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EX-ANTE CONTROLS IN PROCUREMENT PROCEDURES: A WILD-GOOSE CHASE FOR PUBLIC AUTHORITIES? AN EU PERSPECTIVE

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Ex-ante Controls in Procurement Procedures: a Wild-goose Chase for Public Authorities? An EU Perspective

Fabio Di Cristina[1]

Abstract

Enhancing integrity in public procurement is a common aim of both nation States and supranational bodies and has thrust sharply into focus the size of prevention. On the one hand, different and wide notions of integrity and corruption exist, as well as partisan scientific approaches. On the other, the range of ex ante public controls over integrity violations, based on the belief that expelling corruptors is much more important than preventing corruption itself, seems too broad to be effective. What can we learn from the new European directives on public procurement? Is it possible to sketch a common substratum for integrity in public procurement entailing more defined public instruments to prevent illegality and drive out potential misconduct? Is it possible to move from a traditional public control-based model towards an incentive model using sector-specific rules to increase the costs of corruption?

1. Curbing corruption in public procurement: different approaches

As the title of this essay may suggest, fighting the misappropriation of public resources for the pursuing of private interests[2] could be a hard task, a true "wild-goose chase"[3]. Curbing corruption could be likely to prove pointless and unfruitful, especially if

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[2] See in particular J. Gardiner, *Defining Corruption*, in A. Heidenhaime, M. Johnston (2002), *Political Corruption. Concepts & Contexts*, Transaction Publishers, New Brunswick and London, p. 25; and J. Andvig, O. Fjeldstad, I. Amundsen, T. Sissner, T. Soreide (2000), *Research on Corruption. A Policy Oriented Survey*, Bergen, Chr. Michelsen Institute, p. 13.

[3] The term references a type of horse race which was popular in England in the 16th century: the pack of horses would follow a leader, often adopting a formation that casually resembled a flock of geese. The race was extremely challenging, and bettors often commented that it was difficult to predict the outcome of a wild-goose chase. The term was used by William Shakespeare in *Romeo and Juliet:* in Act 2, Scene 4, Mercutio referred to one of Romeo's harebrained plans using the following words: *"Now, if our jokes go on a*

one thinks about public controls on integrity, in their many-sided forms, as a cure-all remedy[4].

The basic idea behind the consideration of control as a panacea for corrupt exchanges is that the more the controls are plentiful and effective, the more the willingness to corrupt decreases. Deterrence is thus considered the counterbalance of administrative burdens on both procedures and undertakings[5].

This idea could sound reasonable within a rational approach to both preventing and combating corruption but it conceals, as several recurrent worldwide procurement scandals highlight[6], the true dark side of controls: the tendency to put as many rules as possible on procurement procedures to clean the legislators' conscience. But, as evidence on procurement procedures suggests[7], even too many rules might open several windows of opportunity to corruption[8].

It must be underlined, at the very beginning of the essay, that one may wonder if an intertwined link among rules and corruption really exists. One might argue[9], otherwise, that the degree of corruption detectable in each country is linked to political culture, the share of common values or a high sense of the State and of the community[10]. Nonetheless, it seems quite hard to fill in the politicians (or the society itself) with integrity and, at the same time, it appears easier to remove or to correct some causes of "objective" corruption[11].

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wild-goose chase, I'm finished. You have more wild goose in one of your jokes than I have in five of mine. Was I even close to you in the chase for the goose?".

[4] See S. Rose-Ackerman (1978), *Corruption: a study in political economy*, New York, Academic Press, p. 35.

[5] D. Della Porta, A. Vannucci (2011), *The dark side of power. Norms and mechanisms of political corruption,* Farnham, Ashgate, p. 87.

[6] See, for example, the ones in the defence sector. A short overview is available at *http://www.transparency.org/topic/detail/defence_security*.

[7] M. Golden, L. Picci (2005), *Proposal for a new measure of corruption and tests using Italian data,* in *Economics and Politics,* vol. 17, p. 37.

[8] See in particular G. D'Auria, *La corruzione e le leggi*, in M. D'Alberti, R. Finocchi (1994), *Corruzione e sistema istituzionale*, Bologna, il Mulino, p. 23, for a deep analysis of the Italian situation during the 90's and *Mani pulite* scandal.

[9] See J.H.H. Weiler, *Why should Europe be a democracy: the corruption of political culture and the principle of constitutional tolerance*, in F. Snyder (2000), *The Europeanisation of law: the legal effects of European integration*, Hart Publishing, p. 114; R. Kroeze, T. Kerkhoff, G. Corni (2013), *Corruption and the rise of modern politics*, Munchen, C.H. Beck, p. 52.

[10] For a sketch of the very fundamental feature of the concept, see G. Droppers (1907), *The sense of the State,* in *Journal of Political Economy,* n. 2, vol. 15, p. 109.

