

**CORRUPTION AS A VIOLATION OF FUNDAMENTAL RIGHTS:  
REPUTATION RISK AS A DETERRENT AGAINST THE LACK OF  
LOYALTY\***

**Gabriella M. RACCA<sup>1</sup> - Roberto CAVALLO PERIN<sup>2</sup>**

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<sup>1</sup> Professor of Administrative Law and Deputy Director for the research of the Department of Management of the University of Turin - Italy (e-mail: [gabriella.racca@unito.it](mailto:gabriella.racca@unito.it)).

<sup>2</sup> Professor of Administrative Law at the University of Turin, Founder and Director for Italy of Ius Publicum Network Review ([roberto.cavalloperin@unito.it](mailto:roberto.cavalloperin@unito.it)).

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## **1. INTRODUCTION**

It is a commonly shared view that poor integrity undermines the main objectives of private and public activities and distracts from their main goals.<sup>3</sup> The lack of integrity affects human rights<sup>4</sup> and is even more unacceptable and serious when perpetrated by

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<sup>3</sup> S. ROSE-ACKERMAN, *Corruption and conflicts of interest*, in J.-B. Auby – E. Breen - T. Perroud (eds. by), *Corruption And Conflicts Of Interest. A Comparative Law Approach*, Edward Elgar Publishing, 2014, 5-10; G. SWEENEY, *Linking acts of corruption with specific human rights*, in *Corruption and human rights in third countries*, Workshop of the European Parliament, 28 February 2013, available at <http://bookshop.europa.eu/>, 8. OECD, *Investing in Trust: Leveraging Institutions For Inclusive Policy Making*, Background Paper of the conference *Restoring Trust in Government: Addressing Money and Influence in Public Decision Making*, Paris 14-15 November 2013, available at <http://www.oecd.org/gov/ethics/Investing-in-trust.pdf>, 2013, 2. “A policy making process conducive to trust (i) secures the inclusiveness of the information available to decision makers, to ensure adequate participation of all actors with a stake in the policy problem at hand; (ii) safeguards the public interest and avoids capture, while effectively aggregating competing, but often legitimate interests; and (iii) is aligned with broader principles and high standards of behaviour”.

<sup>4</sup> Council of Europe, Civil Law Convention on Corruption, Art. 13, signed on 4 November 1999, entered into force on 1 November 2003, Preamble, § 4, “corruption represents a major threat to the rule of law, democracy and human rights, fairness and social justice, hinders economic development and endangers the proper and fair functioning of market economies”; Council of Europe, Criminal Law Convention on Corruption, signed on 27

public authorities. In that event, corruption erodes the pillars of democracy. People's representatives are all too often captured by non-transparent economic interests and divert the pursuit of public and citizens' interests.<sup>5</sup> Illegal behavior buys the loyalty that politicians should have towards citizens, and captures the independent exercise of sovereignty for the benefit of maintaining privileges among the corrupts. Corruption in the public procurement sector represents an emblematic case of such diversion.

## **2. THE LACK OF INTEGRITY AS A VIOLATION OF FUNDAMENTAL RIGHTS**

The corruption of politicians is particularly serious since it becomes pervasive and widespread in both public and private sector activities. Political corruption may influence legislation, its implementation, the public officials involved, competition in the relevant market, and, in the end, fairness and the economic growth of business organizations. It

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January 1999, entered into force on 1 July 2002, Preamble, § 5, "corruption threatens the rule of law, democracy and human rights, undermines good governance, fairness and social justice, distorts competition, hinders economic development and endangers the stability of democratic institutions and the moral foundations of society". International Council on Human Rights Policy, *Corruption and Human Rights: Making the connection*, 2009, available at [http://www.ichrp.org/files/reports/40/131\\_web.pdf](http://www.ichrp.org/files/reports/40/131_web.pdf). The report highlights the links between acts of corruption and violations of rights. See also: OECD, *Recommendation of the Council on Enhancing Integrity in Public Procurement*, C(2008)105, 2008, available at <http://acts.oecd.org/>, "the Recommendation provides policy makers with Principles for enhancing integrity throughout the entire public procurement cycle, taking into account international laws, as well as national laws and organisational structures of Member countries".

<sup>5</sup> EU Commission, *Report from the Commission to the Council and the European Parliament, EU Anti-Corruption Report*, COM(2014) 38 final, 6. Around three quarters of Europeans (73 %) say that bribery and the use of connections is often the easiest way of obtaining certain public services in their country. Similarly, to 2011, around two in three Europeans (67 %) think the financing of political parties is not sufficiently transparent and supervised. See also the Eurobarometer in <http://ec.europa.eu/>.

undermines the fundamental rights of the citizens.<sup>6</sup> Corruption undermines a variety of human rights.<sup>7</sup>

The relationship of trust between citizens and the Government is threatened as corruption leads to gains for political parties or interest groups, and undermines public interests and the quality of spending.<sup>8</sup> A ‘crisis of trust’<sup>9</sup> is growing and new strategies and measures are required to tackle it.<sup>10</sup>

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<sup>6</sup> *International council on Human rights Policy, Corruption and Human Rights: Making the connection*, cit., 9 et seq. “While corruption violates the rights of all those affected by it, it has a disproportionate impact on people that belong to groups that are exposed to particular risks (such as minorities, indigenous peoples, migrant workers, disabled people, those with HIV/AIDS, refugees, prisoners and those who are poor). It also disproportionately affects women and children. Those who commit corrupt acts will attempt to protect themselves from detection and maintain their positions of power. In doing so, they are likely to further oppress people who are not in positions of power, including most members of the groups listed above. The latter tend both to be more exploited, and less able to defend themselves: in this sense, corruption reinforces their exclusion and the discrimination to which they are exposed”.

<sup>7</sup> As posited by S. ROSE-ACKERMAN, *International Actors and the Promises and Pitfalls of Anti-Corruption Reform*, in *Pennsylvania Journal of International Law*, 2013, 449, who noted that corruption can undermine human rights but should not be treated as a per se human rights violation, and refers to J. DUGARD, *Corruption: Is there a Need for a New Convention?*, in R. S. Ackerman - P. Carrington (ed. by) *Anti-Corruption Policy. Can International Actors Play a Constructive Role?*, Carolina Academic Press, 2013, 159; C. RAJ KUMAR, *Corruption and Human Rights in India. Comparative Perspectives on Transparency and Good Governance*, Oxford University Press, 2011.

<sup>8</sup> S. ROSE-ACKERMAN, *Corruption and government. causes, consequences and reform*, Cambridge, 1999, 30 et seq. on the relationships among corruption and political organizations, as “democratic election are not invariably a cure for corruption” (128 et seq.) ID. *Political corruption and democratic structures*, in A. K. Jain (ed. by) *The Political Economy of Corruption*, London, 2001, 35 et seq.; B. G. MATTARELLA, *Le regole dell’onestà*, Bologna, 2007, 25 et seq.; ID., *The conflicts of interests of public officers: Rules, checks and penalties*, in J.-B. Auby – E. Breen - T. Perroud (eds. by), *Corruption And Conflicts Of Interest. A Comparative Law Approach*, cit., 30-31. See also: OECD, *Implementing the OECD Principles for Integrity in Public Procurement*, 2013, available at <http://www.oecd-ilibrary.org/>, 24 et seq. See also: OECD, *OECD Principles for Integrity in Public Procurement*, 2009, available at <http://www.oecd.org/gov/ethics/48994520.pdf>. EU Commission, *Report from the Commission to*

A basic distinction has recently been drawn between cases where politicians make decisions based on their discretionary power, and intermediation of favours which typically includes the transgression of laws and regulations.<sup>11</sup> Lawmakers and governments shape laws and regulations concerning economic activities, taking into account the demands and interests of campaign donors, as well as those of lobbyists, public opinion, guidelines from political parties and their own convictions.<sup>12</sup> In the second case, “elected officeholders use their influence on civil service to arrange for donors to earn contracts, get access to public loans or earn other benefits. This involves undue political influence on public service and unlawful behaviour of public servants involved in public procurement, licensing,

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*the Council and the European Parliament, EU Anti-Corruption Report*, COM(2014) 38 final, in [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014\\_acr\\_france\\_chapter\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014_acr_france_chapter_en.pdf), 8 “Provoked by the crisis, social protests have targeted not only economic and social policies, but also the integrity and accountability of political elites. High-profile scandals associated with corruption, misuse of public funds or unethical behavior by politicians have contributed to public discontent and mistrust of the political system”.

<sup>9</sup> EU Commission, *France annex to the Report from the Commission to the Council and the European Parliament, EU Anti-Corruption Report*, cit., 2014, 2.

<sup>10</sup> EU Commission, *Report from the Commission to the Council and the European Parliament, EU Anti-Corruption Report*, COM(2014) 38 final, 8. Measures such as: limiting presidential immunity, strengthening the rules on financing of political parties and electoral campaigns, restricting multiple office - holding by politicians, and developing a strategy to prevent conflicts of interest, as provided in the Jospin committee set up in France in July 2012 to prepare a reform on ethical standards in public life.

<sup>11</sup> OECD, *Money in Politics: Sound Political Competition and Trust in Government*, Background Paper of the conference *Restoring Trust in Government: Addressing Money and Influence in Public Decision Making*, Paris 14-15 November 2013, available at <http://www.oecd.org/gov/ethics/Money-in-politics.pdf>, 18.

<sup>12</sup> G. HOUILLON, *Corruption and conflict of interest: Future prospects on lobbying*, in J.-B. Auby - E. Breen - T. Perroud (eds. by), *Corruption And Conflicts Of Interest. A Comparative Law Approach*, cit., 53 et seq.

permissions or other areas where companies expect illegal favours in return for campaign donations”.<sup>13</sup>

All possible links between politicians, members of a Government and public officials can be affected by corruption. Each of them may have a distorted relationship with economic operators interested in public procurement.<sup>14</sup> Moreover, corrupt relationships among undertakings can trigger collusion to the detriment of public interest, collusion, of which, public officials are often unaware. Nor is corruption purely “criminal” in the commonly understood sense: it has been estimated that, for 80% of the time, waste in public procurement could be traced to incompetence, and to classic criminal corruption for the remaining 20% of the time.<sup>15</sup>

Informational asymmetries among all stakeholders involved in a procurement system provide opportunities for corrupt practices.<sup>16</sup> The allocation of public resources in the

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<sup>13</sup> OECD, *Money in Politics: Sound Political Competition and Trust in Government*, Background Paper of the conference *Restoring Trust in Government: Addressing Money and Influence in Public Decision Making*, Paris 14-15 November 2013, cit., 18.

