crucial component of eGovernance (EC, 2010). In its 2014 Anti-Corruption Report the European Commission has put special emphasis on eProcurement as an effective tool in the fight against corruption, which has the potential to massively cut costs, increase transparency and accountability of public services, reduce maladministration risks and strengthen citizens' trust in public administrations (EC, 2014:p.31-32). The implementation of a full eProcurement system throughout the EU is expected to reduce the costs of corruption risks by approximately €924 Million annually, which amounts to a reduction of 20% of current costs (EPRS, 2016:p.58). Consequentially, eProcurement plays a pivotal role in the EU Directive on public procurement (European Parliament and Council of the EU, 2014).

The basic assumption that the digitalisation of public procurement contributes to "good", i.e. accountable, transparent, efficient, competition-based and non-discriminatory, public procurement and lower levels of corruption is also shared by the majority of the expert community (Ronchi, 2019; Viscusi, Batini & Mecella, 2010; EPRS, 2018). There is a consensus that the timely publication of easily and cheaply accessible procurement data and the standardisation and automation of the procurement process is essential to enhance transparency, allowing civil society to spot 'red flags' in public procurement procedures. This would ensure increased competition among bidders, thus fostering the best quality of goods, works and services and strengthening integrity and efficiency, as well as minimising bribery, discrimination and fraud (Open

Contracting Partnership, 2019a; EC, 2013:pp.99-120; OECD, 2015; Neupane et al., 2012; Armstrong, 2005). Successfully implemented end-to-end eProcurement can lead to significant efficiency savings (up to 15% of total public procurement volume estimated) (Ferrand, 2019:p.2). Next to cost saving-efficiency and corruption prevention tools, eProcurement is the epitome of a culture of open government and B2G (Business to Government)-ethical conduct (EC, 2020). The positive impact of eProcurement on anti-corruption is confirmed empirically (World Bank, 2004; Garcia-Murillo, 2013; Bhatnagar & Singh, 2010; Mistry & Jalal, 2020). The European Parliamentary Research Service finds that the implementation of a full EU-wide eProcurement system could reduce the costs of corruption risks by around €920m each year (EPRS, 2016:p.117). In Europe, no real-world example other than Estonia illustrates better the manifestations of the advantages of eProcurement in terms of curbing corruption. Estonia's one-stop shop eProcurement platform, which is widely available, accepted, rapid, easy to use and 'frequently referred to as best practice' (EC, 2014b.p.66), has contributed to a significant improvement of anti-corruption (TI, 2004; World Bank, 2017).

Another country that has managed to curb corruption levels through the increased use of eProcurement is Austria.⁸ Public perception of corruption within Austria is one of the lowest in the world. The country has consistently been among the 20 highest ranked countries according to the Corruption Perception Index of Transparency International in the last decade. Most importantly, in the same period the country has consistently improved its score. This positive trend is related to the organisational structure of the Austrian procurement system and the use of electronic means. While public procurement as a general rule is decentralised, federal institutions are obliged to purchase goods and services through the so-called Bundesbeschaffung GmbH (BBG) – a federal institution with the explicit goal of procuring goods and services (Republic of Austria, 2001). Given the experience and expertise of its well-trained procurement staff, the BBG significantly facilitates the conduct of procurement processes for ministries, federal states, cities and communities and outsourced companies, universities, and institutions in the healthcare sector. Moreover, the BBG contributes to reducing costs for public institutions. Due to the centralised,

⁸ This part on Austria's experience and practice in the area of electronic public procurement was written based on the research conducted by Mark Csordas, Trainee at the Institute for the Danube Region and Central Europe within the framework of the Masters Programme European Public Administration, funded by the Walter-Hallstein-Program of the Baden-Württemberg Stiftung.

high-quality services of the BBG renders, there is no need for the individual public institutions to support their own procurement staff. In addition, public institutions profit from the BBG's price-to-offer bargaining power and experience when engaging with economic operators. The second element that helps explain Austria's path to success is the BBG's preponderant use and constant improvement of transparent and smart electronic solutions.⁹ This is evidenced by the online shop – an electronic platform through which users can handle their purchases – which is solely operated by the BBG and exclusively accessible for Austrian public institutions. Furthermore, the information portal of the BBG provides an always available overview of its current portfolio and advice regarding the public procurement procedure. Finally, in the framework of the value-based procurement criteria stipulated in the EU directives on public procurement, the BBG has undertaken to promote innovation on the demand side.¹⁰ To this end, the Austrian Government introduced the so-called Public Procurement Promoting Innovation (PPPI) (innovationsfördernde öffentliche Beschaffung) in 2012.¹¹ The PPPI has integrated a service point within the BBG, which provides strategic advice, information, networking possibilities, education, qualifications and advances the development of the PPPI innovations platform website (IÖB, 2018,:p.7). By creating a higher demand for new and innovative technologies, Austria intends to modernise the public sector, which is aimed at benefitting citizens through better services and more efficient servicing in general (Ibid.).

⁹ The BBG introduces itself: slide 15 (online under: https://www.bbg.gv.at/fileadmin/Bibliothek/Ueber_uns/BBG_Praesentation.pdf) in German only.

¹⁰ *Ibid.*

¹¹ <https://www.bmdw.gv.at/Themen/Innovation/InnovationsfoerderndeBeschaffung.html> (consulted on 24.02.2021).

3. Legal and technical challenges for the implementation of eProcurement in Moldova

The following section maps out the legal (3.1) and technical (3.2) challenges for the implementation of a full-fledged, end-to-end eProcurement system in Moldova. In legal terms, this section provides an overview of the process of legislative approximation of the Moldovan legal framework to EU Directive 2014/24/EU on public procurement via the Association Agreement (AA) and the Deep and Comprehensive Free Trade Area (DCFTA), highlighting major legislative achievements, before eventually focusing on the legal lacunae. In terms of the technical implementation, this section offers an overview of the development of MTender, Moldova's eProcurement system, and critically analyses outstanding practical deficiencies. Drawing from studies to date and extensive interviews with the EBRD, EU Delegation to Moldova, World Bank, Moldovan and international experts, as well as economic operators frequently using MTender,¹² this section provides an overview of the status quo with regard to the legal and technical implementation of eProcurement in Moldova.

3.1 Legal challenges for the implementation of eProcurement in Moldova

3.1.1 EU legislation on eProcurement and the implementation of the EU-Moldova AA and DCFTA in the Moldovan legal framework

As part of its single market policy, the EU has progressively developed a patchwork of minimum standards. One of the most prominent legal frameworks entailing such measures, which primarily aim at liberalising the internal market, is Directive 2014/24/EU on public procurement (European Parliament and Council of the EU, 2014). The legislative measure, which was to be implemented by EU Member States by April 2016, entails surprisingly detailed provisions prescribing the use of eProcurement as a key instrument to curb corruption. The main pillars through which the Union attempts to enhance the development of electronic public procurement, reduce administrative burden and simplify access to cross-border tendering opportunities (EC, 2021b) are the European Single Procurement Document (ESPD), which simplifies the preparation, submission and

¹² See the list of conducted interviews in the Introduction.

evaluation of tenders,¹³ and E-Certis, which allows buyers and bidders alike to compare and identify the different certification requirements between Member States.

The ESPD, a self-certification standard form, is prepared by the contracting authority (CA) through an eTendering system. Through the ESPD, the bidder can declare electronically that possible exclusion grounds (i.e. participation in criminal organisations, corruption, fraud, money laundering, criminal final convictions)¹⁴ do not apply for him. Moreover, the bidder can state in a standard format that he fulfils certain selection criteria (financial situation, technical capabilities, market experience) for a tender. The veracity of this self-declaration, which serves as preliminary evidence, is checked by the CA only after the procurement procedure is finalised, but before the award decision is issued. The winning tenderer is the only one requested to provide full evidence proving the preliminary self-declaration. The online service E-Certis facilitates the CA's assessment of the ESPDs received from the bidder and the bidder's capability to prove that he fulfils the tender criteria. E-Certis allows buyers and bidders alike to compare and identify the different certification requirements between Member States and check the eligibility for procurement procedures EU-wide, thus facilitating cross-border participation in public procurements.

