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DROIT ADMINISTRATIF
ADMINISTRATIVE LAW

20

Transnational Law of Public Contracts

Editors:
Mathias AUDIT
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CHAPTER 31
Public Contracts and International Public Policy Against Corruption

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1. Introduction

In the perspective of the internationalization of public contracts, the problem of integrity of public contracts is of utmost importance as it is possible to identify connections between the fight against improper behavior in international transactions and the internal perception of the phenomenon. Public contracts are traditionally the government activity most vulnerable to corruption, due to the large amount of public funds involved and to the numerous chances for parties' illicit or opportunistic behavior within the awarding and execution. Integrity in public contracts stands for the principle, developed in legal rules and procedures as well as in ethic rules, which ensures proper and correct behavior by all the parties involved with a special focus on the safeguarding of public resources.(1)

Until the 1990s corruption used to be thought of as an intrinsic feature of some domestic institutions. Firms involved in international transactions – and in particular in international public contracts – used to take into account the cost of local corruption in their estimate of the project's total cost.(2) Companies seeking contracts abroad often expected to have to pay a bribe to foreign officials just to stay in the race. Several governments saw no reason to disagree and offered favorable tax treatment for bribery payments which could be written off as expenses; yet in the last two decades the internationalization of the fight

(1) OECD, *Recommendation of the Council on Public Procurement* (18 February 2015); *OECD, Implementing the OECD Principles for Integrity in Public Procurement* (21 November 2013); OECD, *OECD Principles for Integrity in Public Procurement* (2009); OECD, *Integrity in Public Procurement Good Practice From A to Z* (2007); OECD, *Principles for Managing Ethics in the Public Service*, Recommendation, Puma Policy Brief No. 4, Public Management Service (May 1998); G.M. Racca and C.R. Yukins, *Integrity and Efficiency in Sustainable Public Contracts. Balancing Corruption Concerns in Public Procurement Internationally* (2014).

(2) J. Graf Lambsdorff, "Causes and Consequences of Corruption: What Do We Know from a Cross-Section of Countries?", in S. Rose-Ackerman (ed.), *International Handbook on the Economics of Corruption*, 21 (2006).

against corruption seems to have produced tangible effects both at the national and the international level, raising a new kind of awareness which complements the domestic efforts in coping with corruption.

This Chapter aims to explore the potentially fruitful interactions among international conventions and national legal systems as they apply also in the context of public contracts. In fact, the fight against corruption concerns also the sector of public contracts which is unanimously known as plagued by corruption. The extent to which public money is wisely channeled through public procurement is therefore to be considered symptomatic of the commitment by States and by their citizens in their different specific roles (*e.g.* economic operators, civil servants, public officials, final users) at any level of government in the fight against corruption.

Corruption remains admittedly a widespread phenomenon that affects both national and international business transactions. Besides moral and political concerns, corrupt practices are known to affect good governance and economic development mainly by creating an uneven playing field for firms. Different States are then required to share the responsibility and bear the brunt of combating corruption at a global level as much as they would do domestically.

Corrupt behavior not only has economic effects, but also affects human rights; moreover it undermines the trust in the institutions and requires a strong commitment at any level to counteract harmful economic consequences. While displaying a wide scope of application, international instruments to fight against corruption are nonetheless limited by several features that hamper their potential to address the problem effectively. The wide array of existing instruments in fact determines quite a complex framework of tools differing with respect to the scope and to the effects that they generate on different States.

An overview of the instruments at international and European level used in the fight against corruption will be presented in Section 2. An analysis of the OECD Anti-Bribery Convention will follow in Section 3 so as to shed light on its efforts to corruption. Similarities among different international conventions will be highlighted in Section 4, surveying the most relevant definitions contained in the conventions themselves, and more specifically corruption, active and passive bribery and foreign public officials. International instruments and their effects on public procurement will follow in Section 5, whereas Section 6 will focus on the national implementation of the OECD Convention in the UK and in the US and the monitoring reports. In Section 7 some final remarks on the current level of the internationalization of public contracts and their criticisms and challenges will be drawn.

2. *An Overview of International and European Instruments in the Fight Against Corruption*

An overview of international and EU instruments implemented in the fight against corruption will be presented below, so as to shed light on their application to public contracts. Public contracts are more and more subject to international and supranational regulations, as EU law is, but are also affected by soft-law tools which drive all the procurement phases. A greater synergy between all these instruments is needed to fight against corruption in public procurement and assure a fair competition among undertakings at any level to assure the correct use of public funds for the benefit of citizens. At the international level, the Council of Europe pursues the objective to eradicate corruption in order to defend human rights(3) in democratic societies.

The Council's forty-seven Member States have committed to cooperate in the common struggle against bribery by fixing common standards in their national law as they

> shall co-operate effectively in matters relating to civil proceedings in cases of corruption, especially concerning the service of documents, obtaining evidence abroad, jurisdiction, recognition and enforcement of foreign judgments and litigation costs, in accordance with the provisions of relevant international instruments on international co-operation in civil and commercial matters to which they are Party, as well as with their internal law.(4)

In its pursuit of reducing bribery actions, the Council of Europe approved two relevant conventions, namely the Criminal Law Convention on Corruption(5) and the Civil Law Convention on Corruption, together with Twenty Guiding Principles for the Fight against Corruption.(6) Such instruments are deemed to be of utmost importance and they are becoming progressively common in the EU area: at the present moment only one EU Member State(7) has not yet

(3) The connection between corruptive phenomena and human rights has been recently addressed by C. RAJ KUMAR, *Corruption and Human Rights in India. Comparative Perspectives on Transparency and Good Governance* (2011); S. DEVA and D. BILCHITZ (eds.), *Human Rights Obligations of Business. Beyond the Corporate Responsibility to Respect?* (2013).

(4) Council of Europe, Civil Law Convention on Corruption (signed on 4 November 1999, entered into force on 1 November 2003), Article 13. It has 21 ratifications, Italy has ratified it with Law No. 112 of 28 June 2012 concerning the Italian National Implementation of the Civil Law Convention on Corruption, available at http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=174&CM=&DF=&CL=ENG (last visited 10 November 2013). Compared with the Criminal Law Convention, the Civil Law Convention on Corruption and the OECD Convention only apply to bribery and similar acts.

(5) Council of Europe, Criminal Law Convention on Corruption, signed on 27 January 1999, entered into force on 1 July 2002. It has 30 ratifications, Italy has ratified it with Law No. 110 of 28 June 2012 concerning the Italian National Implementation of the Criminal Law Convention on Corruption.

(6) Council of Europe Committee of Ministers' Resolution on the Twenty Guiding Principles against Corruption (97) 24 (6 November 1997).

(7) Germany.

ratified the Council of Europe's Criminal Law Convention on Corruption, four have not yet ratified its additional Protocol(8) while six have not yet ratified(9) the Civil Law Convention on Corruption. The Council of Europe's anti-corruption policies are also channeled through the control of GRECO (Council of Europe Group of States against Corruption), which contributes to assure minimum standards in a pan-European legal area, although GRECO does not focus on the EU legislation on public procurement.(10)

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions(11) is another important instrument to fight against corruption worldwide. Signed in 1997 and entered into force in 1999, the Convention was implemented in all OECD countries and in some other non-OECD countries, since OECD membership is not a pre-requisite for adhering to the Convention. Overall, forty States have signed the Convention, although it is worth noting that neither China nor India are currently parties. In spite of the large set of countries, the Convention's scope is restricted to the specific issue of bribery of foreign public officials in international business transactions. The related measures to make such policies effective are sometimes still uneven and remain insufficient also among EU Member States.(12) Although five EU Member States(13) have not yet ratified the OECD Anti-Bribery Convention, the strict monitoring mechanism provided therein is believed to be improving the effectiveness of the Convention's provisions.

In a broader context, an important role is played by the 2005 UN Convention against Corruption (UNCAC). The UNCAC, however, is not considered a very effective agreement for two main reasons. First, it stands as an intergovernmental instrument involving many States that have adopted lower anti-corruption standards than the ones in force in the EU. Second, when the Convention's recommendations fail to be implemented, remedies are provided only in a limited

(8) Czech Republic, Estonia, Germany, Italy.

(9) Denmark, Germany, Ireland, Luxembourg, Portugal and the United Kingdom.

(10) The Group of States against Corruption (GRECO) was established with a multilateral agreement on 5 May 1998 by the Committee of Ministers of the Council of Europe on its 102nd Session and was definitely formed on 1 May 1999. At the present moment 46 States in the European Area plus the United States join the GRECO networks: the OECD and the United Nations Office on Drugs and Crime (UNODC) join it too with the status of observers. The GRECO commissions experts to evaluate the implementation of the Convention through questionnaires, countries' on-site visits and other additional information. Council of Europe, Resolution (98) 7 authorising the partial and enlarged Agreement establishing the "Group of States against Corruption - GRECO" (adopted by the Committee of Ministers on 5 May 1998 at its 102nd Session); Resolution (99) 5 establishing the "Group of States against Corruption – GRECO" (adopted on 1 May 1999).

(11) Adopted by the Negotiating Conference on 21 November 1997, signed on 17 December 1997, entered into force on 15 February 1999.

(12) European Commission, *Fighting Corruption in the EU* (6 June 2011).

