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# Competing Anti-Corruption Strategies for ensuring Integrity in Public Contracts: U.S. and EU systems compared\*

Franco Peirone\*\*

## Abstract

The aim of the article is to analyze two different models for fighting public contract corruption in a comparative perspective, and to evaluate their outcomes.

This article first analyzes the U.S. compliance and ethics program as a general anti-corruption model. According to U.S. criminal law, corporations are accountable for their employees' crimes. However, they may prevent corporate criminal liability by adopting and enforcing effective compliance programs, provided with a code of conduct and other anti-corruption tools. The overall effect of the implementation of these compliance programs has been a strong prevention of criminal conduct, such as bribery, and the establishment of a good corporate citizenship model. Public contract law has gone even further by implementing this corporate anti-corruption model as a benchmark for contractors. The compliance program is now required *ex lege*, as a mandatory element of a public procurement contractor. Moreover, contractors that neglect to have an effective compliance program expose themselves to the risk of being debarred from the public contract market. Indeed, the U.S. model pushes corporations that want to deal with the Federal Government to the highest ethical standards and reaching the highest integrity possible in the public contract market.

The Integrity Pact, created by Transparency International, and especially enforced in EU countries, represents an alternative to the compliance program model. It substantially requires economic operators engaged in public contracting to act with integrity, and to prevent and disclose knowledge or suspicion of corruption. If an economic operator fails in this respect, the awarding authority is allowed to exclude it from the competition or to terminate the public contract already awarded. The termination of the contract is based on contract, without having to wait for criminal conviction of corruption of the economic operator. The integrity pact as part of the public contract has other advantages in fighting corruption: a general regulatory framework on corruption is not necessary and

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charges anti-corruption burdens exclusively on public procurement contractors, aiming at reducing corruption only in public-private relationship.

Where the enforcement of the integrity pact is mainly directed to allow a swift termination of a public contract in case of corruption, the enforcement of compliance programs (including government administration, non-prosecution agreements and deferred prosecution agreements) complies more with the public's aim to not interfere with the execution of the public contract by maintaining the current contractor. Consequently, the choice of which anti-corruption strategy to apply is not neutral. Even if both strategies aim at encouraging and ensuring integrity in public contracts, the outcomes could sometimes be mutually competing and exclusive.

## 1 Addressing public contracts corruption through the principal-agent prism

Corruption has become an increasingly debated issue in the public contracts area. Particularly, it has been calculated that the direct public loss that can be attributed to corruption in public contracts amounts at least to 13 per cent of the overall project budget.<sup>1</sup>

This is due to the fact that if an economic operator has won a public contract because it has resorted to illicit behavior, the contracting authority, generally, suffers a damage since the works, services or supplies bought have a lower quality than could be otherwise expected and obtained by honest bidders who do not have to downgrade the product quality for getting back the money expended to corrupt the contracting authorities officials.<sup>2</sup> At the same time, corruption could cause damage in the public contract execution phase since corrupt public officials could refrain from enforcing proper and timely delivery of the performances

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<sup>1</sup> PWC, *Public Procurement: costs we pay for corruption – Identifying and Reducing Corruption in Public Procurement in the EU*, 2013, p. 5. On the total cost of corruption worldwide: General Secretariat OECD, *The rationale for fighting corruption*, CleanGovBiz, 2014; ONU, *Remarks to Inaugural Conference of the International Anti-Corruption Academy*, CAC/COPS/WG.4/2010/4, 2010; WORLD BANK, *Six Questions on the Costs of Corruption with World Bank Institute Global Governance*, 2005. On the total costs of corruption within EU: *Opinion of the European Social and Economic Committee, Fighting corruption in the EU: meeting business and civil society concerns*, 2016/C 013/11; EU Commission, *Report From The Commission To The Council And The European Parliament Eu Anti-Corruption Report*, Brussels, 3.2.2014, COM(2014) 38 final; EU Commission, *Fighting Corruption in the EU*, Brussels, 6.6.2011, COM(2011) 38 final.

<sup>2</sup> Treisman, Daniel, *What have we learned about the causes of corruption from ten years of cross-national empirical research*, in *Annual Review of Political Science*, 10, 2007, p. 211; Schooner, Steven L. – Yukins, Christopher R., *Public procurement: focus on people, value for money and systemic integrity, not protectionism*, Richard Baldwin - Simon J. Evenett (eds.), *The collapse of global trade, murky protectionism, and the crisis: Recommendations for the G20*, VoxEU.org Publication, 2009, p. 87.

promised.<sup>3</sup> Within this perspective, the victims of illicit behaviors are the citizens themselves who may obtain both lower-than-expected and lower-than-promised performances (so-called performance risks). Moreover, due to corruption, the public authority suffers a reputational risk (for having dealt with a dishonest contractor) and a fiduciary risk (the public resources have not been spent as was intended) undermining the citizens' trust in the public contracting and in the functioning of democratic institutions.<sup>4</sup>

The whole impact of corruption on citizens in public contracts and the settlement of adequate counter-measures could be properly appreciated through the principal-agent prism, whereby the principal are the citizens through the contracting authority while the contractor represents the agent.<sup>5</sup> The public contract system is called to correct the agent's course so its interest to maximize its profit shall not take the form of corruption and shall thus not diverge from the principal's one that is to obtain the best value for money.<sup>6</sup> Regulating the public contract award and execution through devices that prevent the contractor to corrupt the contracting authority at the citizens' expenses is the main strategy for pursuing this goal.<sup>7</sup>

The principal-agent theory holds that there are two main ways to keep the agent's interest aligned with the principal's: by monitoring and by bonding the agent. While the monitoring is mainly applied through transparency measures – which disclose the contracting authority's and contractor's relationship step by step, in order to monitor and control their integrity – the bonding could be done through several strategies, for instance through criminalization and relying on the intimidating effect of the sanction, or through administrative devices which provide integrity standards to whom the economic operator must comply for being selected as awardee of a public contract.