<sup>14</sup>Y. LENGWILER - E. WOLFSTETTER, *Corruption in procurement auctions*, in N. Dmitri – G. Piga – G. Spagnolo (ed. by) *Handbook of Procurement*, Cambridge, 2006, 412 et seq. See also: OECD policy roundtables, *Collusion and Corruption in Public Procurement*, 2010, available at <http://www.oecd.org/competition/cartels/46235884.pdf>.

<sup>15</sup> O. BANDIERA - A. PRAT - T. VALLETTI *Active and passive waste in government spending: Evidence from a policy experiment*, *American Economic Review*, 2009, 1278-1308.

<sup>16</sup> P. TREPTE, *Regulating Procurement. Understanding the Ends and Means of Public Procurement Regulation*, Oxford, Oxford University Press; ID., *Transparency and Accountability as Tools for Promoting Integrity and Preventing Corruption in Procurement: Possibilities and Limitations*, in OECD Expert Group Meeting on Integrity in Public Procurement, Château de la Muette, Paris, 20 and 21 June 2005, in [https://bvc.cgu.gov.br/bitstream/123456789/3500/1/transparency\\_and\\_accountability\\_tools.pdf](https://bvc.cgu.gov.br/bitstream/123456789/3500/1/transparency_and_accountability_tools.pdf); OECD, Recommendation on Enhancing Integrity in Public Procurement, 2008, in <http://www.oecd.org/corruption/keyoecdanti-corruptiondocuments.htm>, 38. See also: Transparency International, *Corruption and Human Rights: Making the Connection*, 2009, in [http://www.ichrp.org/files/reports/40/131\\_web.pdf](http://www.ichrp.org/files/reports/40/131_web.pdf); C. R. YUKINS, *A Versatile Prism: Assessing Procurement Law*

public interest through public contracts and procurement functions provides a large number of opportunities for corruption.<sup>17</sup> The waste of public funds is mainly related to cost overruns, delays of implementation and the loss of effectiveness (including inferior quality and questionable usefulness).<sup>18</sup>

All procurement systems include resources to be allocated by public authorities, and thus hold an evident political function. The ‘desiderata’<sup>19</sup> of a procurement system are well-known: competition; integrity; transparency; efficiency; customer satisfaction; best value; wealth distribution; risk avoidance; and uniformity. Public resources should be allocated by public authorities in the best possible way, by proactive and ethical procurement officials aiming at the highest satisfaction of citizens’ needs, and through private organizations that consider it an honor to serve public bodies and to provide the best performance in a transparent, efficient and competitive procurement system. However, as is known, each facet of such relationships between the stakeholders in a procurement system can be

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*Through the Principal-Agent Model*, in *PCLJ*, Vol. 40, No. 1, 2010, 63, the article is available also at [www.ssrn.com](http://www.ssrn.com).

<sup>17</sup> For an analysis of the different form of corruption see: United Nations Office on Drug and Crime (UNODC), *Good practices in ensuring compliance with article 9 of the United Nations Convention against Corruption*, 2013, available at [https://www.unodc.org/documents/corruption/Publications/2013/Guidebook\\_on\\_anti-corruption\\_in\\_public\\_procurement\\_and\\_the\\_management\\_of\\_public\\_finances.pdf](https://www.unodc.org/documents/corruption/Publications/2013/Guidebook_on_anti-corruption_in_public_procurement_and_the_management_of_public_finances.pdf), 4 et seq.

<sup>18</sup> Moreover the highest direct public losses concerns corrupt training projects (44% of budget volume lost in projects affected, 29% in urban/utility construction, 20% in road & rail, 16% in water & waste and 5% in Research & Development), PricewaterhouseCoopers study prepared for the European Anti-Fraud office (OLAF), *Identifying and Reducing Corruption in Public Procurement in the EU*, 2013, available at [http://ec.europa.eu/anti\\_fraud/](http://ec.europa.eu/anti_fraud/), 174 et seq.

<sup>19</sup> S. L. SCHOONER, *Desiderata: Objectives for a System of Government Contract Law*, in *PPLR*, 2002, 103 et seq., where the author introduces nine goals frequently identified for government procurement systems: (1) competition; (2) integrity; (3) transparency; (4) efficiency; (5) customer satisfaction; (6) best value; (7) wealth distribution; (8) risk avoidance; and (9) uniformity.

distorted towards different goals. The fundamental rights of citizens fall behind all other interests, and are betrayed.<sup>20</sup>

Stakeholders may be kept unaware of such distortions due to a lack of transparency, information asymmetries, or undeveloped competence.<sup>21</sup> A number of factors that encourage corruption in the public procurement sector have been pointed out: political rent-seeking, commercial usage, culture, state of market development, low pay of procurement officials and low capacity.<sup>22</sup>

A cumbersome set of procurement rules approved by citizens' representatives may restrict competitions among economic operators or prevent others from participating in the award procedures. Inadequate internal and external audits may favor certain special

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<sup>20</sup> T. SØREIDE, *Democracy's shortcomings in anti-corruption*, in [www.u4.no](http://www.u4.no), 2012.

<sup>21</sup> EU Parliament - Directorate General for Internal Policies, *Political and other forms of corruption in the attribution of public procurement contracts and allocation of EU funds: Extent of the phenomenon and overview of practices*, 2013, in <http://bookshop.europa.eu/>, on the problem of political and other forms of corruption in public procurement in the European Union. It identifies weaknesses in all the stages of the public procurement cycle, allowing corruption to undermine the objectives of integrity and value for money and eventually jeopardise the whole EU internal market policy. The document recommends to strengthen national public administration arrangements and implement effective anti-corruption tools covering transparency, accountability and professionalism in public procurement.

<sup>22</sup> International Council on Human Rights Policy - Transparency International, *Integrating Human Rights in the Anti-corruption Agenda. Challenges, Possibilities and Opportunities*, 2010, available at [http://www.ichrp.org/files/reports/58/131b\\_report.pdf](http://www.ichrp.org/files/reports/58/131b_report.pdf), 43; J. G. LAMBSDORFF, *Causes and consequences of corruption: What do we know from a cross-section of countries?*, in S. Rose-Ackerman (ed. By) *International Handbook of the economics of Corruption*, Cheltenham, 2006, 4 et seq., where are identified nine possible causes of corruption in public sector: the size of the public sector, the quality of regulation, the degree of economic competition, the structure of Government, the amount of decentralization, the impact of culture, values And gender, and the role of invariant features such as geography and history. A. MILLS, *Causes of corruption in public sector institutions and its impact on development*, 2012, available at <http://unpan1.un.org/intradoc/groups/public/documents/un-dpadm/unpan049589.pdf>, 7 et seq.



interests. A lack of accountability in procurement officials permits the waste of public funds, in either the selection or the execution of a public contract.<sup>23</sup>

### ***2.1 Social, political, economic solidarity***

A pillar of anticorruption should be the value that holds citizens together in any legal system, from the national to the European<sup>24</sup> level and, from a different perspective, also in international relationships. The value of solidarity should exclude any tolerance for corruption, as corruption undermines the common recognition of fundamental rights.<sup>25</sup>

Indeed, as has already been established, a community of values should grow in the wider context of transnational and international bodies such as the UN, the Council of Europe and EU Member States, all for buttress in a joint system of fundamental rights protection.<sup>26</sup>

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<sup>23</sup> Transparency International, *The Anti-Corruption Plan Language Guide*, 2009, 44 et seq.; International Council on Human Rights Policy - Transparency International, *Integrating Human Rights in the Anti-corruption Agenda. Challenges, Possibilities and Opportunities*, cit., 14 and 26.

<sup>24</sup> E.g. Council Decision 2007/252/EC of 19 April 2007, establishing for the period 2007-2013 the specific programme “Fundamental rights and citizenship” as part of the general programme “Fundamental Rights and Justice”.

<sup>25</sup> R. HODESS, *Civil Society and Nongovernmental Organisations as International Actors in Anti-Corruption Advocacy*, in S. Rose-Ackerman - P. Carrington (eds.) *Anti-Corruption Policy. Can International Actors Play a Constructive Role?*, Carolina Academic Press, 2013, 75 et seq. Where is considered that to build a “virtuous circle” three elements: accountability, trust and coalitions.

<sup>26</sup> As was presented in detail in the Focus of EU Agency for Fundamental Rights (FRA)’s 2011 Annual report available at: [http://fra.europa.eu/sites/default/files/fra\\_uploads/2211-FRA-2012\\_Annual-Report-2011\\_EN.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/2211-FRA-2012_Annual-Report-2011_EN.pdf); see: UN, *Guidebook on anti-corruption in public procurement and the management of public finances*, 2013, available at [www.unodc.org](http://www.unodc.org). See also: T. SØREIDE - R. TRUEX, *Collaboration against corruption?*:

Unfortunately, at the EU level, corruption remains one of the biggest challenges for all societies, harming the EU as a whole by lowering investment levels, hampering the fair operation of the Internal Market and wasting public resources. It is estimated that the economic costs incurred as a result of corruption in the EU amount to around EUR 120 billion per year. The economic costs incurred by corruption in the EU possibly amount to EUR 120 billion per year.<sup>27</sup> This constitutes one percent of the EU GDP, representing only a little less than the EU's annual budget.<sup>28</sup> Four out of five EU citizens regard corruption as a major problem in their State.<sup>29</sup> Transparency International estimates that "systematic corruption can add at least 20-25% to the cost of government procurement."<sup>30</sup>

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*Multistakeholder groups in natural resource management*, in [www.u4.no](http://www.u4.no), 2011; C. MCCRUDDEN, *Buying Social Justice. Equality, government Procurement, & Legal Change*, Oxford, 2007, 90 et seq. S. R. ACKERMAN, *Introduction: The Role of International Actors in Fighting Corruption*, in R. S. Ackerman - P. Carrington (ed. by) *Anti-Corruption Policy. Can International Actors Play a Constructive Role?*, cit., 3.