(13) Cyprus, Latvia, Lithuania, Malta and Romania are not members of the OECD, Bulgaria is the only Member State, which is not a member of the OECD, that has adopted this Convention.

number of cases. In spite of UNCAC's less strict provisions, three EU Member States have not yet ratified the Convention.(14) While the EU's participation in GRECO aims to create synergies with the mechanisms set up by the Council of Europe for the fight against corruption,(15) there seems to be a lack of coordination(16) among the different international policies against corruption set by the Council of Europe, the OECD, and UNCAC, on the one hand, and those set by individual States, on the other.

The EU is generally considered a key player, and its initiatives should affect European policy-making at any level.(17) In fact, the EU has a long record of initiatives to fight corruption. In 1995, for instance, the EU adopted the Convention on the Protection of the European Communities' Financial Interests and afterwards two Protocols aimed "to combat fraud affecting expenditure and revenue using criminal law."(18) The subject of the EU Convention is similar to that of the OECD Convention because both address personal responsibility, money laundering and cooperation among countries. The EU Convention "also calls for specific individual criminal liability for the heads of businesses in cases where the business commits a fraud."(19)

In 1997, the EU adopted the Convention on the Fight against Corruption(20) which makes reference to the conduct of officials of the EU and of Member

(14) Czech Republic, Germany and Ireland.

(15) European Commission, Report from the Commission to the Council on the Modalities of European Union Participation in the Council of Europe Group of States Against Corruption (6 June 2011).

(16) Actually a new approach has been introduced by the mentioned Communication from the Commission to the Council, *Fighting the Corruption in the EU* (6 June 2011), COM(2011) 308 final, in which it is stated that "the Commission will set up a new mechanism, the EU Anti-Corruption Report, to monitor and assess Member States' efforts against corruption, and consequently encourage more political engagement"; alongside this autonomous anti-corruption mechanism "the EU should participate in the Council of Europe Group of States against Corruption (GRECO)."

(17) The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens, OJ C 115 (4May 2010).

(18) Council Act of 26 July 1995 drawing up the Convention on the protection of the European Communities' financial interests, OJ C 316 (27 November 1995); Council Act of 29 November 1996 drawing up, on the basis of Article K.3 of the Treaty on European Union, the Protocol on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention on the protection of the European Communities' financial interests, OJ C 151 (20 May 1997); Council Act of 19 June 1997 drawing up the Second Protocol of the Convention on the protection of the European Communities' financial interests, OJ C 221 (19 July 1997).

(19) P. Webb, "The United Nations Convention against Corruption. Global Achievement or Missed Opportunity", 8 *Journal of International Economic Law* 191-229 (2005); European Union, Convention on the Fight against Corruption Involving Officials of the European Communities or Officials of Member States (26 May 1997), para. 1.

(20) Convention drawn up on the basis of Article K.3(2)(c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, OJ C 195 (25 June 1997).

States; afterwards the EU has also set legally binding standards in the private sector.(21)

In 2003, the European Commission adopted a Communication on a Comprehensive EU Policy against Corruption(22) in order to encourage all countries to

> undertake more efforts to detect and punish all acts of corruption, to confiscate illicit proceeds and to reduce opportunities for corrupt practices through transparent and accountable public administrative standards.(23)

More recently, the European Commission adopted a Communication about "Fighting corruption in the EU" (24) as it has progressively become clear that, despite all initiatives in the last few decades, more progress is needed in making the EU more transparent, open and less affected by corruption.

Today, it is hard to underestimate the impact of (at least perceived) corruption in the EU. The European Commission appraises that four out of five EU citizens regard corruption as a serious problem in their Member State.(25) It is not hard to believe that no-one is willing to accept that an estimated 120 billion Euros per year, roughly 1% of EU GDP(26) is siphoned off by corrupt practices.(27) The reader would also be surprised learning that, although this problem is well known in the EU, the average score of the EU27 in Transparency International's Corruption Perception Index has not decreased(28) throughout the last decade, with some Member States displaying a score significantly below the average. The European Commission explains that:

> although the nature and extent of corruption vary, it harms all EU Member States and the EU as a whole. It inflicts financial damage by lowering investment levels, hampering the fair operation of the internal market and reducing public finances. It causes social harm as organized crime groups use corruption to commit other serious crimes, such as trafficking in drugs and human beings. Moreover, if not addressed, corruption can undermine trust in democratic institutions and weaken the accountability of political leadership.(29)

(21) Council Framework Decision 2003/568/JHA of 22 July 2003 on Combating Corruption in the Private Sector, OJ L 192 (31 July 2003).

(22) Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, *On a Comprehensive EU Policy Against Corruption*, COM(2003) 317 final (not published in the Official Journal).

(23) WEBB, *op. cit.* (fn. 19), 191-229; European Union Convention, *op. cit.* (fn. 19), para. 3.

(24) European Commission, *op. cit.* (fn. 12).

(25) 76%, according to the EU Commission, *EU Anti-Corruption Report* (Brussels, 3 February 2014), COM(2014)38 final, Section II. According to a research by Transparency International, 5% of EU citizens pay a bribe annually, see http://www.transparency.org/policy_research/surveys_indices/gcb (last visited 9 November 2013).

(26) This data is more striking considering that its total amount is about 120 billion Euro per year, *i.e.* approximately EU's annual budget; European Commission, *Commission Fights Corruption: A Stronger Commitment for Greater Results* (6 June 2011), IP/11/678.

(27) As reported in European Commission, *op. cit.* (fn. 12). The total economic costs of corruption cannot easily be calculated. The cited figure is based on estimates by specialised institutions and bodies, such as the International Chamber of Commerce, Transparency International, UN Global Compact, World Economic Forum, *Clean Business is Good Business* (2009), which suggest that corruption amounts to 5% of GDP at world level.

(28) Compare 6.23 in 2000 to 6.30 in 2010, out of the maximum of 10.

The EU anti-corruption legal framework has substantially increased through the mentioned adoption of the legislation on corruption in the private sector(30) and the accession of the EU to the UNCAC in September 2008.(31) The Treaty on the Functioning of the European Union recognizes that corruption is a serious crime with a cross-border dimension which Member States are not fully equipped to tackle on their own.(32) It is worth noting that the implementation of the anti-corruption legal framework remains uneven among EU Member States and unsatisfactory overall due to a lack of firm political commitment on the part of leaders and decision makers to combat corruption in all its forms.(33)

An important EU Commission Communication has been set to foster the integration of anticorruption measures as part of a wider range of EU policies.(34) In particular, because of the sizeable amount of resources involved(35) public procurement is a sensitive sector to be monitored and further addressed through specific provisions on preventing and sanctioning conflicts of interest as well as favoritism and corruption. Such issues should also be tackled in the debated new legislation on public procurement and on concessions to create better conditions for the fair and competitive award of these contracts, thus

(29) The establishment of the EU Anti-Corruption Report is the Commission's response to the call from MemberStates, in the Stockholm Programme 19, to "develop indicators, on the basis of existing systems and common criteria, to measure anti-corruption efforts within the Union", and from the European Parliament to monitor anti-corruption efforts in the Member States on a regular basis.

(30) Council Framework Decision 2003/568/JHA on combating corruption in the private sector (22 July 2003), OJ L 192 (31 July 2003), 54; European Commission, *Report from the Commission to the European Parliament and the Council based on Article 9 of Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector* (6 June 2011).

(31) Council Decision 2008/801/EC on the conclusion, on behalf of the European Community, of the United Nations Convention against Corruption (25 September 2008), OJ L 287 (29 October 2008), 1.

(32) Article 83(1) of the Treaty on the Functioning of the European Union lists corruption among those crimes for which directives providing minimum rules on definition of criminal offences and sanctions may be established, since corruption often has implications across, and beyond, internal EU borders. Bribery across borders, but also other forms of corruption, such as corruption in the judiciary, may affect competition and investment flows.

(33) EU Commission, *op. cit.* (fn. 25); see also Council of the EU, *Council Conclusions on the EU Anti-Corruption Report* (5-6 June 2014), available at http://gr2014.eu/sites/default/files/JHA%20ANTI%20CORRUPTION.pdf (last visited 11 January 2016).

(34) European Commission, *op. cit.* (fn. 12).

(35) In 2009, public expenditure on works, goods and services accounted for roughly 18% of EU GDP. Almost a fifth of this expenditure falls within the scope of the EU Directives on public procurement, that is, approximately € 420 billion or 3.6% of EU GDP.

reducing the risk of corruption.(36) Therefore it is self-evident how important it is to ensure transparency and the most adequate distribution of resources deriving from public contracts. The natural development of public contracts at a supranational level, as in the EU area, or at an international level, as the OECD and the United Nations advance, should not be set aside from a proper supranational and international legislation.

3. The OECD Anti-Bribery Convention: An Important Step to Highlight the Phenomenon of Corruption

The international dimension assumed by business transactions, and consequently also by public contracts, has urged the adoption of international tools to safeguard their integrity.

Corruption, in fact, is one of the main topics on the agenda of many international organizations because it affects the solidity of the whole international system, with a wide range of problems at the individual, regional and transnational level. In particular, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions(37) aims to fight corruption in the worldwide context, as this phenomenon damages the working of the entire economic and administrative system. The significant results provided by the monitoring of the Convention's implementation offered particularly interesting data to be used to address bribery within national legal systems. Countries ought to be aware that corruption threatens the whole national and international system in terms of economic, legal, social and ethical development.(38) Bribery has become a subject of topical interest concerning both public and private officials.(39) For this reason, "all countries share a

(36) EU Commission, Communication from the Commission to the European Parliament, the Council and the Economic and Social Committee, *Fighting Corruption in the EU* (6 June 2011).