Concerning the latter, a suitable strategy against public contract corruption, among other ways, could consist in relying on corporate compliance tools which

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<sup>3</sup> Racca, Gabriella M. – Yukins, Christopher R., Integrity and Efficiency in Sustainable Public Contracts. Balancing Corruption Concerns in Public Procurement Internationally, Bruylant, Bruxelles, 2014, p. 8 ss.

<sup>4</sup> Yukins, Christopher R., Corruption in Public Procurement: Improving Governments' Ability to Manage the Risks of Corruption, Aa. Vv., Risk Management: perspectives and open issues, Mc Graw Hill Education, 2016, p. 837.

<sup>5</sup> Yukins, Christopher R., A Versatile Prism: Assessing Procurement Law Through the Principal-Agent Model, 40 Pub. Cont. L. J, 2010, p. 63.

<sup>6</sup> Yukins, Christopher R – Verma, Sandip, Anti-corruption in Public Procurement: A Survey of the U.S. Experience, International Public Procurement: A Guide to Best Practice, Globe Business Publishing, 2009, p. 383.

<sup>7</sup> Art. 4(4)(c), WTO Agreement on Government Procurement (GPA), 2011 revised version of the 2011, which mandates that contracting authorities conduct “covered procurement in a transparent and impartial manner that: (c) prevents corrupt practices”. See also § 16 - 17, Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014.

bond the contractors from the inside to certain integrity standards, established in the public contract regulations and recognized by the contracting authorities as mandatory for obtaining – and performing – a public contract.

## 2 Competing strategies: the criminal law-based compliance model and the contract-based integrity model

### 2.1 The corporate compliance concept for fighting public contracts corruption

The concept of compliance in criminal law recognizes that wrongdoings will always occur in corporations, and what is important is the way through which corporations respond. Particularly what is required to corporations is to adopt several tools to prevent, detect and respond to illicit behaviors, and will immediately initiate appropriate corrective and remedial actions when wrongdoings occur.<sup>8</sup> Through the implementation of the compliance model within the corporations themselves, they may be absolved from the crimes committed by their employees if the corporations can show that they are not willing to profit at all costs but to strive to create a work environment consistent with laws and ethics, sustained by compliance tools apt to prevent criminal conducts.<sup>9</sup>

In the public contract area the compliance model could be implemented to set an anti-corruption strategy involving corporations and contracting authorities.<sup>10</sup> Contracting authorities may trust the corporations provided with compliance tools admitting them in the public contract system, whose overall integrity thus will be enhanced.<sup>11</sup> The corporate compliance model aims at shifting public contracts system monitoring and bonding costs from public authority to corporations by giving compliance requirements real bite. This could be done through encouraging implementation of effective compliance tools which demonstrably work to prevent, detect and respond to corporate criminal conducts and by excluding from the award procedures those corporations who do not have a sufficient standards of integrity testified by adequate and ongoing compliance tools. The consequence would be that there is less competition in public contracts, but at least the competition is presumed to be among fair corporations.

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<sup>8</sup> Yukins, Christopher R., *New US Contractor Compliance Rules: Challenges Ahead for US and European Contractors*, *Int. Gov. Cont.*, 5, 2008, p. 72 ss.

<sup>9</sup> Kaplan, Jeffrey M., *Government: With a good compliance program, firms may avert prosecution*, *Ethikos* Nov./Dec. 1995, Vol. 9 No. 3.

<sup>10</sup> Hirsch, Hans-Joachim, *La Criminalisation du Comportement Collectif – Allemagne*, in De Doelder, Hans – Tiedemann, Klaus, *La Criminalisation du Comportement Collectif – Criminal liability of Corporations*, Kluwer Law International, The Hague/London/Boston, 1996, p. 43.

<sup>11</sup> Rose-Ackerman, Susan, *Corruption and Government. Cause, consequences and reform*, Cambridge University Press, Cambridge, 1999, p. 59.

Moreover, this will foster the economic development and the efficiency of the public contract system since corporations will be less feared of criminal prosecution and the public authority less scared about misleading in public contract award and execution.<sup>12</sup> By an institutional viewpoint, corporations may thus become powerful allies in the fight against corruption.<sup>13</sup> The compliance model reflects an effort to establish self-policing in corporations as part of a Global Law<sup>14</sup> trend binding them to reach targets other than profit<sup>15</sup> – such as anti-corruption – through an “*administrativization*”<sup>16</sup> of corporate law.

## 2.2 The evolution of the U.S. corporate compliance and ethics program model

Within the U.S. legal system the compliance model dates back from the adoption of the *Sentencing Guidelines* in 1991.<sup>17</sup> These guidelines for judges, originally settled for criminal law purposes – in terms of equity, proportionality and uniformity of criminal fines to corporations – has had long-time effects also in re-building corporations structures and business.<sup>18</sup>

According to the U.S. criminal law, corporations are accountable for the crimes committed by their employees.<sup>19</sup> Under the system established by the *Sentencing Guidelines*, however, a corporation may receive a reduced sentence or even be absolved if it demonstrates to have adopted an effective compliance program.<sup>20</sup> The *Sentencing Guidelines* have outlined an abstract model a compliance program for

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<sup>12</sup> Racca, Gabriella M. – Cavallo Perin, Roberto - Albano, Gian Luigi, Competition in the Execution Phase of Public Procurement, *Public Contract Law Journal*, Vol. 41, No. 1, 2011, p. 89 ss.

<sup>13</sup> Arlen, Jennifer, Corporate criminal liability in the United States, in Aa. Vv., *Impresa e giustizia penale: tra passato e futuro*, Giuffrè, Milano, 2009, p. 314.

<sup>14</sup> Cassese, Sabino, *Il diritto globale*, Giappichelli, Torino, 2009, p. 25.

<sup>15</sup> Hansen, Janna J., *Limits of Competition; Accountability in Government Contracting*, *Yale Law Journal*, 112, 2003, p. 2465 ss.

