«Il diritto dell'economia» issn 1123-3036, anno 65, n. 99 (2 2019), pp. 329-360

Articoli e saggi

Anticorruption Measures in Public Procurement: Issues and Challenges

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1. *Corruption, Human Rights and Economic Implications*

How to ensure integrity, accountability, and transparency of public authorities and economic operators across countries?

According to the Transparency International definition, corruption is the «abuse of entrusted power for private gain»[1]. World Bank – by referring to the definition adopted by the United Nation's Global Program against Corruption – specified that corruption involves such acts as bribery to circumvent public poli-

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[1] The United Nations Convention against Corruption (UNCAC) is a multilateral convention negotiated in 2003 by members of the United Nations. It is the first global legally binding international anti-corruption instrument. Corruption can be classified, given the International Transparency definition, as grand, petty and political, depending on the sector where it occurs. Grand corruption consists of acts committed at a high level of government that distort policies or the central functioning of the states, enabling leaders to benefit at the expense of the public good. Petty corruption refers to everyday abuse of entrusted power by low and mid-level public officials in their interactions with ordinary citizens. Political corruption indeed refers to a manipulation of policies, institutions and rules of procedure in the allocation of resources and financing by political decision makers, who abuse their position to sustain their power, status and wealth. M. Racca, C. Perin, *Corruption as a violation of fundamental rights: reputation risk as a deterrent against the lack of loyalty, Ius Publicum Network Review,* 3-4.

cies, through patronage and nepotism, the theft of public resources, or through the diversion of state resource[2]. Such definition mainly covers bureaucratic/public sector corruption, and particularly emphasises phenomena such as administrative bribes and kickbacks[3].

Corruption follows the unofficial laws of the market, thereby circumventing the rule of law that is a necessary condition for the respect of human rights. The fight against bribery has become a universal issue in several countries. Moreover, considering the importance of international trade for global economic growth, the costs generated by non-tariff barriers – such as those related to the lack of integrity in border control and customs administrations – can be quite significant for the public and private sectors, and for citizens and society as a whole[4]. Indeed, corruption is considered one of the most serious crimes with a cross-border dimension[5].

The lack of integrity and corruption affect human rights and the market, and are an issue in Public Procurement (PP). Non-transparent economic interests supported by lobbies and conflicts of interests may influence the legislation, its implementation, competition and, ultimately, the economic growth and competitiveness of the market itself.

Some scholars consider corruption a «grease the wheels» instrument. In this perspective, it helps to overcome cumbersome bureaucratic constraints, inefficient provision of public services, and rigid laws, especially when countries' institutions are weak and function poorly[6]. Some have highlighted the effects of cor-

[2] Background Document for the 2016 OECD Integrity Forum: *Fighting the hidden tariff: Global trade without corruption*, 19-20 April 2016, OECD Conference Center, Paris, 9-10.

[3] Sometimes a distinction is made between «bribes» and «facilitation payments», where the latter refers to smaller amounts paid to usually lower level officials to accelerate or facilitate a decision. Indeed, a kickback typically occurs when a company that wins a public contract «kickback» a bribe to the government official(s) who influenced the awarding of the contract to that company. PwC, Ecorys, with support of Utrecht University, *Identifying and Reducing Corruption in Public Procurement in the EU*, 30 June 2013, 56.

[4] Loss of revenue caused by customs-related corruption is estimated to cost World Customs Organization (WCO) members at least USD 2 billion in customs revenue each year, with India losing USD 334 million and Russia USD 223 million. Considering the size of their economies, import revenue losses due to corruption in customs are substantial in Eastern Europe and Africa. *Fighting the hidden tariff: Global trade without corruption, cit.,* 54.

[5] M. Racca, C. Perin, *Corruption as a violation of fundamental rights: reputation risk as a deterrent against the lack of loyalty*, cit., 12. See also, V. Mongillo, *La repressione della corruzione internazionale: costanti criminologiche e qustioni applicative*, in *Dir. Pen. e Processo*, 2016, vol. 10, 1320.

[6] S.P. Huntington, *Political Order in Changing Societies*, New Haven:,1968; F. Lui, *An equilibrium queuing model of bribery,* in *Journal of Political Economy*, 1985, vol. 93, 760-781, D-H D. Lein, *A note on competitive bribery games,* in *Economics Letters,* 1986, vol. 22(4), 337-341, D. Acemoglu, T.Verdier, *The choice between market failure and corruption*, in *The American Economic Review, 2000, vol.* 90(1), 194-211; P.G. Meon, L. Weill, *Is corruption an efficient grease?*, in *World Development*, 2010, 38(3). Others argue that corruption only reduces economic performance. This is due to rent seeking, an increase of transaction costs and uncertainty, inefficient investments, and misallocation of production factors (K. Murphy, A. Shleifer, R. Vishny, *The allocation of talent: Implications for growth*, in *Quarterly Journal of Economics,* 1991, vol. 106, 503-530; S. Rose-

ruption on economic performance, and consider them as strong constraints on growth and development. Data shows that bribery behaviours are widespread in Europe, and more significantly in southern countries.

According to Transparency International's Global Corruption Barometer, perceptions of corruption and faith in governmental institutions are on the rise in the region, in particular in Greece, Italy and Spain. However, according to part of the literature, there is no linear relationship between corruption and economic growth in regimes rated as «free» by Freedom House[7]. The growth-maximizing level of corruption – in the so called "free countries" – is significantly greater than zero, with corruption being beneficial to economic growth at low levels of incidence, while abnormally high levels of corruption are detrimental, regardless of the government type.

Last but not least, the quality of the institutions in a given Country is a major determinant of the effects of corruption[8].

In countries with deficient institutions, corruption has little to no effect on economic growth, because voters cannot punish corrupt politicians, while researchers concluded that in countries with relatively strong democratic institutions, corruption does damage growth, but economic growth itself is a strong guarantor of reducing corruption, because it means that the resource base from which leaders extract rents expands over time. This makes them more eager to hold on to political power and creates a positive feedback loop between economic growth and corruption: high growth reduces corruption, which increases growth.

Corruption impacts societies in a multitude of ways, and has an important human rights dimension[9]. Only recently has a human rights perspective been introduced in the anti-corruption narrative[10]. Its costs impact on different

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Ackerman, *The political economy of corruption*, in Elliot (ed.), *Corruption and the Global Economy*, Washington, D.C.: Institute for International Economics, 1997, 31-60) that come with corruption. A third stream finds ambiguous effects of corruption can be illustrated with respect to public finances in new EU member states. J. Hanousek, E. Kočenda, *Public investments and fiscal performance in new EU member states*, in *Fiscal Studies*, 2011, 32(1), 43-72, show that reductions in corruption either increase or decrease public investment, depending on the country and its institutions.

[7] F. Mendez, F. Sepulveda, *Corruption, growth and political regimes: Cross country evidence*, in *European Journal of Political Economy*, 2006, vol. 22, issue 1, 82 ss.

[8] T. Aidt, J. Dutta, V. J. Sena, *Governance regimes, corruption and growth: theory and evidence*, in *Journal of Comparative Economics*, vol. 36, no. 2, 195-220.

[9] The UNCAC not only underlines the economic consequences of corruption but also the developmental and political impacts. It refers to the impact on ethical values and justice, but there is no explicit reference to the impact of corruption on human rights. See e.g., Council of Europe, Recommendation No. R 2003(4), preamble.

J. Wouters, C. Ryngaert, A. S. Cloots, *The Fight Against Corruption in International Law,* Working Paper No. 94 - July 2012, 13.

[10] Official corruption is typically understood as a means by which established human rights are violated, but not as a direct violation. The major rights conventions, including the United Nations Universal Declaration of Human Rights and regional conventions adopted in Europe, Africa or Asia, do not include freedom from

aspects, including political, economic, social and environmental ones. It may occur in several different fields, thus affecting both the public and private sectors, including the health system, climate change, education, humanitarian assistance, PP, the legal system, or politics and government. Moreover, corruption crucially affects the development of Third-World countries. Actually, briberies as well as different indirect forms of corruption are barriers to the development process of those countries, which are difficult to fight. Worldwide, over the last decade, corruption has been placed special focus on the development and political economy debate. It has been seen as a primary impediment to growth, with dramatic consequences in the developing world.[11]

The phenomena of corruption in its different forms and implications – such as lobbying and conflict of interests for example – could potentially build new kinds of borders and boundaries in the economy and in the market. Those include real barriers, new walls aiming at keeping economic interests and groups within the market and society separate. They are negative borders and boundaries, affecting human rights and the market, with dangerous implications on growth, development and employment.

On the other hand, there are traditional borders and boundaries among Countries that need to be crossed if we want to prevent and fight corruption successfully. An increasingly popular way for some States to prevent bribery committed overseas is adopting measures with extraterritorial implications, or asserting direct extraterritorial jurisdiction in specific instances. Such measures may affect companies on the international market, and clearly show a difference in the strategies of the so-called «zero-tolerance» countries compared to the «more tolerant» ones.

The first part of the paper investigates two different profiles linked to the same phenomena, with a comparative approach. The legal boundaries of lobbying combined with conflicts of interest and corruption, on the one hand; the effects of some extraterritorial legislation, such as the UK anti-bribery model, on the other hand. It analyses the role of private and public preventive anti-corruption measures as a means of action in the international market. The aim is to contribute to the current debate in the literature, aiming at developing a model supporting integrity in PP, in order to prevent corruption and its implications (as well as conflict of interests and lobbying) and their negative externalities; and to mitigate the negative externalities linked to the measures adopted by the zero-tolerance Countries.

"official corruption" among their enumerated rights. In addition, the prevalent international anti-corruption agreements, such as the UNCAC and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, do not frame official corruption as a rights violation.