(37) Adopted by the Negotiating Conference on 21 November 1997, signed on 17 December 1997, entered into force on 15 February 1999; see also S. Rose-Ackerman and R. Truex, *Corruption and Policy Reform*, Yale Law & Economics Research Paper No. 444, 3 et seq. (2012).

(38) V. Tanzi, *Corruption Around the World: Causes, Consequences, Scope, and Cures*, International Monetary Fund Staff Papers, Fiscal Affairs Department, WP/98/63 (May 1998) ("Corruption is not a new phenomenon. Two thousand years ago, Kautilya, the prime minister of an Indian king, had already written a book, Arthashastra, discussing it. Seven centuries ago, Dante placed bribers in the deepest parts of Hell, reflecting the medieval distaste for corrupt behaviour. Shakespeare gave corruption a prominent role in some of his plays; and the American Constitution made bribery one of two explicitly-mentioned crimes which could lead to the impeachment of a U.S. president. However, the degree of attention currently paid to corruption is unprecedented and nothing short of extraordinary. For example, in its end-of-year editorial on 31 December 1995, The Financial Times characterized 1995 as the year of corruption. The following two years could have earned the same title").

(39) *Ibid.*, 3 ("Much evidence indicates that corruption has been around for thousands of years, but in recent years it has attracted increasing attention").

responsibility to combat bribery in international business transactions."(40) Before the OECD Convention was adopted, bribing foreign public officials was considered an offence only in the United States. Bribes were actually tax deductible in a number of OECD countries,(41) so transnational bribery was perceived as a legitimate way to conduct business transactions.(42) The OECD Convention originates from a US initiative for combating corruption in all business transactions. Previously, in the United States the Foreign Corrupt Practices Act (FCPA) had been adopted following illegal acts by some US firms in 1977.(43)

The United States therefore spread its principles in order to bind other governments to prevent and fight corruption actions. In comparison with the Criminal Law Convention on Corruption set by the Council of Europe(44) the OECD Convention promotes anti-corruption efforts only in the international context since the Convention does not apply to bribery which is purely domestic or in which the direct, indirect or intended recipient of the benefit is not a public official.(45) According to the OECD Convention, every State should implement the Convention into its own national law in order to undermine the behavior and the intents of corruption between organizations located in different countries or those dealing with international matters. The OECD Convention refers closely to investments, trade of goods and services and exchanges all over the world.(46) The OECD Convention pursues two main objectives. The first concerns a legal aspect: the OECD Convention requires Parties to criminalize and actively pursue the bribery of any foreign public official;(47) the second is to introduce corporate liability for foreign bribery.(48) This is a very important provision in order to go beyond the responsibility of the individuals whenever

(40) OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, signed 17 December 1997, entered into force, 15 February 1999, available at www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf (last visited 20 January 2016), Preamble para. 2.

(41) OECD, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions* (26 November 2009, 3); S. Rose-Ackerman, *Corruption and Government. Causes, Consequences and Reform*, 186 (1999); see also Cour de Cassation, *Fougerolle c. Banque de Proche Orient* (9 December 1981).

(42) As clearly explained by J. Shaarman, *Shell Companies and Puppet Masters*, Anti-Corruption Research News, Issue 9, 3 (April 2012).

(43) U.S.C., Title 15: Commerce and Trade, Chapter 2 B: Securities Exchanges.

(44) Council of Europe, Criminal Law Convention, *op. cit.* (fn. 5).

(45) See the Preamble and Article 1 of the OECD Convention, *op. cit.* (fn. 40).

(46) Unlike the OECD Convention, the OAS Convention (Organization of American States Inter-American Convention Against Corruption, adopted at the 3rd Plenary Session on 29 March 1996, available at www.oas.org/juridico/english/treaties/b-58.html (last visited 20 January 2016)) has a wider scope and identifies not only the acts of bribery in the international business transactions, but it condemns "any act or omission in the performance of that official's public function" (Art. 8).

(47) Article 1 of OECD Convention, *op. cit.* (fn. 40).

(48) Article 2 of OECD Convention, *op. cit.* (fn. 40).

the advantage of the bribery mainly benefits the corporate entity for which an individual is acting.

The ultimate objective of these provisions is to contribute to fairer competition in international transactions, by setting legally binding standards for individual actors and companies alike.(49) Forty-one countries have so far adopted and implemented the Convention(50) in their national legal systems.

The OECD Convention provides valuable insight into how corruption can arise and develop in public procurement through the work of ill-intentioned officials. Corruption can be fueled in different sectors and ways, generating illegal and inappropriate behavior. Thus, any act of corruption could be identified and reported to the competent authorities, in the attempt to contribute towards the condemnation of all the involved individuals. The Revised Recommendation on Combating Bribery in International Business Transactions(51) requires "for effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions."(52) It requires consciousness and cooperation among countries, which have to eradicate the intent and the attempt of corruption.(53)

An effort to criminalize the illegal actions and to implement laws prohibiting corruption in domestic law is still required. It is noteworthy that this is the first international anti-corruption instrument that focuses on the "supply side" of the bribery transaction. One of the important principles of the Convention is the "equivalence among measures to be taken by the Parties."(54) No derogations influencing this equivalence approach can be accepted. The Convention invites all OECD member countries and non-member countries to implement it

(49) N. Bonucci, *The Fight Against Bribery of Foreign Public Officials: Lessons Learned by the OECD and the IBA*, Presentation at the Conference "La Corruzione Internazionale" (Milan, 22 June 2012); J. Boorman, *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, International Monetary Fund, Policy Development and Review Department (18 September 2001).

(50) See www.oecd.org/daf/anti-bribery/antibriberyconventionratification.pdf (last visited 9 November 2015).

(51) Adopted by the Council of the Organization for Economic Co-operation and Development (OECD) on 23 May 1997, COM(97) 123 final.

(52) OECD Convention, *op. cit.* (fn. 40), Preamble, para. 3.

(53) Tanzi, *op. cit.* (fn. 38) ("The causes or factors that promote corruption are those that affect the demand (by the public) for corrupt acts and those that affect the supply (by public officials) of acts of corruption. Among the factors affecting the demand, the most important are (1) regulations and authorizations; (2) certain characteristics of the tax systems; (3) certain spending decisions; and (4) provision of goods and services at below-market prices. Among the factors affecting the supply of acts of corruption are (1) the bureaucratic tradition; (2) the level of public sector wages; (3) the penalty systems; (4) institutional controls; (5) the transparency of rules, laws, and processes; and (6) the examples set by the leadership").

(54) OECD Convention, *op. cit.* (fn. 40), Preamble, para. 8; I. Carr and O. Outhwaite, "The OECD Anti-Bribery Convention Ten Years On", 5 *Manchester Journal of International Economic Law* 3-35 (2008).

in their domestic law. It provides measures and procedures to be adopted jointly in all countries in order to guarantee a higher integration and collaboration between Parties.

Thus, countries should take equivalent measures in an international context. Such implementation could aid the creation of a complex network aimed at the fight against bribery as a sole authority.(55) Similar or comparable national mechanisms adopted against any act of corruption would be beneficial to international cooperation in this regard. States should put into practice reforms to reduce the cost of corruption in terms of economic and social growth.(56)

A strategic aspect of the Convention is the strict monitoring process provided in order to verify States' compliance with the agreed commitments. The monitoring process controls the proper and efficient enforcement of the Convention into the different national legal systems and provides a number of very interesting elements. The monitoring activity is based on peer-review principles and is conducted directly by the OECD Convention members and the Working Group on Bribery.(57) Any country under the review process is examined by the OECD Secretariat Working Group and two other States, one with a similar and another with a different legal system with respect to the reviewed country. The examiners draft a report on the compliance of the Convention that will be discussed in the working group.

The monitoring process is organized into three phases. In the first phase, the correct transposition into the legislation of the concerned legal system is verified. The monitoring can recommend changes and the improvement of legislation. The second phase aims to check the effective implementation of the law: institutions are involved as well as a wider range of subjects such as lawyers, managers and citizens. This phase aims to evaluate the structures put in place

(55) OECD Recommendation of the Development Assistance Committee on Anti-Corruption Proposals for Bilateral Aid Procurement (6-7 May 1996), paras. 2 and 6; see also the OECD Guidelines for Multinational Enterprises – Section VII, *Commentary on Combating Bribery, Bribe Solicitation and Extortion*, available at www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf (last visited 11 january 2016) 39 ("Bribery and corruption are damaging to democratic institutions and the governance of corporations. They discourage investment and distort international competitive conditions. In particular, the diversion of funds through corrupt practices undermines attempts by citizens to achieve higher levels of economic, social and environmental welfare, and it impedes efforts to reduce poverty. Enterprises have an important role to play in combating these practices. Propriety, integrity and transparency in both the public and private domains are key concepts in the fight against bribery, bribe solicitation and extortion").

(56) OECD Recommendation of the Development Assistance Committee, *op. cit.* (fn. 55), para. 1 ("DAC Members share a concern with corruption: It undermines good governance. It wastes scarce resources for development, whether from aid or from other public or private sources, with far-reaching effects throughout the economy. It undermines the credibility of, and public support for, development co-operation and devalues the reputation and efforts of all who work to support sustainable development. It compromises open and transparent competition on the basis of price and quality").