<sup>16</sup> Amorosino, Sandro, *L'amministrativizzazione del diritto delle imprese*, *Dir. Amm.*, 3, 2011, p. 607.

<sup>17</sup> 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. Some agencies have indeed adopted voluntary compliance system and voluntary disclosure programs even before.

<sup>18</sup> Weismann, Andrew, *A New Approach to Corporate Criminal Liability*, *American Criminal Law Review*, 2007, p. 1319 ss.; Hess, David, *Catalyzing Corporate Commitment to Combating Corruption*, in *Journal of Business Ethics*, 3, 2009, p. 1 ss.; Id., *Fighting Corruption; A Principled Approach*, in *Journal of Business Ethics*, 88, 2009, p. 781 ss.

<sup>19</sup> Fisher, Spencer R., *Corporate criminal liability*, *American Criminal Law Review*, 41, 2004, p. 367; Beck, Matthew E. – O'Brien, Matthew E., *Corporate criminal liability*, *American Criminal Law Review*, 37, 2000, p. 261; Coffee, John C. Jr., *Corporate Criminal Liability: An Introduction and Comparative Survey*, Esser, Albin – Heine, Gunther – Huber, Barbara, *Criminal Responsibility of Legal and Collective Entities*, Freiburg, 1999, p. 9 ss; Coffee, John C. Jr., “No Soul to Damn: No Body to Kick”: An Unscandalized Inquiry into the Problem of Corporate Punishment, in *Michigan Law Review*, 79, 3, 1981, p. 386.

<sup>20</sup> U.S. Sentencing Guidelines § 8C2.5 (f).

fostering its adoption.<sup>21</sup> The model is essentially based on a survey on the chances that criminal conducts shall take place in the overall corporate business (*risk-assessment*). The corporate business areas for risk-assessment are usually identified by internal surveys, but also by joint corporate initiatives<sup>22</sup>, federal statutes<sup>23</sup> and judicial mandates<sup>24</sup>. The risk-assessment overall aim is to evaluate the suitability that a certain type of employees commit a certain type of criminal conduct - through a congruity test - and the chance that it happens - through a probability test. This activity must be periodic and repeated and shall be conducted with a dynamic approach that is geared toward past as well as future business.

Following this survey, a corporation should take all the necessary measures and procedures to reduce the identified risks and prevent criminal conducts that may arise from these risk-areas (*risk-management*). The purpose of the risk-management process is to determine what types of counter-measures to misbehaviors the compliance program should address, once the risk-assessment analysis has detected the most serious risks, by evaluating the efficacy of the ongoing compliance tools and the relative emphasis to be placed upon them. The risk-management measures adopted within the compliance program shall work as compliance tools, ensuring the compliance with the law and ethics within the corporation organization and activity (tools as code of conduct and training programs) and helping in detecting, signaling and sanctioning the relative infringements (tools as monitoring and auditing mechanisms and whistle-blowing channels).

Progressively U.S. corporations have modified themselves to be consistent with the model settled by the *Sentencing Guidelines*.<sup>25</sup> The effect is a strong prevention of criminal conducts – the ones typically occurring in corporations, such as bribery – and the settlement of a good corporate citizenship established by the Federal Government, that permits corporations to avoid the criminal liability for employees' criminal conducts.<sup>26</sup>

The U.S. public contract law has gone beyond taking advantage from this model and using it as a benchmark for corporations involved in public procurement contracts. The implementation of compliance tools - under a compliance and

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<sup>21</sup> U.S. Sentencing Guidelines § 8 A1.2 Comment (n3) §§ (k1) – (k7).

<sup>22</sup> E.g. Compliance and ethics Program Guidance for Pharmaceutical Manufactures issued in April 2003 by the Department of Health and Human Service's Office of Inspector General.

<sup>23</sup> 31 U.S.C. § 5318(h).

<sup>24</sup> Letter from U.S. Department of Justice, 14<sup>th</sup> January 2011, to Eric A. Dubelier, Reed Smith LLP, in *United States v. Depuy, Inc.*, DCC (2011) Cr 099,34.

<sup>25</sup> U.S. Sentencing Commission, Federal Sentencing Guidelines Manual, 2007: § B2.1. Effective Compliance and Ethics Programs; C.R. Yukins, *Feature Comment: U.S. Contractor Compliance Rules are likely to Expand*, in *The Government Contractor*, Vol. 50, no. 16, 1, 2008.

<sup>26</sup> Matten, Dirk - Crane, Andrew, Corporate Citizenship: Towards an extended theoretical conceptualization, No. 04-2003, ICCSR Research Paper Series; Andriof, Jorg – McIntosh, Malcom (Eds.), *Perspectives on corporate citizenship*, Sheffield, Greenleaf, 2001, p. 69 ss.

ethics program<sup>27</sup>- is now required *ex lege* by the *Federal Acquisition Regulations* as a mandatory element of the public procurement contractor.<sup>28</sup> The goal here is no more assessing the corporate liability for criminal conducts rather than enforcing integrity in public contracting through setting mandatory requirements to get a public procurement contract. Particularly, the evaluation of compliance tools settled by the economic operator is particularly considered as part of determinations of a contractor's reliability, called responsibility. Within the U.S. legal framework the assessment of the contractor's responsibility is done at the end of the process and not, as typically happens within the EU Member States, at the beginning of the award process.<sup>29</sup> If the economic operators does not shown a satisfied records of integrity and ongoing compliance tools will be excluded from the award procedure and the second best tenderer will be appointed.<sup>30</sup> This process perfectly complies with the "subjective" perspective in award procedure realized in the U.S. public contract system.<sup>31</sup> Moreover, the lack of compliance and ethics program exposes corporations to the risk of being suspended or debarred.<sup>32</sup> Here the ethics and compliance programs come back again, since corporations lacking of adequate legal and ethical standards seriously undermines the public

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<sup>27</sup> 73 Federal Register 67064-67093, especially 67067, Nov. 12<sup>th</sup>, 2008. Particularly the rule has required that federal contractors have to establish written codes of business ethics and conduct (within 30 days); and within a period of 90 days to exclude risky personnel from their organizations (undertake reasonable efforts not to include and individual whom due diligence would have exposed as having engaged in bad conducts) undertake business ethics awareness and compliance programs within their organizations, establish internal control system to facilitate timely discovery of cases of breach of codes of conduct and to ensure corrective actions in such cases, and conduct periodic reviews and adjustment.