The ESPD service, which integrates national registers, eTendering services and national prequalification systems, is expected to serve as a 'business passport' for companies bidding all over the EU. The system provides links to repositories that prove compliance with exclusion and selection criteria and enhances the practicability of 'blacklisting' (EC, 2021b). Moreover, the Tenders Electronic Daily (TED), which sets up an online service for public procurement notices above the EU threshold, enhances Europe-wide online publication of the prior information notice and award contract notice. Member States are obliged to ensure that all communication and information exchange in EU public procurements is conducted using non-discriminatory and generally available electronic tools and devices that facilitate bidders' access to public procurement procedures.¹⁵

¹³ Art. 59 of Directive 2014/24/EU.

¹⁴ See Art. 57(1)b) and c) and Art. 57(4)b) of Directive 2014/24/EU.

¹⁵ Art. 22(1) of Directive 2014/24/EU.

3.1.2 The EU-Moldova Association Agreement and Deep and Comprehensive Free Trade Area – the process of legislative approximation and implementation

Within the multilateral framework of the Eastern Partnership (EaP), a joint initiative involving the European Union (EU), its Member States and six Eastern European countries, the Union has established highly institutionalised relations with Moldova. The AA and DCFTA, concluded between the EU and Moldova in 2014, foresees political association, economic integration and legislative approximation in a variety of political and economic areas. The DCFTA (Title V of AA) envisages ‘market-access conditionality’ (Van der Loo, Van Elsuwege & Petrov, 2014:p.13): Moldova will progressively gain access into the EU internal market if it aligns its national legislation to the EU *acquis communautaire*, which covers a broad range of areas of trade relations, including public procurement (Chapter 8: Art. 268 – Art. 276 AA). The DCFTA chapter on public procurement entails a number of rules, which stem directly from the EU Public Procurement Directives, which is part of the EU *acquis*. These rules oblige Moldova to ensure that public procurement procedures, which fall under the area of application of the DCFTA,¹⁶ are transparent, fair, competitive, non-discriminatory and respect the principle of best value for money. Although the primary objective of these provisions is the gradual and reciprocal liberalisation of public procurement markets on the basis of the principle of national treatment (Art. 268 AA), they entail a variety of anti-corruption provisions. In concretisation of Art. 271 AA, which entails a set of basic standards for the award of contracts, including key publication requirements (paragraphs 2 to 14), Moldova is obliged to approximate its national legislation in accordance with Annex XXIX to the AA on public procurement (European Union – Republic of Moldova Association Committee in Trade Configuration, 2016).¹⁷ The latter makes direct reference to the provisions of Directive 2014/24/EU dealing with eProcurement.¹⁸ While the standard use of electronic means in public procurement (Art. 22) and the ESPD (Art. 59) are among the ‘basic elements of Directive 2014/24/EU’, e-Certis (Art. 61) is outside the scope of approximation of the provisions of Directive 2014/24/EU.¹⁹

¹⁶ Art. 269 EU-Moldova AA.

¹⁷ Adopted to take account of the new Directive 2014/24/EU.

¹⁸ Annex XXIX-C: approximation and implementation of basic elements of Directive 2014/24/EU (Articles 22, 53, 59, Annex IV); Annex XXIX-D: approximation and implementation of other mandatory elements of Directive 2014/24/EU (Articles 35 and 36 of Directive 2014/24/EU).

¹⁹ Annex XXIX-F to the AA on public procurement.

To transpose the EU *acquis* into its national legislation in accordance with the AA (Art. 273(1)), Moldova has elaborated and adopted a string of documents. Based on the priorities for the implementation of the AA identified in the Association Agendas between the EU and Moldova, the latter elaborated a National Action Plan on the Implementation of the Association Agreement (NAPIAA) for the periods of 2014-2016 and 2017-2019 respectively. As a result, in 2015 the Moldovan Parliament passed Public Procurement Law No. 131, which aligned Moldova's legislation to the EU public procurement legal framework (Expert-Grup, 2017). Additionally, in December 2016 the Moldovan Government approved the Strategy of the Development of the Public Procurement System for 2016-2020 and the Action Plan on its implementation for 2016-2018 (Government of the Republic of Moldova, 2016a). Following the entry into force of the new Directive 2014/24/EU on public procurement on 18 April 2016, Moldova's legal approximation and implementation efforts increasingly focused on eProcurement. For this purpose, the Moldovan Parliament adopted multiple changes to Law No. 131 (Ungureanu, 2019:pp.25-32). Moreover, key documents for the implementation of the AA, including the NAPIAA for 2017-2019 (Government of the Republic of Moldova, 2016a), the Strategy of the Development of the Public Procurement System for 2016–2020 and the action plan for its implementation (Government of the Republic of Moldova, 2016b), as well as the sectorial plan for anti-corruption actions in the field of public procurement for 2018–2020 expressly foresaw the set-up of an electronic public procurement system that provides information on the planification and execution of contracts (Government of the Republic of Moldova, 2018a: Priority 3: Action 8, Priority 6: Actions 19-21). Crucial eProcurement elements introduced into the Moldovan public procurement legal framework included:

Table 4: Legislative approximation of Moldovan legislation in the area of eProcurement

| eProcurement element | Adopted EU norm (Directive 2014/24/EU) | Transposition in national legislation (Law No. 131) |
|---|---|--|
| Open, direct, full and free of charge access to PP documentation through electronic means | Art. 22 | Art. 34 |
| Standard of electronic means in all communication and information exchange | Art. 22 | Art. 33 |
| ESPD | Art. 59 | Art. 20, 65 |
| Electronic catalogue | Art. 36 | Art. 46 |
| Electronic auction | Art. 35 | Art. 57 |

As a result of Moldova’s continuous legislative approximation and implementation efforts, the national public procurement legal framework has been largely harmonised to EU legislation (EC&EEAS, 2019:p.16; EC&EEAS, 2018:p.12). Out of the 25 actions Moldova has committed itself to in the NAPIAA for the periods of 2014-2016 and 2017-2019 respectively, 22 actions have been fully or partially implemented (seven of which with deficiencies) (IDIS “Viitorul”, 2019:p.93). As regards the 44 actions foreseen in the 2016-2018 Action Plan for the implementation of the public procurement system development strategy for 2016-2020, 27 actions have been fully or partially implemented (nine of which with deficiencies) (Turcan & Enachi, 2019:p.5). Finally, out of the 23 actions foreseen in the sectoral plan of anti-corruption actions in the field of public procurement for 2018 and 2019, 14 were fully or partially implemented (of which eight with deficiencies) (Enachi & Parvan, 2020:p.5; Parvan & Enachi, 2019:p.5). In particular, among the main achievements are the adoption and implementation of Law No. 169/2018 of 26.07.2018 amending Law No.131 on public procurement, which rendered the conduct of public procurement procedures through MTender mandatory in 15.10.2018. The law simplified electronic communication in public procurement, introduced the ESPD and allowed for the development of technical facilities for the electronic public procurement system, enabling the electronic collection and processing of information included in the procurement announcements, and the generation of reports and statistical data. Moreover, a string of relevant secondary normative acts has been adopted, regulating the technical concept, accreditation and management

of electronic procurement platforms within the automated information system MTender (Government of the Republic of Moldova, 2018b). As a result, in 2019, members of Civil Society Organisations (CSOs) have seen transparency and access to public procurement information considerably improved (Enachi & Parvan, 2020:p.5).