[11] OECD, *Fighting the hidden tariff: Global trade without corruption*, 19-20 April 2016, Paris, cit., 58

The second part of the paper will deal with the renegotiation issue linked to the risk of corruption. It investigates the tendering process, with special focus being placed on the selection stage and the risk of corruption related to the submission of overly aggressive offers designed solely to ensure selection, with the hidden purpose of renegotiating the contract at a later stage.

2. *International anti-corruption instruments*

A community of values is growing in the wider context of transnational and international bodies such as the OECD, the UN, and in single Member States, to promote a joint system against corruption, but it still needs clear means of actions.

Over the last decade, some efforts have been made to reduce corruption at an international level[12].

In the European Union, corruption remains one of the biggest challenges for all societies.[13] Corruption allows the creation of a kind of barriers that build new borders and constrains within the single market. In this perspective, it restricts the four fundamental freedoms established in the year 2000 Charter of Fundamental Rights of the European Union[14].

The Treaty on the Functioning of the European Union recognizes that corruption is a serious crime with a cross-border dimension, and art. 83(1) includes it among those crimes for which directives providing minimum rules on definition of criminal offences and sanctions may be established. In particular, the EU should ensure a high level of security, including by preventing and combating serious crimes, which are often linked to corruption and cannot be addressed by the EU Member States alone. In this perspective, the recent EU Anti-Corruption Report confirms that this objective «cannot be sufficiently achieved by the Member States» and will require an intervention at the Union level.

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[12] «A basic condition for corruption control is a viable legal framework and an institutional structure that enforces the law without accusations of political favouritism or arbitrariness» (UNDP, 1997:58).

[13] M. Racca, C. Perin, *Corruption as a violation of fundamental rights: reputation risk as a deterrent against the lack of loyalty*, 10.

[14] The Charter of Fundamental Rights of the European Union is a legally binding document that contains a list of human rights recognised by the European Union. It was drafted by the European Convention in 1999 and solemnly proclaimed on 7 December 2000 by the European Parliament, the Council of Ministers and the European Commission. Following the entry into force of the Lisbon Treaty in 2009 the fundamental rights charter has the same legal value as the European Union treaties.

The European anti-corruption framework is based on the accession[15] of the EU to the United Nations Convention against Corruption (UNCAC), on the role played by Transparency International, and on the joining of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The setting up of Transparency International in 1993 was the first crucial milestone in terms of the work of civil society organizations and networks, both national and international, dedicated to controlling corruption.[16]

The implementation of the anti-corruption legal framework remains uneven in the various EU Member States and, overall, unsatisfactory. The EU anti-corruption legislation has not been implemented in all Member States. Prior to the entry into force of the TFEU, the Commission had no power to take legal action against those Member States that did not implement measures adopted under the Third Pillar of the Treaty. Since December 1st, 2009, instead, it is possible for the Commission to take such legal actions pursuant to Art. 10 of Protocol No. 36 on Transitional Provisions of the Treaty of Lisbon.

From a national point of view, some countries have still not ratified the most important international anti-corruption instruments and, even where anti-corruption institutions and legislations are in place, there are strong weaknesses on the enforcement side. It is now clear that finding appropriate tools and solutions to tackle corrupt practices in trade is not a simple «endeavour», and there is no single fix solution. The need has been underlined to establish and enforce clear provisions against bribery and corruption for both public and private sectors, in order to promote integrity, facilitate trade, ensure a more effective distribution of benefits, and contribute to sustainable, fair, and inclusive economic growth[17].

As stated in a 1999 OECD survey, PP is the mostly affected sector by corruption and collusion[18]. The allocation of public resources in the public interest through public contracts and procurement functions provides a large number of oppor-

[15] Three types of legislation are most often used by EU countries to prohibit certain behaviour and impose related penalties: (1) criminal provisions against specified types of corruption, (2) most countries reported civil service legislation that establishes obligations applying specifically to public officials; and (3) some countries also included general law provisions which had the effect of corruption prevention. OECD, *An International survey of prevention measures*, Corruption, Public Sector, 1999.

[16] The Convention draws the attention to the need for co-operative multilateral action in controlling corruption. However, there is a growing awareness of the role that sound domestic governance plays in effective action against corruption, and OECD Member countries are also taking individual, domestic action against corruption. *An International survey of prevention measures*, Corruption, Public Sector, OECD 1999.

[17] *Fighting the hidden tariff: Global trade without corruption*, 19-20 April 2016, OECD Conference Center, Paris, 58.

[18] Collusion involves a horizontal relationship between bidders in a PP, who conspire to remove the element of competition from the process. Bid rigging is the typical mechanism of collusion in public contracts. The OECD acknowledges that vertical corruption and horizontal collusion are distinct problems within procurement. However, corruption and collusion will frequently occur in tandem and have mutually reinforcing effects.

tunities for corruption. Hence, PP has been targeted by various national, international, and multilateral anti-corruption initiatives as an area in need for reform[19].

In PP, corruption can add as much as 50% to a project's cost, while reducing the quality of works or services. However, until 2014, the EU legal framework on PP did not include any specific provisions on the prevention and sanctioning of conflicts of interest, as it only included few specific provisions on sanctioning favouritism and corruption. The 2014 Directives on public contracts and concessions tried to bridge the gap[20], but there is still a long way to go.

An holistic approach for risk mitigation and corruption prevention is suggested by OECD Recommendation on Public Procurement[21], highlights several mutually supportive principles which may, directly or indirectly, prevent corruption and stimulate good governance and accountability in public procurement. These principles include integrity, transparency, stakeholder participation, accessibility, e-procurement, oversight and control.

Integrity refers to upholding ethical standards and moral values of honesty, professionalism and righteousness, and it is a cornerstone for ensuring fairness, non-discrimination and compliance in the public procurement process. Therefore, safeguarding integrity of actors in the procurement process may significantly reduce corruption risks. Some European Countries apply national integrity standards for all public officials, for example through civil service regulation or a generic code of conduct outlining the standards and expectations for good conduct of civil servants; and sometimes a dedicated government department is responsible for developing, updating and diffusing the code of conduct, and may provide advice supporting the implementation of the code.

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[19] PP is often subject to the ordinary private law of the state concerned. This is the position in the United Kingdom, for example. However, where that is the case there are often special and additional rules, which apply to government contracts; this is especially so in relation to the formation of government contracts, where special «administrative law» rules on tendering procedures often apply. In other countries, PP contracts are subject to a body of rules, wholly separate from private contracts. This is the case in France where government procurement contracts are subject to a distinct «droit administratif» regulating both the formation and execution of the contract. S. Arrowsmith, *Public Procurement: basic concepts and the coverage of procurement rules*, cit., 4.

[20] Firstly, the new rules will make it easier and cheaper for small and medium-sized enterprises to bid for public contracts, as well as it will ensure the best value for money for public purchases and moreover will respect the EU's general principles of transparency and competition. To encourage progress towards particular public policy objectives, the new rules also allow for environmental and social considerations, as well as innovation aspects to be taken into account when awarding public contracts. See European Commission on http://ec.europa.eu/growth/single-market/public-procurement/rules-implementation/index_en.htm

[21] OECD, *Preventing corruption in Public Procurement*, 2016. The motivation for an «holistic approach» is that «integrity risks exist throughout the public procurement process, so focusing integrity measures solely on one step in the process may increase risks in other stages. Similarly, addressing only one type of risks may give leeway to integrity violations through other mechanisms. For example, administrative compliance measures in the bidding phase do not root out the risk for political interference in the identification of needs. Likewise, asset declarations for procurement officials may not sufficiently protect against bid- rigging or petty fraud».

Specific standards for procurement officials may mitigate the specific risks related to the complexity and characteristics of the public procurement process. Most common conflict of interest situations are related to personal, family or business interests or activities, gifts and hospitality, disclosure of confidential information, and future employment. Therefore, some additional standards may include provisions on asset declaration requirements, whistleblowing procedures, and protection measures for whistleblowers. Several OECD countries have introduced specific codes of conduct for procurement officials[22], often linked to specific guides and training, to help procurement officials apply these standards in their daily practice[23].

Transparency in public procurement is essential because promotes accountability, ensures access to information, and plays an important role in levelling the playing field for businesses and allowing small and medium enterprises to participate on a more equal footing. The OECD Recommendation on Public Integrity recommends to safeguard integrity and the public interest at all stages of the policy process, promoting transparency and open government, including actively ensuring full access to information and open data, along with active and timely responses to request for information. For an effective accountability several conditional factors are required, such as so-called watchdog, data availability needs to be paired with timeliness, data quality, processing capacity, effective reporting and whistleblower channels[24]. An appropriate degree of information requires for governments to strike a balance between ensuring accountability and competition on the one hand and on the other hand protecting trade secrets and respecting the confidentiality of information.

A large range of stakeholders are involved in the procurement process, including anti-corruption offices, private sector organisations, end-users, civil society,

[22] The Anti-Corruption Strategy of the Austrian Federal Procurement Agency Integrity is at the heart of the Anti-Corruption Strategy developed by the Austrian Federal Procurement Agency (BBG), and embodied by setting precise organisational procedures (clear definition of roles and structures); integrating anti-corruption measures in the workday life; constantly reassessing and improving the strategy and awareness of staff. The Strategy contains an explicit regulation of the main values and strategies regarding prevention of corruption, clear definition of grey areas (e.g. the difference between customer care and corruption), clear rules on accepting gifts, as well as rules on additional employment. The Strategy also offers the employees a clear view on emergency management.

[23] The idea is that ethics or integrity training for public officials, and procurement officials in particular, can raise awareness, develop knowledge and commitment and foster a culture of integrity in public organisations. Specialised training for public procurement is provided by France. The Central Service of Corruption Prevention, an inter-ministerial body attached to the French Ministry of Justice, has developed training material for public procurement to help officials identify irregularities and corruption in procurement.