<sup>28</sup> U.S. Federal Acquisition Regulations 52.203-13 (b)(2)(1).

<sup>29</sup> This is done because an earlier assessment could be perceived as an anti-competitive, stating who is a good contractor before could unduly limit the competition. By the United States Federal Government point of view, this process is cost-effective because they just can pass to another contractor if the first one has not implemented the compliance program and then not considered responsible.

<sup>30</sup> Schooner, Steven L., *Desiderata: Objectives for a System of Government Contract Law*, Public Procurement Law Review, 11, 2002, p. 203 ss.

<sup>31</sup> Gordon, Daniel I., *Protecting the integrity of the U.S. federal procurement system: Conflict of interest rules and aspects of the system that help reduce corruption*, in Auby, Jean Bernard – Breen, Emmanuel – Perroud, Thomas (Eds. By), *Corruption and Conflicts of Interest: A Comparative Law Approach*, Edward Elgar, Cheltenham, 2014, p. 39; Gordon, Daniel I. – Racca, Gabriella M., *Integrity Challenges in the EU and U.S. Procurement Systems*, in Racca, Gabriella M. – Yukins, Christopher R. (Eds. by), *Integrity and Efficiency in Sustainable Public Contract. Balancing Corruption in Public Procurement Internationally*, Bruylant, Bruxelles, 2014, p. 117.

<sup>32</sup> U.S. Federal Acquisition Regulations 4.703. Another step in the compliance model has consisted in requiring federal contractors to self-report criminal behaviors, U.S. Federal Acquisitions Regulations 52.203-13(b)(3). The failure to report these violations has also been added as a ground for suspension and debarment, U.S. Federal Acquisitions Regulations 9.406-2(b)(1)(4), 9.407-2(a)(8)



contract system.<sup>33</sup> This way the Federal Government pushes corporations that want to deal with it to the highest legal and ethical standards and so it reaches the highest integrity in the public contract system.<sup>34</sup>

Thus the corporate compliance model has come out from a strict criminal law area becoming a central issue in the public contract legal framework, being a form for fighting corruption at the expense of public procurement contractors.

### 2.3 Corporate compliance perspectives in the EU Directive on public procurement

The compliance program model has been adopted in several EU countries, such as Germany, Sweden, United Kingdom and Italy in their respective criminal legal framework.<sup>35</sup> While corruption has been largely and increasingly addressed at the EU-level<sup>36</sup> the adoption of the compliance program model in EU Member States has indeed mainly represented the outcome of the compliance with the international convention against corruption<sup>37</sup> and to the current challenges of corporate criminal liability rather than a fulfillment of a Eu-law specific legal provision. Indeed, the compliance program model has been mostly implemented to constitute an organizational defense for mitigating the punishment in criminal corporate liability or even in assessing whether to bring charges against the corporation or not where the criminal prosecution is discretionary. More specifically

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<sup>33</sup> Schooner, Steven L., *The Paper Tigers stirs: Rethinking Suspension and Debarment in Aa. Vv., Suspension and Debarment: Emerging Issues in Law and Policy*, Public Procurement Law Review, Vol. 13, 2004, p. 1 ss.

<sup>34</sup> Yukins, Christopher R., *Feature Comment: Enhancing Integrity - Aligning Proposed Contractor Compliance Requirements With Broader Advances In Corporate Compliance*, Gov. Contr., 25, 2007, p. 166 ss.

<sup>35</sup> Italy, for instance, has adopted a compliance model for corporations in 2001 in order to regulate their corporate criminal liability. The Italian implementation of the model has substantially failed: the legal tools for supporting the model have been poorly realized; the list of criminal conducts to be avoided has been instead excessively extended and as a consequence, corporations cannot focus on typical white-collars crimes and therefore there has not been a serious deterrence effect. Many Italian corporations have moreover just copied a standard compliance program without adapting it to their specific needs. Last, contracting authorities have not been entitled to use this model for assessing the public procurement contractors' reliability. See Garegnani, Giovanni Maria, *Etica d'impresa e responsabilità da reato. Dall'esperienza statunitense ai «modelli organizzativi di gestione e controllo*, Giuffrè, Milano, 2008.

<sup>36</sup> The EU's most important legal instruments against corruption are: Art. 83(1) of TFEU which provides a mandate for EU to address serious crime (mentioning among others corruption) with a European or cross-border dimension; Art. 325(4) of TFEU which provides a legal basis for all necessary measures to fight against fraud affecting the financial interests of EU; 1997 Convention on the fight against corruption involving officials of EU and EU member states; Framework Decision (2003/568/JHA) on combatting corruption in the private sector.

<sup>37</sup> United Nations Convention against Corruption (UNCAC); OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; Council of Europe 1999 Criminal Law Convention on Corruption; Civil Law Convention on Corruption).

the implementation of the corporate compliance program model responds to two main different trends.