3.1.3 Legal constraints for the implementation of MTender

Notwithstanding these major legislative approximation efforts in the area of eProcurement, economic operators and CSO members continue to have low trust in the transparency, integrity and efficiency of public procurement (Ibid.). This is directly related to outstanding deficiencies regarding progress on the legislative agenda. The following main aspects have been identified:

- Law No. 131 is confusing in parts, provides unclear interpretations and even creates barriers for economic operators
- the secondary normative framework that should concretise Law No. 131 is incomplete and not fully aligned to the primary law provisions; it is, therefore, non-compliant with EU requirements and Moldova's commitments under the WTO GPA (Ungureanu, 2019:pp.30-31)
- the current legal framework regulating MTender does not cover the full public procurement cycle (execution phase of public procurement contracts and additional agreements)
- Moldovan public officials justify exceptions from the mandatory use of MTender for certain public purchases with lacking technical functionalities of the MTender system
- according to the EBRD, these restrictions of MTender functionalities hamper the full potential of MTender

These aspects are detailed in the table below (Table 5):

Table 5: Legal constraints for the implementation of MTender²⁰

| | | |
|----|---|--|
| 1. | ESPD | <ul style="list-style-type: none"> • Art. 20(7) of Law No. 131 stipulates the CA’s discretion to request from all bidders the full or partial package of documents certifying their qualifications already at the stage of the submission of tenders if this is necessary to conduct the procurement procedure. The provision should instead clarify that the CA can solicit all the documents certifying all the qualifications declared in the ESPD only “after the opening of the bids” • Lack of a straight-forward and comprehensive catalogue of instructions for the use of the ESPD, separated from the ESPD form, that clarifies: <ul style="list-style-type: none"> ○ when the veracity of the self-declaration must be proven ○ that the data contained in the ESPD can be reused ○ that documents that have been presented before can be reused (principle of “a single time”) |
| 2. | Lacking alignment between primary and secondary regulatory framework | <ul style="list-style-type: none"> • Secondary legislation to Law No. 131 of 2018 is outdated, non-compliant with EU mandatory requirements, descriptive and creates confusion (see for a comprehensive overview of outdated secondary legislation including the one not directly related to eProcurement: Țurcan & Enachi, 2019:p.13) • As MTender has been built to comply with primary legislation of 2018, standard forms of the system are not compliant with secondary legislation. This regards in particular: <ul style="list-style-type: none"> ○ notices, procurement record and contract register, where MTender requires a higher standard than current secondary legislation foresees/allows |

²⁰ Authors’ own design and compilation.

| | | |
|----|--------------------------------|--|
| | | <ul style="list-style-type: none"> ○ <u>EBRD official comment</u>: EBRD consultants on several occasions raised issue concerning legislative inconsistencies and provided inputs to draft secondary legislation that due to political situation is yet to be adopted • There is currently no secondary regulatory framework in place concretising the use of electronic catalogues stipulated in Art. 46 of Law 131; consequently, electronic catalogues are not available • Until recently, Art. 45(2) of Law No. 131 referred to the Regulation on the establishment and maintenance of the public procurement dossier (Government Decision No. 9 of 17.01.2008), which prescribed the usage of paper <-> mandate to use electronic form / MTender |
| 3. | Questionable exceptions | <ul style="list-style-type: none"> • Moldovan primary law entails a variety of questionable exceptions, which were introduced after Moldova’s World Trade Organisation Agreement on Government Procurement (WTO GPA) accession on 14 June 2016 and are not in line with the WTO GPA commitments • Law No. 148 of 01.07.2016 exempted public procurement of ballots, educational material, equipment for the electoral staff • Law No. 231 of 10.11.2017 exempted public procurement by the Public Services Agency of goods, services and works aimed at establishing multifunctional centres (single offices offering public services), although Moldova’s National Anti-Corruption Centre expressed serious doubts as to the compliance of Law No. 231 with the national and European legal framework as regards the transparency and efficiency of the PP process (National Anti-Corruption Centre of the Republic of Moldova, 2017) • The Ministry of Finance emphasised that all the modifications of Art. 4 (now Art. 5 regulating the exceptions to the scope of application) of Law No. 131 are not in line with EU Directives on PP (Ministry of Finance, 2018:p.16) |

- Law No. 23 of 11.03.2019 exempted the purchase of medicines from Law No. 131 on public procurement that mandates the use of MTender until January 2021: medicine procurement conducted through the old system RSAP MTender (electronic communication, publication of general information about notices and contracts)
 - perceived as an attempt to protect the vested interests of certain business-political groupings (EP, 2020:p.63)
 - World Bank official comment MTender lacks technical functionalities for centralised procurement to ensure purchase efficiency for the Centre for Centralised Public Procurement in the Health Sector (CAPCS) (e.g. use of Framework Agreements)
 - EBRD official comment:
 - It needs to be noted that CAPCS was using MTender between October and December 2018
 - Massive number of lots is not a technical issue, but rather a bad practice issue (problem of correctly conducting procurement with lots, and proper managing the lots)
 - CAPCS evaluation is not made by lot, but against the EU requirements and against international best practice, i.e. per each position (item) separately, so one lot can have several winners
 - In MTender, procedures with about 600 lots have been conducted and the system supported it very well
 - It needs to be noted that after CAPCS lobbied for a return to paper procedures, many hospitals continued to use MTender and conduct all their procurement via MTender without any issues (see e.g. <https://mtender.gov.md/en/tenders/ocds-b3wdp1-MD-1582201504217?tab=awards>)
 - Presently, MTender CDU supports not only aggregation of demand, but also aggregation of contracts and framework agreements

| | | |
|----|---|---|
| | | <ul style="list-style-type: none"> • Since 01.01.2021, CAPCS announced that it is using MTender again: all tenders for medicines and equipment are back to MTender: e.g. https://mtender.gov.md/en/tenders/ocds-b3wdp1-MD-1610362676709?tab=contract-notice |
| 4. | Exclusion of low-value procurement | <ul style="list-style-type: none"> • Since 14 December 2018, Law 319 of 30.11.2018 increased the minimum value for thresholds that fall under the scope of application of Law No. 131 by a factor of 2.5 (from 80,000 MDL to 200,000 MDL for goods and services, from 100,000 MDL to 250,000 MDL for works) • Low-value public procurements (< 200,000 MDL and <250,000 MDL) do not fall under the scope of application of Law No. 131 (Government Decision No. 665 of 27.05.2016) and therefore do not have to be conducted via MTender <ul style="list-style-type: none"> ○ <u>Moldovan public official comment</u>: no plans to include low-value public procurements in the scope of application of Law No. 131 in the near future. Arg.: <ul style="list-style-type: none"> - MTender with its current technical capabilities would otherwise be overwhelmed - Obligation to use MTender would be cost-intensive for SMEs ○ <u>EBRD official comment</u>: Argument that “MTender with its current technical capabilities would be overwhelmed; obligation to use MTender would be cost-intensive for SMEs” is not justified <ul style="list-style-type: none"> - MTender Pilot Phase 1 operated for 12 months with SMEs constituting 80 per cent of participants - MTender Pilot Phase 2 has been operational for 18 months, without any technical problems and with a minimum IT support - Digital service is interoperable with three commercial e-procurement platforms and serves on daily basis more than 7000 end-users, contracting entities and suppliers - Until recently, MTender processed more than 50,000 electronic public procurement procedures (https://mtender.gov.md/en) |

| | | |
|----|--|---|
| | | <ul style="list-style-type: none"> - the number of SMEs participating in public procurement via MTender increased: 1396 new suppliers participated in MTender electronic tenders, which constitutes a 30 per cent increase in comparison with the suppliers using the old system • Government Decision No. 665 of 27.05.2015 for the adoption of the regulation on low value public procurement is very vague and leaves room for interpretations; it does not stipulate any specific rules on the publication and transparency of low-value procurement, but leaves them to the discretion of the CA • This causes higher risk for untransparent and uncompetitive public procurement procedures of low value (Merjan, 2020) |
| 5. | <p>State-owned enterprises (SOEs) and municipal enterprises</p> | <ul style="list-style-type: none"> • SOEs, municipal enterprises and joint-stock companies with full or majority state capital do not fall under the scope of application of Law No. 131 • Public procurement procedures involving such (partially) state-owned enterprises are not subjected to the mandatory use of MTender and they are conducted behind “closed doors”; Law No. 131 merely stipulates the “right” of such companies to conduct procurement within the framework of MTender <ul style="list-style-type: none"> ○ see: Government Decision no. 351 of 10.06.2020 on the Regulation on procurement of goods, services and works within state-owned enterprises (adopted on the basis of Law no. 246 of 22.11.2017 on state-owned enterprises and municipal enterprises) • no transparent and generally accessible announcement of public tenders • This legal loophole stands against Art. 269 AA, according to which the AA “covers bodies governed by public law and public undertakings in the field of utilities, such as state-owned enterprises carrying out the relevant activities, and private undertakings operating on the basis of special and exclusive rights in the field of utilities” |