[24] As a minimum, adequate and timely information may be provided about upcoming contracts as well as contract notices and information about the status of ongoing procurement processes. Additional information such as the average procurement duration, justification of exceptions and specific overview records by type of bidding procedure may further enable external parties to scrutinize public procurement practice.

the media and the general public. A direct social control is possible by involving citizens at critical stages of the procurement process and has been introduced in several OECD Countries. Open and regular dialogue with suppliers and business associations can reinforce mutual understanding of factors shaping public markets[25].

In order to get the best value for money through fair competition, access to public procurement contracts by potential companies of all sizes is important.

Participation in public procurement by small and medium enterprises (SMEs) may be facilitated in several ways through streamlining tendering procedures and reducing bureaucracy (so called SMEs friendly procurement) and thought positive actions (such as set asides commonly used in United Stated, but debated in Europe). These measures may level the playing field among businesses and at the same time cut out opportunities for corruption. In order to ensure fair competition and to sanction corrupt practices, companies with a proven track record of integrity breaches can be excluded from access to public procurement contracts[26]. The 2014 European Union directives put a lot of effort to support SMEs thought PP, even if not all member States have reacted with the effort. Many countries have adopted tools to reduce corruption while reinforcing competition and efficiency in procurement procedures[27].

Also e-procurement, the use of information and communication technologies in public procurement, can increase transparency, facilitate access to public tenders, reduce direct interaction between procurement officials and companies, increasing outreach and competition, and allow for easier detection of irregulari-

[25] The Chief Acquisition Officers Council in the United States has institutionalised the dialogue with external stakeholders. In 2014, the Chief Acquisition Officers Council (CAOC), in coordination with the Federal Acquisition Regulatory Council, the Chief Information Officers Council, and the Office of Management and Budget's (OMB) Office of Federal Procurement Policy (OFPP), created an online platform to allow stakeholders to discuss problems, barriers and possible solutions associated with the federal acquisition process. The aim is to identify improvements to the public procurement cycle and the management of public contracts to improve the efficiency of the federal acquisition system by identifying impactful steps to make it easier for government agencies to do business with companies and enter into contracts.

[26] As highlighted by the report Corruption Prevention to Foster Small and Medium Sized Enterprises Development (UNIDO & UNODC, 2007), SMEs are more susceptible to bureaucratic corruption than larger companies, because of their structure (e.g. a greater degree of informality and fewer accountability mechanisms); a vision and perspective that focus on short term implications of entering into corrupt transactions (as opposed to larger companies, SMEs may be less concerned about reputation and other long-term negative impacts of corruption); limited financial resources; their inability to wield influence over officials and institutions as they lack bargaining power to oppose requests for illegal payments from public officials.

[27] Spain has introduced a self-declaration system facilitates participation of SMEs in public procurement; Italy runs a training programme to empower SMEs in the area of public procurement. The project consists of a network of dedicated training desks over the country. The central purchasing agency (Consip) experts train trainers from the business associations, who will subsequently guide and coach local MSMEs on the use of electronic procurement tools. Ireland has consultation and review mechanisms in place to tailor the procedures to SME needs.

ties and corruption, such as bid rigging schemes. According to OECD, the digitalisation of procurement processes strengthens internal anti-corruption controls and detection of integrity breaches, and it provides audit services trails that may facilitate investigation activities[28].

Last but not least in supporting accountability and promoting integrity in the public procurement process are essential the oversight and control of the procurement cycle, processes generating valuable evidence on the performance and efficiency of the procurement cycle. The basis for an adequate oversight and control system is a risk analysis of the government process and its environment in question. Proportional sanctions following the detection of illicit behaviour through oversight and control activities may act as an effective deterrent to engage into corrupt behaviour.

The 2015 OECD Recommendation of the Council on Public Procurement encourages adherents to apply oversight and control mechanisms to support accountability throughout the public procurement cycle, including appropriate processes for complaint handling and sanctions.

At European level the legal framework on remedies is found in the following Remedies Directives[29], providing harmonised legal actions available to economic operators who participate in contract award procedures, which allow them to request the enforcement of the public procurement rules and the protection of their rights under them in cases where contracting authorities, intentionally or unintentionally, fail to comply with the law.

At an international level, the OECD Convention on Combating Bribery of Foreign Public Officials (OECD Convention) entered into force in 1999, and only covers corruption to the extent it is related to business transactions. Moreover, it only covers «active» corruption[30]. Only in 2003, did the UN Convention against Corruption target the passive side of the phenomenon. Moreover, while the OECD Convention only referred to corrupt practices in transnational busi-

[28] The e-procurement system KONEPS in Korea is an example of an integrated online platform for procurement. United States is working to build the right supplier relationships and focuses on doing business with contractors who place a premium on integrity, performance and quality. To this end, government agencies have been directed to improve the quantity, quality, and utilization of vendor performance information through the use of two systems.

[29] Directive 89/665/EEC regulates remedies available to economic operators during public sector contract award procedures and directive 92/13/EEC regulates remedies available to economic operators during utilities contract award procedures, amended by Directive 2007/66/EC which introduced two main features. The aim is to allow irregularities occurring in contract award procedures to be challenged and corrected as soon as they occur, therefore to increase the lawfulness and transparency of such procedures, build confidence among businesses and facilitate the opening of local public contracts markets to competition from all over Europe.

[30] As laid down in the Action Plan of 28 April 1997 to fight against the organized crime, articles 2 and 3. Both these definitions of active and passive corruption fit into the OECD definition of corruption. This distinction is relevant for development, implementation and evaluation of anti-corruption measures.

ness transactions, the UN Convention against Corruption (UNCAC) also covers corruption beyond transnational business transactions[31]. In this perspective, the Preamble to the UNCAC refers to the detrimental effects of corruption on political stability, on the rule of law, on ethical values and democracy; while the OECD Convention mainly focused on the market distorting effects of corruption.

The UNCAC[32] is also open for signature by regional economic integration organizations, provided that at least one Member State of such organizations has signed the Convention. The European Union signed the Convention on 15 September 2005, and ratified it on 12 November 2008. Currently, it is the only regional economic integration organization that is party to the Convention. Despite its innovative approach, the UNCAC monitoring was not ground-breaking. It merely established a Conference of State Parties with the aim of «regularly» monitoring the implementation of the Convention. It requires the State Parties to set up domestic corruption-preventing and corruption-combating bodies. In order to be effective, such bodies should meet the requirements laid down by the Convention as, inter alia, independence, adequate resources, training, and specialization.

According to an OECD study[33], those anti-corruption bodies should focus at least on four areas of anti-corruption efforts[34]. Some States have adopted multi-agency models, which focus on strengthening anti-corruption measures in existing governmental agencies (e.g. the US, UK, Russia, India, and South Africa), while other countries opted for the single-agency model, which gives one anti-corruption agency the primary responsibility of implementing an anti-corruption program (e.g. Hong Kong, Chile, Korea, and Thailand). There are also countries where the strength of internal monitoring by governmental agencies is mixed[35].

In fighting corruption offences worldwide, huge efforts have also been made by private initiatives. Established by a former World Bank Director in 1993, the Transparency International NGO has been the driving force behind the global anti-corruption movement. Its most influential corruption tool is the Corrup-

[31] UNCAC criminalized not only basic forms of corruption such as bribery and embezzlement of public funds, but also trading in influence and concealment and laundering of the proceeds of corruption. The document also makes references to various discrete human rights, and highlights the collateral impact of anti-corruption enforcement measures on other rights. UNCAC, however, generally avoids taking position on the relationship between corruption itself and human rights.

[32] It was adopted by the UN General Assembly on 31 October 2003 and was opened for signature in Merida, Mexico on 9-11 December 2003. It entered into force two years later, on 14 December 2005.

[33] Specialised anti-corruption institutions – Review of Models, above note 49.

[34] (1) Policy development, research, monitoring and co-ordination; (2) Prevention of corruption in power structures; (3) Education and awareness raising; and (4) Investigation and prosecution.

[35] One example of such strong internal monitoring is the municipality of Amsterdam, which launched its special Integrity Bureau more than a decade ago. See http://www.amsterdam.nl/gemeente/organisatie-diensten/integriteit-0/bureau- integriteit/2011/jaarverslag-2010.

tion Perception Index[36]. In addition to the CPI, TI publishes a Bribe Payers Index (BPI)[37] and a Global Corruption Barometer (GCB)[38]. Moreover, already in 1977, the International Chamber of Commerce (ICG) adopted its first set of flagship rules against corruption[39].

In the last decades, the European Union has also been broadening its focus on anti-corruption policies[40], but despite the effort, data shows a low level of trust of EU citizens in the EU ability to fight corruption. Major efforts are expected in this direction, while adequate EU legislation, mechanisms and standards against corruption are needed to tackle the issue at its roots[41]. As it has already been pointed out, civil society has a key role to play in preventing and combating corruption offences, which ranges from monitoring PP and services to denouncing bribery and raising awareness of the risks of wasting public money[42]. The international anti-corruption legal framework has been substantially strengthened in the past two decades, with impressive progress being made at both global and regional levels. Nevertheless, the work is far from being over.

Since the various anti-corruption instruments were rather fragmented and due to the idea that streamlining a coherent anti-corruption policy in all its activities would have enhanced success on this issue, the EU has developed a comprehensive anti-corruption framework[43], focused on the enforcement of existing

[36] The CPI ranks countries according to their perceived level of corruption, based on polls with, to a large extent, international business people and experts. However, critics have argued that such a ranking is misleading, as the perceived level of corruption does not necessarily reflect the actual degree of corruption.

[37] The BPI provides a ranking of leading exporting countries according to the perceived likelihood of their firms to bribe abroad. It is based on a survey of business executives focusing on the business practices of foreign firms in their country.