(57) OECD Convention, *op. cit.* (fn. 40), Article 12.

to enforce the laws implementing the Convention, the analysis of case-law, and the problems that may hamper sanctioning improper behaviors, for example because of statutes of limitation. In the third phase, the Report evaluates and makes recommendations on each State's implementation of the Convention.

The whole review process aims to ensure effective enforcement in each Member State by relying on the evaluation and monitoring processes. Although the Convention does not provide any explicit sanction mechanism, reputational forces constitute an implicit sanctioning system owing to the publicity of the review report. The review procedure builds on the peer pressure that urges States to fulfill all the commitments made in the Convention. Peer pressure targets especially countries lagging behind their peers as the former face constant questioning and insistence from other parties to the Convention. However, it is worth mentioning that the first OECD analysis of trends in finalized cases of bribery of foreign officials in international business estimates the value of bribes as amounting to some 8 % of the contracts.

Nonetheless, the absence of cases over a significantly long period should be interpreted as "bad news", that is, as a sign of the effectiveness or lack thereof of the investigation, detection and prosecution framework put in place in a particular State, as recently stated in the Phase 3 Report on implementing the OECD Anti-bribery Convention in Sweden.(58) Thus, there is still a long way to go to, but the OECD Convention is a key instrument in the fight against corruption.

4. International Definitions

In order to highlight the similarities among different international conventions, it is instructive to survey the most relevant definitions contained in the conventions themselves. Understanding differences and similarities in the definitions provided by the different international conventions will shed light on how they impact the award of public contracts and the fight against corruption. Indeed these acts deal with corruption by different points of view and therefore they set quite different policies and legal remedies against corruption. Nonetheless all these efforts should be usefully integrated and combined to obtain the best achievement in preventing and combating corruption in international as well as national public contracts. So in this section the sanctioned behavior, that is bribery in a broad sense, will be treated at first; then, the focus will be on the two parties of the unlawful agreement, *i.e.* the (foreign) public

(58) OECD, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Sweden* (June 2012), available at www.oecd.org/daf/briberyininternationalbusiness/50640024.pdf (last visited 9 November 2015).

official and the individual or legal persons involved; last, an accounting of the remedies provided in terms of sanctions for the illicit behavior and the rights of the injured parties will be provided.

4.1. The Sanctioned Behavior: Corruption and Active and Passive Bribery

Definitions of corruption, active and passive bribery in international conventions will be presented below and discussed in the light of the preceding sections. As already mentioned, the United States was the first country to criminalise international bribery, the decision hinging on the strong belief that

> corruption causes enormous harm and respects no borders. It impoverishes national economies, threatens democratic institutions, undermines the rule of law, and facilitates other threats to human security such as organized crime and terrorism.(59)

The OECD Convention provides a definition of corruption as a "criminal offence" occurring when any person intentionally offers, promises or gives

> any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.(60)

Furthermore, it should be made clear that a "criminal offence" is also to be considered any "complicity in, including incitement, aiding and abetting, or authorization of an act of bribery of a foreign public official" and any "attempt and conspiracy to bribe a foreign public official."(61)

Thus the OECD Convention deals with a set of circumstances that in some legal systems are called "active corruption" or "active bribery",(62) that is, the offence committed by the person who promises or gives the bribe, whereas "passive bribery" is the offence committed by the official receiving the bribe. The Convention does not use the term "active bribery" in order to prevent it from being misread by the non-technical reader as implying that the briber has taken the initiative and the recipient is a passive victim. In fact, in a number

(59) WEBB, *op. cit.* (fn. 19), 191-229.

(60) OECD Convention, *op. cit.* (fn. 40), Article 1. About the criminal offences and EU policy, see S. WILLIAMS-ELEGBE, "Coordinating Public Procurement to Support EU Objectives – A First Step? The Case of Exclusions for Serious Criminal Offences", in S. ARROWSMITH and P. KUNZLIK (eds.), *Social and Environmental Policies in EC Procurement Law*, 479 (2009).

(61) OECD Convention, *op. cit.* (fn. 40), Article 1(2).

(62) OECD, Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (21 November 1997), available at www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf (last visited 20 January 2016), 14 et seq..

of situations, the recipient does pressure the briber, thus playing the active role in the transaction. Although the OECD Convention does not directly deal with passive bribery, it is worth noting that the 2009 Recommendations provided that the Convention "should be implemented in such a way that it does not provide a defense or exception where the foreign public official solicits a bribe."(63)

In this perspective, it is recommended that any country shall provide information and train its public officials posted abroad so that the latter can adequately instruct and provide assistance to national companies (and to their employees at any level of responsibility) in the event of bribe solicitations. The OECD Convention seeks to ensure a functional equivalence among the measures taken by the Parties to sanction bribery of foreign public officials, without requiring uniformity or changes in fundamental principles of each Party's legal system.(64) At this point of our discussion, the different definitions of corrupt behavior in other international conventions must be introduced: a detailed comparison is needed to exactly define the scope of these international legal tools and to enhance as much as possible the effectiveness of their provisions. As already mentioned the United Nations Convention against Corruption represents the first binding global agreement on corruption(65) and sets out the concerns about:

> the seriousness of problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law.(66)

In the Criminal Law Convention on Corruption, the Council underlines that corruption:

> threatens the rule of law, democracy and human rights, undermines good governance, fairness and social justice, distorts competition, hinders economic development and endangers the stability of democratic institutions and the moral foundations of society.(67)

The Civil Law Convention emphasized the risk to "the proper and fair functioning of market economies."(68) Related to purpose of allowing for "effective

(63) Annex I A of OECD Recommendation, *op. cit.* (fn. 41).

(64) OECD, Commentaries, *op. cit.* (fn. 62).

(65) It was signed by 95 countries in Mexico in 2003 and in 2004 it already had 113 signatories, see WEBB, *op. cit.* (fn. 19), 191-229.

(66) UN Convention against Corruption (UNCAC), General Assembly Resolution 58/4, 31 October 2003 available at www.unodc.org/unodc/en/treaties/CAC/ (last visited 20 January 2016). Pursuant to Article 68(1) of the Resolution, the UNCAC entered into force on 14 December 2005. A Conference of the States Parties is established to review implementation and facilitate activities required by the Convention.

(67) See Council of Europe, Criminal Law Convention on Corruption, *op. cit.* (fn. 5), Preamble, para. 5.

(68) See Council of Europe, Civil Law Convention on Corruption, *op. cit.* (fn. 4), Preamble, *op. cit.* (fn. 4), para. 4.

remedies for persons who have suffered damage as a result of acts of corruption"(69) the same Civil Law Convention provide that:

> "corruption" means requesting, offering, giving or accepting, directly or indirectly, a bribe or any other undue advantage or prospect thereof, which distorts the proper performance of any duty or behaviour required of the recipient of the bribe, the undue advantage or the prospect thereof.(70)

The Criminal Law Convention more precisely defines different recipients of bribes and distinguishes between active and passive bribery. Concerning active bribery, it affirms that "criminal offence" takes place

> when committed intentionally, the promising, offering or giving by any person, directly or indirectly, of any undue advantage to any of its public officials, for himself or herself or for anyone else, for him or her to act or refrain from acting in the exercise of his or her functions.(71)

Passive bribery occurs

> when committed intentionally, the request or receipt by any of its public officials, directly or indirectly, of any undue advantage, for himself or herself or for anyone else, or the acceptance of an offer or a promise of such an advantage, to act or refrain from acting in the exercise of his or her functions.(72)

Similarly to the Criminal Law Convention on Corruption, the OAS Convention defines active bribery as the offence committed by the person who promises or gives the bribe(73) and passive bribery as the offence committed by the person who receives the bribe.(74) UNCAC requires criminalization and law enforcement concerning different kinds of conduct for public officials such as bribery of national public officials, bribery of foreign public officials and officials of public international organizations,(75) embezzlement, misappropriation or other diversion of property by a public official,(76) trading in influence,(77) abuse of functions,(78) illicit enrichment,(79) embezzlement of property in the private sector(80) and laundering of proceeds of crime.(81) According to the UNCAC, bribery occurs when committed intentionally:

(69) See *ibid.*, Article 1.

(70) *Ibid.*, Article 2.

(71) Council of Europe, Criminal Law Convention on Corruption, *op. cit.* (fn. 5), Article 2.

(72) *Ibid.*, Article 3.

(73) Organization of American States Inter-American Convention, *op. cit.* (fn. 46), Article 2; see also UNCAC, *op. cit.* (fn. 66), Article 2.

(74) Organization of American States Inter-American Convention, *op. cit.* (fn. 46), Article 3.

(75) UNCAC, *op. cit.* (fn. 66), Article 16.

(76) *Ibid.*, Article 17.

(77) *Ibid.*, Article 18.

(78) *Ibid.*, Article 19.

(79) *Ibid.*, Article 20.

(80) *Ibid.*, Article 21.

(81) *Ibid.*, Article 22.

> (a) The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties; (b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties(82)

While the breadth of such definitions is linked to the scope of each Convention, monitoring effective implementation remains the crucial aspect. This indeed affects the chance to prosecute both the natural and the legal persons that perpetrated the offence, or that failed to prevent it because of a failure in the supervision and in adequate internal controls.