| | | |
|----|---|--|
| | | <ul style="list-style-type: none"> • <u>Moldovan public official comment</u>: MTender does not have the technical capacity to offer SOEs the purchase efficiency needed to compete on the free market; an MTender mandate thus risks impeding these companies’ commercial activities • <u>EBRD official comment</u>: statement that “MTender does not have the technical capacity to offer SOEs the purchase efficiency needed to compete on the free market”, is not justified <ul style="list-style-type: none"> ○ In 2019, in context of the GPA Annex III (utilities), the EBRD conducted a number of workshops with SOEs, and a survey, which identified the practice and most used procurement procedures by SOEs ○ The majority of SOEs use Open Tender as a basic procurement procedure as well as small value procedures and negotiated procedure without publication that are available in MTender since 2018 ○ As of December 2019, all basic procurement methods are supported by the MTender CDU, including restricted tenders, negotiated procedure with publication and without as well as framework agreement ○ A pilot for SOEs has been prepared since December 2019; it awaits the ministerial permission to open new release of MTender for operations and allow new functionalities of MTender to contracting entities • <u>NEW legal framework</u>: Law No. 74 of 21.05.2020 on procurement by entities operating in the water, energy, transport and postal services (in force on 27.06.2021) foresees an obligation for enterprises providing public services to use MTender |
| 6. | <p>Division of competences between the PP Agency and the Ministry of Finance</p> | <ul style="list-style-type: none"> • According to Government Decision No. 705 of 28.07.2018, the Ministry of Finance, as the owner of the system, has the competence to ensure the implementation, operation and development of MTender central data unit in compliance with EU law • <u>EU official comment</u>: given that the PP Agency has specific PP-related expertise, in contrast to the Ministry of Finance, there are serious doubts whether the lead of the Ministry of Finance in the further development of MTender is justified |

| | | |
|----|---|---|
| | | <ul style="list-style-type: none"> • <u>EBRD official comment</u>: since the Ministry of Finance is the policy owner and it also has in its subordination CTIF that has the necessary technical and IT expertise to operate and develop the system, it is an appropriate decision to have MTender ownership, implementation, operation and development under the Ministry of Finance |
| 7. | <p>Lacking repressive measures</p> | <ul style="list-style-type: none"> • The current legislative framework on public procurement is not able to enforce compliance with the mandatory use of MTender due to the lack of legal punitive measures • No mechanism or national authority that has the competence to stop/cancel a procurement procedure without former complaint (Art. 71 (2) Law No. 131: National Agency for Solving Complaints (NASC)) • <u>EBRD official comment</u>: requests for repressive measures reflect a misunderstanding of the concept of automation of compliance requirements in digital government tools; MTender is designed in such a way that user workflows are automated so that they are compliant with mandatory requirements of primary law by default; as a consequence, there is no need for compliance enforcement; there is, however, a need for performance monitoring |

3.2 Technical opportunities and deficiencies of MTender and outstanding challenges for its implementation in Moldova

In what follows, this section outlines the potential of MTender to increase transparency and curb corruption risks in public procurement (3.2.1) and explores outstanding technical challenges of the eProcurement system.

3.2.1 MTender – a whole range of functionalities to maximise transparency in public procurement

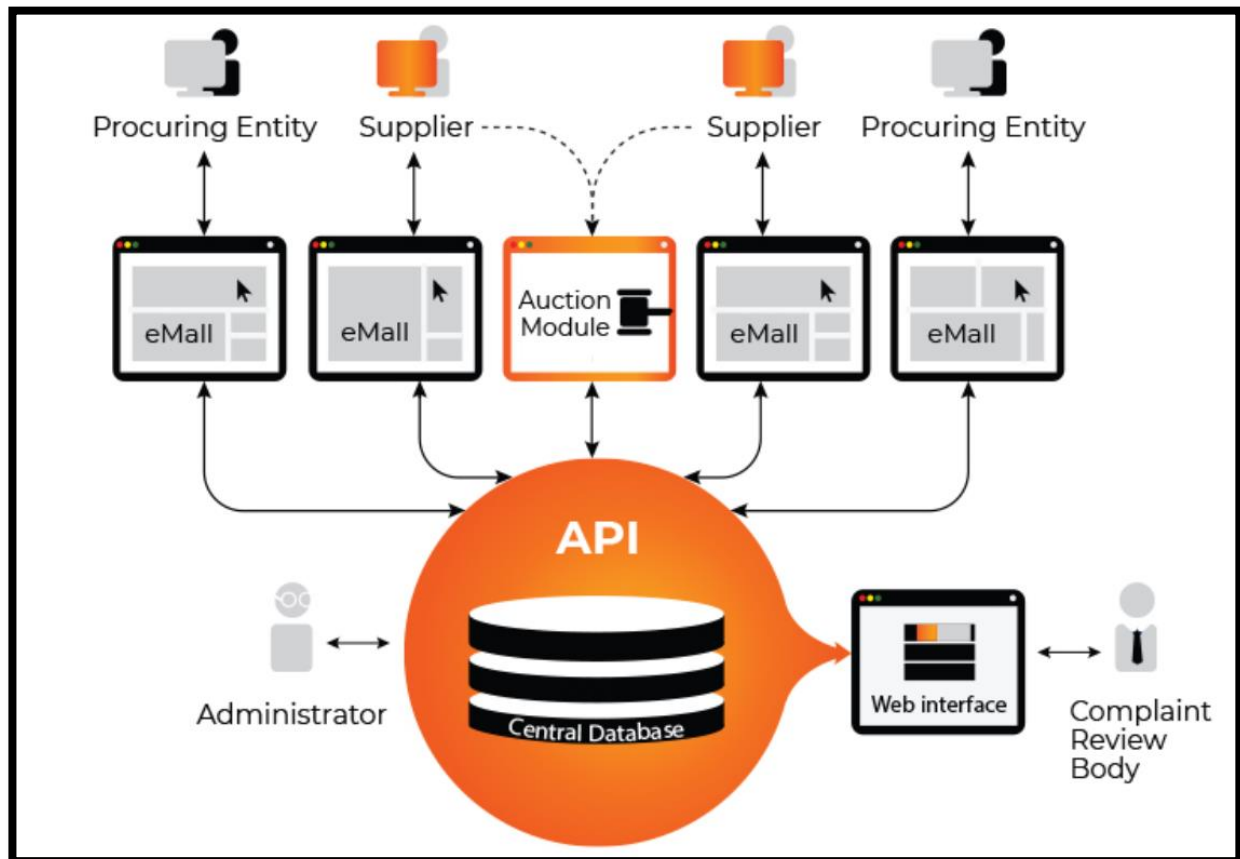
The technical implementation of a Moldovan eProcurement system started in 2016 under the Strategy of the development of the public procurement system for 2016-2020. With the financial and technical assistance of the EBRD and the EU, in January 2017 the first electronic public procurement system in Moldova – SIA RSAP MTender (hereinafter MTender) – was launched in pilot mode. At the end of 2018, after its approval by the Moldovan Government (Government of the Republic of Moldova, 2018b), MTender was introduced as the new mandatory standard in public procurement procedures²¹ for all public entities in Moldova. Drawing from Ukraine’s experience with “ProZorro” (Ukrainian Government, 2020) from the outset, the objective was to establish a system with end-to-end electronic coverage (from planning to billing and payments) on the basis of the Open Data Concept and the Open Contracting Data Standards (OCDS), where relevant governmental electronic services are integrated and high value for money ratio is guaranteed.²² Following the idea of “everyone eyes everything”, procurement-related data was supposed to be freely accessible online and facilitate data-driven monitoring through analysis tools, thus technically ensuring the wide availability of early risk detection for the Moldovan business community and CSOs. The Moldovan eProcurement system aimed at digitalising the entire procurement cycle: publication of procurement plans, tender notices, communication and information exchange between tenderers and authorities; submission of electronic offers; filing and receiving ESPDs; publication of overall procedural results and contract awards; and electronic signature of concluded contracts. The full automatization of public purchases, similar to purchases

²¹ Requests for price quotation (RPQ) and open tender types of procedures.