[38] The GCB is based on surveys of around 90,000 households in almost 90 countries, and does not provide a ranking.

[39] The ICG rules on Combating Corruption serve as self-regulatory rules for companies and are described as «good commercial practices in fighting corruption».

[40] In 1995, the Council adopted the Convention on the Protection of the European Communities' Financial Interests (EU Convention) which covers the misappropriation of EU funds though fraudulent statements or false documents. It entered into force on 17 October 2002. In 1996, a Protocol to the Convention was adopted. In 1997, the Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union was adopted. On 22 July 2003, the Council adopted Framework Decision 2003/568/JHA on Combating Corruption in the Private Sector, covering business activities within profit and non-profit entities.

[41] See http://www.transparencyinternational.eu/focus_areas/eu-anti-corruption/.

[42] G. Racca, Perin, *Corruption as a violation of fundamental rights: reputation risk as a deterrent against the lack of loyalty*, in *Ius Publicum*, 14.

[43] In a Decision of October 2008 the Commission set up a network of contact points of the Member States, in order to improve cooperation between authorities in combating corruption in Europe. Finally, in 2011, the Commission adopted a proposal for harmonized procurement rules, including anti-corruption safeguards. In the same year, it also issued a new communication. Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, Fighting Corruption in the EU, 6 June 2011, COM(2011) 308 final.

instruments[44]. The communication set up a new EU Anti-Corruption Report mechanism[45], with the aim to work closely together with GRECO[46], the anti-corruption enforcement mechanism of the Council of Europe,[47] and to avoid overlapping reporting mechanism[48].

3. *French and Italian Models Compared*

Under the French law, corruption and conflicts of interests have many legal qualifications: active and passive corruption, influence peddling and conflicts of interest.[49] It is not possible to assimilate corruption, lobbying and conflicts of interest. The object of the three practices can be the same, but their aims are different. Lobbying has been defined as an influential action, motivated by particular, category-specific and divisive interests, which is brought to the attention of a particular public officer or a producing branch of imperative legal rules without any counterpart[50]. In other words, lobbyists solicit administrative or legal protection for their particular interests.

At an international level, conflicts of interests are defined as conflict between the public duty and private interests of a public official, in which the public official has private-capacity interests, which could improperly influence the performance of his/her official duties and responsibilities[51]. Within the procurement procedure, conflicts of interest may occur at any stage of the process, regardless

[44] The idea behind this communication is that, at the time there was an adequate anti-corruption framework on the international and European level, but the main challenge was related to the enforcement of the existing provisions.

[45] As of 2013, the EU will release a report every two years, with a dual goal. First, it will provide a «diagnosis» of corruption challenges in the EU. Secondly, the report will highlight specific issue in each Member State, according to country analyses.

[46] The Group of States against Corruption is the Council of Europe's anti-corruption monitoring body, headquartered in Strasbourg. It was established in 1999, it currently has 49 members, including two States that are not members of the Council of Europe (the United States and Belarus). GRECO's objective is to improve the capacity of its members to fight corruption by monitoring their compliance with Council of Europe anti-corruption standards though a dynamic process of mutual evaluation and peer pressure.

[47] As is known, the general focus of the Council of Europe (CoE) lies on the development of common and democratic principles in Europe, as well as on rule of law and human rights. On 6 November 1997, the Committee of Ministers of the CoE adopted the Twenty Guiding Principles for the Fight against Corruption.

[48] «Commission steps up efforts to forge a comprehensive anti-corruption policy at EU level», E O 11/376, press release of 6 June 2011.

[49] Criminal code, art 432-11 & 433-1, 433-2.

[50] G. Houillon, *Corruption and conflicts of interest: Future prospects on lobbying*, in *Corruption and Conflicts of Interest, A Comparative Law Approach*, edited by J.B. Auby, E. Brenn, T. Perroud, Cheltenham, 2014.

[51] OECD (2003) Recommendation of the Council on Guidelines for Managing Conflict of Interests in the Public Service. Academic Authors point out that a conflict of interests can be actual, apparent or potential. S. White, *Footprints in the sand: regulating conflict of interests at EU level*, in J.B. Auby, E. Breen, T. Perroud, *Corruption and Conflict of Interest: Comparative Law Approach*, 2014.

of whether the procedure is open, restricted or negotiated. They arise at the time of defining the specifications of a project and the awarding criteria, or at the verification and selection stage or, lastly, at the awarding stage.

The necessity to establish legal boundaries between the three above-mentioned practices stems from the fact that corruption and conflicts of interest are regulated by *law*, whereas lobbying still remains in the domain of *facts.* Hence, it is necessary to define the cases in which defending a particular interest with public authorities, which is allowed by law, exceeds permissible limits and becomes an unlawful behaviour.

As a matter of urgency, the French policy-maker adopted two laws: the *Loi organique* n° 2013-906 and n° 2013-907 of 11 October 2013 on Transparency in public life. Awareness is raised on the need for a preventive approach in the fight against conflicts of interest, as opposed to the repressive method that has been used so far.

The first requirement is the obligation of restraint imposed on the members of the Government or of the Committee of Independent Authorities, either private or public, or on local office-holders with executive functions and on public service agencies. On the other hand, there are the disclosure requirements on property and income, in the frame of the fight against corruption and the so-called disclosure of any conflicts of interest[52].

At EU level, the debate on lobbying focuses mainly on direct representations by pressure groups in the legislation making process. A more comprehensive approach includes different forms of communication and research activities that underpin, inform, and support the preparation of policy proposals before lobbyists send them to the legislators and decision makers[53].

As noted before, the issue concerning lobbying in the French legal system is related to the absence of a legal definition of the phenomenon. However, despite the absence of a legal definition, lobbying exists in fact, and doctrine tries to elaborate a definition in order to recognize when it is implemented in practice. Lobbying is considered as a spontaneous action taken with the aim to consider a specific interest while exercising decision-making powers. No compensation is involved in the process leading to the adoption of a legal act specifically adop-

[52] The declarations shall be addressed to the new *Haute Autorité pour la transparence de la vie publique* and shall relate to all the property or the undivided assets and a declaration on the interests held within the starting date of the function and the previous five years.

[53] In 2011, the European Parliament and the Commission signed an Inter-Institutional Agreement [OJ L (2011) 191/29] on the establishment of a Transparency Register for organizations and self-employed individuals engaged in EU policy-making and implementation. The Register covers all activities carried out with the aim of directly or indirectly influencing the formulation or implementation of policy and decision-making process of the EU institutions. It is voluntary and the registrants disclose their interest and agree to comply with a code of conduct.

ted or modified in order to satisfy that particular interest[54]. As a consequence, in France, lobbying does not have proper «juridical evidence», but it could be the base for further legal action. Actually, it does not cause any direct modification of the legal system, but it may produce effects on the current legal order.

As some scholars maintain, lobbying is a freedom. The first concern for the French policy-maker is to understand when exercising said freedom goes beyond what is legally feasible, and how to prevent this and punish illegal actions. In fact, any reprehensible behaviour can be indicated in the activity carried out by groups of interest that try to raise the awareness of the decision-making authorities on a specific issue in order to adopt a better designed policies. It is important to clarify when such freedom becomes relevant and could be pursued vigorously as a criminal behaviour. The boundary between the legitimate exercise of lobbying and corruption is the core of the issue, and it is linked to the concept of «absence of compensation». The interest can come into consideration of the decision-making agent without any direct or indirect compensation. Any offer, as well as any request of compensation can be considered as a means of corruption. On the contrary, when the action of the decision-making agent is not driven by any compensation, but it is only based on simple recommendations or suggestions made by the groups of interest, it can be considered as lobbying.

Consequently, transparency in lobbying becomes essential in order to avoid the lack of legality that badly influences public confidence in Public institutions. Both particular and public interest should be taken into account. In this perspective, in 2009, the internal rules of the French Parliament have been amended in order to introduce a Register of lobbyists. Registration in the Register is voluntary and aims at regulating access to the House and Senate[55]. Penalties are not imposed in the event of breach of procedural and conduct rules. The only possible consequence is removal from the Register, which is decided by the *Direction de l'Accueil et de la Sécurité*[56]. That was the first reform that represents a step in the right direction, but it is still not enough to regulate a wide spread and potentially highly dangerous phenomenon.

Moving towards the second civil law system, Italy made some effort in the strategy against corruption[57].

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[54] G. Houillon, *Le lobbying en droit public*, Bruxelles, 2012.

[55] *Art. 26 III, B de l'Instruction générale du Bureau de l'Assemblée nationale* and *Chapitre XXIIbis de l'Instruction générale du Bureau du Sénat.*

[56] Transparency International France, *Transparence et Intégrité du Lobbying, un enjeu de démocratie,* 2013 Report on Lobbiyng, available at http://www.transparency-france.org/e_upload/pdf/transparency_france_lobbying_en_france_octobre2014.pdf

[57] An overview on the corruption in PP sector and the italian legislative strategy against the phenomenon is made by G. Fidone, *La corruzione e la discrezionalità amministrativa: il caso dei contratti pubblici*, in *Giorn. dir. amm.*, 2015, vol. 3, 325.

The first comprehensive reform in this field is the so called Anti-corruption Law of November 6th 2012, no. 190, that has made the sanctions harsher for offences such as corruption in the performance of act in breach of official duties[58]. Together with a more dissuasive effect, there is also the extension of the limitation period for each of the officer[59]. Furthermore, a special Ministerial Study Commission – the so-called «Commissione Fiorella» – was set up in 2013 to study the possibility of a more systematic reform in the field of time limitation[60].

In Public Procurement, Law n. 190/2012 provide for rules fostering transparency, in order to prevent corruption in PP[61].