[11] See M. D'Alberti, *Corruzione "soggettiva" e "oggettiva"*, in M. D'Alberti, R. Finocchi (1994), *Corruzione e sistema istituzionale*, Bologna, il Mulino, p. 49. "Objective" corruption referes to the institutional and legal causes beyond corrupt exchanges and its easiness at a lower cost.

Preliminarily, it seems interesting to call up the two different approaches commonly used to study and debar corruption in public procurement. One can be defined as a "legal approach", and pertains to the idea that rules introducing controls, or sanctions, are a sort of "integrity bond": off-the-shelf illegal agreements are less probable as long as the stock of rules imposing controls increases. The second, which could be defined, borrowing an economic concept, the "rising costs approach", is mainly focused on the underlying incentives for being part of a shadow corruptive exchange[12].

Almost everyone is worried about the problem of bureaucratic and political corruption[13], but while most people and social scientists emphasize the role of values and ethics in this context, economists (as well as some legal scholars) usually take into account the second approach, focusing, instead, on the need for appropriate incentives[14] and on the need for increasing the cost of corruption by drafting appropriate sectorial rules[15].

Both approaches share common values and some valuable aspects. It is impossible to conceive an effective anticorruption strategy without specific *ex ante* and *ex post* controls of integrity and correct use of public money. But, at the same time, some forms of disincentives at the bottom of the legal framework for procedures shall be provided. Even a legal rule introducing down-raids or random inspections, or heavily sanctioning illegality, might entail disincentives to corrupt. Moreover, the draft of rules concerning, for instance, the functioning of purchasing bodies or information sharing on undertakings exclusions among different contract administrations may produce a disincentive effect to collude or corrupt[16].

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[12] S. Rose-Ackerman (2012), *Corruption: an incentive-based approach,* in *Percorsi costituzionali,* n. 1-2, p. 109. For a more extensive discussion, S. Rose-Ackerman (1999), *Corruption and government. Causes, consequences, and reform,* Cambridge, Cambridge University Press, *passim*.

[13] W.A. Niskanen (1971), *Bureaucracy and Representative Government*, Chicago, Aldine-Atherton, p. 19. See also E.C. Banfield (1975), *Corruption as a Feature of Governmental Organization*, in *Journal of Law and Economics*, n. 18, p. 587.

[14] P. Bardhan (2006), *The economist's approach to the problem of corruption*, in *World Development,* n. 2, pp. 341-348. See also A. Ades, R. Di Tella (2001), *Rents, competition and corruption*, in *American Economic Review*, n. 4, pp. 982-993.

[15] See one of the most recent contribution dealing with this topic, D. Hough (2013), *Corruption, anti-corruption and governance*, Basingstoke, Palgrave Macmillan, p. 49.

[16] See F. Anechiarico, J. Jacobs (1996), *The pursuit of absolute integrity. How corruption controls makes government ineffective*, Chicago and London, The University of Chicago Press, *passim.*

2. A focus on the EU perspective

The EU perspective on this matter seems to refer to a subsided "legal approach". As a matter of fact, the 2014 *"Anticorruption Report"* of the European Commission[17] addresses corruption in public procurement focusing on the major loopholes in procurement controls and on the scale of potential spill-over effects, such as the diversion of public funds. In the Commission's view, all Member States, even those traditionally considered as champions of integrity, are not immune to corruption[18] and public procurement is particularly prone to illegality, owing to deficient control mechanisms and risk management[19]. The Commission, shifting to the side of prevention, mainly strengthened the weak points of public controls and also put into evidence that *"there is a considerable divide among Member States concerning prevention of corruption"*[20].

Member States seem to fully adhere to the Commission's perspective. Following the subsided "legal approach", which has already been recalled, some European countries place a high burden on law enforcement on prosecution bodies or on anti-corruption agencies that are seen as solely responsible for addressing corruption in the public sector. While the activity of these institutions is, generally speaking, of utmost importance, deep-rooted corruption cannot be tackled without a comprehensive approach aiming at enhancing prevention and incentive-based mechanisms throughout the public administration, at central and local level. Moreover, some Courts of Audit, for example, have played a prominent role in pushing anti-corruption reforms forward[21]. However, their

[17] On February 3, 2014, the European Commission (Home Affairs Directorate General) published its first report on the issue of anti-corruption measures. The report covers all 28 Member States of the EU. It consists of a general chapter summarizing the main findings, describing corruption-related trends across the EU, and analyzing how Member States deal with corruption in public procurement. There are 28 country chapters providing a snapshot of the situation concerning corruption, identifying issues that deserve further attention, and highlighting good practices which might inspire others. The report also includes the results of two Eurobarometer surveys on the perception of corruption amongst European citizens, on the one hand, and companies, on the other. A further section of the report specifically deals with public procurement. European Commission (2014), *Report from the Commission to the Council and the European Parliament – EU Anticorruption Report* [COM(2014) 38], Bruxelles, February 3, 2014. See for a brief *résumé* R. Williams (2014), *Anti-corruption measures in the EU as they affect public procurement,* in *Public Procurement Law Review*, n. 1, p. 38.