²² See: <https://mtender.gov.md> (consulted on 23.10.2020).

on the shopping platform Amazon, was supposed to enable “blockchain-like levels of trust in public procurement transactions”²³ and improve the accountability of public officials by decreasing the need for discretionary decisions and lower the risks for bribery, nepotism, manipulation and human mistakes.

Table 6: MTender system²⁴



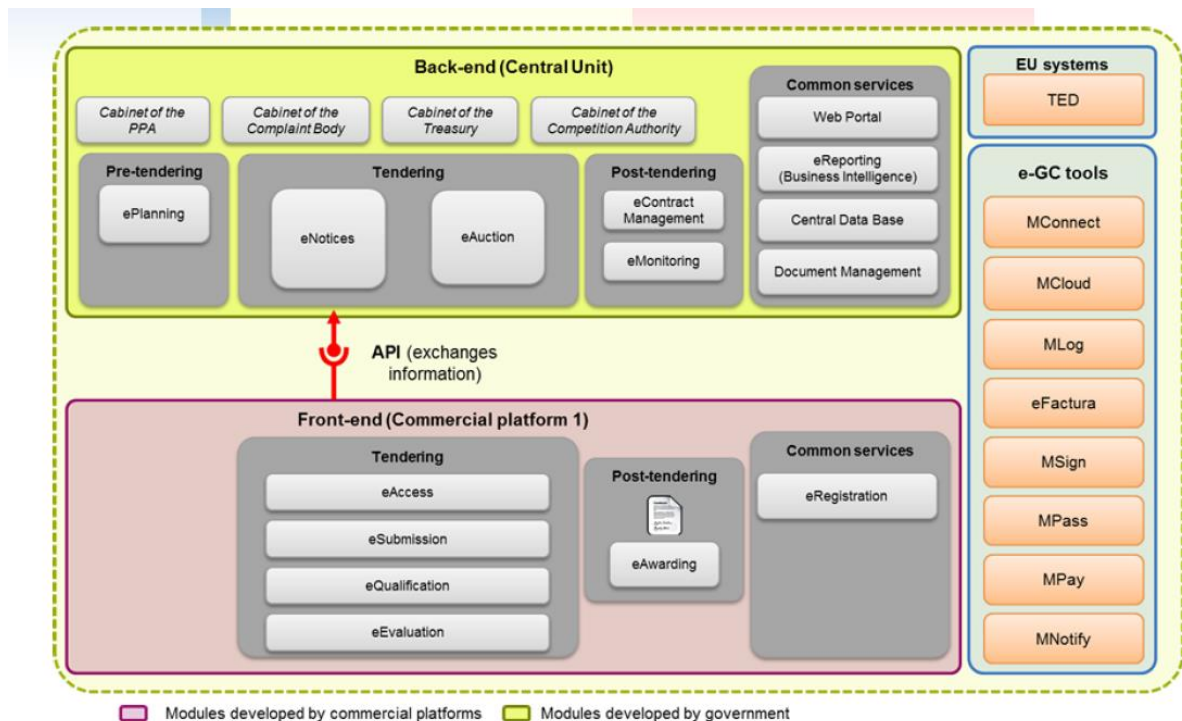
During its first year of operation, MTender has become a fully functioning marketplace that provides official data on public procurement procedures and awards public contracts above national and European thresholds through a commercial network of platforms that operates on the principle of “low-cost, low-maintenance” (Nestulia, 2019). The public procurement data is stored on a government-operated central database unit (CDU), which is interconnected with independent

²³ Eliza Niewiadomska at Online conference “The legal and technical challenges for the implementation of the eProcurement system MTender”, 17.02.2021.

²⁴ Quintagroup, *MTender*, 2020, available at: <https://quintagroup.com/services/e-procurement/mtender> (consulted on 21.01.2021).

eProcurement front-end platforms (commercial platforms). The digital procurement model applied in the MTender system uses an open source and open data interoperable digital procurement architecture for multi-platform networking. The system collects and records real-time data from procurement process exchanged between central unit, networking electronic platforms and the end-user single point of access web-portal. A collective authentication, synchronisation and validation of the data is achieved online in real time for all public procurement transactions conducted on the MTender system.

Table 7: Scheme on the functioning of eProcurement in Moldova²⁵



The MTender Pilot Phase 2 (2019) provides a full range of functionalities (Atomate, 2020:p.18) which are in line with EU Directives and best international practice. This is evidenced by the table below, which shows MTender criterions in comparison to the best practices included in the 2013 *eProcurement EU Golden Book*²⁶ and the 2013 *e-TEG recommendations for effective public e-Procurement*²⁷.

²⁵ PPA, 2016.

²⁶ See <https://www.procurement.org/post/2016/11/06/e-procurement-golden-book-of-good-practice> (consulted on 18.02.2021).

²⁷ See https://aeaep.com.ua/en/wp-content/uploads/2014/11/eteg-part1-hl-report_en.pdf (consulted on 18.02.2021).

Table 8: Benchmarking of the functionality of the MTender Pilot Phase 2 (2019)²⁸

| Criterion / best practice | EU Golden book | e-TEG | MTender Pilot Phase 2 (2019) |
|---|----------------|-------|---|
| Platforms automatically transmit all their notices to a single point of access for publication | 1 | 3.1 | Yes |
| Affordable training plans for economic operators and contracting authorities | 2 | 2.2 | Yes |
| Platforms have communication plans to promote the use of e-Procurement | 3 | - | Yes |
| Economic operators can access and retrieve contract notices and tender specifications as anonymous users | 4 | 1.1 | Yes ²⁹ |
| Economic operators can register on platform without having to provide country-specific information | 5 | 1.1 | Yes |
| Economic operators complete their registration on a platform by clicking an activation link sent by email | 6 | 1.1 | Yes |
| Platforms support English in addition to the official language(s) of the member state(s) of operation | 7 | 12.1 | Partially, three languages available |
| Economic operators can log in to platform with username & password | 8 | 1.1 | Yes |
| Economic operators can search contract notices using search criteria | 9 | 3.1 | Yes |
| Economic operators can evaluate whether tender specifications are relevant for them based on information available in contract notices | 10 | 3.1 | Yes ³⁰ |
| Economic operators are notified of changes to tender specifications | 11 | 3.1 | Yes, by anonymised online publication and individual system alert |
| Platforms support automatic transmission of all types of notices to TED | 12 | 3.1 | TED complaint notifications are available, but current Moldova legislation does not follow the TED notification templates. OCDS eSender service is under development. |
| Economic operators and contracting authorities can search CPV categories based on their code or their description | 13 | - | Yes |
| Contracting authorities can re-use information in their profile or previous notices to create contract notices, tender specifications and award notices | 14 | 2.1 | Yes ³¹ |
| Economic operators can choose to manually or electronically sign a submission report containing the hash value of each submitted document | 15 | 6.8 | Unclear |
| Economic operators receive proof of delivery upon successful tender submission | 16 | 6.4 | Yes |
| Economic operators can resubmit tenders up until the submission deadline | 17 | 6.3 | Yes |

²⁸ This summary was kindly provided by EBRD following an extensive interview in February 2021.

²⁹ This is possible through the online web portal.

³⁰ This is possible because contract notices include access to tender documentation.