The contracting authorities shall publish on their web sites information on the ongoing tendering procedures[62] and send such information in digital format to the Authority for the Supervision of Public Contracts, which was replaced by the Anti-Corruption Authority in 2014. The supervisory Authority shall publish it on its web site, in a section that is freely accessible to all citizens, listed by type of contracting authority and Region[63]. As additional information requirements, public administrations shall publish on their websites information on budgets and final accounts, as well as on unit costs for construction works and the production costs for the services provided to citizens[64].

Among the most innovative aspects, the above-mentioned law introduced, for the first time in Italy, a provision specifically related to the whistle-blowing regulation in the public sector. The whistle-blower cannot be punished, dismissed or discriminated on grounds that are directly or indirectly connected to him/her blowing to whistle. During any disciplinary proceedings, the identity of the

[58] These are: «corruzione propria», «corruption in judicial proceedings», «abuse of office», «misappropriation of public property or public funds»; (peculato), provided for, respectively, by articles 318, 319-ter, 323 and 314 of the Italian Criminal Code.

[59] In particular, in the case of corruption in the performance of acts in breach of official duties, the minimum term of time limitation, for the first time offenders, increased from 7 and half years to 10 years with a parallel increase also for the offence of international corruption, according with sec. 322 bis c.c.

[60] The final report of this Commission, also containing draft options for a reform, have been brought to the attention of the Minister of Justice and it is available at https://www.giustizia.it/giustizia/it/mg_1_12_1.wp?facetNode_1=0_10&facetNode_3=0_10_56&facetNode_2=4_57&previsiousPage=mg_1_12&contentId=SPS914317

[61] See in particular art. 1, par. 15, par. 16, par. 32 and par. 33 of the mentioned law.

[62] Information on: the subject of the contract notice; the economic operators invited to tender; the successful contractor; the amount of the award; the time limit to complete the work, service or supply; the amount paid. Furthermore, each year by the end of 31 January, summary tables providing information, freely available in digital format, on the previous year are published in order to allow data assessment, also for statistical purposes.

[63] The Authority, by means of its own deliberation, identifies the relevant information and the transmission method. Moreover, each year by the end of 30 April, the Authority shall transmit to the Court of Auditors the list of administrations which have not provided and published, in whole or in part, the information in digital format.

[64] The information on the costs is published on the basis of standard forms elaborated by the Authority for the Supervision of Public Contracts, replaced by the Anti-Corruption Authority on the basis of the Law. N. 114 of June 24th 2014 that will ensure its collection and publication on website in order to allow easy comparison.

whistle-blower cannot be disclosed without his/her consent, unless this is a *sine qua non* condition for the defence of the accused person. Any discriminatory measure must be reported to the Department for Public Administration by the whistle-blower or by the trade unions representing the administration involved[65].

In general terms, it is important to underline that Law no. 190/2012 places emphasis on the relevance of training for public employees in the prevention of and fight against corruption. Such training activities are coordinated by the National School of Administration – SNA[66].

It is also important to remind the action taken through the adoption of Law Decree no. 62/2013, the Code of conduct for public employees. The Code includes rules and provisions that contribute to counter the bribery phenomenon. Each administration is required to adopt its own code of conduct[67].

Italian policy-maker follow its strategy against corruption by adopting a last and most recent anti-corruption reform, by the Law 9 January 2019, no. 3, even defined by the Government as «Spazzacorrotti»[68]. There are three main topics: the fight against corruption in Public Administration, the limitation period for the offence; and transparency within political parties and political movements, especially about their funding.

Once again, with reference to the first aim, the Law made the sanctions harsher and try to simplify and make more efficient the proceedings.

The most controversial part is the reform of the limitation period for the offence that will come into force the 1 January 2020. The Law provides the suspension of the period from the judgement of first instance until the last instance judgement. The scope of the provision is to avoid that such important proceedings on corruption will finish with no pronunciation because the limitation period is over.

Concerning the transparency, we can remind that the political parties and political movement shall register each contribution received and publishing it on

[65] The whistle-blower's report is a protected disclosure as per Law no. 241/1990. Furthermore, the whistleblowing mechanism is further developed in chapter 3.1.11 of the National Anti-corruption Plan that state as follow: "protection of the employee who reports illegal activities".

[66] In relation to the public sector a huge number of initiatives have been taken in particular by the SNA (Scuola Nazionale di Amministrazione) and from the Ministry of Foreign Affairs with specific purpose of raising awareness against corruption and international bribe. Also the National Anti-corruption Plan, prepared by the Department of public administration and approved by ANAC (National Anti-corruption Authority), under paragraph 3.1.12, among the training activities, establishes that particular attention must be given to the international corruption.

[67] At this respect ANAC has already issued some general guidelines available at http://www.anticorruzione.it/portal/public/classic/AttivitaAutorita/AttiDellAutorita/_Atto?id=0a5d875f0a77804256dbbf9fe715a0d9

[68] Law 9 January 2019, n. 3, «*Misure per il contrasto dei reati contro la pubblica amministrazione, nonché in materia di prescrizione del reato e in materia di trasparenza dei partiti e movimenti politici*», published on *Official Journal* on 16 January 2019, no. 13.

their web site; and they have to publish the curriculum vitae of any candidate before and during the election period.

We can observe that, once more, the Italian legislator took a sanctioning approach to the issue that, alone considered, is not enough to fight a general system and a way to behave in the relationship between the privates and the Public functionaries. Furthermore, any specific provision on PP are included in the Law[69].

4. *UK Model: The Common Law Approach*

One increasingly popular way for States to prevent bribery committed overseas is by adopting measures with extraterritorial implications, or by asserting direct extraterritorial jurisdiction in specific instances. Such measures may have implications for companies operating in different countries.

The international fight against corruption, and the fight against transnational bribery in particular, received a strong impulse from the effort of the UK legislation against bribery offences of foreign public officials. Some issues arise because firms face different kinds of illegal behaviour. As argued above, in many countries, engaging a local agent or having a local sponsor is a requirement for doing business in that country[70].

In recent times, new legislations with extraterritorial effect have been developed, which is a reality in the framework of international law. As it has been pointed out by some scholars, the debate on extraterritorial effect is closely linked to the framework of globalisation of economic and financial flows, which leads to a fragmentation of national sovereignty and of the national legal systems[71]. Under international law, based on the principle of territoriality, States may regulate acts committed in their territory and can exercise territorial jurisdiction over individuals and companies within their territory. This means that territorial jurisdiction may be exercised over natural or legal persons even when the con-

[69] The Italian legislator leaves to a sectoral legislation the intervention in the specific field of PP. Noted that also some soft law interventions are notably. We want to remind the effort made by the Italian Anti-Corruption Authority by adopting the Anti-Corruption Plan 2017. It devoted a particular attention to the university system, providing guidelines on the transparency and control in carrying on the public service and on the selection of teaching staff. On this argument, see G. Mulazzani, *«Le università e il perseguimento della mission istituzionale alla luce dell'autonomia tra riforme legislative e interventi dell'Anac»*, published by Munus- law review on public services, Napoli, no. 2, 2018, 579.

[70] M. Koelher, *Revisiting a foreign corrupt practices act. Compliance defense*, in *Wisconsin Law Review*, 2012, 609.

[71] Laurent Cohen-Tanugi, *L'application extraterritoriale du droit américain, fer de lance de la régulation économique internationale?*, in *En Temps Réel - Les cahiers*, 2015.

duct under consideration takes place abroad[72]. Extraterritoriality formally occurs when a national legislation is applied to a foreign person/enterprise that is subject to the jurisdiction of the regulating State, due to acts committed, at least partially, outside the territory of that State. The issue concerns the demonstration of the existence of a link between the individuals or the acts committed on the one hand, and the territory of the regulating State on the other hand.

The United Kingdom has recently adopted a zero-tolerance approach through a special regulation prohibiting bribery of foreign officials for business purposes. The U.K. Bribery Act (UKBA), which entered into force on July 1, 2011[73], prohibits improper payments to both domestic and foreign public officials, as well as bribes and kickbacks in purely commercial contexts[74]. It also provides for an autonomous title of company's liability when there is a lack of effective arrangements to prevent corruption within the enterprise[75].

In the circumstances referred to in Section 7 of the UKBA, relating to the failure of commercial organizations to prevent bribery, the *respondeat superior* principles apply if an isolated incident of bribery occurs within a commercial organization. However, in the Bribery Act Guidance, the Ministry of Justice pointed out that the organization concerned would have a full defence if it can prove that, despite a particular case of bribery, it nevertheless had adequate procedures in place to prevent persons associated with it in from bribing[76].

Going back to the issue of extraterritorial legislation, it may be stated that, the UKBA regulation is not a piece of extra-territorial legislation. It provides for the company's liability for the act committed by a person associated with it, regardless of where the act was committed. Section 7 also requires that the commercial organisation carries out business or part of its business in the UK, wherever in the world it may be incorporated or formed. Thus, the requirement of a link with the territory of the regulating State always needs to be met.

As a result, it is possible to talk about the extraterritoriality of law in relative terms. Looking at the application of specific legislation that spreads its effects over a foreign legal or natural person, is not possible to give a trenchant answer – yes or no. One could, on the contrary, imagine different degrees of extra-ter-

[72] J. Scott, *Extraterritoriality and Territorial Extension in EU Law*, in 62 *Am. J. Comp. L.*, 87, 2014. The Author focuses her attention on EU legislative technique with territorial extension effects, in order to gain regulatory traction over activities that take place abroad. That technique is compared with the enactment of extraterritorial legislation and it leads to the EU governing transactions that are not centred upon the territory of the EU and it also enables the EU to influence the nature and content of third country and international law.

[73] Bribery Act 2010, 2010 Chapter 23, 8th April 2010.