Firstly, it has been the result of the several international conventions and initiatives against corruption providing that economic operators shall adopt corporate compliance tools in order to join the fight against corruption and the overall promotion of integrity. The United Nation Convention against Corruption enlists, among the tools for fostering integrity within private sector, the use of compliance programs and internal controls by economic operators.<sup>38</sup> This concept has been lately expressed as tenth principle of the United Nations Global Compact initiative as corporate commitment to reform their organizations and business according to ethics and law through compliance tools.<sup>39</sup>

The OECD Working Group on Bribery in International Business Transactions<sup>40</sup> has recommended to Member countries to adopt compliance tools for corporations for preventing and detecting bribery, establishing to this end specific corporate principles on how combating foreign bribery.<sup>41</sup> Particularly, the risk-management process has been addressed as an anti-corruption corporate compliance tool by the OECD Good Practices on Internal controls, ethics, and compliance.<sup>42</sup> Similarly, the Task Force on Anti-Corruption and Transparency has stated that the set-up of robust compliance programs for private companies is one of the most urgent business-driven actions against corruption.<sup>43</sup> Last, the International Chamber of Commerce provides guidelines – called Rules on Combating Corruption – on how fighting corruption within corporations and therein it is suggested to adopt compliance tools such as risk-management proceedings for this purpose.<sup>44</sup>

Secondly, the diffusion of corporate compliance programs in Europe is due to the extra-territorial enforcement of the U.S. Foreign Corrupt Practices Act<sup>45</sup>: this statute allows the U.S. authorities to prosecute companies for having committed foreign bribery even if they are not U.S. companies nor have their headquarters

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<sup>38</sup> United Nations, United Nations Convention against Corruption, Art. 12 (2), b, f., 9<sup>th</sup> December 2003

<sup>39</sup> United Nations, Global Compact Tenth Principle, 24<sup>th</sup> June 2004.

<sup>40</sup> OECD Anti-Bribery Convention, Art. 12, 21<sup>th</sup> November 1997.

<sup>41</sup> OECD Good Practice Guidance, 18<sup>th</sup> February 2010.

<sup>42</sup> OECD, Good Practice Guidance on Internal Controls, Ethics, and Compliance, 26<sup>th</sup> November 2009.

<sup>43</sup> B20 Mexico Task Force on Improving Transparency and Anti-Corruption: Immediate Actions and Decisions for Los Cabos, Principle B, 17<sup>th</sup> June 2012.

<sup>44</sup> ICC Rules on Combatting Corruption, Guidelines on Whistleblowing, Handbooks 2011; ISO 37001 standard on “Anti-Bribery Management Systems” (under work, ISO PC/278); World Bank Group Anticorruption Guidelines; Global Reporting Initiative (GRI, GR4); Transparency International’s Business Principles for Countering Bribery etc.

<sup>45</sup> Davis, Kevin E., Why Does the United States Regulate Foreign Bribery: Moralism, Self-Interest, or Altruism?, 67 N.Y.U. Annual Survey of American Law 2012, p. 497-511.

in the U.S. territorial jurisdiction, being enough they have resorted to the U.S. securities exchange, by falling within the scope of the notion of “issuer”.<sup>46</sup> The threat to be internationally prosecuted by the U.S. Foreign Corrupt Practices Act, as is happening more and more frequently<sup>47</sup>, had pushed even European companies to adopt those compliance programs that, according to the U.S. statute, operate as a corporate defense tool.<sup>48</sup> Interestingly, somehow mirroring the U.S. developments in the field, compliance model and tools have also recently appeared in the EU public contract area, directly through the new EU Directive on public procurement.<sup>49</sup>

The resulted system cannot be said complete as the U.S. Sentencing Guidelines and U.S. Federal Acquisition Regulation combination<sup>50</sup> and rather being a significant achievement in merging anti-corruption strategies, procurement law and corporate compliance tools. The new EU legal framework on public contract provides indeed exclusion grounds related, among the others, to corruption<sup>51</sup> as well as the possibility of rehabilitation by self-cleaning through compliance tool for avoiding *ex post* the exclusion. More specifically the EU Directive legal provision sets forth a number of mandatory grounds for exclusion in case of a final conviction for corruption<sup>52</sup>, as defined in the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, in the Council Framework Decision in combating corruption in the private sector as well as corruption as defined in the national

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<sup>46</sup> U.S.C. 15, § 78dd-1, 3 (a).

<sup>47</sup> *SEC v. AB Volvo*, Civ. A. No. 08-CV-00473 (D.D.C. 2008); SEC Litigation Release No. 20504 (Mar. 20, 2008); *EC v. Akzo Nobel, N.V.*, Civ. A. No. 07-CV-02293 (D.D.C.); SEC Litigation Release No. 20410 (Dec. 20, 2007); *SEC v. Chandramowli Srinivasan*, Civ. A. No. 1:07-CV-01699 (D.D.C.).

<sup>48</sup> Tillipman, Jessica, Foreign Corrupt Practices Act Fundamentals, in Briefing Papers (Thomson West), No. 08-10, 2008, p. 2 ss.

<sup>49</sup> **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.** See, among the many, Telles, Pedro – Butler, Luke, Public Procurement Award Procedures in Directive 2014/24/EU, Lichere, François – Caranta, Roberto – S Treumer, Steen (Eds by) *Novelties in the 2014 Directive on Public Procurement*, Djof Publishing, 2014.

<sup>50</sup> The U.S. Federal Acquisition Regulations indeed addresses anti-corruption strategies both by the procuring entity side (FAR Part 3) and the economic operators side (FAR Part 9).

<sup>51</sup> The legal framework maintains the systematic approach of the previous Directive 2004/18/EU by distinguishing between mandatory and discretionary grounds; what is noteworthy is that the Member States are now allowed to implement the discretionary grounds as grounds for mandatory exclusions.

<sup>52</sup> Additionally, due to the fact not in all jurisdiction legal persons can be convicted, the exclusion will take place in case in which a person who is a member of the administrative, management or supervisory board of the economic operators has powers of representation, decision or control is convicted by a final judgment, Art. 57 (1) (2), **Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014.**

law of the contracting authority or the economic operator.<sup>53</sup> These grounds on corruption require to the contracting entities to exclude economic operators from public contracting basically for not being responsible. Any economic operator may however provide evidence to the effect that it has taken sufficient steps to demonstrate its reliability despite the existence of a relevant ground for exclusion and therefore not be excluded.