[18] See also J.S. Hellman, G. Jones, D. Kaufmann, M. Schankerman (2000), *Measuring governance, corruption, and state capture*, in *Policy Research Working Paper Series*, Washington DC, The World Bank.

[19] See J.G. Lambsdorff (2007), *The Institutional Economics of Corruption and Reform. Theory, Evidence and Policy*, Cambridge, Cambridge University Press, p. 56.

[20] European Commission (2014), *Report from the Commission to the Council and the European Parliament – EU Anticorruption Report* [COM(2014) 38], Bruxelles, 3 February 2014, p. 10.

[21] See M. Kapstein, (1998), *Ethics management. Auditing and developing the ethical content of organizations*, Springer, p. 56. In some cases, as the European Commission underlines, the Court of Audit is also the institution responsible for verification of party and electoral campaign financing. In a few Member

pro-activeness is not matched with effective internal and external controls at regional and local level[22].

In several Member States, internal controls across the country (particularly, at local level) are weak and uncoordinated. In the Commission's view, there is a strong need to reinforce such controls and match them with strong prevention policies in order to deliver tangible and sustainable results against corruption[23]. That's a reason why the watchdog-based approach to anticorruption may result poor and over-timid

At this point, some other specifications on the extent of controls in public procurement, and on some instruments to guarantee "compliance and enforcement" should be provided. Nonetheless, shifting from the already recalled watchdog approach (public powers are in charge of commanding and controlling) to a more slight information-base approach (transparency obligations could decrease the willingness to corrupt) does not always entail different results in the of prevention and repression of corruption in public procurement[24].

On the one hand, asset disclosure could also be considered as a form of *ex ante* control. Asset disclosure for officials in sensitive posts contributes to consolidating the accountability of public officials, ensures enhanced transparency and facilitates detection of potential cases of illicit enrichment, conflicts of interest, incompatibilities, as well as the detection and investigation of potential corrupt practices. In some Member States, bodies in charge of monitoring asset disclosure have limited powers and tools and controls are merely formalistic. In others, there is little evidence of active implementation or enforcement of those rules[25].

States, the Court of Audit is active in notifying other relevant authorities of suspected corruption. However, its pro-activeness is not matched by effective internal and external controls at regional and local level.

[22] For a general perspective, see R. Klitgaard (1991), *Controlling corruption*, Berkeley, University of California Press, p. 101; A. Vannucci (2000), *Corruption, political parties, and political protection*, European University Institute, p. 14; S. Guriev (2003), *Red tape and corruption*, London, Centre for economic policy research, p. 16.

[23] For extensive *law and economics* literature on this matter, see M. Karpoff, D. S. Lee, V.P. Vendrzyk (1999), *Defense procurement fraud, penalties and contractor influence*, in *Journal of Political Economy*, n. 4, vol. 107, p. 809; S. Kelman (1990), *Procurement and public management: the fear of discretion and the quality of public performance*, Washington, The AEI Press, p. 64; K. Krawiec (2005), *Organizational misconduct: beyond the principal-agent model*, in *Florida State University Law Review*, n. 2, vol. 32, p. 143; J.G. Lambsdorff (2002), *Making corrupt deals. Contracting in the shadow of the law*, in *Journal of Economic Behavior and Organization*, n. 3, vol. 48, p. 221.

[24] See S. Williams-Elegbe (2012), *Fighting corruption in public procurement: a comparative analysis of disqualification or debarment measures*, Oxford-Portland, Hart publishing, p. 111.

[25] European Commission (2014), *Report from the Commission to the Council and the European Parliament – EU Anticorruption Report* [COM(2014) 38], Bruxelles, 3 February 2014, p. 15.

On the other hand, the issue of conflicts of interest has therefore been included in the scope of several supranational anti-corruption instruments and review mechanisms. Some Member States have dedicated entire legislation covering a wide range of elected and appointed public officials[26], as well as specialized agencies tasked to carry out controls. But the depth of the scrutiny varies from one Member State to another: some have independent agencies that monitor conflicts of interest, but the ability to cover these situations countrywide is limited and follow-up of their decisions is insufficient; others have an ethics commission in charge of controlling only members of Parliament. Verifications on substance are often formalistic and mostly limited to administrative controls. Conflicts of interest in decision-making, allocation of public funds and public procurement tenders, particularly at local level, form a recurrent pattern in many Member States[27].

Many crucial issues, such as fighting against corruption through sectorial rules, irregularities in tendering procedures and the prevention of anti-competitive conduct, has been left mainly unregulated by European procurement rules[28]. Having addressed to some methodological aspects, and having focused on the European Commission's view on the matter, it is possible to choose a "litmus test" for the basic assumptions of this paper. The new European directives on procurement and concession contracts[29], which shall be implemented by Member States of the European Union by middle-2016, will be taken into account as a specimen of fighting corruption through both general and sector-specific legal rules based on incentives and the increase or the decrease of corruption risk through legal provisions.