³¹ In particular, through the library of technical specifications.

| | | | |
|---|----|----------|--|
| Platforms keep tenders encrypted until the opening session | 18 | 6.7 | Not available in the pilot version, functionality under development |
| Contracting authorities can evaluate part of their tenders automatically based on pre-defined criteria | 19 | 2.3, 9.2 | Yes |
| Platforms use European e-Signature validation services during e-Submission | 20 | 6.8 | No. Moldova MSign is used. Use of foreign certificated is prohibited under Moldovan laws |
| Platforms clearly indicate all costs related to use of the platform | 21 | - | Yes |
| Economic operators can create tenders using a core set of structured data and unstructured documents | 22 | 6.2 | Yes |
| Economic operators have freedom to choose platform of their preference without being locked in by choice of contracting authority | 23 | - | Yes |
| Platforms use standard specifications to structure data & promote interoperability | 24 | - | Yes |

Since its establishment, MTender has become widespread. As of December 2019, the system has been introduced in all ministries, 2,500 state institutions, and has advertised 50,000 purchasing orders and awarded 26,000 contracts (Nestulia, 2019). In 2019, 1,300 contracting authorities used MTender (four times more than authorities that had used the pilot project) (Enachi & Parvan, 2020:p.34). The distribution of the system has also led to its factual use and increased transparency in public procurement. Whereas in 2016 only 3,580 tenders were published, the number in 2019 amounted to 12,478,³² of which 38.5% were submitted via MTender (PPA, 2019:pp.8-13). As a consequence, the ratio between published tenders and signed contracts has grown considerably. In contrast to the period between 2015 and 2018, when twice as many contracts were signed as tenders published³³, this gap narrowed considerably when MTender became mandatory. Out of the 13,800 contracts signed in 2019 (PPA, 2019:p.17), 90% of the tenders were published beforehand,³⁴ of which 35% were via MTender (PPA, 2019:p.8-13). The value of procedures submitted via MTender in 2019 amounted to 7,817,626,819.23 MDL (~€386,933,439.42) (Ibid.), representing 87% of the total financial value of public procurement procedures in the same year. The increased transparency and accountability of procurement procedures brought by MTender has also strengthened economic operators' trust in the procurement system, increased Moldova's supplier base by 30% (Pirvan, Enachi & Ungureanu, 2019:p.12; Nestulia, 2019) and, according to

³² Moldova Contract Data Visualisation, available at: <https://opencontracting.eprocurement.systems/tenders> (consulted on 11.11.2020).

³³ *Ibid.*

³⁴ *Ibid.*

the EBRD, helped to save €25 million (estimation based on comparison between cost of the tender and actual contracted price) (EBRD, 2019b). In particular, increased transparency with regard to the procurement process through open data has enabled CSOs to monitor bidders' interactions and competition, detect suspicious tendering practices and calculate 'red flags'.³⁵ Nearly three quarters of CSOs believe that MTender has positive implications on tackling corruption and fraud in the area of public procurement, of which one third rates these implications as "major" (Enachi & Parvan, 2020:p.22). This assessment is shared by the economic operators and the contracting authorities (Ibid.).

3.2.2 Technical challenges and restraints for the implementation of MTender

Notwithstanding above-mentioned positive key performance indicators that MTender has achieved within its three and a half years of operation, its potential to curb corruption, increase competition and innovation and spur economic growth and investment remains untapped (OECD-OPSI, 2019). Only 42% of the 2911-3100 public authorities use MTender (Covalciuc, Diaconu & Stamate, 2020:p.9). 19% of economic operators remain "dissatisfied" with the system (Nestulia, 2019). Challenges with regard to transparency, accountability and integrity of public spending persist. The Moldovan Agency for Public Procurement (APP), the main public authority responsible for the monitoring of public procurement procedures, and Asociația pentru Guvernare Eficientă și Responsabilă AGER have reported a variety of irregularities committed by contracting authorities throughout 2019 (PPA, 2020; Covalciuc, 2020:pp.7-46) (Covalciuc & Diaconu, 2019:pp. 6-30; Stamate & Covalciuc, 2019:pp.9-19).

These figures are, at least in part, correlated to currently existing technical issues of the MTender system:

- MTender does not cover the entire public procurement cycle (from procurement planning over contracts management to billing and payments under the procurement contract);

³⁵ See <https://revizia.md/ro/>.

- MTender is not mandatory for all types of public procurement procedures, in particular the framework agreement and negotiations without prior publication of an announcement for participation;
- The technical functionalities of MTender currently available are not aligned with the Moldovan primary and secondary regulatory framework;
- Although implemented as a dematerialised and automated digital service, which is compliant with relevant EU requirements and EU interoperability rules, for economic operators the usage of the ESPD is currently only possible in paper form: it has to be manually completed, signed and uploaded into the system, which is time- and cost-consuming and goes against the ratio of the ESPD;
- Uploaded public procurement documents in PDF format are not machine-readable;
- Although at CDU level, technical scoring is available, including lowest price, lowest cost, best quality-price ratio and best quality-cost ratio, almost all interviewed economic operators, which are frequent users of the system, have harshly criticised that MTender evaluates public procurement procedures based purely on the ‘price’ factor; this situation significantly restricts the margin for negotiation with the contracting authorities and oftentimes leads to arbitrary and non-uniform price-setting practices;
- MTender does not offer encryption of procurement documents (in particular the price) until the opening of bidders’ offers, which poses confidentiality issues and could under certain circumstances increase, rather than minimise, risks of corruption;
- There are no advanced Business Intelligence (BI) and preventive data-driven control tools based on automated risk indicators that would facilitate enhanced monitoring of public procurement procedures; the absence of such red flag detectors is particularly significant given that economic operators regularly express a deep-rooted mistrust vis-à-vis contracting authorities and public institutions in general;
- Public procurement staff, economic operators and CSOs lack training and expertise with regard to the legislative and technical modifications.

These challenges are related to two different but equally important factors. On one hand, part of the existent technical issues are inherent to the MTender system, which is still under development. On the other hand, the full range of technical functionalities that MTender is able to perform is currently not available to public procurement market participants. The subsequent table (Table 9)

reflects this division. By having included the partially contradictory comments and positions of crucial stakeholders, it also highlights the gap, which has become evident throughout the literature synthesis and interviews, between on one hand the emphasis of the enormous technical capacity of MTender in general and on the other hand the criticism vis-à-vis existing implementation challenges in practice.

The table below categorises the technical challenges of the current system, according to their origins – endogenous (or within the system) or exogenous (resulting from stakeholders of the system) – as well as qualitative classifications along the entire procurement cycle. In brief, the table below illustrates the lack of fully-fledged functionalities that ensure the electronic execution over the entire public procurement cycle (I.2-I.4). These deficiencies generate a series of technical flaws or inconveniences for economic operators, who, as a consequence, may be discouraged from participating in public procurement procedures and embracing the advantages of electronic bidding. As regards the contracting authorities, only semi-digitalised or not fully-thought-through workflows (including compliance problems) are available, including manual workflows, such as manual printing, signing and re-uploading of procurement documents. This creates frustration for public servants, hampers user-friendliness and diminishes the belief in the advantages of MTender for all stakeholders. As a consequence of these malfunctions, the positive effects of an electronic procurement system are seriously impaired.

Table 9: Technical deficiencies of MTender³⁶

| <i>I Endogenous (intra-system)</i> | | |
|------------------------------------|---|---|
| I.1 | General technical inefficiencies | <ul style="list-style-type: none"> • MTender does not support important public procurement procedures: restricted and negotiated procedure (with and without publication of a contract notice) • MTender does not support framework agreements and dynamic purchasing • ESPD (see for a comprehensive overview of challenges related to the use of MTender: Pirvan & Enachi, 2019). <ul style="list-style-type: none"> ○ Although MTender has implemented an ESPD as a dematerialised and automated digital service, fully compliant with relevant EU requirements and EU interoperability rules, currently usage only in paper form possible (ESPD’s manual completion, signing and uploading into the system is time-consuming for contracting authorities (CAs) and bidders alike) <ul style="list-style-type: none"> - <u>EBRD official comment</u>: as per the technical functionalities of MTender, there is no need to use paper copies of the ESPD as advised by PPA ○ The connection between MTender and MConnect on the CDU level has been accomplished; digital register data from national databases (state registries) for the ESPD is, however, only partially available in the MConnect (e-Certis) → No link of the ESPD to national repositories that prove economic operators’ compliance with the exclusion and selection criteria ○ According to economic operators, ESPD completion is prone to error: complex format; unclear structure; no numeration of sections and subsections; repetitive and imprecise questions; unclear and confusing instructions for completion |

³⁶ Authors’ own design and compilation.