<sup>27</sup> OECD, *Implementing the OECD Principles for Integrity in Public Procurement*, cit., 2013, 78. OECD, *CleanGovBiz, Integrity in Practice*, 2013 available at <http://www.oecd.org/cleangovbiz/49693613.pdf>, according to the World Bank, the document reported that corruption represents 5 % of global GDP (USD 2.6 trillion), with over USD 1 trillion paid in bribes each year; and whereas corruption adds up to 10 % of the total cost of doing business on a global basis and 25 % of the cost of procurement contracts in developing countries The economic costs incurred by corruption in the EU possibly amount to EUR 120 billion per year.

<sup>28</sup> EU Home Affairs Department, data available at the home page of DG Home affairs: [http://ec.europa.eu/dgs/home-affairs/what-we-do/agencies/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/agencies/index_en.htm).

<sup>29</sup> EU Commission, *Fighting corruption in the EU*, 6 June 2011, COM (2011) 308 final, in <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52011DC0308:EN:NOT>, 3.

<sup>30</sup> International Council on Human Rights Policy - Transparency International, *Integrating Human Rights in the Anti-corruption Agenda. Challenges, Possibilities and Opportunities*, cit., 43.

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A firm political commitment is required to restore trust in the effectiveness of anti-corruption policies.<sup>31</sup> The European Union (EU) has a general right to act in the field of anti-corruption policies,<sup>32</sup> within the limits established by the Treaty on the Functioning of the European Union.<sup>33</sup> In particular, the EU should ensure a high level of security, including through the prevention and combating of crime.<sup>34</sup> Indeed, corruption is one of the

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<sup>31</sup> S. ROSE-ACKERMAN, *Corruption and government. causes, consequences and reform*, Cambridge, 1999, 143 et seq., concerning the form of control of the political power. EU Parliament - Directorate General for Internal Policies, *Political and other forms of corruption in the attribution of public procurement contracts and allocation of EU funds: Extent of the phenomenon and overview of practices*, cit., 40.

<sup>32</sup> EU Commission, Consultation on a future reporting and monitoring mechanism on EU Member states progress on fighting corruption, in [http://ec.europa.eu/home-affairs/news/consulting\\_public/consulting\\_0007\\_en.htm](http://ec.europa.eu/home-affairs/news/consulting_public/consulting_0007_en.htm). In the EU, corruption has been on the agenda since the mid-1990s. Although the focus on it has been sharpened by the two latest waves of enlargement, its effects have been identified across the Union to the extent that the European Commission concludes that “within the EU there is no corruption free-zone.”

<sup>33</sup> Treaty on the Functioning of the European Union, Art. 83, § 1. “The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime”. Council of the EU - General Secretariat, *The Lisbon Treaty's impact on the Justice and Home Affairs (JHA) Council: More co-decision and new working structures*, December 2009, available at [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/111615.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/111615.pdf); C. Di Damian - D. Gareth - G. Monti, *European Union Law: Cases and Materials*, Cambridge, 2010, 581 et seq.

<sup>34</sup> The EU established its own instruments to tackle corruption as the two conventions on the protection of the European Communities' financial interests and the fight against corruption involving officials of the European Communities or officials of the EU Member States and the European Anti-Fraud Office (OLAF), set up in 1999, which has interinstitutional investigative powers. The first call for action was in 1997 (see: EU Commission, *Action programme on organised crime calls for a comprehensive anti-corruption policy based on preventive measures*, 1997, see: [http://europa.eu/legislation\\_summaries/fight\\_against\\_fraud/fight\\_against\\_corruption/l33301\\_en.htm](http://europa.eu/legislation_summaries/fight_against_fraud/fight_against_corruption/l33301_en.htm)) followed

most serious crimes with a cross-border dimension. Moreover, it is often linked to other forms of serious crime, such as the trafficking of drugs and human beings, and cannot be adequately addressed by EU Member States alone.<sup>35</sup> The recent EU Anti-Corruption Report<sup>36</sup> confirms that this objective “cannot be sufficiently achieved by the Member States”<sup>37</sup> and will require an intervention at the Union level.<sup>38</sup>

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by a 2003 Commission Communication on “a comprehensive anti-corruption policy” (see: EU Commission, *Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on a Comprehensive EU Policy Against Corruption*, COM(2003) 317 final, May 28, 2003) and by the 2003 Framework Decision on combating corruption in the private sector since it introduced criminal liabilities for legal persons (EU Council, *Council Framework Decision on combating corruption in the private sector*, 2003/568/JHA, 22 July 2003).

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<sup>35</sup> EU Commission, *Fighting corruption in the EU*, cit. See also EU Parliament - Directorate General for Internal Policies, *Political and other forms of corruption in the attribution of public procurement contracts and allocation of EU funds: Extent of the phenomenon and overview of practices*, cit., 36-38. See also: J. DUGARD, *Corruption: Is there a Need for a New Convention?*, in S. Rose-Ackerman - P. Carrington (ed. by) *Anti-Corruption Policy. Can International Actors Play a Constructive Role?*, cit., 159 et seq. In the same book see also: K. E. DAVIS, *Does the Globalization of Anti-Corruption Law Help Developing countries?*, 169 et seq.

<sup>36</sup> EU Commission, *Report from the Commission to the Council and the European Parliament, EU Anti-Corruption Report*, cit., 3 February 2014, 24, where is reported that “the proposal also included the setting up of oversight monitoring of the implementation of public procurement rules, red flagging and alert systems to detect fraud and corruption. However, Member States raised fundamental objections to such measures which were considered too cumbersome for their administrations”.

<sup>37</sup> Treaty of the European Union, Art. 5, § 3: “Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.”

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A lack of integrity, either in public institutions or in private markets, undermines fundamental rights. First, it causes a waste of scarce resources and undermines the trust and effectiveness of public powers.<sup>39</sup> Moreover, tolerance of corruption distorts all the rules of civil society and the quality of services provided to citizens.<sup>40</sup>

The current widespread socio-economic crisis requires us to identify shared values in order to cope with the new challenges.<sup>41</sup> The urgent need for resources provides an extraordinary incentive to ensure accountability in public authorities, and to improve social controls over the quality of public spending.

As a result of citizens' growing consciousness of their social rights, there is a greater demand for inclusiveness and opportunities for social mobility. Such citizens may mobilize pressures to establish more open and transparent governments, or for an increase in service provision standards.<sup>42</sup> The urge to gain clear data on the quality of public

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<sup>38</sup> EU Commission, *Report from the Commission to the Council and the European Parliament, EU Anti-Corruption Report*, cit., 2. Concerning the relationship between the corruption prevention and public procurement infringements see 23 et seq.

<sup>39</sup> Concerning social sectors see: S. GUPTA - H. DAVOODI - E. TIONGSON, *Corruption and the provision of health care and education services*, in A. K. Jain (ed. by) *The Political Economy of Corruption*, London, 2001, 111 et seq. See also: International Council on Human Rights Policy - Transparency International, *Integrating Human Rights in the Anti-corruption Agenda. Challenges, Possibilities and Opportunities*, cit., 43-45.

<sup>40</sup> Concerning the policy for "zero tolerance" on corruption see: PricewaterhouseCoopers study prepared for the European Anti-Fraud office (OLAF), *Identifying and Reducing Corruption in Public Procurement in the EU*, 2013, available at [cit.](#), 318.

<sup>41</sup> EU Agency for Fundamental Rights (FRA), *Fundamental rights: challenges and achievements in 2012*, 2013, available at <http://fra.europa.eu/en/press-release/2013/eu-agency-fundamental-rights-fra-presents-its-annual-report>, 12 et seq.

<sup>42</sup> OECD, *Perspectives on Global Development 2012 Social Cohesion in a Shifting World*, 14 December 2011, in <http://www.oecd.org/site/devpgd2012/>.

spending, for better assessments and consequently better policies, is evident. Demands for quality services can be expected to grow faster and faster, and to require improvements despite the economic crisis.

Public spending in procurement could significantly improve citizens' quality of life, affecting all the sectors of services.<sup>43</sup> In the procurement sector, information tools make it possible to gather data on prices, and disparate higher prices covering bribes should not be tolerated.<sup>44</sup> Two factors converge: the need for quality in spending; and the potential of information technologies to overcome the obscurity of paper documents in historically impenetrable archives.

Civil society has a key role to play in fighting corruption, from monitoring public procurement and services to denouncing bribery and raising awareness of the risks of wasting public money. As representatives of the general public, civil society organizations should investigate and bring to light cases of corruption. In this context, new technologies and social media can be used to gather information and publicly hold governments and public entities to account.<sup>45</sup>

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<sup>43</sup> OECD, *Implementing the OECD Principles for Integrity in Public Procurement*, cit., 53 et seq. and 101 et seq.

<sup>44</sup> G. M. RACCA, *The Electronic Award and Execution of Public Procurement*, in *Ius Publicum Network Review*, 2012, available at <http://www.ius-publicum.com/pagina.php?lang=it&pag=articoli>, 6. See also: ID., *The role of IT solutions in the award and execution of public procurement below threshold and list B services: overcoming e-barriers*, in D. Dragos - R. Caranta (Eds.) *Outside the EU Procurement Directives - Inside the Treaty?*, Djøf, Copenhagen, 2012, 373-395.

<sup>45</sup> Clean gov biz, *Boosting Integrity fighting corruption*, 2013, available at: <http://www.oecd.org/daf/anti-bribery/50350066.pdf>.

## ***2.2 Securing Fundamental Rights in the EU***

According to the Preamble of the EU Charter of Fundamental Rights, “the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice”.

Within the EU, it is possible to make a distinction between a wider set of values that address areas falling outside the EU scope,<sup>46</sup> an inner set of fundamental rights obligations imposed on and by the EU,<sup>47</sup> and socio-economic rights (especially Title IV ‘Solidarity’ of the Charter of Fundamental Rights of the European Union). These values all

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<sup>46</sup> Treaty on European Union (TEU), Art. 2. The ECJ has interpreted this more widely as referring to situations that are “covered by European Union law”. See: European Court of Justice, 15 November 2011, *Murat Dereci and Others v. Bundesministerium für Inneres*, in C-256/11, par. 72 and European Court of Justice, 26 February 2013, *Åklagaren v. Hans Åkerberg Fransson*, in C-617/10, par. 18. EU Commission, 2012 Report on the application of the EU Charter of Fundamental Rights, C OM(2013) 271 final, 8 May 2013, available at: [http://ec.europa.eu/justice/fundamental-rights/files/charter\\_report\\_2012\\_en.pdf](http://ec.europa.eu/justice/fundamental-rights/files/charter_report_2012_en.pdf).