[74] The UK Anti-Corruption Plan, December 2014, is available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/388894/UKantiCorruptionPlan.pdf

[75] Section 1, 2. 6 and 7 of the UKBA.

[76] Ministry of Justice, The Bribery Act 2010: Guidance 15 (2011), available at http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf.

ritorial application of law. Hence, purely territoriality does not exist. Even with the so-called "universal jurisdiction" – the best example of which is the legislation countering crimes against humanity – a link with the territory of the regulating country is always required for the jurisdiction of the regulating country over a foreign person to be recognised. It might even be a very tenuous link – such as the presence of the guilty person in the territory of the country, or the fact that he/she is captured in that country – but it has to be there.

All the above leads to further considerations. Besides the financial risk for enterprises, which arises in the framework of foreign legislation against corruption in international trade, there are several consequences of the application of a foreign legislation with extra-territorial effects, and more specifically the UKBA, which are analysed in this paper.

Bribery causes reputational risks and dents the worldwide image of companies. Suffice it to think of the media impact of allegations of corruption. Furthermore, there is a human risk for the employees, the management, and the representatives prosecuted in their own countries or abroad. International corruption also causes a loss of income, as those companies are excluded from PP contracts financed by States, local and regional authorities, as well as by investment banks.

As it has already been highlighted, the implications of such measures are important for single companies, but also for the market as a whole, as well as for the relations between individual European countries, and at global level. Public and private entities are expected to adopt preventive measures to limit the effects of said regulations and avoid penalties. A hint in this direction is given by section 7 of the UK BA, pursuant to which any company accused of bribing (committed by a person associated, regardless of where the act was committed) may avoid being prosecuted (because liable) if it is able to prove that it had adopted a structured preventive strategy against corruption.

5. *Preventive Anti-corruption Measures in Europe. Private and Public Ethics and Compliance Programs*

A risk-based approach promoting integrity is required. As it was pointed out by the 2016 OECD Integrity Forum, it is imperative that public and private sector entities conduct comprehensive corruption risk assessment to define their exposure to integrity risks, which allows them to put in place appropriate anti-corruption controls[77].

[77] 2016 OECD Integrity Forum, *Fighting the Hidden Tariff: Global Trade without Corruption, Background Document*, Paris, 19-20 April 2016. See also, A. Musella, *Corruzione internazionale, responsabilità delle*

The fight against corruption and the efforts to avoid the dangerous effects of zero-tolerance countries on bribery affect all companies worldwide trading abroad. In fact, firms may find it extremely difficult to conduct business without bribing in jurisdictions at high risk of corruption. Such lack of integrity in trade particularly affects smaller firms, which are disadvantaged because they are unable to bear the costs of corruption due to a lack of access to appropriate legal resources and sufficient cash flow[78].

The OECD issued an Anti-Corruption Ethics and Compliance Handbook for Business to encourage companies to develop and adopt adequate internal controls, ethics and compliance programmes, or measures for the purpose of preventing and detecting foreign bribery[79]. As it has been underlined, enterprises should conduct an anti-corruption risk assessment to better understand their risk exposure. Each enterprise's own risk assessment exercise is unique, depending on that enterprise's industry, size, location, and so on.

The relevance of good anti-corruption risk assessment is strictly connected with the adoption of a good compliance programme by the enterprises; it may allow business to develop and maintain a compliance program that is tailored and risk-based. An enterprise should update its risk assessment plan periodically, also envisaging the training of those employees whose activities entail higher corruption risks.

First, it is necessary to promote the idea that integrity is the heart of a company's activity. This implies doing business in a responsible, transparent, and ethical way. Those values increase the reputation of a company and are the most valuable assets, which could be further strengthened through the adoption of specific compliance policies, procedures, and controls. As it is well known, integrity is at the basis of a company's activity, and has a positive impact on a company's competitiveness. Doing business in a responsible, transparent, and ethical manner may increase the reputation of the company and represents the most crucial issue.

First of all, a large number of multinational companies become aware of how important is to act in a sustainable way. In this light, many of such companies are parties to the United Nation Global Compact (UN Global Compact), whose mission is: «to mobilize a global movement of sustainable companies and stakeholders to create the world we want. That's our vision»[80]. To make this happen, the UN Global Compact supports companies in doing business responsibly

società e modelli organizzativi di prevenzione del reato, in Società, 2013, vol. 11, 1206.

[78] As noted by the 2014 OECD Foreign Bribery Report, local firms, due to their knowledge of local customs and officials, may be inclined to play the role of intermediaries for foreign firms in corrupt transactions.

[79] Anti-Corruption Ethics and Compliance Handbook for Business, OECD - UNODC - World Bank 2013.

[80] https://www.unglobalcompact.org/what-is-gc/mission

by aligning their strategies and operations with ten principles onhuman rights, labor, environment and anti-corruption. In particular, principle 10 says: «Businesses should work against corruption in all its forms, including extortion and bribery» and it aims not only to avoid bribery, extortion and other forms of corruption, but also to proactively develop policies and concrete programmes to address corruption internally and within their supply chains.

As a concrete step in implementing principle 10, we can refer to the Principles for Responsible Investment (PRI), an evidence-based guide on company-investor engagement on anti-bribery and corruption[81]. The document points out the corruption and bribery's impact in terms of GDP and, in particular, in terms of losses from large company involved in corruption scandals. It also reminds some international legislation aim at promoting preventive measures against corruption such as the UK Bribery Act and the US non-prosecution agreements (NPAs) and deferred prosecution agreements (DPAs). Finally, the PRI analyse deeply which measures are needed for a successful company's engagement in a preventive strategy against corruption[82].

On the private side, there are firms or companies that adopt very structured ethics and compliance programs consisting in the adoption of rules, in their implementation within the company and, lastly, in the adoption of a monitoring and enforcement system through the application of sanctions for the infringement of the relevant rules[83].

A key point is the provision of an adequate enforcement system in cases of breach of the relevant ethical standards. This implies the adoption of a disciplinary system. The measures envisaged by the enforcement system shall be appropriate to the nature and gravity of the infringement, and shall always be based on the principles of proportionality and adversarial process[84]. Such compliance

[81] O. Mooney, M. Navarro Perez, O. Makinwa and M. Goldsmith, *Engaging on Anti-bribery and Corruption. A guide for Investors and Companies*, edited by H. Aho, B. Wilson Tamagnini, 2016, https://www.unpri.org/download?ac=1826

[82] Those are, at an initial stage: «know investor expectations», «benchmark», «inform your board», «estimate resource» and «tailor responses»; follows by «keep programs up-to-date» and «maintain communication channel with your board»; finally some follow-up measures, such as «keep track of engagement queries», «see the issue as a continuous process» and «communicate outcomes and keep up reporting».

[83] Siemens is an example of company that adopted a very structured compliance program. Siemens Compliance Guide - Anti-Corruption, 13, available at http://w3.siemens.no/home/no/no/omsiemens/Documents/sc_upload_file_anticorruption_handbook.pdf

[84] At National level, is important to remind the Confindustria Guidelines, adopted on March, 7th 2002 and updated on March 2014 on the construction of organizational, management and control models, on the base of the law decree n. 231 of 2001. Confindustria is the main association representing manufacturing and service companies in Italy. The document is available at http://www.confindustria.it/wps/portal/IT/AreeTematiche/Diritto-d-impresa/Documenti/Dettaglio-doc-diritto-impresa/4eaa0336-f353-4bc8-aa05-35dfda228a50/4eaa0336-f353-4bc8-aa05-35dfda228a50/!ut/p/a0/04_Sj9CPykssy0xPLMnMz0vMAfGjzOJ9PT1MDD0NjLz83UxNDBxNgpwCfYzdLCzDTPQLsh0VAVhK9gI!/

measures may be envisaged for public authorities as well. This strategy implies the adoption of anti-corruption preventive measures based on the specific organization of the individual institution under consideration.

Some measures appear particularly justified, like risk mapping related to corruptive practices, the adoption of a code of conduct with a preventive role with respect to corruption practices, an effective management of the *pantouflage* phenomenon, controls on causes of incompatibility of public mandates, and rotating assignments.

The code of conduct should provide for appropriate supervisory and rule infringement sanctioning mechanisms; it should also envisage a system of incentives and specific training courses promoting a culture of integrity. The effectiveness in the implementation of public authorities' principles could be guaranteed by a civil servants performance assessment method. Lacking a sanctioning mechanism designed for any case of breach of conduct rules, a performance-related pay system may have a serious incentive effect.

In a soft law perspective, it is possible to mention the adoption of Guidelines for the implementation of legislation on transparency and corruption prevention by the publicly owned corporation, issued by the Italian Anti-Corruption Authority on April 15th 2014[85]. The purpose of those guidelines is to guide all such companies in the application of the anti-corruption and transparency Italian legislation. They also target the authorities, which are tasked with ensuring and promoting the adoption of preventive measures in connection with the powers of scrutiny accorded. According to the Guidelines, the supervising authorities should take action in order to ensure the adoption of organizational and management risk arrangements by the companies. Those organizational and management models are required by Law Decree n° 231/2001, with the aim to prevent crime related with company' activity, which includes corruption. In particular, with reference to corruption prevention organizational measures, the Guidelines require that each company pinpoints the risk areas based on the internal and external environment in which they conduct their activities, and on the type of activity they carry out.