4.2. The Foreign Public Official

The OECD Convention defines the foreign public official as

> any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organization.(83)

According to the Convention, a "foreign country includes all levels and subdivisions of government, from national to local."(84) For the purpose of the OECD Convention, "act or refrain from acting in relation to the performance of official duties" includes any use of the public official's position, whether or not within the official's authorized competence.

In line with the wider scope of the Criminal Law Convention on Corruption the definition of "public official" is contained in the first article:

> "public official" shall be understood by reference to the definition of "official" "public officer", "mayor", "minister" or "judge" in the national law of the State in which the person in question performs that function and as applied in its criminal law.(85)

According to this Convention, "legal person" means "any entity having such status under the applicable national law, except for States or other public bodies in the exercise of State authority and for public international organisations."(86)

(82) *Ibid.*, Article 15.
(83) OECD Convention, *op. cit.* (fn. 40), Article 1 and 4 (a).
(84) *Ibid.*, Article 1, 4(b).
(85) Council of Europe, Criminal Law Convention, *op. cit.* (fn. 5), Article 1(a).
(86) *Ibid.*, Article 1(d) of Chapter I.

The UNCAC defines "public official" as:

> (i) any person holding a legislative, executive, administrative or judicial office of a State Party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person's seniority; (ii) any other person who performs a public function, including for a public agency or public enterprise, or provides a public service, as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party; (iii) any other person defined as a "public official" in the domestic law of a State Party.(87)

However, for the purpose of some specific measures governed by Chapter II of UNCAC, "public official" might be any person who performs a public function or provides a public service as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party; "foreign public official" shall mean any person holding a legislative, executive, administrative or judicial office of a foreign country, whether appointed or elected; and any person exercising a public function for a foreign country, including for a public agency or public enterprise; "official of a public international organization" shall mean an international civil servant or any person who is authorized by such an organization to act on behalf of that organization. Therefore in both the Conventions the role of the public official is described in very broad terms, focusing more on the public function effectively performed rather than on the nominalist definitions provided by the State Party.

4.3. The Individual Persons and Legal Persons

The OECD Convention requires the pursuit of all the subjects potentially involved in bribery and its potential recipients. All the managerial levels can be involved, including intermediaries and related legal persons, and the legal person that is part of the international business transactions as well. The Convention does not require to introduce criminal liability of legal entities, but where the principle of corporate criminal liability already exists the Convention requires that an organization shall be held responsible in case of bribery of a foreign public official.

The States parties to the Convention "shall not be influenced by considerations of national economic interest"(88) given that a bribe is often instrumental for national companies to obtain valuable contracts.

In any event, the potential effect on the relations with another State or the identity of the natural or legal persons involved should not influence the

(87) UNCAC, *op. cit.* (fn. 66), Article 2.
(88) OECD Commentaries, *op. cit.* (fn. 62), Article 5.

willingness to pursue corruption. The State of the foreign public official corrupted maintains its jurisdiction over him. The Criminal Law Convention of the Council of Europe covers also the aspect of responsibility, stating that

> each Party shall provide in its internal law for the following conditions to be fulfilled in order for the damage to be compensated: i. the defendant has committed or authorised the act of corruption, or failed to take reasonable steps to prevent the act of corruption; ii. the plaintiff has suffered damage; and iii. there is a causal link between the act of corruption and the damage.(89)

The Criminal Law Convention addresses corporate liability in Article 18:

> each Party shall take the necessary measures to ensure that a legal person can be held liable where the lack of supervision or control by a natural person has made possible the commission of the criminal offences for the benefit of that legal person by a natural person under its authority.(90)

Therefore all the international conventions require the extension of responsibility for the lack of integrity and consequent criminal offences to the legal person, rather than requiring the adoption of the legal principle of criminal corporate liability itself.

4.4. The Sanctions

Regarding the sanctions applicable to concrete cases of bribery, the OECD Convention states that "effective, proportionate and dissuasive criminal penalties"(91) must be established in each country in order to punish the acts of corruption. Sanctions include criminal and non-criminal penalties such as deprivation of liberty and monetary sanctions, while the former is limited to natural persons only. Moreover, "[t]he range of penalties shall [...] in the case of natural persons, include deprivation of liberty sufficient to enable effective mutual legal assistance and extradition."(92) While legal persons are free from criminal liability, they are subject to pecuniary sanctions:

> [i]n the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials.(93)

Both the OECD Convention and the Criminal Law Convention provide additional sanctions, other than criminal, on subjects found guilty of a crime of corruption: indeed the OECD Convention states that "each Party shall consider

(89) Council of Europe, Criminal Law Convention, *op. cit.* (fn. 5), Article 4.
(90) *Ibid.*, Article 18.
(91) *Ibid.*, Article 19; OECD Convention, *op. cit.* (fn. 40); Article 3.
(92) OECD Convention, *op. cit.* (fn. 40), Article 3(1).
(93) *Ibid.*, Article 3(2).

the imposition of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official"(94) while the Criminal Law Convention provides that "each Party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions."(95)

Moreover, in order to contribute actively to reduce bribery,

> [e]ach Party shall adopt such measures as may be necessary to ensure that persons or entities are specialized in the fight against corruption. They shall have the necessary independence in accordance with the fundamental principles of the legal system of the Party, in order for them to be able to carry out their functions effectively and free from any undue pressure. The Party shall ensure that the staff of such entities has adequate training and financial resources for their tasks.(96)

As they are likey to hide acts of bribery, Countries have

> to prohibit the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents.(97)

The Criminal Law Convention contains provisions concerning the "account offences" as well, establishing as "offences liable to criminal or other sanctions" the following acts: "creating or using an invoice or any other accounting document or record containing false or incomplete information and unlawfully omitting to make a record of a payment."(98) In the same way, the OECD Convention, in this regard, states that:

> [e]ach Party shall provide effective, proportionate and dissuasive civil, administrative or criminal penalties for such omissions and falsifications in respect of the books, records, accounts and financial statements of such companies.(99)

Finding an act of bribery made by a foreign public official should be carried out according to national procedural rules.(100) Nonetheless, the principle of procedural autonomy in this field should not hinder national economic interests or diplomatic interests which could be undermined by the prosecution of the episode of corruption. The only and common goal to which States are called upon is the elimination of the phenomenon of corruption. The synergies between the

(94) *Ibid.*, Article 3(4).
(95) Council of Europe, Criminal Law Convention, *op. cit.* (fn. 5), Article 19.
(96) *Ibid.*, Article 20.
(97) OECD Convention, *op. cit.* (fn. 40), Article 8.
(98) Council of Europe, Criminal Law Convention, *op. cit.* (fn. 5), Article 14.
(99) OECD Convention, *op. cit.* (fn. 40), Article 8.
(100) *Ibid.*, Article 5.

national and international commitment to pursue integrity are of utmost importance.

4.5. Rights of Injured Parties

The Council of Europe Civil Law Convention focuses more than the OECD Convention on the rights of injured parties,(101) stating in Article 5 that

> each Party shall provide in its internal law for appropriate procedures for persons who have suffered damage as a result of an act of corruption by its public officials in the exercise of their functions to claim for compensation from the State or, in the case of a non-state Party, from that Party's appropriate authorities.(102)

Countries should support and assist citizens providing tangible measures in their domestic laws in order to discourage any act of corruption. If everyone had the right to ask for compensation or use other civil means to defend her or his own interests, which were damaged as a consequence of bribery, private and public officials would not be tempted to corrupt any individual.(103) The country has to define its jurisdiction "when the offence is committed in whole or in part in its territory."(104) However some countries apply their domestic law even when corruptive episodes are committed abroad.(105) If more countries are involved, the most appropriate jurisdiction should prevail:

> [w]hen more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.(106)

The same issue is highlighted in the Criminal Law Convention when

(101) This is not surprising considering that the Council of Europe is a human rights-oriented organization and economic values are not its priority. Nonetheless the fight against corruption is becoming more and more an issue for human rights organizations too, as demonstrated by the UN Global Compact Ten Principles. Launched in 26 July 2000, the UN Global Compact is a leadership platform for the development, implementation and disclosure of responsible and sustainable corporate policies and practices: the Global Compact was initially launched with nine Principles but in June 24, 2004 during the first Global Compact Leaders' Summit, the United Nation Secretary announced the addition of the tenth principle against corruption in accordance with the UNCAC adopted in 2003, see www.unglobalcompact.org/aboutthegc/thetenprinciples/ (last visited 10 November 2013).

(102) Council of Europe, Civil Law Convention, *op. cit.* (fn. 4), Article 5.

(103) F. HEIMANN and F. VINCKE, *Fighting Corruption: International Corporate Integrity Handbook*, ICC Publication No. 678 (2008).

(104) OECD Convention, *op. cit.* (fn. 40), Article 4.

(105) For example, the United States' jurisdictions under the provisions of the Foreign Corrupt Practices Act is really extensive, see 15 U.S.C., paras. 77dd-1(g), 77dd-2(g), 78dd-1(a), 78 dd-2(a), 78dd-3(a); J. TILLIPMAN, *The Foreign Corrupt Practices Act & Government Contractors: Compliance, Trends & Collateral Consequences*, George Washington University Law School Public Law and Legal Theory Paper No. 586, No. 11-9 (2011); J. TILLIPMAN, *Foreign Corrupt Practices Act Fundamentals*, George Washington University Law School, Briefing Paper No. 08/10 (September 2008).