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[26] See B.G. Mattarella (2013), *Government ethics: the strange Italian "conflict of interests",* in *Italian Journal of Public Law,* n. 2, p. 360: *"[…] it should be pointed out that not every contrast or tension between different interests is a legally relevant conflict of interest. Political activity necessarily requires comparing and balancing different interests. In fact, comparing and balancing are required by every public function, including those of administrative agencies, and also by every private function, such as those of the contract representatives and of the company managers. […]. There is a conflict of interests only when one of the involved interests belongs to the office and the other belongs to the individual who is in charge of the office or works in it. Conflicts of interests imply conflicting loyalties on the part of an officer when his personal interest might get him to postpone or disregard the interest of the institution that he works for."*. For a comparative approach, see J.-B. Auby, E. Breen, T. Perroud (2014), *Corruption and conflicts of interest: a comparative law approach,* Northampton, Edward Elgar Publishing, p. 98.

[27] See R.K. Goel, M.A. Nelson (2010), *Causes of corruption: History, geography and government*, in *Journal of Policy Modelling*, n. 2, vol. 32, p. 443.

[28] The current Art. 45 of the 2004 public sector directive, for example, has been considered as insufficient. See, in particular, H-J. Priess (2014), *The rules on exclusion and self-cleaning under the 2014 public procurement directive*, in *Public Procurement Law Review,* n. 1, p. 34.

[29] Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts; directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing directive 2004/18/EC; directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing directive 2004/17/EC.

The balance between "legal" and "rising-costs" approach will be put into evidence, as well as the extent of the possible (and desirable) incentive-based drafting process. The general perspective which will be adopted is normative, aiming at provide some policy recommendations through legal instruments.

3. The twofold nature of ex ante controls in the new European procurement rules: an overview

Given the level of financial flows generated, and a number of factors pertaining to rent-seeking and political influence, public procurement is an area naturally prone to corrupt practices. But procurement is not just a matter of money-spending and sound procedures. As pointed out by the *Organisation for economic co-operation and development* in 2009, public procurement is increasingly recognized as a strategic profession (rather than a simple administrative function) that plays a central role in preventing mismanagement, waste of money and potential corruption. In this perspective, adequate public employment conditions and incentives, in terms of remuneration, bonuses, career prospects and personnel development, help attract and retain highly skilled professionals[30]. This issue, which is usually underestimated by both social scientists and policy makers, shall be taken into account when anticorruption rules have to be implemented (and Singapore, one of the country with the lowest level of percept corruption, has already taken into account these suggestions with great success)[31].

From a closer procedural point of view, the European Commission has already addressed the problem of corruption in procurement in its *"Green Paper"* of 2011[32], dealing with "sound procedures" to be ensured by national authorities. In the Commission's view, *"most stakeholders (except for academia and legal experts) consider […] that European instruments are not needed to offset"* risks of corruption: *"[…] this issue should rather be addressed through national legislation, for subsidiarity reasons and in order to take*

[30] As also pointed out by the Organisation for Economic Co-operation and Development (2009) in its *Principles for Integrity in Public Procurement* document, *"weak governance in public procurement hinders market competition and raises the price paid by the administration for goods and services, directly impacting public expenditures and therefore taxpayers' resources. The financial interests at stake, and the close interaction between the public and private sectors, make public procurement a major risk area"*.

[31] See, for instance, K.T. Hin (2012), *Corruptuion control in Singapore*, working paper, 13th International raining course on the criminal justice response to corruption – Visiting experts' papers, p. 2.

[32] European Commission (2011), *Green paper on the modernization of EU public procurement policy. Towards a more efficient European procurement market* [COM(2011) 15], Bruxelles, 27 January 2011, p. 113.

account of the very different administrative and business cultures in the Member States". Indeed, an incentive-based approach to fighting corruption is neutral towards centralized (European) or decentralized (national) legal solutions for procurement procedures.

Beside the relations between European and national rules, some soft or strong safeguards must be enshrined in the EU public procurement and all stages of the public procurement cycle have to be considered: pre-bidding, including needs assessment and specifications; bidding, including selection, evaluation and contract award; and post-award. Moving from an evaluation of prosecuted cases, some incentive-based rules might be drafted.

The most frequently prosecuted cases of corruption in public procurement in Member States, which refers to the ability of both public and private actors to distort the awarding procedure, concern[33] drafting of tailor-made specifications to favor certain bidders; splitting of public tenders in smaller bids to avoid competitive procedures; conflicts of interest affecting various stages of procedures and concerning not only procurement officials, but also higher level of contracting authorities[34].