The question is how to assign a value, in the procurement procedure, to the adoption of such soft-law strategies. As it is well known, the adoption of specific models of compliance cannot be imposed at the tendering stage. This could result into a market entry barrier; it would also be against the principle of competition, and against the so called *favor partecipationis*[86] principle, which is par-

[85] The document can be consulted at www.anticorruzione.it/portal/rest/jcr/repository/collaboration/Digital%Assets/anacdocs/Attivita/ConsultazioniOnline/SchemaDeliberaCons.15.04.14.pdf

[86] The principle of *favor partecipationis* has been suggested in some judgements of the courts of participating Member States. In Italy, for example, by the judgement No 1245/2011 and No 528/2011 of the Ital-

ticularly invoked at a European level[87]. However, priority may be given to compliance programs at the stage of tender evaluation. The contracting authorities should clarify in the contract notice the selection priority mechanism. Moreover, the contracting authorities should keep control even after the contract awarding, especially during contract execution, in order to verify if the preventive anti-corruption measures are still implemented by the contracting party. It shall furthermore issue guidelines on the bases of which the relevant company might adjust its corruption preventive strategy.

The European Court of Justice[88] asserted the need to separate the stage of the evaluation of the tenderer's qualifying requirements from the stage of the evaluation of the tenders, *stricto sensu*. The first stage is based on qualitative selection criteria, and may include the ethical and moral standards of an enterprise. Instead, the second stage is based on awarding criteria, and those that do not allow selecting the most economically advantageous tender are excluded[89].

6. *The prohibition of renegotiation of bids in public procurement*

Renegotiation of contracts is a frequent and widespread practice, especially for complex and long-term contracts[90]. It is usually useful in case of unforeseen events, or where additional services become necessary and a change of contracting party is not possible or would be a major drawback.

On the other hand, renegotiation may encourage opportunistic behaviours, may discourage honest tenderers and may weaken the result of the procedure. Moreover, if having firm-driven renegotiations of contracts for infrastructure ser-

ian Council of State.

[87] Relevant judgements of the ECJ on the elimination of practices that restrict competition in general and participation in contracts by other Member States see Joined Cases C-226/04 and C-228/04, February 9th 2006; C-213/07, December 16th 2008; C-538/07, May 19th 2009. According to those statements, MSs can introduce further exclusionary measures, but always abiding by the principles of equal treatment of tenderers and of transparency, provided that such measures do not go beyond what is necessary to achieve that objective.

[88] For criteria which may be accepted as «criteria for qualitative selection» or «award criteria» ECJ, Case C-532/06, January 28th 2008; June 19th 2003, C-315/01.

[89] The Italian Anti-Corruption Authority (ANAC consultation paper n. 36 of 2015) tries to mitigate this restrictive approach, especially with regard to a service contract where the experience and the background of the performer re relevant in view of the efficient execution of the contract. The document mentioned is available at http://www.anticorruzione.it/portal/public/classic/home/_RisultatoRicerca?id=e09918230a7780425303082827cee41c&search=PREC+151%2F14%2FS

[90] According to the 2013 Report of Centre for Economic Study, contract renegotiation in the highways and parking sector in France accounts for 50% and 73% respectively of the awarded contracts. See https://www.cesifo-group.de/ifoHome/publications/docbase/details.html?docId=19126461. See also, R. Cippitani, *Obbligo di rinegoziazione dei contratti pubblici e normative per la riduzione della spesa*, in *Urb.e app.*, 2016, vol. 4, 377; R. Damonte, *La rinegoziazione delle offerte nelle gare pubbliche*, in *Urb. e app.*, 2002, vol. 2, 445;

vices is a major concern, efficiency should not be the only consideration in selecting an operator. Indeed, consumers may want to award the contract to a less efficient firm if that would reduce the likelihood of renegotiation[91].

The 2014 European Directives on Public Procurement outline the situations in which contracts may be modified over the course of their execution. In particular, the EU legislator recognised that PP contracts are incomplete and leave a great deal of room for potential renegotiation at the contract execution stage[92]. In general, modifications amounting to less than 10% of the initial value of the contract for supplies and services and 15% for works, are permitted[93], along with modifications that are either not substantial or had been incorporated in the contract in the form of price revision clauses or clear options, regardless of their value. However, any increase in price shall not exceed 50% of the value of the original contract where additional works, supplies or services have become necessary.

Concessions can also be significantly modified under the same conditions and to the same extent as procurement contracts. It is important to recognise the hypothesis of substantial modification of the contract[94]. According to art. 72 of EU Directive no. 2014/24/EU, these alter the character of the original contract/framework; would have allowed other potential suppliers to participate or be selected, or another tender to be accepted; changes the economic balance in favour of the contractor; extends the scope of the contract/framework «considerably»; a new contractor replaces the original contractor, other than where the change arises from a review or option clause in the original contract or from corporate changes such as merger, take over or insolvency. Clearly, art. 72 of 2014 EU Directive leaves great discretionary power about to any substantial modifica-

[91] See A. Estache, L. Quesada, *Concession Contract Renegotiations: Some Efficiency vs. Equity Dilemmas*, World Bank Policy Research Working Paper No. 2705.

[92] Art. 72 of EU Directive 2014/24/EU of the European Parliament and of the Council on Public Procurement and repealing Directive 2004/18/EC; art. 43 of EU Directive 2014/23/EU of the European Parliament and of the Council on the award of concession contracts.

[93] Defined as modifications for design flaws. In this case, the designer's responsibility remains unchanged. Some Scholars argue that the percentage is relatively high and suggest an amount of less than 5%. At the same time, there is no consensus in the interpretation of the 2014 EU Directives. In particular, it is not clear whether the estimated percentages of 10% and 15% of the initial value of the contract relate to each modification or, on the contrary, should be calculated on the total amount of the contract. The issue has arisen during the 3rd Interdisciplinary Symposium on Public Procurement, held in Belgrade, on Sep. 29th and 30th by F. Decarolis and M. Trybus in their speeches.

[94] It is worth to provide some terminological clarifications. The 2014 EU Directives mention the term «modification», while the phenomenon is defined differently in the EU Member States. In Italy, for example, changes to the contract after it is awarded are called «renegotiation». Instead, common law countries such as UK, use the terms «adjustment» or «amendment». It is advisable to think of whether, besides terminology, the meaning is also different. This issue has been discussed at the 3rd Interdisciplinary Symposium on Public Procurement, which was held in Belgrade on Sep. 29th and 30th.

tion of the contract. The difficulty to select in advance such hypothesis could be overcome by the interpretation provided by case-law.

Furthermore, before coming into force the new directives on PP of 2014, ECJ clarified the cases in which the contract could be modified after being awarded. The Danish Supreme Court made a request for a preliminary ruling concerning the interpretation of Article 2 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts[95].

The Court says that a substantial amendment of a contract after it has been awarded cannot be effected by direct agreement between the contracting authority and the successful tenderer, but must give rise to a new award procedure for the contract so amended, unless that amendment had been provided for by the terms of the original contract. Moreover, «neither (i) the fact that a material amendment of the terms of a contract results not from the deliberate intention of the contracting authority and the successful tenderer to renegotiate the terms of that contract, but from their intention to reach a settlement in order to resolve objective difficulties encountered in the performance of the contract nor (ii) the objectively unpredictable nature of the performance of certain aspects of the contract can provide justification for the decision to carry out that amendment without respecting the principle of equal treatment from which all operators potentially interested in a public contract must benefit».

This judgement recalls the principles expressed in a precedent where, the ECJ[96] clarified the cases in which the contract could be modified after being awarded with no need for re-advertising in OJEU. In particular, a contract may change without re-advertisement where the change, irrespective of its value, is not substantial or the change is provided for in the initial procurement documents in a clear, precise and unequivocal review or option clause, which specifies the conditions of use and the scope and nature of the change; and the overall nature of the contract/framework is not altered. Moreover, the EU Directives now provide for the cases of major or minor changes, without re-advertisement, in art. 72(1) (b), 72(1) (c), 72(3) and 72(5), 72(6).

[95] Judgement of 7 September 2016, Finn Frogne A/S, C- 549/14, EU:C:2016:634, 30, 32.

[96] In particular, Pressetext, C- 454/06: changes in a contract post award could in certain cases lead to a legal requirement for re-advertisement in OJEU. The purpose is to provide a « safe-harbour » for certain types of amendments. This provision should help contracting authorities to ensure that post-award changes to contracts are properly controlled.

6.1. *Contract Renegotiation and Risk of Corruption*

However, there is a relevant nexus between renegotiation and risk of corruption. It usually arises at the company selection stage that generally involves a tendering process. At such stage, an illicit agreement might be reached between the Public officer and the tenderer, according to which an overly aggressive offer will be submitted which is designed solely to ensure selection, with the aim of renegotiating the contract at a later stage.

Some scholars argue that renegotiation weakens invitation to tender by encouraging opportunistic behaviours (aggressive bids in which the companies willingly submit a low bid in anticipation of the fact that they will renegotiate the contract during the execution stage). A list of recommendations has been drawn up, aiming at increasing the efficiency of the French PP system[97]. The same could also apply to other countries, such as Italy, for example.

It is worth mentioning the need to recognise that the aim of PP is primarily to meet an identified need by achieving the best possible performance in terms of cost and service or expected functionalities. It is also suggested to make it compulsory for the public party to provide and publish online two summary reports on the analysis of the bids both prior to and following the negotiation stage; to centralise information regarding the past performances of contractors for the purposes of facilitating and encouraging the use of such information at the awarding stage, so as to penalise less reliable companies; to introduce electronic advertising and application platforms only at regional level and upload all the information to a national platform. Making it compulsory for a bid analysis report to be published online, along with the relevant legal information is necessary to improve transparency, as well as making it compulsory to publish an 'amendment notice' when the value of the contract varies by more than 10%, and introduce a quick amendment summary procedure that is open to all stakeholders. Transparency requirements should also be applied to directly managed activities, along with appropriate incentives and penalties. It is also very useful to strengthen the professionalization and expertise of public buyers and project managers, and to centralise the purchasing of standard goods and services wherever possible; to give public buyers the option of decentralising their purchases so to ensure maximum flexibility where it is required. Last but not least, a good recommendation is that of entrusting the upstream and downstream evaluation of all of PP tools to an agency for amounts exceeding a given threshold, such as 50 million euros.