(106) OECD Convention, *op. cit.* (fn. 40), Article 4.

> the offence is committed in whole or in part in its territory; the offender is one of its nationals, one of its public officials, or a member of one of its domestic public assemblies; the offence involves one of its public officials or members of its domestic public assemblies who is at the same time one of its nationals.(107)

The Civil Law Convention requires to provide for

> effective remedies for persons who have suffered damage as a result of acts of corruption, to enable them to defend their rights and interests, including the possibility of obtaining compensation for damage.(108)

This provision opens to a range of possible remedies, such as compensation for damages, but also non-monetary sanctions.

It is therefore clear how the internationalization of public contracts implies the adoption of different provisions that should protect the injured party in the most appropriate way. The rules set within the international conventions normally still rely on the place where the crime has been materially committed that is, in the field of corruption, a huge legal issue to define. However, from the States' disputes on jurisdiction, a more informed cooperation against corruption and a further protection for injured parties may arise.

5. *International Instruments: Effects on Integrity in Public Procurement as a Key Anti-Corruption Strategy*

Having defined the parties involved and the concept of corruption from different viewpoints, it is necessary to analyze existing different strategies to prevent and fight corruption in public organizations and, in particular, in public procurement which have been blossoming especially in the last decade.

Part V is focused on 2009 OECD Recommendations inviting each Member country to

> take concrete and meaningful steps in conformity with its jurisdictional and other basic legal principles to examine or further examine the following areas: [...] public subsidies, licenses, public procurement contracts, contracts funded by official development assistance, officially supported export credits, or other public advantages, so that advantages could be denied as a sanction for bribery in appropriate cases.(109)

The deterrent effect of losing public advantages could be achieved by adopting temporary or permanent disqualification from participation in public procurement against those who have engaged in corrupt practices.

(107) Council of Europe, Criminal Law Convention, *op. cit.* (fn. 5), Article 17.

(108) Council of Europe, Civil Law Convention, *op. cit.* (fn. 4), Article 1.

(109) OECD Recommendations, *op. cit.* (fn. 41).

The risk of being black-listed might become a powerful incentive for firms to act fairly and honestly.(110) Where international business transactions are concerned, member countries should encourage(111) their government agencies to provide adequate internal controls, ethics and compliance programs or measures in their decisions to grant public advantages, including public subsidies, licenses, public procurement contracts, contracts funded by official development assistance, and officially supported export credits. These sanctions adopted may be civil or administrative ones, other than non-criminal fines, which might be imposed upon legal persons for an act of bribery of a foreign public official.

The negative effect for the legal person can be either suspension from competition for public contracts, including public procurement contracts and contracts funded by official development assistance, or exclusion from any other possible public advantage. According to the equivalence approach,(112) procurement sanctions applied to enterprises that are found guilty of bribing domestic public officials should be applied equally in the case of bribery of foreign public officials.

A way to enforce the mentioned sanctions of suspension is to require(113) anti-corruption provisions in bilateral aid-funded procurement, to promote the proper implementation of these provisions in international development institutions, and to work closely with development partners to combat corruption in all development co-operation efforts. Ultimately, it has been pointed out that improving the degree of transparency throughout the whole procurement cycle from the definition of needs to the end of contract execution(114) and particularly in aid-funded procurement also by other international governmental organisations, such as the United Nations and the World Trade Organisation (WTO),(115) is of paramount importance.

(110) This type of sanction has been suggested by both the UN and the OECD in presentation of the United Nations Procurement Task Force at the OECD Forum on Governance: Sharing Lessons on Promoting Integrity in Procurement (November 2006) within OECD, *Implementing the OECD Principles*, *op. cit.* (fn. 1), 84; see also E. HJELWENG and T. SØREIDE, *Debarment in Public Procurement Rationales and Realizations*, in Racca and Yukins, *op. cit.* (fn. 1), 215-232.

(111) Council of Europe, Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions VI (adopted by the Council on 26 November 2009); T. SØREIDE and A. WILLIAMS, *Certified Integrity? Forest Certification and Anti-corruption* (January 2013), available at www.u4.no/publications/certified-integrity-forest-certification-and-anti-corruption/ (last visited 10 November 2013).

(112) CARR and OUTHWAITE, *op. cit.* (fn. 54), 34.

(113) OECD Recommendation of the Development Assistance Committee, *op. cit.* (fn. 55), paras. 2 and 3.

(114) OECD, Recommendation on Enhancing Integrity in Public Procurement, 105 (16 October 2008).

(115) OECD Recommendation of the Development Assistance Committee, *op. cit.* (fn. 55), paras. 3 and 4.

5.1. The Award Procedure

One of the most relevant strategies that a State can provide to better combat corruption is adopting and enforcing an efficient, clear and smart public procurement system. The international conventions against corruption normally have a broader scope than public contracts; nonetheless their positive influence on national rules can be particularly evident in this sector and really useful since in public contracts a large amount of public money is managed. Then, the need arises for public contract rules and procedures which can ensure as much as possible that the general principles are implemented at a national level. The award procedure will be further examined in this section, since the rules governing the starting phase of public contracts can effectively prevent episodes of corruption. As found in the OECD Convention, a strict monitoring on such implementation can ensure compliance with national rules and international principles, but this sometimes requires the change of national regulations.(116) Moreover in public contracts, the goal of fighting corruption too often generates the temptation to "overregulate" that is, to add additional layers of constraints concerning the choice of procurement officials. This is at odds with at least one of the main objectives of the regulatory framework governing public procurement, namely to provide "correct" economic incentives to those who are involved in the entire procurement process. The relevance of an "economic incentives"-approach to integrity and honesty can be better understood by considering public procurement as a three-tier hierarchy whereby a principal actor (the government and, ultimately, the tax payers) needs specific goods/services/civil works, an agent (procurement officers or agency) implements the process to procure them, and firms compete to provide them.(117)

Any public procurement process then becomes a fairly standardized sequence of phases, involving the identification of needs and resource allocation, design and preparation of tender documents, award procedure, evaluation, contract award, and contract management. From this perspective, the efforts to eradicate corruption should aim at identifying, for each stage of the process, whether a procurement official is in the condition to use the position of trust to her/his own advantage. Assessing the degree of effectiveness of rules and regulations requires an appraisal of the extent to which actors involved in the process are able to manipulate the award system.

Public procurement activities are included among the so called "public functions" that includes any activity in the public interest, delegated by a State,

(116) OECD Convention, *op. cit.* (fn. 40), Article 12.

(117) C.R. YUKINS, "A Versatile Prism: Assessing Procurement Law Through the Principal-Agent Model", 40 *Public Contract Law Journal* 63 (2010).

such as the performance of a task in connection with public procurement.(118) The scope of this definition is broad enough to include among the main public functions that can be affected by corruption also all the activities connected with the award and the execution of public contracts, including for example the needs assessment.

Traditionally, the awarding phase of public procurement, that is, the stage at which the contractor is selected, has attracted much attention from policy makers, particularly at the EU level. This is explained by the fact that the award phase is instrumental to the allocation of public funds in the procurement process. In the award phase integrity is not only harmed by corrupt practices undertaken by public officials, but also by forms of collusion among bidders, that is the conduct adopted by a group of firms that aims at reproducing or approximating the market outcome induced by a single, dominant firm.

Successful collusive behavior at the awarding stage normally yields higher prices and/or lower (promised) quality than the ones under a competitive scenario in which firms decide independently from each other.(119)

Although the award stage is a critical link in the procurement chain, in principle all the efforts to assure competition, transparency and objective criteria in decision-making, which are instrumental to an efficient allocation of social resources, ought to be ensured throughout the entire cycle of the public procurement procedure, from its inception until the completion of the execution of the contract. Yet, after the award, the public official may accept or be subject to a different worse-than-promised performance. Transparency and due diligence in all phases and from all parties involved in the award of a public contract are critical for the fight against corruption. Contract management, analyzed in the following section, is another key stage to be addressed within the scenario presented in this Chapter.

5.2. The Contract Management

Contract management is another critical phase of public procurement. Indeed, there are several reasons why the lack of integrity during the contract execution phase should be closely scrutinized. First, the contract management phase typically stretches over a longer period than the contractor selection

(118) OECD Commentaries, *op. cit.* (fn. 62), Article 1, paras. 4 and 12.

(119) G.M. Racca and R. Cavallo Perin, *Material Changes in Contract Management as Symptoms of Corruption: A Comparison between EU and U.S. Procurement Systems*, in Racca and Yukins, *op. cit.* (fn. 1), 247-270; G.M. Racca, R. Cavallo Perin and G.L. Albano, "Competition in the Execution Phase of Public Procurement", 41 *Public Contract Law Journal* 89-108 (Fall 2011).

phase.(120) While this time imbalance between the pre- and the post-award phase may be moderate in the procurement cycle of high-obsolescence goods such as IT equipment, it becomes more striking in the case of the procurement of infrastructures such as highways, bridges and tunnels. The longer the contract execution phase is, the more likely it is that unlawful relations arise between the contractor and the contract manager(s). Repeated and prolonged interaction between the two contracting parties may give rise to cooperative strategies whereby profits arising from lower-than-promised levels of performance are shared between the contractor and the contract manager(s).