These steps particularly consist that compensation for the harm rendered by the wrongdoing, whether criminal or more general misconduct, has been paid; an active cooperation with any investigative authorities in order to clarify the facts of the transgression has been carried on; and appropriate concrete technical, organizational and personnel measures have been taken to prevent repeat offences or misconduct.<sup>54</sup> The latter might consist in personnel and organizational measures such as the severance of all links with persons or organizations involved in the misbehavior, appropriate staff reorganization measures, the implementation of reporting and control systems, the creation of an internal audit structure to monitor compliance and the adoption of internal liability and compensation rules, which basically is what a corporate compliance program is made of.<sup>55</sup>

The EU Directive compliance program model is therefore a compliance tool mainly structured on the concept of *self-cleaning*<sup>56</sup>: the adoption of the compliance program is explicitly directed to show that the economic operators has changed its own behavior in order to regain access to procurement processes before exclusion periods have expired.<sup>57</sup> Therefore the EU legal provision provides that compliance only works for avoiding an exclusion ground since it is not a mandatory require-

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<sup>53</sup> The contracting authority may derogate from the obligation to exclude an economic operator if overriding reasons of public interest justify an exception (e.g. public health). This could represent an escape clause for cases whereas excluding an economic operator actually harms the interests of the contracting authority (e.g. competition ends in highly concentrated or specialized markets).

<sup>54</sup> Art. 57(6), Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014.

<sup>55</sup> § 102, Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014. However, these are merely *examples* of what kind of policies economic operators *may* adopt or be asked to adopt in order to self-clean; Article 57(6)'s fully leaves open to the Member States (whether at central, regional, or contracting authority level) to establish whether or not enough self-cleaning has taken place, noting only that contracting authorities will evaluate self-cleaning 'taking into account the gravity and particular circumstances' of the misconduct.

<sup>56</sup> Priess, Hans-Joachim, The rules on exclusion and self-cleaning under the 2014 Public Procurement Directive, 23 PPLR, 2014, p. 112; Sanchez-Graells, Albert, Exclusion, Qualitative Selection and Short-listing in the New Public Sector Procurement Directive 2014/24, Lichere, Francois, Caranta, Roberto, Treumer, Steen (eds.), *Novelties in the 2014 Directive on Public Procurement*, Djøf, Copenhagen, 2014.

<sup>57</sup> Art. 57(5), Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014. If an economic operator has been excluded by final judgment from participating in procurement or concession award procedure, it shall not be entitled to make use of the possibility provided for under this paragraph during the period of exclusion resulting from that judgment in the Member States where the judgment is effective.

ment for public procurement contractors. The main idea is that in principle, economic operator does something wrong, then secondly he can take self-cleaning measures, and then thirdly it will not be excluded. So that is different with the U.S. system, because there it is normal to take always self-cleaning measures, where economic operators actually start there with self-cleaning measures, and then, if something goes wrong, it is possible to be excluded for, first of all, the wrong itself, but also if the self-cleaning measures would not be considered sufficient.<sup>58</sup>

The result is a limited approach to compliance: while the U.S. legal system generally assumes that a contractor compliance system is always present and ongoing, the EU directive assumes that a compliance system will be put in place only after a contractor has engaged in misconduct. The resulted approach indeed seems an *ex-post* remedial measure voluntarily taken. The EU Directive poses an interesting starting point, but should be really implemented by the national legal system, giving more broad scope to compliance programs and where it is possible being required to the public procurement contractor as actually happens within the U.S. legal system.

Moreover, the EU legal provision is broad and little detailed enough that it does not preclude somewhat arbitrary standards being applied to individual self-cleaning process in front of contracting authorities. It is not only quite vague on what measures can demonstrate an accomplished self-cleaning, but does not place any procedural requirements on the decision-making authority at the time that it decides whether to exclude or not a self-declared self-cleaned economic operator. While the contracting authority will have to state reasons for having decided to deny an economic operator's participation request, and while such stated reasons would be subject to judicial review proceedings, the EU legal provision does not address what would justify excluding a an economic operator. The EU Directive leaves indeed to Member States to determine whether to allow the individual contracting authorities to carry out the relevant assessments or to entrust other authorities on a central or decentralized level with that task. Whereas the exclusion of the economic operators and the assessment on its self-cleaning is done on procedure-by-procedure basis small contracting authorities will have difficulties to handle these complex issues, lacking the needed expertise. This could be quite problematic considering the high number of small contracting authorities in EU.<sup>59</sup>

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<sup>58</sup> See, among the many, Sanchez-Graells, Albert, Competition infringements and procurement black-listing, *Competition Law Journal*, 1, 2017.

<sup>59</sup> In U.S. the Clinton Administration allowed to assess the economic operator compliance with several integrity standards by using the *black-listing* measure adopted by the *Office of Management and Budget*, within the responsibility determination procedure (65 Fed. Reg. 80, 256, Dec. 20, 2000; see 42 GC 505). This regulation substantially equalized the (non-)responsibility determination to a debarment sanction without its due procedure (*debarment de facto*) and was repealed during the Bush Administration (Fed. Reg. 66, 983, Dec. 27, 2001).

## 2.4 The contractual model option: the Transparency International Integrity Pact

A contractual model may constitute an alternative to the compliance program model in anti-corruption strategies for enforcing integrity in public contracts. The Integrity Pact model, created by Transparency International, represents the most famous anti-corruption contractual strategy.<sup>60</sup>

The integrity pact is substantially an agreement among contracting authorities and economic operators established to promote heightened standards of transparency and integrity within the public contract process they are involved in. The integrity pact becomes in all means a part of the public procurement contract: the integrity pact must be signed by all the bidders for participating to the public procurement competition and its clauses binds the awardee by an explicit referral in the public procurement contract. The integrity pact content requires the economic operators involved in public procurement to commit themselves to prevent and disclose corruption. If they fail in complying with these integrity standards, the contracting authority is allowed to exclude them from the procedure or even to terminate the public procurement contract already awarded.<sup>61</sup> The exclusion of a bidder is therefore made on a contractual basis by the contracting authority itself, and there is no need to wait for a criminal conviction. This exclusion for violation of the contractual terms of the integrity pacts allows EU contracting authorities to operate similarly to the U.S. contracting authorities, which are entitled to assess as non-responsible an economic operator for its questionable integrity by discretionary means, even if no criminal conviction is presented.