<sup>47</sup> Treaty on European Union (TEU), Art. 6, where it is stated that “the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions. 2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties. 3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law”. See: European Union Agency For Fundamental Rights, *The European Union as a Community of values: safeguarding fundamental rights in times of crisis*, 2012, available at [http://fra.europa.eu/sites/default/files/fra-2013-safeguarding-fundamental-rights-in-crisis\\_en.pdf](http://fra.europa.eu/sites/default/files/fra-2013-safeguarding-fundamental-rights-in-crisis_en.pdf), 8.

overlap with national social rights, and fundamental rights form part of the founding values in Article 2 TEU. However, the level of compliance with these rights appears to differ.

Amsterdam Treaty and Lisbon Treaty primary law explicitly provides for an EU “founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.”<sup>48</sup> These foundational values have normative implications for both candidate countries and EU Member States. Nonetheless the sanctioning procedure against a Member State has never been used and might only have a deterrent effect.<sup>49</sup>

The obligation to comply with fundamental rights also arises “from the constitutional traditions common to the Member States” which constitute the general principles of EU law. The recalled multi-level governance of the community of values provides for the sharing, in a coordinated system, of the protection of fundamental rights.<sup>50</sup>

Regrettably, the actions of the Member States must comply with the requirements deriving from the fundamental rights guaranteed in the legal order of the EU “only when they are implementing Union law”, according to European Court of Justice case-law.<sup>51</sup> The exact scope of application of fundamental rights obligations under EU law remains open to

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<sup>48</sup> Treaty on European Union (TEU), Art. 2 “*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail*”.

<sup>49</sup> Treaty on the Functioning of the European Union (TFEU), artt. 258 - 259.

<sup>50</sup> Presented in detail in the Focus of EU Agency for Fundamental Rights (FRA)’s 2011 Annual report, cit. See: R. CAVALLO PERIN, *Crisis del Estado de Bienestar. El papel del Derecho Administrativo*, in J. L. Piñar Mañas (ed. by) *Crisis económica y crisis del Estado de Bienestar El papel del derecho administrative*, Madrid, 2014.

<sup>51</sup> ECJ, 26 February 2013, *Åklagaren v. Hans Åkerberg Fransson*, in C-617/10, par. 18.



interpretation and discussion. It is up to the Court, also in part to guarantee legal clarity, to fine-tune the limits of the fundamental rights review offered by EU law.<sup>52</sup>

This situation seems to be the consequence of a limited awareness of EU law obligations and limited access to the CJEU for individuals. Moreover, it has been reported that “even where cases reach the CJEU, there remain differences with the ECHR, with the latter hearing a large number of third-party interventions providing on-the-ground information and evidence”.<sup>53</sup>

It is important to remember that the “principles” are “judicially recognizable” only in the interpretation of implementing acts. Half of the rights listed in the Charter’s title on solidarity refer back to “national laws and practices”.<sup>54</sup> This implies that the European Community of values requires that the EU and its Member States respond by working

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<sup>52</sup> EU Agency for Fundamental Rights (FRA), *Fundamental rights: challenges and achievements in 2012, 2013*, cit.

<sup>53</sup> EU Agency for Fundamental Rights (FRA), *Fundamental rights: challenges and achievements in 2012, 2013*, cit. To gain political consensus on the inclusion of all these rights in the Charter, the drafters included a cross-cutting provision in paragraph 4 of Article 52.

<sup>54</sup> Charter of Fundamental Rights of The European Union, Art. 52, differentiates between rights and “principles”. The article “Scope and interpretation of rights and principles” state that “Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. 2. Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties. 3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.. In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions”.

“closely together to support growth and employment, ensure financial stability, and put in place a better governance system for the future”.

EU Member States should not be seen as decoupled from their neighboring states and the EU as a whole. Member States and the EU are increasingly linked by an interdependent, but in some ways “semi-constitutional”, construction.<sup>55</sup>

The EU principle of solidarity,<sup>56</sup> together with the corresponding national principles, stipulates that the citizens, as members of a Community of values, should assure loyalty to the deeper meaning of solidarity implied by social cohesion.

It has always been considered that Government representatives and administrators should not only conform to Constitutions and laws, but also adhere to the scope and spirit of such rules (principles).

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<sup>55</sup> EU Agency for Fundamental Rights (FRA), *Fundamental rights: challenges and achievements in 2012*, 2013, cit.. S. GRILLER - J. ZILLER (eds. by), *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?*, Springer, Wien, 2008, 235-256; J. ZILLER, *Il nuovo Trattato europeo*, Il Mulino, Bologna, 2007, 27 et seq. J.-B. AUBY - J. DUTHEIL DE LA ROCHERE *Introduction*, in J.-B. Auby - J. Dutheil de la Rochère (eds. by) *Traité de droit administratif européen*, Bruxelles, 2014, 30-32. In the same book see: S. DE LA SIERRA, *Les sources constitutionnelles du droit administratif européen*, 487-489.

<sup>56</sup> The principle of solidarity is applied in the context of social protection. Cfr. ECJ, *Poucet v. Assurances générales de France* in cases C-159/91 and C-160/91, [1993] ECR 637. The French government cited Article L 111-1 of the Social Security Code, which defines the principles of social protection in France: solidarity and compulsory affiliation. See also: Charter of Fundamental Rights of the European Union, artt. 27-38. The Chapter IV is entitled ‘Solidarity.’ Artt. 27-34 bear directly on employment and industrial relations: Workers’ right to information and consultation, right to collective bargaining and action, right of access to placement services, protection in the event of unjustified dismissal, fair and just working conditions, prohibition of child labour and protection of young people at work, family and professional life, and social security and social assistance. The other articles in the Solidarity Chapter concern: health care, access to services of general economic interest, environmental protection and consumer protection.

By way of example, the Italian Constitution provides for any citizen to be loyal to the Constitution and laws, and elected politicians and public officials have a specific duty of “discipline and honor” in their functions (art. 54 Italian Constitution).<sup>57</sup> The further obligation of civil servants (including elected politicians) implies that their work must aim at reaching the final goal of public interest (“the spirit of the law”) with a commitment that in fact goes beyond the legal *minima*.

A lack of loyalty to these aims risks undermining the credibility and effectiveness of public institutions, and may warrant sanctions that should differ from criminal or civil sanctions, but should be either disciplinary or reputational for public servants and undertakings, in the sense of a lack of respect for the community of the citizens. Violation of the integrity principle undermines the link of solidarity typical of citizenship.

Such a commitment might be considered as soft law, and sanctions for its violation might be issued to unfair citizens.

### **3. THE PROBLEM OF LEGAL RULES, EFFECTIVENESS AND RAPID OBSOLESCENCE. THE INSTRUMENTS OF TRANSPARENCY AND ACCOUNTABILITY. THE NEED FOR FINE-TUNED STRATEGIES FOR FIGHTING COLLUSION AND CORRUPTION.**

The two pillars of transparency and accountability should be correctly addressed to encourage correct incentives toward integrity and avoid establishing a further cumbersome

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<sup>57</sup> Italian Constitution, Art. 54, “All citizens have the duty to be loyal to the Republic and to uphold its Constitution and laws. Those citizens to whom public functions are entrusted have the duty to fulfil such functions with discipline and honor, taking an oath in those cases established by law”.

procedure either for public authorities or economic operators in the market.<sup>58</sup> Recording and reporting mechanisms together with benchmarking might become useful tools for integrity.<sup>59</sup>

The right incentives and disincentives at the right time for public and private part compliance,<sup>60</sup> as well as the correct quantity/quality of transparency and accountability, should be provided.

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<sup>58</sup> OECD, *Recommendation of the Council on Enhancing Integrity in Public Procurement*, C(2008)105, 2008, cit. The principles set out in the Recommendation are anchored in four pillars: transparency, good management, prevention of misconduct, accountability and control. See also: United Nations Office on Drug and Crime (UNODC) and the World Bank, *Stolen asset Recovery (StAR), Initiative: Challenges, Opportunities, and Action Plan*, June 2007 and Interaction, *Anti-corruption and Transparency*, 2013, available at <http://www.interaction.org/document/2013-g20-anti-corruption-and-transparency-background-policy-brief>, 3. “anonymous companies are increasingly being misused by criminals and kleptocrats to conceal their identities while they benefit from the assets derived from their illegal activities. Once these anonymous companies are formed they easily enter the global financial system to begin the process of laundering the criminal proceeds. The lack of transparency of beneficial ownership of these companies makes it too easy to hide the proceeds of corrupt acts. It is estimated that \$20 billion to \$40 billion are illegally removed from developing countries annually - roughly equivalent to the combined annual GDP of the world’s 12 poorest countries, where more than 240 million people live. Furthermore, these stolen assets are often hidden in the financial centres of developed countries. The true cost of corruption far exceeds the value of these stolen assets - siphoning away funds that could have been used to further critical development goals”.

<sup>59</sup> G. M. RACCA, *The Electronic Award and Execution of Public Procurement*, in *Ius Publicum Network Review*, 2012, available at <http://www.ius-publicum.com/pagina.php?lang=it&pag=articoli&n=2>, 17 et seq.; OECD, *Checklist for record keeping*, 2013, available at <http://www.oecd.org/>; World Bank, *Country Procurement Assessment Report*, 2013, available at <http://web.worldbank.org/>. Concerning the tools to be implemented see also: EU Parliament - Directorate General for Internal Policies, *Political and other forms of corruption in the attribution of public procurement contracts and allocation of EU funds: Extent of the phenomenon and overview of practices*, cit., 57 et seq.

<sup>60</sup> P. TREPTE, *Transparency and Accountability as Tools for Promoting Integrity and Preventing Corruption in Public Procurement*, paper to OECD Expert Group meeting on Integrity in Public Procurement, 2005, 3.

It seems important to distinguish between different kinds, forms and means of transparency and accountability in order to assure the right incentives for compliance.

At the international level, for example, the United Nations Convention against Corruption (UNCAC) requires the disclosure and declaration of any existing interest, in particular public procurement.<sup>61</sup> It recommends that each party make all information relating to procurement public and that all the requirements for awarding a contract be clearly established in advance and published. The selection criteria must be objective and predetermined, and a system of domestic review and appeal must be available in the event that a conflict arises. Other principles to promote transparency and accountability include a system of accounting and auditing standards and related oversight, as well as effective and efficient systems of risk management and internal control.<sup>62</sup>

A set of instruments has already been foreseen for public officials, at various levels. However, they are often not effective and merely constitute redundant bureaucracy and red tape for economic operators.<sup>63</sup>

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<sup>61</sup> United Nations Convention Against Corruption, Art. 9.