Second, lack of integrity at the contract management stage may jeopardize de facto the competitive procedure leading to the contractor selection. In fact, any violation, modification or worsening of the quality during the execution phase entails undue profit for the winner, thus giving rise to a change in the conditions set in the award, and consequently in the contractual equilibrium set therein. This leads to a violation of the competition principle as applied in the selection and in the award phase, which infringes the rights of losing bidders. In other words, any substantial modification of the contractual terms during the contract execution is as if the contractor's quality-price tender had become ex post lower than the one submitted at the award stage.(121) Consequently, the contractor does not guarantee, from an ex post perspective, the best value for money to the buyer.

Only recently, at the international level, the United Nations Commission on International Trade Law (UNCITRAL) has started to emphasize the significance of problems in public procurement "beyond the selection of suppliers", that is, the importance of considering the entire procurement cycle, from the planning and budgeting prior to commencing a procurement procedure up to the contract administration.(122)

Transparency International has also pointed out that the other two phases of "planning and budgeting" and "contract administration" are "increasingly

(120) European Parliament, Directorate-General for Internal Policies, *An Economic Analysis of the Closure of Markets and other Dysfunctions in the Awarding of Concession Contracts*, IP/A/IMCO/NT/2012, PE 475.126 (11 June 2012).

(121) A. Brown, "When Do Changes to an Existing Public Contract Amount to the Award of a New Contract for the Purpose of the EU Procurement Rules? Guidance at Last in Case C-454/06", *Public Procurement Law Review*, 253-267 (2008); S. Treumer, "Towards an Obligation to Terminate Contracts 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*, 371-386 (2007); S. Arrowsmith, "The 'Blackpool' Implied Contract Governing Public Sector Tenders: A Review in the Light of Pratt and Other Recent Case Law", 5 *Public Procurement Law Review* 125-131 (2004).

(122) United Nations Commission on International Trade Law, *United Nations Convention against Corruption: Implementing Procurement-Related Aspects*, Conference of the States Parties to the United Nations Convention against Corruption, 2nd Session, Nusa Dua (Indonesia), (28 January-1 February 2008).

exposed to corruption" and are neither duly addressed nor sufficiently monitored.(123) It is worth underlining that collusion and corruption are two interlinked phenomena in public procurement processes, although they are often believed to occur under a separate set of circumstances. However, both the OECD and the World Bank(124) have repeatedly emphasized that collusion and corruption tend to jointly occur in procurement processes. Because collusion dampens competition and allows the cartel to extract extra profit, a corrupt agent may be interested in appropriating part of this profit.

The increasing number of international provisions on the execution phase of public contracts might represent another step in the development of the fight against corruption. The national or supranational rules on debarment, disqualification and conviction for suspected or guilty contracting party share common features as they share the same target. Therefore, the international set of rules on public contracts may indeed become an effective instrument to drive public contract markets towards higher fairness, transparency and integrity.

6. National Implementations: Effects on Integrity in Public Procurement

On the basis of the wider international scenario presented in terms of definitions and parties in the preceding sections, Part VI will be focused on the national implementation of international conventions and its effect on integrity in public procurement at a national level. According to the above-mentioned perspective of the internationalization of public contracts, a logical cycle can be identified, where the international rules drive national legal systems and vice versa. This cycle goes from international conventions and their implementation to their effects on national legal systems that often previously inspired international conventions.

The latter effects can stretch beyond the scope of the conventions themselves and have an impact on the awareness of the phenomenon and on how to combat it. In particular, the monitoring activities carried out according to the OECD Conventions seem to track such influence thanks to the convention's capacity to be pervasive and objective.

In this regard it is worth mentioning that the 2009 OECD Recommendation requires States to carefully examine the area of

> public subsidies, licenses, public procurement contracts, contracts funded by official development assistance, officially supported export credits, or other public advantages"; "civil, commercial, and administrative laws and regulations, to combat foreign bribery"; "international co-operation in investigations and other legal proceedings.(125)

(123) Transparency International, Business Principles for Countering Bribery, *A Multi-Stakeholder Initiative Led by Transparency International*, 5.2.4.2 (2009).

(124) S. Williams-Elegbe, *Fighting Corruption in Public Procurement*, 66 (2012).

An overview of the implementation of the OECD Convention is possible thanks to the recent conclusion of the third phase of such monitoring of all the member countries to the Convention. The reports on such monitoring are all available online at the OECD website and provide a very detailed perspective on each member country.(126) It is worth focusing on two concrete examples of implementation and monitoring of the OECD Convention in order to further stress the positive synergies arising between the international and national perspective in the fight against corruption and, in particular, by means of public contracts. For this purpose two examples of implementation of the OECD Convention are examined to highlight the benefit of the provided monitoring phase. The choice has fallen on two countries that seem particularly relevant: the UK and the United States.

6.1. Implementation in the UK

The United Kingdom signed the OECD Convention on 17 December 1997, and deposited its instrument of ratification on 14 December 1998.(127) Notwithstanding, it is worth noting that the UK has prosecuted "the crime of bribery under the common law (unwritten) for many centuries."(128) The 1906 Prevention of Corruption Act extended to bribery into the private sector and introduced the concept of bribing agents acting on behalf of a principal.(129) "The Anti-Terrorism, Crime and Security Act 2001 received Royal Assent on 14 December 2001. Part 12 of the Act, which came into force on 14 February 2002, expressly extended the jurisdiction of domestic courts to bribery committed abroad by UK nationals or bodies incorporated under UK law."(130) It has, thus, been acknowledged that the UK legal system was already very advanced in the fight against corruption. Moreover efforts continue, and

> [t]he United Kingdom has signed the Council of Europe Criminal Law Convention on Corruption and joined GRECO. The round 1 report was published September

(125) OECD Recommendation, *op. cit.* (fn. 41) (with amendments adopted by Council 18 February 2010 to reflect the inclusion of Annex II, Good Practice Guidance on Internal Controls, Ethics and Compliance).

(126) See www.oecd.org/daf/anti-bribery/countryreportsontheimplementationoftheoecdanti-briberyconvention.htm (last visited 10 November 2013).

(127) Steps taken to implement and enforce the OECD Convention, *op. cit.* (fn. 40). The UK's ratification was extended to the Isle of Man in 2001 and to the two Channel Islands of Jersey and Guernsey in early 2010. The Bribery Act received Royal Assent on 8 April 2010 and came into force on 1 July 2011.

(128) *Ibid.*

(129) *Ibid.*

(130) *Ibid.*

2001 and the compliance report in August 2003. An on-site evaluation mission was completed April 2004. The United Kingdom signed the United Nations Convention against Corruption (UNCAC) on 9 December 2003 and ratified UNCAC on 14 February 2006.(131)

The United Kingdom's Bribery Act(132) defines quite clearly and in great detail the figure of "briber":

> [a] person ("P") is guilty of an offence if either of the following cases applies. Case 1 is where: (a) P offers, promises or gives a financial or other advantage to another person, and (b) P intends the advantage: (i) to induce a person to perform improperly a relevant function or activity, or (ii) to reward a person for the improper performance of such a function or activity. Case 2 is where: (a) P offers, promises or gives a financial or other advantage to another person, and (b) P knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity.(133)

This definition sounds different from the general "violation of one's duties" generally provided by the conventions against corruption;(134) it seems to be one of the most precise and accurate definitions found worldwide and it provides a variety of different detailed cases.(135)

The function or activity to which the bribe relates are considered to be any function of a public nature, any activity connected with a business, any activity performed in the course of a person's employment, any activity performed by or on behalf of a body of persons (whether corporate or non-corporate).(136) Such activities are performed improperly if performed in breach of a relevant expectation(137) by any individual in the public service of the Crown but the definition applies also to other individuals.(138) The offence is committed when there is an intention to influence the capacity of a foreign public official.(139)

(131) *Ibid.*

(132) United Kingdom's Bribery Act 2010, Article 1(1), (2) and (3) (Offences Relating to Being Bribed) (General Bribery Offences, Offences of Bribing another Person).

(133) *Ibid.*, Article 1; about the UK's policy against corruption, see S. WILLIAMS-ELEGBE, *Fighting Corruption in Public Procurement*, 51 et seq. (2012).

(134) OECD Convention, *op. cit.* (fn. 40), Article 1; United Nation Convention, *op. cit.* (fn. 72), Article 16; Convention drawn up on the basis of Article K.3(2)(c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, Article 2, lit. a), b).

(135) United Kingdom's Bribery Act 2010, *op. cit.* (fn. 132), Article 1 (Offences Relating to Being Bribed).

(136) *Ibid.*, Article 3 (General Bribery Offences, Function or Activity to which Bribe Relates).

(137) *Ibid.*, Article 4 (1)(a) (General Bribery Offences, Improper Performance to which Bribe Relates).

(138) *Ibid.*, Article 16 (Supplementary and Final Provisions, Application to Crown).

(139) *Ibid.*, Article 6 (1) (General Bribery Offences, Bribery of Foreign Public Officials) According with the UK Bribery Act, a "'foreign public official' means an individual who: (a) holds a legislative, administrative or judicial position of any kind, whether appointed or elected, of a country or territory outside the United Kingdom (or any subdivision of such a country or territory), (b) exercises a public function: (i) for or on behalf of a country or territory outside the United Kingdom (or any subdivision of such a country or territory), or (ii) for any public agency or public enterprise of that country or territory (or subdivision), or (c) is an official or agent of a public international organisation."