| | | |
|-----|--------------------------------------|---|
| | | <p>→ This leads to higher risks for the disqualification of bidders, PP procedures complaints, delays in PP, annulment of PP procedures</p> <ul style="list-style-type: none"> • No full electronic processing of awarding documentation → manual filing and uploading by CA • According to economic operators, uploaded public procurement documents in PDF format are not machine-readable • Minimum deadlines set in the system do not correspond to those provided for in Law 131/2015, which stipulates in the case of a request for price quotation (RPQ) a minimum of 7 days for goods, and a minimum of 12 days for works and services • No automatic continuation of new procurement procedures and modification of procurement plan as a result of a cancelled procedure because of, for instance, the lack of participants |
| I.2 | Participation bidding process | <ul style="list-style-type: none"> • According to economic operators, ambiguous or inconsistent publication of participation requirements (e.g. type of procedure, time period) • The system does not number the lots and does not display them in the order established by the CA in the award documentation, creating confusion and leading to procedural errors • The system does not permit the selection of Common Procurement Vocabulary (CPV) codes from different categories in order to be able to carry out mixed procurement procedures, which is particularly helpful in guiding private businesses in their market analysis phase • Functionality of automatic verification of financial resources of bidding tenderer by state treasury is not offered by all electronic platforms of MTender |

I.3 Conduct, evaluation and monitoring of PP procedure

- MTender technical functionality poses challenges as regards splitting a tender into lots (the legally foreseen potential of splitting a tender into a maximum of 800 lots cannot be tapped) – challenges in the management of PP procedures with high amount of lots
 - EBRD official comment:
 - There were conducted procedures with more than 500 lots in MTender (e.g.: <https://mtender.gov.md/en/tenders/ocds-b3wdp1-MD-1582201504217?tab=awards>)
 - Main issue relates to wrong interpretation and implementation of the “lots” concept: e.g.: <https://mtender.gov.md/en/tenders/ocds-b3wdp1-MD-1580373581340?tab=awards> → example of tender with 691 lots
 - If there would be proper determination of lots, then the number of lots per procedure would reduce significantly making the procurement process easier for both CAs and suppliers
- The system does not allow the modification of the data (i.e. quantity, value, order of lots) of the procurement procedure after publication
- The system does not provide the technical means for submitting the offer guarantee in electronic form
 - EBRD official comment:
 - The offer guarantee in electronic form is not an issue related to MTender *per se*, it is rather a question of integration with commercial banks
 - A mechanism should be elaborated, and a technical proposal was submitted in 2019, but not approved as yet
- According to a large number of economic operators which are frequent users, MTender evaluates PP procedures based purely on the ‘price’ factor, technical scoring is not available (although technical scoring is available at CDU level and includes all criteria: lowest price, lowest cost, best quality-price ratio or best quality-cost ratio)

- This technical functionality contradicts Art. 26 of Law No. 131: para. 3: the most economically advantageous offer must be determined according to the lowest price, lowest cost, best quality-price ratio or best quality-cost ratio
- Unclear for economic operators on what grounds the CA sets the price (“arbitrary and non-uniform price-setting practices”)
- Prices set by CA are seen by economic operators as economically disadvantageous
- Economic operators see this technical functionality as restraining any room for negotiations
- No Business Intelligence (BI) module that contains an automated detection mechanism of fraud and corruption risks, which systemically analyses procurement bids and generates statistical reports → weakened capability of the competent institutions, CSOs and the general public to monitor and control PP procedures
- No preventive data-driven control tools based on automated risk indicators (statistical data on public procurement; reports on performance indicators, public procurement implementation plans, the implementation of AA, on complaints and decisions; beneficiaries registry; asset declarations), structured according to the OCDS scheme
 - EBRD official comment:
 - BI and preventive data-driven control tools is not in the scope of MTender but subject to separate technical projects
 - MTender was required to provide a public data point for the open data and it is available since October 2018
 - Details on the description of the System API (implemented in MTender) and the processes to consume information from the system: <https://mtendereprocurementssystem.github.io/MTender-Documentation/>
 - An example of such kind of implementation is: <https://openmoney.md/institutions/162832?darkMode=false>

I.4 Award and contract management

- Although as per EBRD:
 - MTender operates Open Government Data Standard protocol in the Open Contracting Data Standard format
 - all procedural actions of the CAs are subject to mandatory online open data OCDS publication in real time
 - any action of CA in respect to advertised tender is recorded online in real time and notified by the online publication on the web portal, including an online procurement record and online procurement contract
 - all decisions of CA during electronic tendering procedure is recorded and published online when taken or reported to the system by Tender Committee
 - The open data electronic document renders preparing additional or printable document unnecessary, since all legally relevant information is recorded and published online as electronic document, providing the same information to all interested parties
- National experts and economic operators have observed:
 - The system does not automatically generate the awarding decision; the CA often establishes a paper document, which is uploaded and sent to the Public Procurement Agency (APP)
 - No automatic tool to compile the concluding report about the entire procurement procedure
 - No electronic generation tool of a procurement contract
 - Non-transparent justification of tender decision by CA (“behind closed doors”); MTender foresees a text bar, where CA can type in all sorts of reasons (e.g. “Internal decision”) instead of offering a restricted selection of clear reasons through the e-drop-down menu
- No functionality to process electronically a cancellation of the procurement contract after the National Agency for Solving Contestations (Agenția Națională pentru Soluționarea Contestațiilor) established irregularities and decided to revoke the award decision

| | | |
|-----|--------------------------|--|
| | | <ul style="list-style-type: none"> ○ <u>EBRD official comment</u>: the electronic cancellation of procurement contract by NASC will be possible only once the full integration with NASC will be done and electronic document management on the NASC side will be implemented with electronic complaints ● No electronic interfacing for electronic registration of procurement contracts with the state treasury, nor offering functionalities for modifying/correcting errors in the contract after State Treasury supervision <ul style="list-style-type: none"> ○ <u>EBRD official comment</u>: the new contracting module is available in the CDU, and more options on the Treasury side are to be developed by the Treasury to ensure future modifications and corrections of the contracts (work in progress) ● No functionalities for initiating, generating and registering additional agreements to public procurement contracts in the execution period |
| I.5 | User-friendliness | <ul style="list-style-type: none"> ● Overwhelming majority of economic operators acknowledge that MTender has significantly contributed to making tender participation easier both in terms of time and financial resources (Open Contracting Partnership, 2019b): <ul style="list-style-type: none"> ○ Over 70% of users find new e-procurement platform MTender useful for their work ○ 60% of business representatives and 62% of contracting authorities think that the implementation of the new system has made it easier to carry out and participate in public procurement ○ 57% of contracting authorities and 63% of companies are “satisfied” or “quite satisfied” with the system ○ Only 19% of users said they are dissatisfied ● Notwithstanding, interviewed economic operators and public institutions have reported outstanding challenges regarding user-friendliness: <ul style="list-style-type: none"> ○ Non-EU acquis harmonised or ambiguous terminology, sometimes differing between integrated platforms |

| | | |
|---|------------------------------|---|
| | | <ul style="list-style-type: none"> ○ Minimum deadlines for clarification and submission of the offer set in the MTender system do not correspond to those stipulated in Law 131/2015 (requests for price quotation: minimum of 7 days for goods, and a minimum of 12 days for works and services; open auction: 20 days for purchases exceeding 2.3 million MDL (goods and services) and 90 million MDL (works)) ○ Insufficient filtering functions (only three filters regarding the CA, type of public procurement procedure and time specification); no filter facilitating research of bidders and contracts awarded to a certain economic operator; in general, deficient and user-unfriendly search tools ○ No specific uploading format for electronic bid submission to allow for uniform documentation and automatic eradication of minor errors (in particular the price) until the opening of bidders' offers ○ “Transparency is not a panacea”³⁷: lack of encryption to ensure confidentiality of data (in particular the price) until the opening of bidders' offers (Atomate, 2020:p.32) ○ No automatic notification, including an electronic receipt, to the economic operator if the bid was submitted successfully ○ No automatic message to participating bidders that the awarding process has been completed, nor an automatic announcement to all bidders about the final award decision of the procedure |
| II Exogenous (stakeholders of the EPP/PP system) | | |
| II.1 | Governance of MTender | <ul style="list-style-type: none"> ● Project Steering Committee should ideally have fewer members to facilitate consensus building and decision-making processes ● High-risk factor: the lack of a comprehensive agreement between the Ministry of Finance and operating platforms of MTender could seriously endanger the proper functioning of the electronic PP system |