<sup>62</sup> United Nations Office on Drug and Crime (UNODC), *Good practices in ensuring compliance with article 9 of the United Nations Convention against Corruption*, cit., 8-9.

<sup>63</sup> Transparency generally involves: (a) publicity of procurement opportunities and the disclosure of the rules to be followed; (b) undertaking procurement processes publicly and visibly, according to prescribed rules and procedures that limit the discretion of officials; and (c) the provision of a system for monitoring and enforcing applicable rules. Given that procuring entities frequently have a high degree of discretion in the procurement process, it is also transparency which allows this exercise of discretion to be monitored. Concerning the principle of transparency in EU in public contracts see also: M. TRYBUS, *Public Contracts in European Union Internal Market Law*, in (R. Nogueu - U. Stelkens) *Comparative Law on Public Contracts*, Bruxelles, 2010, 103 et seq. and in the same book R. CARANTA, *Transparence et concurrence*, 145 et seq.; J. GONZÁLEZ GARCÍA, *Classic Procurement Procedures*, in M. Trybus - R. Caranta - G. Edelstam (eds. by), *EU Public contract Law. Public Procurement and Beyond*, Bruxelles, 2014, 61-64.

Incentives and sanctions on compliance by politicians could be made to turn on the values that they should pursue in the public interest.

Especially with regard to procurement, strategies could be designed by skilled teams of procurement officials to mitigate corruption, for example by tampering with the size of lots to be purchased, or with the kind of products, work or services required on a case by case basis.<sup>64</sup>

These types of strategies could efficiently prevent collusion and nurture competition in the relevant markets; moreover, discouraging repetitive procedures may improve the quality of public spending.<sup>65</sup> The procurement strategies are characterized by rapid obsolescence, due to their need to be frequently changed in order to get the most favorable tenders from the market, improving participation and fostering competition. Working in skilled teams could also prevent the loneliness of the procurement officials, who might otherwise find it difficult to resist the pressure applied by unfair participants. Networking between procuring entities and Central Purchasing Bodies also might strengthen these positive effects.<sup>66</sup>

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<sup>64</sup> United Nations Office on Drug and Crime (UNODC), *Good practices in ensuring compliance with article 9 of the United Nations Convention against Corruption*, cit., 14; concerning the Problem of a qualified workforce in the field of the US Public Contracts see: S. L. SCHOONER, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government*, in *Stanford Law & Policy Review*, 2005, 10-11.

<sup>65</sup> OECD, *Implementing the OECD Principles for Integrity in Public Procurement*, cit., 2013, 32, between the 2008 and the 2013 “the majority of countries reformed their procurement legislation while only 7% reported investing in human, financial and technological resources” to ensure an adequate degree of transparency. See also: OECD, *Survey on Reporting Back on Procurement Recommendation*, 2011.

<sup>66</sup> G. M. RACCA - G. L. ALBANO, *Collaborative Public Procurement and Supply Chain: The European Union Experience*, in C. Harland - G. Nassimbeni - E. Schneller (eds. by) *The SAGE Handbook of Strategic Supply Management*, London, 2013, 185-188 and G. M. RACCA, *Collaborative procurement and contract performance in the Italian healthcare sector: illustration of a common problem in European procurement*, in *PPLR*, 2010, 1130-132. Collaborative procurement in the EU through a network of CPBs is the object of the *Healthy Ageing and*

### ***3.1 The incentives for compliance in the public sector***

Preventing and combating favoritism, conflicts of interest, corruption and collusion cannot be left to the mechanical application of legal rules and procedures.<sup>67</sup>

The legal rules ought to be designed in such a way as to provide “correct” incentives towards integrity. A joint approach and multidisciplinary strategy for effective enforcement is required. Public resources are too scarce (and precious) for any waste to be tolerated, be it for incompetence or corruption.<sup>68</sup> Monitoring the performance of any procurement system requires peer reviews, benchmarks and indicators.<sup>69</sup>

A new emphasis on individual responsibility, organizational design and economic incentives is needed. In addressing these issues, it is necessary to investigate civil servants’ ethical obligations as a set of norms which guide public administration towards the public

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*Public Procurement of Innovation* (HAPPI) project funded by the EU Commission (DG Enterprises) - rif. call ENT/CIP/11/C/N02C011 - within the framework of the *Competitiveness and Innovation Programme (CIP)*. The project concerns the EU joint procurement system in Healthcare. see: <http://www.happi-project.eu/>.

<sup>67</sup> S. ROSE-ACKERMAN, *Corruption and conflicts of interest*, in J.-B. Auby - E. Breen - T. Perroud (eds. by), *Corruption And Conflicts Of Interest. A Comparative Law Approach*, cit., 5-10

<sup>68</sup> OECD, *Bribery in Public Procurement. Methods, Actors and Counter-Measures*, 2007, available at <http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/44956834.pdf>, 64.

<sup>69</sup> OECD, *Implementing the OECD Principles for Integrity in Public Procurement*, cit., 2013, 97. G. L. ALBANO, *Discussion Paper on Public Procurement Performance Measures. OECD Meeting of Leading Practitioners on Public Procurement*, 11-12 February 2012, available at <http://search.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=GOV/PGC/ETH%282013%291&docLanguage=En>, 7-8.

interest,<sup>70</sup> taking into account that “procurement officials are not recognised as a specific profession in more than a third of OECD countries” and the procurement function is not yet considered to be strategic.<sup>71</sup> In assessing “ethics requirement for public officials, including procurement officials, policymakers may wish to consider that ethics rules and screening procedures are almost always part of a broader fabric of social norms, laws and mechanisms for ensuring social harmony”.<sup>72</sup> In that light, the ethics rules designed to protect the procurement system “should complement the broader set of norms and rules, and may well draw upon other formal and informal mechanisms for maintaining social order”.<sup>73</sup> Preventive policies cover a wide variety of aspects including clear-cut ethical rules, awareness-raising measures, building a culture of integrity within various organizations, setting a firm tone from the top in relation to integrity issues, to effective internal control mechanisms, transparency, easy access to public interest information, effective systems for evaluating the performance of public institutions.<sup>74</sup> Forms of effective external and internal audits and asset disclosure might make it possible to consolidate the

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<sup>70</sup> G. M. RACCA, *Disciplina e onore nell’attuazione costituzionale dei codici di comportamento*, in F. Merloni - R. Cavallo Perin, *Al servizio della Nazione. Etica e statuto dei funzionari pubblici*, FrancoAngeli Editore, Milano, 2009, 254 et seq.

<sup>71</sup> OECD, *Implementing the OECD Principles for Integrity in Public Procurement*, cit., 2013, 78. The report identifies: Austria, Belgium, Czech Republic, Finland, France, Germany, Italy, Japan, Luxemburg, Norway, Turkey.

<sup>72</sup> United Nations Office on Drug and Crime (UNODC), *Good practices in ensuring compliance with article 9 of the United Nations Convention against Corruption*, cit., 11-12. See: OECD, *CleanGovBiz Integrity in practice. Toolkit for Integrity*, available at <http://www.oecd.org/cleangovbiz/49891354.pdf>, 2012, 96.

<sup>73</sup> United Nations Office on Drug and Crime (UNODC), *Good practices in ensuring compliance with article 9 of the United Nations Convention against Corruption*, cit., 11-12.

<sup>74</sup> EU Commission, *Report from the Commission to the Council and the European Parliament, EU Anti-Corruption Report*, cit., 10.



accountability of public officials.<sup>75</sup> A clear code of conduct may provide concrete examples of situations officials could face in the course of their work. It should also give the contact details of persons that can provide advice and guidance to procurement practitioners. Many countries have codes of conduct that set general rules by which all public officials are to govern themselves. These general rules are sometimes supplemented by more specific codes related to a high ranking and specific high-risk positions, of which public procurement is one.<sup>76</sup>

Particular difficulties arise from the scarce and weak sanctions applicable to elected officials. Where they cover conflicts of interest, the codes of conduct of various elected assemblies are usually not accompanied by dissuasive sanctions. Party discipline and self-control may not be sufficiently effective in this regard. Cancellation of contracts and procedures concluded or carried out in conflict of interest situations or the recovery of estimated damages are often left to general civil regulations and are not effectively implemented in practice.<sup>77</sup> Integrity in politics is a serious issue in many countries and codes of conduct within political parties or elected assemblies at the central or local level are the exception more than the rule and often lack an effective monitoring mechanism or clear sanctioning regulations, rarely leading to the application of dissuasive penalties. Insufficient accountability has generated a perception of quasi-impunity of political elites.<sup>78</sup>

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<sup>75</sup> EU Commission, *Report from the Commission to the Council and the European Parliament, EU Anti-Corruption Report*, cit., 11 and 13.

<sup>76</sup> OECD, *Code of conduct for procurement practitioners*, in <http://www.oecd.org/>.

<sup>77</sup> EU Commission, *Report from the Commission to the Council and the European Parliament, EU Anti-Corruption Report*, cit., 12.

<sup>78</sup> EU Commission, *Report from the Commission to the Council and the European Parliament, EU Anti-Corruption Report*, COM(2014) 38 final, 8.

At the same time, a corresponding obligation for private operators to act with integrity when dealing with a public administration is also required.

Both sides (public and private) must face sanctions for improper behavior, whether by impaired reputation, or through sanctions on individuals acting on the organizations' behalf (criminal, administrative, or disciplinary sanctions, for example).

It is well-known that legal systems punish corruption as a crime,<sup>79</sup> but it is less known that corrupt behavior can also be sanctioned because it undermines a plurality of further public interests and goods protected by the law.<sup>80</sup>

Social cohesion for the benefit of the protection of fundamental rights requires not only that economic operators abide by the rules, but also that they be sufficiently loyal to them to share the goals and accept the loss of a contract if a better tender is submitted.