Moreover other cases deal to disproportionate and unjustified selection criteria or unjustified bidders exclusion; unjustified use of emergency procedures; inadequate analysis of situations where bid prices were too low; excessive reliance on the lowest price as the most important award criterion to the detriment of other criteria regarding quality of deliverables and capacity to deliver; unjustified exceptions from publication of bids[35].

Given this premise, it should be underlined that the new European directive on public procurement (2014/24/EU: directives 2014/23/EU and 2014/25/EU provide some similar rules and will not be considered), addresses corruption in its preamble only few times. Thus, it does not address to those prosecuted cases and to the possibility of preventing them providing specific rules.

[33] European Commission, *Report from the Commission to the Council and the European Parliament – EU Anticorruption Report* [COM(2014) 38], Bruxelles, 3 February 2014, p. 18.

[34] See on those cases Organisation for Economic Co-operation and Development (2005), *Fighting corruption and promoting integrity in public procurement*, Paris, p. 45.

[35] For an extensive analysis, see F. Di Cristina (2012), *La corruzione negli appalti pubblici,* in *Rivista trimestrale di diritto pubblico,* n. 1, p. 345.

On the one hand, as the European legislator has pointed out, public contracts should not be awarded to economic operators that participated in a criminal organization[36] or were found guilty of corruption or fraud[37]. On the other hand, the traceability and transparency of decision-making in procurement procedures is essential for ensuring sound procedures, including efficiently fighting corruption and fraud[38].

The twofold nature of new European rules, and the too simple basic assumptions which has just been underlined, appear quite clear: even if the European Commission has tried to rebalance repression and prevention of corruption, expelling corruptors, when identified, seems much more important than preventing corruption itself[39]. Repression and controls are inversely proportional to prevention incentives.

4. The place for raising corruption's cost through sector-specific provisions in the new European procurement rules: an assessment

Some new European "targeted measures" against corruption shall now be examined. As already pointed out, they do not rely, as they should have done, on incentives and on the desirable decrease of corruption risk in procurement procedures.

Art. 26 of directive 2014/24/EU deals with the choice of procedures: tenders where *"there is evidence of collusion or corruption"* shall be considered as being irregular. The same rules shall be applied to electronic auctions (Art. 35). Moreover, on the side of exclusion grounds (Art. 57)[40], contracting authorities shall exclude an economic operator from participation in a procurement procedure where they have established, by verifying

[36] See P. Gounev, V. Ruggiero (2012), *Corruption and organized crime in Europe: illegal partnership*, London, Routledge, p. 78; S. Caneppele, F. Calderoni (2013), Org*anized crime, corruption and crime prevention: essays in honor of Ernesto U. Savona*, Cham, Springer, p. 106; R.J. Burke, E.C. Tomlinson, C. L. Cooper (2011), *Crime and corruption in organizations: why it occurs and what to do about it*, Farnham, Gower, p. 87.

[37] Preamble of the directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing directive 2004/18/EC, n. 100.

[38] Preamble of the directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing directive 2004/18/EC, n. 126. For a critical assessment, see G. Loewenstein, D. Cain, S. Sah (2011), *The limits of transparency: pitfalls and potential of disclosing conflicts of interest*, in *American Economic Review*, n. 3, vol. 101, p. 423.

[39] For a critical assessment of this balance, see Organisation for Economic Co-operation and Development (2007), *Integrity in Public Procurement – Good Practice from A to Z*, p. 54.

[40] The grounds for exclusion from public procurement procedures have been strengthened and extended. In addition to conviction for fraud and corruption, grounds for exclusion include: i) situations where a company has unduly influenced the decision-making process leading to the award of a contract; ii) false statements in connection with the procedure for the award of a public contract, whether these relate to the absence of grounds for exclusion, the possession of professional, technical and financial capacities, or failure to send the necessary certificates; iii) agreements to distort competition.

the *European Single Procurement Document*, the means of proof available under national law or the *e-Certis* system, that the economic operator has been the subject of *"a conviction by final judgment"* for corruption[41]. Upon request, Member States shall make available to other Member States any information relating to the grounds for exclusion (Art. 60).

Several doubts could arise on the time-line of discovering of corruption (normally quite long) and the duration of procurement procedures (variable but not as long as trials)[42]. Nonetheless, if one follows the *fil rouge* of the new European legal framework, some incentive-based rules made for avoiding suspect cost-rising variations of contracts can be found out. Modifying contracts during their term without calling a new tender procedure may breach the rules on public procurement. The applicable rules have been clarified and simplified by the new European directives to remove any doubt in this regard[43].

Moreover, Member States shall ensure that contracting authorities take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators (Art. 24).