³⁷ Boris Filipov, Project Manager to EU Delegation to Moldova, Online conference “The legal and technical challenges for the implementation of the eProcurement system MTender”, 17.02.2021.

| | | |
|------|---|---|
| II.2 | Communications/ Public Relations | <ul style="list-style-type: none"> • Dedicated communications officers would strengthen the implementation of the communications plan • Argument: eProcurement success depends, first and foremost, on motivation, transparency, trust and the availability of skilled personnel as sufficient conditions; functioning technology only comes second • Scepticism of CAs and suppliers |
| II.3 | Human Resources Capacities | <ul style="list-style-type: none"> • Lacking professionalisation of PP staff: lack of trained staff, including IT specialists, in the Public Procurement Agency (APP) and Ministry of Finance (Turcan & Enachi, 2019) • Lack of a national training programme in the field of public procurement (as regards legislative modifications, technical knowledge) • Dispersed and insufficient actions taken in order to strengthen the capacities of the actors involved in the procurement process (CAs, economic operators, civil society) • CAs have not internalised the concept of ESPD and request from all bidders the submission of the full set of documents certifying their qualifications |

Conclusions

Embedded in the context of Moldova's integration into the EU internal market, which foresees increasing transparency and reducing levels of corruption in public procurement, this study provided an up-to-date overview of outstanding challenges for the establishment of an eProcurement system that meets the requirements of modern and digitalised public administration. While MTender, the current electronic public procurement system in Moldova, has significantly contributed to increasing transparency and accountability in public procurement procedures, thus curbing risks of corruption and making public procurement easier both for contracting authorities and economic operators, this study provided evidence of the fact that the system faces both external constraints and inherent technical limitations.

External constraints, which are not related to MTender, include the regulatory framework that hampers the eProcurement system from unfolding the full potential of its technical functionalities. Notwithstanding legislative approximation efforts, convergence of Moldovan legislation in the area of public procurement with EU standards remains an unfinished business. Questionable exceptions in the national public procurement law for the use of MTender regarding certain public procurements (types of purchases, low-value procurement, SOEs, municipal enterprises, and joint-stock companies with full or majority state capital) have been adopted. Also, significant incoherencies exist between the primary and secondary framework. Constraints that are not inherent to the MTender system are, moreover, evidenced by a discursive gap that permeates throughout the analysed studies and conducted interviews: while some stakeholders emphasise the potentially enormous technical capacity of MTender, others point to existing implementation challenges in practice. For instance, although MTender has implemented an ESPD as a dematerialised and automated digital service, which is compliant with relevant EU requirements and EU interoperability rules, economic operators have reported that its usage is possible only in paper form. The self-declaration form that is supposed to simplify the preparation, submission and evaluation of tenders has to be manually completed, signed and uploaded into the system. This creates additional costs and goes against the ratio of the ESPD. Moreover, economic operators have reported that uploaded public procurement documents in PDF format are not machine-readable, although, according to the EBRD, the MTender networking multi-platform design has implemented the latest digital standards of the EU policy for better accountability of digital government towards citizens, including online real-time transactional machine-readable open data.

Additionally, although at the Central Data Unit level technical scoring is available, including lowest price, lowest cost, best quality-price ratio and best quality-cost ratio, almost all interviewed economic operators frequently using MTender have harshly criticised that the system evaluates public procurement procedures based purely on the ‘price’ factor. Interviewees argue, moreover, that this situation significantly restricts the margin for negotiation with the contracting authorities and oftentimes leads to arbitrary and non-uniform price-setting practices. Whereas Moldovan public officials report to have no plans to include low-value public procurements in the scope of application of Law No. 131 on public procurement in the near future, arguing that MTender would otherwise be overwhelmed and create additional costs for SMEs, the EBRD does not see these objections justified. It argues that MTender Pilot Phase 2 has been operational for 18 months, without any technical problems and with minimum IT support, and that during this timeframe the number of SMEs participating in public procurement via MTender increased by 30%.

At the same time, technical challenges exist that are inherent to the MTender system. One example includes the lack of an advanced “business intelligence” module that contains an automated detection mechanism for fraud and corruption risks, as well as the absence of a preventive data-driven control tool that is based on automated risk indicators. While such tools have never been conceived as being part of the MTender project, the absence of such “red flag” detectors is particularly significant given that economic operators regularly express a deep-rooted mistrust vis-à-vis contracting authorities and public institutions in general. Moreover, while in principle it is a desirable outcome, the degree of transparency provided by MTender has been criticised by economic operators. This refers to the lack of encryption of sensitive system data, such as personal data, tax information and the value of submitted bids. In particular, publicly accessible information on the price (until the opening of bidders’ offers) could lead to counterproductive effects and even enhance corrupt practices between contracting authorities and bidders. Last but not least, CSOs and economic operators share the view that the quality of MTender needs improvement to ensure that it covers the entire public procurement cycle (from procurement planning over contract management to billing and payments under the procurement contract) and supports all types of public procurement procedures (merely the workflow for open procedure is supported in the current MTender pilot).

Besides the external constraints in the implementation of MTender and its inherent technical limitations, another factor hampering its transfer to Moldova and day-to-day application in practice

has been the lack of involvement of the Centre of IT of the Ministry of Finance (CTIF) in the acceptance of MTender features during the development process (Atomate, 2020:p.22). As a consequence, IT professionals at the CTIF have not been able to test and familiarise themselves with new MTender features. This goes hand in hand with a low degree of professionalisation of public procurement staff and the capacities of all actors involved, including CAs, economic operators and civil society.

Policy recommendations

Against the background of ongoing negotiations between the Moldovan Ministry of Finance and the EU Delegation to Moldova on one hand, and ED on the other hand, the future of eProcurement in Moldova stands at a crossroads. Following the findings of this study, the following policy actions are recommended:

- Moldovan legislators should continue to harmonise Law No. 131 on public procurement with EU law. This refers, first and foremost, to exceptions regarding the centralised procurement of medicines, low-value procurement, and public procurement by SOEs and municipal enterprises. Currently, the legal framework does not allow MTender to unfold the full range of its technical functionalities;
- The Moldovan executive should align secondary legislation with Law No. 131 on public procurement. As a consequence of the current regulatory framework, MTender, which is compliant with Law No. 131, is non-compliant with secondary legislation;
- There is the need for a more intensified dialogue and cooperation between the Ministry of Finance and the Public Procurement Agency. In particular, the Public Procurement Agency, which is supposed to have a high degree of specialised knowledge and expertise in the area of public procurement, needs to have more ownership in the digitalisation of procurement processes. Both institutions are important pillars for the development of eProcurement in Moldova. Therefore, both need to pull at the same end;
- Prior to establishing whether MTender is an appropriate eProcurement system for Moldova, it needs to have the chance to run at its maximum capacity (the full range of its technical functionalities being available to public procurement market participants). This is currently not the case. At the time of writing, the Ministry of Finance is expected to switch on all functionalities of MTender as of March 2021;
- There is momentum to address the system-inherent deficiencies of MTender. In particular, MTender should be improved to allow for encryption of procurement documents until the opening of bidders' offers, cover the whole procurement cycle and support all types of procurement procedures, including restricted and negotiated procedures (with and without publication of a contract notice), as well as framework agreements and dynamic purchasing;

- Given deep-rooted mistrust of economic operators towards public authorities, advanced Business Intelligence (BI) and preventive data-driven control tools that currently surround infrastructure should be included in MTender. To this end, a legal framework to detect fraud and corruption risks needs to be established, after which technical implementation can follow. While CSOs are currently using MTender OCDS data to calculate “red flags”, BI needs to become a government-backed initiative that is used by public institutions to conduct investigations;
- If MTender will be able to perform at maximum capacity, its technological suitability to the socio-economic characteristics of Moldova must be critically assessed. This includes an analysis on whether the multi-platform design, which has worked well in Portugal and Ukraine (Prozorro), is also the best design for Moldova or whether a centralised model would be better suited;
- An automatised electronic public procurement system is as good and impartial as the regulatory and institutional environment in which it operates allows it to be. Therefore, the future development of eProcurement technologies in Moldova must go hand in hand with good governance and institutional reforms.

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