Most corrupt behavior involves not only the violation of criminal law but also the citizen's lack of loyalty to the State (Republic). The citizen does not hesitate to undermine the proper functioning of the institutions, such as the course of justice (by buying a judgment), or of the administration (by paying an official to win a tender) for individual interest.<sup>81</sup>

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<sup>79</sup> H. CAROLI CASAVOLA, *Global rules for public procurement*, in (R. Noguellou - U. Stelkens) *Comparative Law on Public Contracts*, Bruxelles, 2010, 48 et seq., deals with the Italian implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Recently, see: Law 6 November 2012, No. 190, and G. M. RACCA, *La prevenzione e il contrasto della corruzione nei contratti pubblici* (Art. 1, commi 14-25, 32 e 52-58), in B. G. Mattarella - M. Pelissero (ed. by) *La legge anticorruzione. Prevenzione e repressione della corruzione*, Torino, 2013, 125-151.

<sup>80</sup> R. CAVALLO PERIN - B. GAGLIARDI, *Status dell'impiegato pubblico, responsabilità disciplinare e interesse degli amministratori*, in *Dir. Amm.*, 2009, 53.

<sup>81</sup> G. M. RACCA, *Disciplina e onore nell'attuazione costituzionale dei codici di comportamento*, cit., 250 et seq.

Non-acceptance of the rules of the game and the will to win unfairly betrays the principle of solidarity between the members of a community, and should trigger exclusion from that community.

Such unfaithfulness does not concern only the corruptor and the person corrupted. Corruptive behavior gives rise to a general distrust of institutions, which weakens other citizens' confidence in the impartiality and effectiveness of public institutions. Similarly, corruption alters the proper functioning of private institutions when these are exposed to corruptive power. Here too, corruption breeds a lack of confidence in the proper functioning of market forces, and undermines public faith in the ability of the market to correct itself.

Loyalty is considered to be a constitutive element of every organization as it represents an element of cohesion.<sup>82</sup> Its deficiency is usually sanctioned by the organization through temporary discontinuation of membership and, in serious cases, through expulsion from the corporate team, i.e., through temporary or permanent deprivation of the benefits enjoyed by belonging to the corporate group.

The relationship between the benefits of citizenship and a violation of the duty of loyalty to the State should be seriously re-assessed. Violation of the latter could lead to the administrative sanction of a temporary suspension of the benefits of citizenship scaled in proportion to the severities of the unloyal behavior.

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<sup>82</sup> R. CAVALLO PERIN, *L'etica pubblica come contenuto di un diritto degli amministratori alla correttezza dei funzionari pubblici*, in F. Merloni - R. Cavallo Perin, *Al servizio della Nazione. Etica e statuto dei funzionari pubblici*, cit., 152-155. See also: OECD, *Bribery in Public Procurement. Methods, Actors and Counter-Measures*, 2007, available at <http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/44956834.pdf>, 57 et seq. The report moves into the detail of how to prevent and punish bribery. It evaluates transparency issues, as well as preventive measures and controls. One challenge pointed out in the report is to train up staff not only to spot the signs, but also to come forward and report them. This raises important issues about teamwork and loyalty of civil servant involved in public procurement.

The sanction would not be a fine, but it could mean being denied the right to receive public services, with any privileges of citizenship, for some time (e.g. one month). The essential element of the sanction is not so much the inconvenience that this might cause; it is the impairment and compromising of the person's reputation within the social group, which presents a very evident deterrent effect.

### ***3.2 The incentives for compliance in the private sector***

Integrity in the business sector is important because clean companies are more efficient and more competitive, which in turn leads to healthier markets and greater investor confidence. Governments can promote greater private sector integrity by encouraging companies to adopt stronger anticorruption practices and robust corporate governance systems (compliance and ethics systems) and to compete fairly and openly.<sup>83</sup> Corporations are called upon to adopt principles related to human rights protection, social and environmental standards, and anti-corruption in the management of their businesses, on a voluntary basis, according to key UN targets".<sup>84</sup>

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<sup>83</sup> Many resources to help keep business clean are available: this includes OECD instruments such as the Anti-Bribery Convention; the Good Practice Guidance on Internal Controls, Ethics and Compliance; the Principles of Corporate Governance; and the Guidelines for Multinational Enterprises. It also includes instruments from other organizations such as the APEC Anti-Corruption Code of Conduct for Business; the Ten Principles of the UN Global Compact; the EITI Principles and Criteria; the World Economic Forum PACI Principles for Countering Bribery. See: <http://www.oecd.org/corruption/ethics/>. United Nations Office on Drug and Crime (UNODC), *Good practices in ensuring compliance with article 9 of the United Nations Convention against Corruption*, cit., 26, "compliance systems include business principles that reject corruption and put standards and procedures in place to ensure that the entity acts according to the legal requirements".

<sup>84</sup> Transparency International, *Handbook for Curbing Corruption in Public Procurement*, available at [http://www.transparency.org/whatwedo/pub/handbook\\_for\\_curbing\\_corruption\\_in\\_public\\_procurement](http://www.transparency.org/whatwedo/pub/handbook_for_curbing_corruption_in_public_procurement), 2006, 70. "They derive from the Universal Declaration of Human Rights, the International Labour Organization's Declaration on Fundamental Principles and Rights at Work, the World Summit for Social Development in

Guidelines,<sup>85</sup> recommendations for responsible corporate behaviour, integrity pacts,<sup>86</sup> and standards of conduct (e.g. codes of ethics in business)<sup>87</sup> may favor the prevention of and fighting against illicit conducts by promoting the best practices and integrating legal provisions. However, these tools require a voluntary commitment on the part of the economic operators.<sup>88</sup>

Compliance systems have proven to be an effective instrument for combating corruption inside private organizations.<sup>89</sup> The more advanced experiences in the United

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Copenhagen 1995, the Rio Declaration on Environment and Development of 1992 and the United Nations Convention Against Corruption. The 10th Principle “Anti-Corruption” was integrated after long debates in 2004”.

<sup>85</sup> See the *OECD guidelines for Multinational enterprises*, available at: <http://mneguidelines.oecd.org/text/>.

<sup>86</sup> Transparency International, *The integrity pact. The Concept, the Model and the Present Applications: a Status Report*, 31 December 2002, 3 e 4; Transparency International, *Handbook for Curbing Corruption in Public Procurement*, 80-81.

<sup>87</sup> See: International Chamber of Commerce, *Combating Extortion and Bribery: ICC Rules of Conduct and Recommendations*, available at <http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2004/ICC-Rules-of-Conduct-and-Recommendations-to-Combat-Extortion-and-Bribery-%282005-Edition%29/>.

Transparency International, in co-operation with Social Accountability International, spearheaded the development of the Business Principles for Countering Bribery (BPCB), introduced in December 2002. The Business Principles as well as the Guidance Document and a document outlining the Six Step Implementation Process can be downloaded for free at: [http://www.transparency.org/global\\_priorities/private\\_sector/business\\_principles](http://www.transparency.org/global_priorities/private_sector/business_principles). OECD, *code of conduct for procurement practitioners*, in <http://www.oecd.org/>.

<sup>88</sup> Transparency International, *Handbook for Curbing Corruption in Public Procurement*, cit, 68 et seq.

<sup>89</sup> The US legal Framework provide a committee for drafting federal guide-lines on how to state on corporate sentences (see: *Sentencing Reform Act*, Pub. L. No. 98-473, 98. Stat. 1873,1987, 18 U.S.C.A. §§ 3351-3742; 28 U.S.C.A. §§ 991-998) and a guidelines system for establishing and maintaining within the corporates specific internal controls to detect and prevent improper conduct (*United States Federal Sentencing Guidelines*, 1<sup>st</sup> November 1991, 18 U.S.C. §§ 1365 (f), 1801; 42 U.S.C. §§ 1129(a), 14133; 49 U.S.C. § 31310). About the case-law *United States v. Johnson & Johnson*, 37, Cr-99 (DDC 2011); *United States v. Caputo*, 456 F. Supp. 2d 970

States permit enterprises to discover and disclose the corrupt practices of their own employees.<sup>90</sup> In the US experience, public officials require the undertaking to provide a substantial compliance system in order to guarantee that future procurement will be fairly conducted.<sup>91</sup> Suspension or debarment from public contracts has proven to be an effective

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(N.D. Ill 2006); *United States v. Booker*, 375 F.3d 508 (7<sup>th</sup> Cir. 2004); *Fanfan v. United States*, 2004 WL 1723114 (D. Me. 2004); *Hollis v. City of Buffalo*, 28 F. Supp. 2d 812, 821 (W.D. N.Y. 1998); *United States v. Exxon Corp.*, No. A90-015 CR (U.S. Supreme Court 1990); *Hoffman - LaRoche Ltd. et Rhone Paulenc*, Plead Agreement, 1999; *Caremark Intern. Inc.* Derivative Litigation, 698 A.2d 959 (Del. Ch. 1996); *United States v. Daiwa Bank* (SDNY 1995 Cr 947); *United States v. C.R. Bard, Inc.*, 848 F. Supp. 287 (D. Mass. 1994); *United States v. NME Psychiatric Hospital*, 94 Cr. 0268 (D.D.C. 1994). See J. E. MURPHY, *The EU Takes a Tentative First Step Toward Compliance Programs*, in *Ethikos* Jan./Feb. 2012, Vol. 25, No.4; J. E. MURPHY, *How the CEO can make the difference in Compliance and Ethics Program*, in *Ethikos*, May/June 2007, Vol. 20, No. 9; ID., *Ethic for Ethicists? A code for Ethics and Compliance and ethics professionals*, in *Ethikos*, March/April 2004, Vol. 17, No. 8; J. E. MURPHY - C. VIGALE, *The Role Of Incentives In Compliance Programs*, in *Ethikos* May/June 2005, Vol. 18, No. 6; A. SINGER, *Anti-Corruption Enforcement Gains Traction On a Global Scale*, in *Ethikos* Jan./Feb. 2012, Vol. 25, No. 4; ID., *Even At Smaller Companies Ethics Programs Gain Traction*, in *Ethikos* Jan./Feb. 2010, Vol. 23 No.4; J. KAPLAN, *Key to success when mitigating identified compliance and ethics and ethic risks*, Corporate Compliance and Ethics Insights, June 2011; C. E. CARRASCO - M. K. DUPEE, *Corporate Criminal Liability*, in *Am. Crim. L. Rev.*, 1999, 445 ss.