[97] S. Saussier, J. Tirole, *Strengthening the Efficiency of Public Procurement*, French Council of Economic Analysis, www.cae-eco.fr.

Changing a contract after it has been signed reduces the competitive effect of the tender and, therefore, the transparency of the process and compromises its value for money. If, in some cases, an adjustment may be necessary, it is often driven by opportunism and it increases distrust in the Country, thus generating market «crowding out» (moving away best skills and capital). Moreover, the asymmetry of information and the lack or difficulty in activating the necessary skills erodes the bargaining power of the PA, thus making the process of review and renegotiation even more critical.

According to this approach, improving the transparency of renegotiation procedures would help to limit the distortion of the initial tendering process and to ensure that the rules governing renegotiation are abided by.

As it has been pointed out above, the will of the contracting parties to renew a contract could be driven by corruption or/and collusion. Such phenomena have been taken into consideration by the international literature conducting an empirical analysis of public-private agreements. It has been observed that if, on the one hand, corruption was facilitating cooperative renegotiations and, therefore, contract renewals, it should be highlighted that, on the other hand, the more frequent the renegotiations, the more corrupt the public authority, and the more willing both parties to renew a contract[98].

How could such opportunistic behaviours be checked?

One possibility is that of improving the transparency of the renegotiation procedure[99], by drafting a specific procedure for amendments to PP contracts, starting from the publication of an amendment summary in order to inform the parties concerned. This could also involve a special dispute procedure concerning the content of the changes made to the contract.

The French Conseil d'analyse économique seems to move in this direction. It has designed an amendments procedure that applies to the French contracting authorities. Such procedure would be quick and improve the transparency and accountability of public authorities. Furthermore, the amendment proposals would be simultaneously published and sent electronically to all bidding companies. The proposals have to specify, at least, the value of the contract, the value of the increase, and the object of the amendment. The right to be notified any amendment and its characteristics is also envisaged.

Another possibility is that of choosing selection criteria other than the lowest price. In fact, the international literature argues that when the contract is

[98] J. Beuve- J. De Brux- S. Saussier, *Renegotiations, Discretion and Contract Renewals*, March 11th 2014, http://economix.fr/pdf/seminaires/lien/S_Saussier_2014.pdf

[99] R. Cunha Marques, S.V Berg, *Revisiting the strengths and limitations of regulatory contracts in infrastructure industries*, on Munich Personal RePEc Archive, https://mpra.ub.uni-muenchen.de/32890/1/MPRA_paper_32890.pdf.

awarded based on the lowest price criterion there are more chances for opportunistic behaviour. A company could exploit the lack of information or errors made by the Contracting Authority within the project. Therefore, it would offer the lowest price being aware of the fact that the contract will be renegotiated during its execution. In order to avoid such consequences, focus should be placed on the company's reputation parameter. For example, if special value is attached to the previous performance of the company, the latter will be motivated to improve its reputation. Along the same lines, policy-makers should consider the possibility to award the contract based on a negotiation.

7. *Final Remarks*

Implementing an effective public procurement system based on transparency, competition and integrity is not simple, but it is a need, whereas a procurement system that lacks transparency and competition is the ideal breeding ground for corrupt behaviour.

A lot can still be done on both the regulatory and the soft-law sides, at a national, European level.

On the regulatory side, the existing 2014 PP directives put a lot of emphasis on the need to prevent and fight corruption, but with no clear means of action. More could be done at European level to guide towards good practice that could act as guideline for the Member States and for the national regulatory bodies as well as for local supervisory authorities. European directives could identify at least few basic means of action considering the high-risk areas and key elements of successful public procurement discussed at international level[100]. Good rules need good practice to be effective and in order to pursue the aim indicated by the rules resulting in an effective harmonization, directives should indicate the road to follow. The procurement cycle as well as procurement methods to limit associated corruption risks have to be better harmonised, considering that public contracting processes broadly follow the same general steps.

Good rules and practice should be then introduced and implemented in single Member States in order to guarantee more transparency in the procurement procedures. Discretionary powers have been strongly increased by the 2014 European directives on procurement and should be used in the proper way to avoid the risk of abuse.

[100] UNODC, *Guidebook on anti-corruption in public procurement and the management of public finances*, 2013.

The additional flexibility has been argued to provide several advantages, considering it allows better risk mitigation, thanks to the possibility to create new solutions tailored to the needs of the contracting authority, and to mitigate uncertainties for example through an easier dialogue between the supply side and the demand side of the market. However, flexibility has also potential drawbacks, such as a higher risk of corruption and abuse of discretionary power. Concerns have also been expressed with regard to confidentiality, proprietary information, down-scaling of bidders and the mechanics of running several parallel negotiations with different bidders in a multi-stage procedure.

Discretion is useful to guarantee greater flexibility of procedures, but needs to be supported by adequate mechanisms for allocating responsibilities. These imply effective actions of responsibility have been considered a lack in some member States such as Italy.

Rules on negotiated procedures for example are based on a discretionary choice of the Contracting Authority concerning the technical characteristics of the works, services and imply the adoption of specific rules on transparency, publicity and equal treatment. The flexibility of these procedures is appreciated, but the EU Commission warns on possible risks of favouritism, because of the greatest discretional power given to public Authorities[101]. An appropriate project supervision system could avoid alterations and changes while work is in progress, and any related cost increase. Furthermore, only specialized experts should be competent to evaluate the project submitted and to set up a mechanism of accountability of public officials with political power, tasked with ascertaining that the project meets public interest.

The new procurement directives attribute the contracting authorities' greater flexibility in the use of the most suitable contract models to meet their specific needs. However, this approach is not always reflected at the national level, where some Member States including Italy[102] have preferred to limit discretion in order to curb the evolution of corruptive phenomena in the field of public contracts. Here the idea is that more discretion implies more flexibility of procedures, but also potentially more risk of abuse, which could only be mitigated by introducing (other) rules. In Italy, the need to mitigate the risk of abuse given the trade-off between rules and flexibility – rules and discretion resulted in an overproduc-

[101] European Commission SEC (2011) 853 final, Brussels 27.6.2011, available at ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/er853_1_en.pdf. M. Cozzio, *La nuova strategia europea in materia di appalti pubblici*, in *Giorn. dir. amm.*, 2019, vol. 1, 53 underlined the role of the soft law in the fight against corruption after the EU Directives on PP of 2014.

[102] The Italian legislator has implemented the EU Directives on PP through legislative decree n° 50 of April 18th, 2016. In particular, art. 95 sets forth the awards criteria. It refers to the most advantageous offer as general criterion and specifies the cases in which is possible to derogate from it.

tion of rules at national level. Notwithstanding the experience shows that having so many rules does not help to make the procurement market working better than other Countries. Rather it contributes at flooding the courts, keeping slow and complex the administrative procedures and an important infrastructure gap.

Waiting for something to change at national system, it should be useful to draw up a stronger European strategy and a joint supervisory system of enforcement at European level, not affected by political uncertainty.

On the European soft-law side, an administrative PP procedure standardization process – see Renewal model, book IV – could also be implemented, including for example the obligation to adopt private and public ethics and compliance programs. There could be a way to link the above-mentioned soft-law strategies with the existing regulations and procedures, by attaching value to compliance programs at the tender evaluation stage. Only companies that have special anti-corruption programs could be selected.

Along the same lines it is important to stress the value of a company's reputation and its motivating effects as well as the beneficial effects of negotiated procedures if conducted in a transparent and non-discriminatory context.

Without challenging the need to ensure discretion to the public administration in order to support the flexibility of procedures, it is possible to «adjust discretionary power» through soft law, by adopting corruptive phenomena conflict prevention measures, such as renegotiation procedures. As it is the case for public and private preventive anticorruption measures, soft law may be a tool to supplement the existing regulations without reducing flexibility.

Anticorruption Measures in Public Procurement: Issues and Challenges

Corruption is a particular issue in Public Procurement. Integrity risks occur in every stage of the procurement process, from the needs assessment over the biding phase to contract execution and payment. The nature of the integrity risk may differ for each step: it includes undue influence, conflict of interest and various kinds of fraud risks. Ex post renegotiations may also offer exposition to further risks of corruption.
How can we ensure integrity, accountability and transparency of public authorities and economic operators across countries? A community of values is growing in the wider context of transnational bodies to promote a joint system against corruption, but still needs clear means of action. Preventive measures, both public and private, are applied in several countries, but non everywhere. The paper focuses on some of these measures and their implications.

Misure anticorruzione nel settore dei contratti pubblici: tematiche e sfide

La corruzione è tema di particolare rilievo nel settore degli appalti pubblici. Rischi che minano l'integrità ricorrono in ogni fase della procedura di affidamento, dalla valutazione del fabbisogno in fase di offerta, fino all'esecuzione del contratto e al pagamento. La natura del rischio connesso al venir meno dell'integrità può essere diverso in ogni singola fase: ricomprende l'influenza indebita, il conflitto di interessi e vari tipi di frode. Le rinegoziazioni successive possono esporre ad ulteriori rischi di corruzione.
Come garantire integrità, trasparenza e responsabilità delle autorità pubbliche e degli operatori economici nei diversi paesi? Una comunità di valori si sta definendo nel contesto di alcuni organismi transnazionali per promuovere un sistema comune di lotta alla corruzione, ma mancano ancora chiari strumenti di azione applicabili in modo uniforme. Diverse misure di prevenzione della corruzione, sia pubbliche che private, vengono oggi applicate in alcuni paesi, ma non ovunque e non allo stesso modo. Il documento si concentra su alcune di queste misure e sulle loro implicazioni in vista dell'auspicabile definizione di un modello di riferimento quantomeno in Europa.