For the first time in the history of European procurement rules, the concept of conflicts of interest has been clarified. It shall at least cover any situation where staff members of the contracting authority or of a procurement service provider, acting on behalf

[41] As defined in Art. 3 of the *Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union ("the deliberate action of whosoever promises or gives, directly or through an intermediary, an advantage of any kind whatsoever to an official for himself or for a third party for him to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties shall constitute active corruption")* and Art. 2.1 of *Council Framework Decision 2003/568/JHA ("(a) promising, offering or giving, directly or through an intermediary, to a person who in any capacity directs or works for a private-sector entity an undue advantage of any kind, for that person or for a third party, in order that that person should perform or refrain from performing any act, in breach of that person's duties; (b) directly or through an intermediary, requesting or receiving an undue advantage of any kind, or accepting the promise of such an advantage, for oneself or for a third party, while in any capacity directing or working for a private-sector entity, in order to perform or refrain from performing any act, in breach of one's duties")*, as well as corruption as defined in the national law of the contracting authority or the economic operator.

[42] R. Williams (2014), *Anti-corruption measures in the EU as they affect public procurement,* in *Public Procurement Law Review*, n. 1, p. 38.

[43] A new call for tenders is not required for any modifications that are not substantive (i.e. do not change the nature or the economic balance of the contract); the value of which does not exceed the thresholds for application of the directives and is less than 10% of the value of the original contract for goods and services and 15% for work; specified in the contract, regardless of their value; arising from unforeseen events or relating to additional work, products or services needed but which, for technical reasons of interchangeability or interoperability or cost, can be provided only by the company holding the current contract. In both cases, the corresponding increase in price may not exceed 50% of the initial contract.

of the contracting authority, who are involved in the conduct of the procurement procedure, *"may influence the outcome of that procedure have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure"* (Art. 24).

As this cross analysis may suggest, even if the European legislator has tried to find the optimal balance between some remedies for debarring corruption and some other for expelling corruptors from tendering procedures. However, the latter seem to be overwhelming. Moreover, when the European legislator tries to deal with incentives, the result is utmost undesirable.

Other brief examples may clarify and strengthen this point.

First, the aggregation of demand in public procurement by single buyers or purchaser, which is strongly recommended by the new European directives[44]. Secondly, the choice of procedures (Art. 26 of directive 2014/24/EU) and the selection criteria (Art. 58) are strongly affected by the new so-called "life-cycle costing" approach. In the European legislator's view, *"to identify the most economically advantageous tender, the contract award decision should not be based on non-cost criteria only. Qualitative criteria should therefore be accompanied by a cost criterion that could, at the choice of the contracting authority, be either the price or a cost-effectiveness approach"*[45]. Thirdly, preliminary market consultations (Art. 40) may be needed before launching a procurement procedure, in order to prepare the procurement itself and to properly inform economic operators. Contracting authorities may, for example, seek or accept advice from independent experts or authorities or from market participants[46].

[44] Preamble of the directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing directive 2004/18/EC, n. 59: *"There is a strong trend emerging across Union public procurement markets towards the aggregation of demand by public purchasers, with a view to obtaining economies of scale, including lower prices and transaction costs, and to improving and professionalizing procurement management. This can be achieved by concentrating purchases either by the number of contracting authorities involved or by volume and value over time. However, the aggregation and centralization of purchases should be carefully monitored in order to avoid excessive concentration of purchasing power and collusion, and to preserve transparency and competition, as well as market access opportunities for SMEs."*.

[45] Preamble of the directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing directive 2004/18/EC, *passim.*

[46] That advice may be used in the planning and conduct of the procurement procedure, provided that such advice does not have the effect of distorting competition and does not result in a violation of the principles of non-discrimination and transparency.

Single purchaser units, the life-cycle approach beyond the selection criteria and market consultations are very useful tools for a more dynamic and competitive market[47]. From the point of view of incentives to conclude illegal agreements and the probability that corruption risk arise, some negative consequences may be determined. On the one hand, single purchaser units may be captured more easily. On the other, the life-cycle approach increases the discretionary power of tendering public bodies and prior market consultation may be prone to expose the administration to corruption risks and undeserved external pressure.

5. Concluding remarks. A paradigm shift: a move from ex ante controls to incentive-based controls

In the well-known book *"The structure of scientific revolutions"*[48]*,* Thomas Kuhn put into evidence that a "paradigm shift" is a change in the basic assumptions, or paradigms, within the ruling theory of science. Being very similar to the Hegelian *"Zeitgeist",* a paradigm is what members of a scientific community, and they alone, share.

Moving from this point of view, the American philosopher strengthened the idea that successive transitions from one "spirit of the scientific age" to another via revolution represents the usual developmental pattern of mature hard-science. Conversely, social science seems characterized by a tradition of *"claims, counterclaims, and debates over fundamentals"*[49].

Following a slightly different perspective, Karl Popper argued in *"The open society and its enemies"*[50] that "piecemeal social engineering" is the better gateway to social reforms. Improving social institutions and legal rules by means of a systematic criticism and a piecemeal approach becomes a possible task.

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[47] M. Essig, J. Frijdal, W. Kahlenborn, C. Moser (2011), *Strategic Use of Public Procurement in Europe. Final Report to the European Commission Study commissioned by the European Commission* [DG MARKT, MARKT/2010/02/C], p. 67.