<sup>90</sup> On compliance and ethics programs in the public procurement sector see: *United States v. Metcalf & Eddy, Inc.*, CA No. 99CV-12566-NG (D. Mass. 1999); *United States v. Depuy, Inc.*, 34 (DDC 1999); *United States v. Lucas Aerospace Communications & Electronics, Inc., Wholly Owned Subsidiary of Lucas Industries, Inc.* (1994 Cr 493 E.D. N.Y.); *United States v. Hernandez*, 952 F.2d 1110 (9<sup>th</sup> Cir. 1991). See: J. E. MURPHY, *A Compliance and ethics & Ethics Program on a Dollar a Day: How Small Companies Can Have Effective Programs*, Society of Corporate and Compliance Ethics, August 2010; J. M. KAPLAN, *Compliance Programs for Smaller Companies*, in *Ethikos* Jan./Feb. 2008, Vol. 21 No. 5; K. W. BUFFINGTON - M. FLYNN, *The Legal Aspects of Public Purchasing*, in *Journal Of Public Procurement*, Vol. 6, 3, 2006, p. 321ss.; C. R. CARTER - M. M. JENNINGS, *The Role Of Purchasing In Corporate Social Responsibility: A Structural Equation Analysis*, in *Journal of Business Logistics*, Vol. 25, No.1, 2004, 145 ss.

<sup>91</sup> On the relevance of compliance and ethics programs for the contracting authorities see *United States Federal Acquisition Regulation*, Vol. 73, §§ 67064 - 67091-92, Rev. 12 November 2008 about the requirements for a federal contractor code of business ethics and conduct, an internal control system, and disclosure to the Government of certain violations of criminal law, violations of the civil False Claims Act, or significant

tool in the fight against corruption. Depriving private companies of the opportunity to do business with the government is likely to be one of the strongest deterrents for future wrongdoers, and ensures that the government does not enter into contracts with contractors that lack effective internal controls.<sup>92</sup>

Whenever an economic operator tries to avoid competition by persuading a government to give it a protected position, colluding with competitors to fix prices, or artificially dividing requirements among a group of contractors, the result for the public consumer is almost always a higher price for inferior goods.<sup>93</sup> The risk of the loss of not

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overpayments. See OECD, *Good practice Guidance on Internal Control, Ethics and Compliance*, 18<sup>th</sup> February 2010; J. LEET, *A New Compliance and Ethics Certification Program*, in *Ethikos*, Jan./Feb 2007, Vol. 20, No. 4; B. SHARPE, *Checking your Compliance and ethics Program's performance - By the Numbers*, in *Ethikos*, May/June 2003, Vol. 16, No. 10. See also: U.S. Department of Justice, *Largest health care fraud case in U.S. history settled HCA investigation nets record total of \$ 1.7 billion*, available at [http://www.justice.gov/opa/pr/2003/June/03\\_civ\\_386.htm](http://www.justice.gov/opa/pr/2003/June/03_civ_386.htm).

<sup>92</sup> United Nations Office on Drug and Crime (UNODC), *Good practices in ensuring compliance with article 9 of the United Nations Convention against Corruption*, cit., 25. As debarment systems have matured in different countries, two broad models for debarment have emerged. The first is a highly discretionary approach, such as that used by the United States federal procurement system, under which a senior contracting official, acting on behalf of one or more government agencies, may exclude contractors because of almost any serious issue regarding contractor qualification. The alternative model, used by the World Bank (WB) in its sanctions system, is much more focused: under this approach, the reviewing officials act in an adjudicative manner, and a formal determination must be made as to whether the contractor in question has committed acts that qualify as grounds for debarment, under a specific list of prohibited acts. The EU Directives, for example, do not provide for a debarment regime, but for an ad-hoc approach of exclusion in which each procuring entity has to determine, on a case-by-case basis, whether or not a particular company is suitable and reliable or should be excluded from a public tender procedure. See: S. WILLIAMS, *Fighting Corruption in Public Procurement. A Comparative analysis of Disqualification or Debarment Measures*, Oxford, 2012, 38-81. C. R. YUKINS, *Cross-Debarment: A Stakeholder Analysis*, *GW Law Faculty Publications*, 2103, 220 et seq.

<sup>93</sup> G. M. RACCA - R. CAVALLO PERIN, *Material Amendments of Public Contracts during their Terms: From Violations of Competitions to Symptoms of Corruption*, in *European Procurement & Public Private Partnership Law Review*, 2013, 287-290; G.M. RACCA - R. CAVALLO PERIN - G. L. ALBANO, *Competition in the execution*

only reputation but also the opportunity to win procurements should act as an effective deterrent for improper conduct.

An effective anti-corruption clause might be included in order to guarantee a more effective follow-up in the event of corrupt practices being proven within the lifetime of the contract, “e.g. clear-cut procedures for declaring a contract null and void or for applying other contractual penalties”.<sup>94</sup> This would avoid the lengthy procedures involved in the annulment of the “corrupt” public contract with a separate civil action that often risks producing effects too late, when it is difficult or even impossible to fully recover the losses.<sup>95</sup>

#### **4. PUBLIC OVERSIGHT, “SOCIAL WITNESS” EXPERIENCE FOR THE EVIDENCE OF THE QUALITY OF PUBLIC SPENDING**

It has been recognized that civil society has an important role to play in the fight against corruption.<sup>96</sup> Governments are realizing the growing importance of civil society participation, and are starting to involve citizens in scrutinizing government activities.<sup>97</sup>

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*phase of public procurement*, in *PCLJ*, 2011, 99 et seq.; OECD instruments such as the Recommendation concerning Effective Action against Hard Core Cartels and the Guidelines for Fighting Bid Rigging in Public Procurement help to ensure free and fair competition. On OECD Legal Instruments on Corruption Prevention see: <http://www.oecd.org/gov/ethics/oecdlegalinstrumentsoncorruptionprevention.htm>.

<sup>94</sup> EU Commission, *Report from the Commission to the Council and the European Parliament, EU Anti-Corruption Report*, cit., 34.

<sup>95</sup> R. CAVALLO PERIN - G. M. RACCA, *Caratteri ed elementi essenziali nelle sponsorizzazioni con le pubbliche amministrazioni*, in *Dir. Amm.*, 2014, forthcoming.

<sup>96</sup> United Nations Office on Drug and Crime (UNODC), *Good practices in ensuring compliance with article 9 of the United Nations Convention against Corruption*, cit., 26. R. CAVALLO PERIN, *L'etica pubblica come contenuto*



The monitoring of procurement processes by an independent voice might provide a source of expertise and make it possible “to raise issues and difficult questions, to manage conflict and balance powers and bring together groups of people”.<sup>98</sup> In a far-reaching transparency policy, civil society can become very active in the “complex monitoring of procurement processes and public contracts”.<sup>99</sup> “Integrity pacts”<sup>100</sup> could present an effective instrument for defining further instruments to provide transparency, monitoring activities by civil society organizations.

Integrity pacts, as agreements between the contracting authority for a particular project and the bidders, who are all committed to abstaining from any corrupt practices,<sup>101</sup> could help enhance public trust in government contracting and therefore contribute to

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*di un diritto degli amministrati alla correttezza dei funzionari pubblici*, cit., 159-161, on the right of citizens to require compliance of civil servant to their duties. P. SZAREK-MASON, *OLAF: The anti-corruption policy within the European Union*, in J.-B. Auby - E. Breen - T. Perroud (eds. by), *Corruption And Conflicts Of Interest. A Comparative Law Approach*, cit., 288.

<sup>97</sup> See also a Mexican case where the participation of “social witnesses” to scrutinise the integrity of the procurement procedure is mandatory for large contracts. A study of the OECD and the World Bank Institute (2006) found that such practice had resulted in savings of approximately USD 26 million in 2006 and increased the number of bidders by over 50%.

<sup>98</sup> Transparency International, *Handbook for Curbing Corruption in Public Procurement*, cit., 80 et seq.

<sup>99</sup> EU Commission, *Report from the Commission to the Council and the European Parliament, EU Anti-Corruption Report*, cit., 31.

<sup>100</sup> EU Commission, *op. ult. cit.*, 31. Transparency International, *The integrity pact. The Concept, the Model and the Present Applications: a Status Report*, 31 December 2002, 12.

<sup>101</sup> EU Commission, *Report from the Commission to the Council and the European Parliament, EU Anti-Corruption Report*, cit., 31.

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improving the credibility of government procedures and administration in general.<sup>102</sup> Integrity pacts can establish the contractual rights and obligations of all the parties to a governing contract and thus eliminate uncertainties as to the quality, applicability and enforcement of criminal and contractual legal provisions in a given country.<sup>103</sup> Moreover, such obligations could attribute a role to third parties in order to assure further monitoring during the selection and execution of the contract. Codes of conduct and integrity pacts may introduce additional constraints on transparency and monitoring during the period of execution of the contract by also allowing for the collaboration of other participants in the competition as well as social witness<sup>104</sup> and citizens' associations.<sup>105</sup>

Voluntary compliance with the terms defined in integrity pacts might allow economic operators to engage in the monitoring activity. The reciprocal obligations

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<sup>102</sup> Using the integrity pacts economic operators wishing to participate in a procedure for the award of a public contract, contracting and public officials acknowledge that they understand and accept the obligations arising as a result of their turning. OECD, *Integrity in Public Procurement: good practice from A to Z*, 2007, cit., 158.

<sup>103</sup> Transparency International, *The integrity pact. The Concept, the Model and the Present Applications: a Status Report*, cit., 3 - 4. "The IP is intended to accomplish two primary objectives: (a) to enable companies to abstain from bribing by providing assurance to them that (i) their competitors will also refrain from bribing, and (ii) government procurement, privatisation or licensing agencies will undertake to prevent corruption, including extortion, by their officials and to follow transparent procedures; and (b) to enable governments to reduce the high cost and the distortionary impact of corruption on public procurement, privatisation or licensing". Transparency International, *Handbook for curbing corruption in public procurement*, 2006, 125 et seq.

<sup>104</sup> OECD, *CleanGovBiz Integrity in practice. Fighting corruption in public procurement*, February 2012, 25 e ss.; OECD, *Integrity in Public Procurement. Good Practice From A To Z*, cit., 117 et seq.