In the EU Directive a final judgment of criminal conviction of corruption is required to exclude a bidder and this may take a long time; the EU Directive also provides a ground for exclusion for economic operators' lack of integrity without

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<sup>60</sup> Transparency International, *The Integrity Pact Methodology and its Impact on the efficiency, efficacy and transparency of contracting processes*, 2005; *The Integrity Pact: the Concept, the Model and the Present Applications: A Status Report*, 2002.

<sup>61</sup> For example, the integrity pacts have been remarkably applied in Italy, contributing to enhance integrity in public contract by excluding from procurement procedure those economic operators that did not comply with the integrity standards established in the pact signed; Cons. St., Sez. VI, 8 maggio 2012, n. 2657; Cons. St., Sez. V, 18 aprile 2012, n. 2232; Cons. St., Sez. V, settembre 2011, n. 5066; Cons. St., Sez. V, 6 aprile 2009, n. 2139; Cons. St., Sez. V, 8 settembre 2008, n. 4267; Cons. St., Sez. V, 6 marzo 2006, n. 1053; Cons. St., Sez. V, 8 febbraio 2005, n. 343.

having a criminal conviction<sup>62</sup> but this ground of exclusion is considered discretionary and optional, and it is therefore left for Member States to implement them or not. This ground works once the contract is awarded, and if the integrity of the awardee is questionable, it is possible to terminate the public contract.<sup>63</sup> The implementation of the integrity pact could achieve the same result relying on a contractual infringement. It allows terminating a public procurement contract in case of corruption, excluding the corrupt awardee and appointing a new contractor, thus sanctioning corrupt corporations harsher.<sup>64</sup>

The traditional path to give economic relief to the second best bidder after corruption is discovered indeed does not promote integrity within the whole public contract system and instead creates a reputational, fiduciary and a financial loss to the contracting authority. Particularly the financial loss is double since the corrupt contractor has been paid for having unlawfully obtained the contract and then later an honest contractor being paid because he did not get the award that he had deserved. The integrity pact presents several advantages in fighting corruption: its application covers the whole public contract, included the execution phase which often is hampered by corrupt behaviors among the contracting authority officers and the contractors. Moreover the integrity pacts model does not need a massive regulatory framework and charges anti-corruption commitment exclusively on public procurement contractors, aiming at reducing corruption solely in public-private relationship. What is remarkable is that this compliance system based on contractual basis has been assessed as consistent with

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<sup>62</sup> Whereas the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable, Art. 57(4) (c); whereas the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition, Art. 57(4)(d); whereas the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior contract with a contracting entity or a prior concession contract which led to early termination of that prior contract, damages or other comparable sanctions, Art. 57(4)(g), **Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014**.

<sup>63</sup> Art. 73(2)(b), **Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014**. This because all the grounds provided for exclusion serve also as ground enabling a contracting authority to terminate the contract awarded and also the discretionary ground could be used for this purpose if the national law permits it.

<sup>64</sup> The Italian case Expo 2015 has become notorious since there the integrity pact has represented an alternative to government administration of a corrupted contractor. During the Expo event in Milan, 2015, indeed there was a big corruption scandal about the award of the public works for building the main pavilion regarding the Italian State exposition; thanks to the integrity pact signed, it would have been possible to immediately terminate the public contract for corruption and re-awarding it to the second scored economic operator, T.A.R. Lombardia, Milano, Sez. I, 9 luglio 2014, 1802. However, the supreme administrative judge has declared that, since the government administration of the public contract awarded have taken place – meaning that an expert appointed by the Anti-Corruption National Authority manages the public contract awarded – there was no need to terminate the public contract anymore, Cons. St., Sez. IV, 20 gennaio 2015, n. 143.

the EU law by the Court of Justice since its responsibility system does not seem disproportionate to end of fighting corruption even if it hampers competition.<sup>65</sup> The use of integrity pacts is growing and should be further promoted, as sustained by EU institutions.<sup>66</sup>

### 3 Anti-corruption models' mutually exclusive outcomes

It seems that both the enforcement of a compliance program or the signing of an integrity pact are directed to enforce the principal-agent theory by bonding the latter to certain integrity standards under the threat to not to get the contract it competes for or by losing it once awarded for certain illicit behaviors.

Corporate compliance programs and integrity pacts are therefore powerful tools for enforcing the consistency of the agent's interest with the principal's one by ensuring that integrity will be observed during the award procedure and during the execution phase by making the awardee get the contract and deliver the performances requested in a proper manner.

Even if both the models are directed to the aim of fighting public contract corruption, they may have significant different outcomes and seem reflecting a different approach to public contract risk-mitigation. The large and dynamic use of the corporate compliance model in the U.S. system is supported by the criminal legal framework that, in practice, confers a significant discretion to prosecutors in determining whether to pursue criminal charges against a corporation and to courts in evaluating its corporate criminal liability, by considering a corporate compliance program a serious issue.<sup>67</sup> Moreover, during the charge, the Department of Justice and the target company to enter in a non-prosecution agreement (NPA) or a deferred prosecution agreement (DPA) under which the prosecutors refrains from filing charges based on the corporations' commitment to cooperate fully and take remedial actions;<sup>68</sup> if the corporation does not cooperate with the prosecuting authorities it could lose the qualification of being a "good contrac-

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<sup>65</sup> CEJ, 22 October 2015, C-425/14, *Impresa Edilux Srl and Società Italiana Costruzioni e Forniture Srl (SICEF) v. Assessorato Beni Culturali e Identità Siciliana*.