[48] T. Kuhn (1962), *The structure of scientific revolutions,* Chicago, University of Chicago Press. Among the most famous paradigm shifts in natural science there are, for example, the transition from a Ptolemaic cosmology to a Copernican one, or the transition between the worldview of Newtonian physics and the Einsteinian relativistic worldview. In the field of social science, some famous examples arethe cognitive approach in psychological studies and the Keynesian revolution in both political economy and government sciences.

[49] T. Kuhn, (1972), *Logic of Discovery or Psychology of Research*, in I. Lakatos, A. Musgrave (ed. by), *Criticism and the Growth of Knowledge*, Cambridge, Cambridge University Press, p. 6.

[50] K.R. Popper (1971), *The Open Society and Its Enemies*, Princeton, Princeton University Press, p. 15.

Examining corruption in procurement or even corruption widely pertaining to public-private relations in more general terms, great diversity in issues and approaches could be highlighted[51]. The tradition of Kuhn's claims and counterclaims is thus well-rendered, while a piecemeal approach to repression and prevention is commonly used. Scholars try to use political-structural analyses focusing on systemic corruption and the need of integrity rules for politicians, rule of law approaches focusing on control and prosecution, public administration and systems improvements analysis for preventing corruption by risk assessment or transparency and accountability obligations, capacity building and organizational development to strengthen society's ability to address corruption through education.

All these approaches share a common step-by-step framework and the idea that corruption should be fought with rules. In the field of combating corruption, a paradigm shift is needed and *ex ante* controls, which apparently are the most effective way to prevent the misuse of public money, are often the best way to burden procurement procedures following an insane counterproductive will. Moreover, controllers do not usually operate in an integrated system and the increase of costly efforts might occur.

The reason why the head-on approach to fight corruption seems to be failing is that it is built over a misleading assumption: corruption happens because of individual choice, weaknesses in the institutional and legal frameworks, or lack of capacity to enforce existing rules and regulations. Consequently, legal reform is considered the most suitable response[52]. As a matter of fact, in a neo-patrimonial political system or state capture, politics and senior civil servants are oriented towards maintaining control and influence through personal, commercial or financial bonds[53]. Political and bureaucratic *élites* are able to influence policies and manipulate the state apparatus to their advantage: coming to power and maintaining power is a resource-intensive process[54]. The ability to remain in power is thus dependent on access to considerable resources, which are accessed through various rent extraction activities, draining resources even from public

[51] A. Disch, E. Vigeland, G. Sundet (2009), *Anti-Corruption Approaches. A Literature Review*, Norwegian Agency for Development Cooperation, p. 9. See also J.G. Lambsdorff, (2007), *The new institutional economics of corruption and reform: theory, policy, and evidence*, Cambridge, Cambridge University Press, p. 67.

[52] J. Andvig *et al.* (2000), *Research on corruption: a policy oriented survey*, Norwegian Institute of International Affairs, p. 38.

[53] For an extensive analisys, Transparency International (2006), *Handbook for Curbing Corruption in Public Procurement*, p. 61.

[54] See Organisation for Economic Co-operation and Development (2007), *Guidelines for Fighting Bid Rigging in Public Procurement. Helping Governments to Obtain Best Value for Money*, p. 2.

procurement[55]. The way the legal framework is draft affects the probability of draining, having an impact on corruption risk.

Integrity of civil servants is another crucial aspect of any anticorruption strategy but, as it is clear from the recurrence of procurement scandals all over the world, integrity and *ex ante* controls are just one side of the coin[56]. Bribes are obviously part of a two-side deal and operate like market prices: money is paid to receive a benefit which is quantifiable[57].

Generally speaking, one class of cases of corruption arises when public servants give out a benefit that is scarce and is supposed to be allocated on a basis other than willingness to pay. Hence, scarcity can produce obvious incentives for corruption and an increase of the incentives may be produced, for example, when public money for procurement is less and less during a long timeline[58].

Another class of cases arises notwithstanding scarcity. It can be related to qualification: the public benefit should only be provided to qualified individuals: that is the case of public works and urban administrative procedures. Another class of cases deals with the people's willingness to avoid costs imposed by governments, such as controls or inspections. As Susan Rose-Ackermann has recently written, *"all of these incentives for bribery occur at the street level in the day-to-day activities of individuals and businesses, but […] these incentives also arise at the highest level of government where there is an intersection between public administration and politics"*[59].

Anticorruption is a deserving crusade where ethical considerations are often needed to provide guidance to key actors. But morality is often an insufficient guide. Instead, to get

[55] For an extensive discussion, see J. Freeman, M. Minox (2009), *Government by Contract, Outsourcing and American Democracy*, Harvard, Harvard University Press, ch. 5. See also The World Bank (2000), *Helping countries combat corruption. Progress at the World Bank since 1997*, Washington, p. 12.