<sup>105</sup> Transparency International, *The integrity pact. The Concept, the Model and the Present Applications: a Status Report*, cit., 5. The report highlight the two arguments that "often rised against such a monitoring role for civil society can easily be disarmed: availability of the necessary expertise among the Civil society monitors (...) and the legitimate confidentiality of property information, to which civil society representatives would gain access".

between private parties and public entities makes each party liable in respect of the others<sup>106</sup> for any violations that occur during the whole procurement cycle.<sup>107</sup>

With a view to ensuring that they are effectively implemented, integrity pacts<sup>108</sup> could be effectively monitored by civil society groups at the initiative of NGOs, especially with regard to certain large public contracts (e.g. large-scale infrastructure projects).<sup>109</sup>

Public oversight requires the transparent management of public finances in order to improve the likelihood of limited resources being used as intended. All countries should establish transparent and accountable public finance management systems, including for budgeting and procurement.<sup>110</sup> Information regarding awarded contracts, including the name of the contractor and the contract price, should be publically available, either through transparency measures or through access to information regimes.<sup>111</sup> Not only is the economic efficiency in procurement important, but so is the perceived legitimacy of public

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<sup>106</sup> Transparency International, *The integrity pact. The concept, the Model and the Present application. A status report*, cit., 5. OECD, *Principles for Integrity in Public Procurement*, 2009, 36-37.

<sup>107</sup> Transparency International, *Handbook for curbing corruption in public procurement*, 2007, 82.

<sup>108</sup> EU Commission, *Report from the Commission to the Council and the European Parliament, EU Anti-Corruption Report*, cit., 31. Integrity pacts are agreements between the contracting authority for a particular project and the bidders, all committing themselves to abstain from any corrupt practices.

<sup>109</sup> EU Commission, *Report from the Commission to the Council and the European Parliament, EU Anti-Corruption Report*, cit., 31. Integrity pacts are agreements between the contracting authority for a particular project and the bidders, all committing themselves to abstain from any corrupt practices.

<sup>110</sup> United Nations Office on Drug and Crime (UNODC), *Good practices in ensuring compliance with article 9 of the United Nations Convention against Corruption*, cit., 30-31.

<sup>111</sup> United Nations Office on Drug and Crime (UNODC), *Good practices in ensuring compliance with article 9 of the United Nations Convention against Corruption*, cit., 27.

decisions. This legitimacy is fostered by due procedures in awarding public contracts even if due processes might represent more economic costs (i.e. less economic efficiency).<sup>112</sup>

Civil society initiatives have already had a “beneficial effect on the accountability of local administrations with regard to transparency of public spending”.<sup>113</sup> Civil society, “be it a single citizen, media, a company, an NGO, academia, etc.” may identify possible improper public official actions which may be the result of collusion between a public official and a bidder.<sup>114</sup>

Directing media attention onto procurement spending might help in discovering “that the number of computers contracted and purchased for a public school was not delivered or that a procurement official is providing incomplete information to selected bidders in order to favor a certain company, which repeatedly wins contracts from the same procuring entity.”<sup>115</sup> The reputation of the subjects involved would be compromised and

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<sup>112</sup> EU Parliament - Directorate General for Internal Policies, *Political and other forms of corruption in the attribution of public procurement contracts and allocation of EU funds: Extent of the phenomenon and overview of practices*, 2013, 30.

<sup>113</sup> EU Commission, *Report from the Commission to the Council and the European Parliament, EU Anti-Corruption Report*, cit., 28.

<sup>114</sup> G.M. RACCA - R. CAVALLO PERIN - G. L. ALBANO, *Competition in the execution phase of public procurement*, cit., 99-100; OECD, *Implementing the OECD Principles for Integrity in Public Procurement*, cit., 119. One of the ten OECD principles for enhancing integrity in public procurement provides that “Member countries should empower civil society organisations, media and the wider public to scrutinise public procurement. Governments should disclose public information on the key terms of major contracts to civil society organisations, media and the wider public. The reports of oversight institutions should also be made widely available to enhance public scrutiny. To complement these traditional accountability mechanisms, governments should consider involving representatives from civil society organisations and the wider public in monitoring high-value or complex procurements that entail significant risks of mismanagement and corruption”.

<sup>115</sup> OECD, *Implementing the OECD Principles for Integrity in Public Procurement*, cit., 119. One of the ten OECD principles for enhancing integrity in public Procurement provide that “Member countries should empower civil society organisations, media and the wider public to scrutinise public procurement. Governments should

might be an incentive for appropriate behavior. Civil society can generate pressure against corruption in public procurement, leading to various kinds of sanctions of the corrupt actors

This practice of “direct social control” could complement more traditional accountability mechanisms under specific circumstances. Strict criteria should be defined so as to determine when direct social control mechanisms may be used, on the basis of the high value, complexity and sensitivity of the procurement, and for the purpose of selecting the external observers.<sup>116</sup> Obviously, a systematic verification should be carried out to ensure that the external observer is exempt from any conflict of interest to participate in the process and that they are also aware of any restrictions and prohibitions with regard to potential conflict-of-interest situations, such as the handling of confidential information. The oversight of third parties could prove extremely useful for ensuring the competitive selection principle is respected and the procurement correctly executed.<sup>117</sup>

Governments should support an effective monitoring by civil society “by ensuring timely access to information, for instance through the use of new technologies, and providing clear channels to allow the external observer to inform control authorities in the case of potential irregularities or corruption”.<sup>118</sup>

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disclose public information on the key terms of major contracts to civil society organisations, media and the wider public. The reports of oversight institutions should also be made widely available to enhance public scrutiny. To complement these traditional accountability mechanisms, governments should consider involving representatives from civil society organisations and the wider public in monitoring high-value or complex procurements that entail significant risks of mismanagement and corruption”.

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<sup>116</sup> OECD, *OECD Principles for Integrity in Public Procurement*, cit., 47.

<sup>117</sup> G.M. RACCA - R. CAVALLO PERIN - G. L. ALBANO, *Competition in the execution phase of public procurement*, cit., 99-100; United Nations Office on Drug and Crime (UNODC), *Good practices in ensuring compliance with article 9 of the United Nations Convention against Corruption*, cit., 26-27

<sup>118</sup> OECD, *OECD Principles for Integrity in Public Procurement*, cit., 47.

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**5. NEW SOCIAL SANCTIONS FOR THE INFRINGEMENT OF PUBLIC LOYALTY TO FUNDAMENTAL RIGHTS: A VIOLATION OF SOCIAL SOLIDARITY. TEMPORARY EXCLUSION FROM FULL SOCIAL MEMBERSHIP**

Reliable judicial systems are crucial for ensuring that laws and regulations are properly enforced.

If verdicts or favors can be bought, any set of laws to curb corruption will be crippled. Clear rules on ethical conduct for judges and court officials, built around the fundamental principles of independence, impartiality, integrity, propriety, equality, competence and diligence, are essential, along with a system to make sure that they are being implemented.<sup>119</sup>

Different forms of sanctions need to be applied, that could also be informal in nature.<sup>120</sup> Informal sanctions mean penalties that do not impose tangible costs on the offender, though they may decrease their utility. It has been proven that “informal sanctions such as social disapproval, ostracism, gossip, peer pressure, or public embarrassment of offenders are often applied to try to alter behavior, and in many cases appear to be effective”.<sup>121</sup> In corporations and academic institutions, the failure to perform a level of service activity viewed as appropriate may be penalized through various sorts of sanctions. These may include financial sanctions, such as lower salary increases, or the denial of promotion, as well as the engendering of expressions of disapproval and a degree of social

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<sup>119</sup> Clean gov biz, *Boosting Integrity fighting corruption*, 2013, cit. , 6. International instruments such as the UN’s Bangalore Principles of Judicial Conduct and the UN’s work on boosting judicial integrity contribute to putting these systems in place.

<sup>120</sup> P. BLAU, *Exchange and Power in Social Life*, New York: Wiley, 1964.

<sup>121</sup> C. NOUSSAIR - S. TUCKER, *Combining Monetary and Social Sanctions to Promote Cooperation*, in *Economic Inquiry*, Vol. 43:3, 2005, 649.

ostracism. In organizations such as the military and at some academic institutions, “honor codes exist that overlap with formal policies. One reason that these institutions label cheating and theft as honor code violations may be to create a social prohibition against them in addition to the explicit penalties in force”.<sup>122</sup>

According to some recent economic models, social pressure and shame can have highly effective consequences. Social penalties (condemnation, ostracism, loss of esteem)<sup>123</sup> or some form of public “black-listing” of citizens that betrayed the common bonds of solidarity might have a significant effect in terms of reputation, and could therefore be feared.

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<sup>122</sup> C. NOUSSAIR - S. TUCKER, *Combining Monetary and Social Sanctions to Promote Cooperation*, cit., 650.

<sup>123</sup> See for example: G. A. AKERLOF, *A Theory of Social Custom, of Which Unemployment May Be One Consequence*, in *Quarterly Journal of Economics*, 1980, 749; A. LINDBECK - S. NYBERG - J. W. WEIBULL, *Social Norms and Economic Incentives in the Welfare State*, in *Quarterly Journal of Economics*, 1999, 1; J. ELSTER, *Emotions and Economic Theory*, in *Journal of Economic Literature*, 1998, 47, distinguishes between guilt, an internal type of pressure and shame, an external type of social pressure, as forces promoting pro-social behaviour. Labour economists have modelled the effect of peer pressure on team output. For this aspect see: E. KANDEL - E. P. LAZEAR, *Peer Pressure and Partnership*, in *Journal of Political Economy*, 1992, 801; J. M. BARRON - JOHN M. - G. K. PAULSON, *Peer Pressure in an Agency Relationship*, in *Journal of Labor Economics*, 1997, 235. K. KAMEI - L. PUTTERMAN - J.-R. TYRAN, *State or Nature? Formal vs. Informal Sanctioning in the Voluntary Provision of Public Goods*, in *Brown Economics Working Paper*, 2011 available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1752266](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1752266), 5, where they remember that James Madison wrote: “If there be no virtue among us, no form of government can render us secure. To suppose that any form of government will secure liberty or happiness without any virtue in the people is an illusion.” (Speech to Virginia Ratifying Convention, June 20, 1788). The same theme appears almost two millennia earlier in the observation of Horace that “Leges sine moribus vanae” (Laws without morality are useless).

Informal sanctions may have less of a deterrent effect because they are less certain, but they may have the advantage of avoiding fixed administrative costs.<sup>124</sup> Moreover, in the context of an information society, web reputation can become a great value.

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<sup>124</sup> K. KAMEI - L. PUTTERMAN - J.-R. TYRAN, *State or Nature? Formal vs. Informal Sanctioning in the Voluntary Provision of Public Goods*, *cit.*