<sup>66</sup> European Economic And Social Committee, *Fighting Corruption in the EU - Meeting Business and Civil Society Concerns*, 16 September 2015, § 1.4.3

<sup>67</sup> U.S. attorneys particularly are directed to consider numerous factors including a corporation's remedial and corrective action taken in response to the detected wrongdoing and assess if they deserve to receive more lenient treatment and even avoiding the prosecution. The discretion is so huge that when the conviction of a corporation may have disproportionate harmful consequences for innocent employees, consumers, shareholders, citizens and the general public, or may not be in the best interest of the public, the Department of Justice has availed itself of alternative dispositions that mitigate these consequences or avoiding them, while also promoting corporate reform.

<sup>68</sup> Memorandum for Acting Deputy Attorney General C. Morford to Heads of Department Components U.S. Attorneys, *Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations* (March 7, 2008).



tor” and being labeled as non-responsible within the public procurement award procedure.<sup>69</sup> The rationale behind the compliance program in the U.S. public contracts system is that economic operators may minimize or even eliminate the risk of being excluded from the participation in public procurement procedures by implementing an effective compliance program and thus providing themselves with a second chance.<sup>70</sup>

This overall U.S. legal framework render a compliance program that is well fitted to address the performance risks in public contracts, avoiding delay or non-conforming performances in the public contract by maintaining the current contractor under the condition that it commits itself to a higher integrity level than before. The enforcement of a compliance program together with the large use of NPA and DPA<sup>71</sup> comply with the Federal Government’s aim not to prejudice the execution of public procurement contracts in public contracts by maintaining the current contractor, even where its integrity is questionable. The integrity pact model seems instead more fitted to address the fiduciary and reputational risks in public contracts. The enforcement of the integrity pact indeed allows to terminate a public procurement contract for corruption, excluding the corrupt awardee and appointing a new contractor, thus sanctioning corrupt corporations harsher and avoiding that public procurement contracts are awarded to and performed by contractors who has distorted the fair competition and the impartiality of the public action.

This anti-corruption strategy, however, bears the risk of interrupting the public procurement contracts – which compels the authority to re-award the contract or to even open up an entirely new procurement procedure – causing more damage to the performance of the contract and therefore to the services to be given to the citizens. The enforcement of the integrity pacts has often represented an alternative to government administration of corrupted awardee: where the enforcement of integrity pact allows to terminating a public procurement contract for corruption, organizational model such as the government administration complies more with the public goal to not prejudice the execution of public procurement contract.

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<sup>69</sup> *United States v. Alstom S.A.*, Crim. Case 3:14-cr-00246-JBA, U.S.D.C., District of Connecticut (Dec. 22, 2014);

<sup>70</sup> Arlen, Jennifer, Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed through Deferred Prosecution Agreements, 8 *Journal of Legal Analysis* 2016, p. 197–204.

<sup>71</sup> In the Darleen Druyun affair, a procurement officer improperly manipulated certain program requirements and the related evaluation factors in a manner that favored the ultimate awardee, the Boeing Company. Even if, thanks to the bid protest of *Lockheed Martin*, corruption was discovered in the form of conflicts of interest (18 U.S.C. § 208(a) considering the Army needs, the best interest of the U.S. Federal Government, the integrity of taxpayers resources and the fact that the most part of the public contract was already been performed, the Government Accountability Office ordered that the contract had to be terminated and re-awarded only to the extent it was still not performed and the Lockheed Martin being reimbursed for the proposal preparation costs and the bid-protest costs only, GAO, B-295402, February, 18<sup>th</sup> 2005.

Therefore, the two anti-corruption strategies seem not only to address different risks in public contract awarding and execution, but even having mutually exclusive goals and outcomes, that are the need of exclusion of the corrupt bidders *against* the need of obtaining the performances requested timely.

However, the two legal systems they mostly support these different tools, U.S. and EU, seem converging in adopting a criterion for exclusion which bridge together corporate compliance efforts, performance-risk mitigation and the purpose of avoiding undesirable contractors.<sup>72</sup> The U.S. public contracts system makes use of the criterion of poor past-performance as a ground for exclusion. The ground allows contracting authorities to (self)-protect their interests by not engaging contractors prone not to deliver as expected.<sup>73</sup> Interestingly, also the new EU Procurement Directive has established a new ground for exclusion based on poor past performance: under this ground, contracting authorities can exclude economic operators that have shown significant or persistent deficiencies in the performance.<sup>74</sup>

The introduction of past performance as an exclusion ground brings the EU system closer to that of the US. The exclusion for poor past performances seems particularly proportionate in view of the rules on self-cleaning that allow contractors to compensate such poor past performance by showing that they have implemented changes to avoid them to reoccur. This way the EU legal system seems more sensible to the issue of performance-risk, allowing exclusion on poor past performance but at the same time allowing a concrete risk-mitigation: contracting authorities will be permitted to exclude economic operators with poor past performance, thus managing the performance-risk, but will also be able to not exclude a contractor, even if corrupt, whereas it has proceeded to a reliable self-cleaning process.<sup>75</sup>

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<sup>72</sup> Schooner, Steven L., Reflections on Comparative Public Procurement Law,” 43 Public Contract Law Journal, 1–2,2013, p. 43 ss.

<sup>73</sup> Treumer, Steen, Towards an obligation to terminate contract concluded in breach of the E.C. Public Procurement rules – the end of the status of concluded public contracts as sacred cows, Public Procurement Law Review, 2007, 6, p. 371 ss.;

<sup>74</sup> Art. 57(4)(g), Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014.

<sup>75</sup> Racca, Gabriella M. – Yukins Christopher R., Steps for integrity in public contracts, in Racca, Gabriella. M. – Yukins, Christopher R. (Eds. By.), Integrity and Efficiency in Sustainable Public Contract. Balancing Corruption in Public Procurement Internationally, Bruxelles, Bruylant, 2014, p. 1 ss.