[56] Organisation for economic co-operation and development (2007), *Bribery in Public Procurement. Methods, actors and counter measures*, p. 11.

[57] S. Rose-Ackerman (2012), *Corruption: an incentive-based approach,* in *Percorsi costituzionali,* n. 1-2, p. 109.

[58] On the opposition between a legal approach and an incentive-based approach, see J.G. Lambsdorff (2012), *The organization of anticorruption. Getting incentives right!*, Diskussionsbeitrag n. V-57-08, 2012, Volkswirtschaftliche Reihe: *"Governments and private firms try to contain corruption among their staff mostly in a top-down, rules-based approach. They limit discretion, increase monitoring or impose harsher penalties. Principles-based, bottom-up approaches to anticorruption, instead, emphasize the importance of value systems and employee's intrinsic motivation. This embraces the invigorating of social control systems, encouraging whistle-blowing, coding of good practice and alerting to red flags."*.

[59] S. Rose-Ackerman (2012), *Corruption: an incentive-based approach,* in *Percorsi costituzionali,* n. 1-2, p. 110.

incentives right in order to increase the risks of corrupt behavior and the economic returns to integrity could be effective[60].

Which effective anticorruption agenda could be drafted, moving from the incentive-based approach to rules? To define its main strong points, one may argue if certain rules could be eliminated without any serious cost for the quality of public benefits, if other rules could be simplified to avoid "red tape", and if controls (somehow still necessary as a complement) could be streamlined rather than centralized[61].

Some other more precise recommendations dealing with an incentive-based approach to anticorruption and risk management strategies could finally be provided.

The first one is related to *corruption risk*. Corruption risk management should not only focus on the contractors, but also on subcontractors and other subjects involved in the execution of the contract. No outsourcing of public procurement activities should be performed by public entities to either private or public enterprises that are not subjected to public procurement laws.

The second one is related to *information*. A proper screening of contractors and beneficiaries must be conducted, especially their ultimate beneficiary owners, in order to discourage conflict of interest[62]. Pre-employment screening and periodical in-employment screening of all subjects involved in public procurement and specialized, well-trained public procurement staff must be used. A structured market analysis and sharing of market intelligence, also across EU Member States' borders, shall be performed, as well as optimal transparency in the entire public procurement process and maximal public availability of procurement information. Contracting authorities should make all necessary efforts to perform market analyses and invest in good functioning systems for whistle blowers, including their protection[63].

The third one pertains to a change in the current anticorruption paradigm and in *the way legal rules are conceived*. On the side of repression, *"Corrupt acts have to be*

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[60] J.G. Lambsdorff (2012), *The organization of anticorruption. Getting incentives right!*, Diskussionsbeitrag n. V-57-08, Volkswirtschaftliche Reihe.

[61] S. Rose-Ackerman (2012), *Corruption: an incentive-based approach,* in *Percorsi costituzionali,* n. 1-2, p. 112.

[62] Organisation for economic co-operation and development (2005), *Managing conflict of interest in the public sector: a toolkit*, p. 19. See also PwC, I-Force (2011), *Corruption and conflict of interest in the European Institutions: the effectiveness of whistle-blowers. Study commissioned by the European Parliament – DG Internal Policies*, p. 55.

[63] See PwC (2013), *Identifying and Reducing Corruption in Public Procurement in the EU*, Bruxelles, p. 2. *"[…] corrupt actors must be seduced to betray each other so as to destabilize corrupt transactions"*: J.G. Lambsdorff (2012), *The organization of anticorruption. Getting incentives right!*, Diskussionsbeitrag n. V-57-08, Volkswirtschaftliche Reihe, p. 16.

detected and prosecuted and offenders have to be punished and deprived of their illicit proceeds"[64]*.* At the same time, opportunities for corrupt practices have to be reduced defining which sort of rules entail increasing corruption risks. Beside this, potential conflicts of interest have to be prevented through transparent and accountable administrative structures at the legislative, executive and judicial level, as well as in the private sector.

Moreover, as Transparency International has recently suggested, *"the European Commission should make concerted use of its discretionary powers to exclude legal entities guilty of grave professional misconduct from […] public procurement […]. Its database of debarred companies should be made public, as a further deterrent against fraud and corruption"*[65]. The importance of a European guide of integrity strategies across the continent seems of utmost and crucial importance.

The hunt for the wild goose can be possible and national legislators, by middle-2016, shall seriously take up the challenge.

[64] European Commission (2003), *Commission Communication on a comprehensive EU policy against corruption*, Bruxelles, 28 May.

[65] Transparency International (2014), *The European Union Integrity System,* EU Office, p. 13. *"Much financial information is publicly available, but not information on entities debarred from EU procurement"*. See on this matter H. Cendrowski, J.P. Martin, L.W. Pedro (2007), *The Handbook of Fraud Deterrence*, New Jersey, John Wiley & Sons, p. 57.