(140) *Ibid.*, Article 12(2), (3) and (4) (Other Provisions About Offences, Offences under This Act: Territorial Application).

(141) *Ibid.*, Article 7(2) (General Bribery Offences, Failure of Commercial Organizations to Prevent Bribery).

(142) OECD, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the United Kingdom* (March 2012).

(143) See www.sfo.gov.uk/ (last visited 10 November 2015).

(144) Directive 18/2004/CE of the European Parliament and the Council on the Coordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts, Article 45 (31 March 2004).

(145) Regulation 23 of the Public Contracts Regulations (2006) and Regulation 26 of the Utilities Contracts Regulations (2006). Companies that were convicted of foreign bribery under the Prevention of Corruption Act have been excluded. Mandatory exclusion applies to companies convicted of bribery under Sections 1 and 6 of the Bribery Act, but not to those that reach civil settlements with the SFO. Procuring authorities may – but are not obliged to – exclude a company convicted of failure to prevent bribery under Article 7 of the UK's Bribery Act. The now defunct Office of Government Commerce (OGC) developed guidance for procuring authorities on the mandatory exclusion of economic operators in 2010. This Guidance is currently available only on the website of the National Archives, see www.archives.gov/ (last visited 10 November 2013).

The Bribery Act applies not only to British companies operating in the UK, but also to British companies operating outside the United Kingdom and to British companies not engaged in or part of the United Kingdom, regardless of where the company was formed and the place where bribery was committed.(140) A contractual relationship between the company and the "associated persons" is not necessary. The organization will not be held liable just insofar, following the model of compliance programs in the United States, it will prove to have adopted all the adequate procedures needed to prevent the crime committed.(141)

According to the OECD Report,(142) the UK has strengthened its enforcement of foreign bribery laws in recent years. The Serious Fraud Office (SFO) is the main law enforcement agency responsible for foreign bribery cases. A number of cases of bribery have been identified and properly sanctioned.(143)

It is worth mentioning that the OECD 2009 Recommendation suggested that the UK considers adopting a regime of additional administrative or civil sanctions for legal persons that engage in foreign bribery. The UK has implemented the provision of the EU directive on public procurement(144) providing that a UK public contracting authority must permanently exclude an economic operator from public procurement contracts if the authority knows that the economic operator (or its directors or representatives) has been convicted of offences relating to corruption, bribery, fraud or money laundering.(145) The UK considers such exclusion or debarment not as a sanction but as protection

of the procurement process.(146) In addition to that, the UK does not maintain a national corporate procurement exclusion registry. Such an exclusion registry would provide a comprehensive database of all the companies that have been subject to mandatory or discretionary exclusion in the UK, and could allow procuring authorities to more effectively and efficiently conduct due diligence on suppliers and contractors. Moreover, public authorities should check for any convictions of the tenderer who won the contracts. A national debarment register could ensure this, with the possibility to monitor whether excluded companies have subsequently improved their internal governance. The described system provides an interesting set of measures that can assure an effective deterrent effect and that seems to improve transparency and integrity beyond the UK borders as well.

6.2. Implementation in the United States

As already mentioned before, the United States approved the Foreign Corrupt Practices Act (FCPA) in 1977 and started fighting the corruptive practices of their companies very early on. Nonetheless, enforcement in the first years was quite rare;(147) more recently, however, a high level of enforcement of the FCPA has been reached, as reported by OECD.(148) The United States considers the bribery of foreign public officials as high priority and ensures vigorous law enforcement.(149) The rate of enforcement has substantially increased in recent years. Prosecutions have increased from 4.6 per year from 2001 to 2005, to 18.75 per year from 2006 to 2009. Various business sectors and various modes of bribing foreign public officials were investigated and prosecuted.(150)

In addition, the United States has been conducting proactive investigations, using information from a variety of sources(151) and innovative methods like plea agreements, deferred prosecution agreements, non-prosecution agreements, and the appointment of corporate monitors.(152) Vigorous enforcement

(146) ROSE-ACKERMAN, *op. cit.* (fn. 41), 62-63.

(147) WILLIAMS-ELEGBE, *op. cit.* (fn. 124), 60.

(148) OECD, *United States: Phase 3 Report on the Application of the OECD Convention on Combating Bribery of Foreign Public Officials, approved and adopted by the Working Group on Bribery in International Business Transactions* (15 October 2010).

(149) B.P. LOUGHMAN and A.R. SIBERY, *Bribery and Corruption: Navigating the Global Risks*, 30 (2012).

(150) ROSE-ACKERMAN, *op. cit.* (fn. 41), 59-60.

(151) False Claims Act, 31 U.S.C., paras. 3729-3733 allows any person to file a legal action, known as a qui tam action, against government contractors on the basis that the contractor has committed a fraud against the government. The person bringing the action is entitled to recover a portion of the proceeds of the action.

(152) OECD, *Phase 3 Report*, *op. cit.* (fn. 142).

and record penalties, alongside increased private sector engagement, has encouraged the establishment of robust compliance programs and measures, particularly in large companies, which are verified by the accounting and auditing profession and monitored by senior management.(153)

More attention to civil society to ensure public awareness has been suggested.(154) The size of recent fines (*i.e.*, as in the *Siemens* case)(155) and associated international media coverage, industry-wide sweep investigations and targeting of individuals have had a broad deterrent effect. Due to the large fines imposed for not having adopted effective measures to prevent corruption according to the FCPA – as stated in *Siemens* – companies in the United States are incentivized to build and implement ethics and compliance programs in order to avoid heavy sentences as well as to obtain a good reputation. In fact the organizations' good reputation is of utmost importance within the procurement procedures since the evaluation of the past performances of the bidders, as a selection criterion, is strongly based on reputational indicators.(156) Beyond these aspects the United States Government has a large list of administrative penalties that can be used whenever the FCPA provisions are violated: companies involved in public contracts may be debarred or suspended from future government contracts.(157) According to the OECD Report, the pharmaceuticals and healthcare industry are more likely to act proactively in terms of FCPA compliance because they were previously targeted for FCPA action.(158) Less is known, by contrast, on the effect that FCPA enforcement has had on small- to medium-sized enterprises (SMEs), which is a problem that concerns all States involved in the OECD Convention. As mentioned in the recent OECD Report, at the federal level, the United States Government has improved several legislative provisions to ensure fair and transparent public contracting.(159)

(153) ICC Anti-Corruption Clause (10 October 2012); ICC Rules on Combating Corruption (2011).

(154) OECD, *OECD Principles for Integrity in Public Procurement*, *op. cit.* (fn. 1), 45 et seq.

(155) Civil Action No. 08 CV 02167 (DDC), *Securities and Exchange Commission v. Siemens Aktiengesellschaft*, Litigation Release No. 20829 (15 December 2008), Accounting and Auditing Enforcement Release No. 2911 (15 December 2008).

(156) J.V. BUTLER, E. CARBONE, P. CONZO and G. SPAGNOLO, "Reputation and Entry", 15 *EIEF Working Paper* (12 November 2012). The Federal Acquisition Regulation (FAR) requires federal agencies to post all contractor performance evaluations in the Past Performance Information Retrieval System (PPIRS).

(157) Federal Acquisition Regulation (FAR), US Code Federal Regulation, paras. 9.406-2, 9.407-2; see C.R. YUKINS, "Cross-Debarment: A Stakeholder Analysis", 45 *George Washington International Law Review* 222 et seq. (2013).

(158) Letter from U.S. Department of Justice (14 January 2011) to Eric A. Dubelier, Reed Smith LLP, *United States v. Johnson & Johnson*, 37, DDC 11-Cr-99, available at http://lib.law.virginia.edu/Garett/prosecution_agreements/pdf/johnson.pdf (last visited 10 November 2015).

(159) Federal Acquisition Regulation (FAR), US Code Federal Regulation, para. 48. It is issued pursuant to the Office of Federal Procurement Policy Act of 1974 (*Pub. L.*, 93-400; and Title 41 of the United States Code), Chapter 7.

Relevant provisions require the use of procedures such as sealed bidding whenever an objective award is possible and negotiated procurement when sealed bidding is not appropriate and negotiation is necessary for establishing price reasonableness for acquisitions.

Federal legislation also provides oversight powers to certain bodies, such as the authority of the Comptroller General of the Government Accountability Office to investigate all matters regarding the disbursement and use of public money; the Chief Acquisition Officers Council to monitor and evaluate the performance of acquisition activities and programs and to make recommendations for their improvement; the Offices of the Inspectors General to conduct and supervise audits and investigations of executive branch agencies and departments; and finally the Acquisitions Advisory Panel to review relevant laws, regulations and policies and to make any necessary modifications.(160)

Additionally, the False Claims Act(161) enables any person to file an action in the appropriate District Court against federal contractors on the basis that they have committed fraud against the government. In such cases, the person bringing the action is entitled to recover a portion of the proceeds of the action. Such measures of careful monitoring of the procurement officials assure an effective deterrent effect and strongly limits the risks for integrity.

The described outcomes of the Reports, regarding two examples of implementation of the OECD Convention, provide a picture of the utility of gathering such data through a peer monitoring and comparing them in order to highlight the common problems and possibly the best solutions or at least the direction to take in order to improve integrity in the International and National transactions.

7. *Conclusions*

Corruption is a phenomenon which appears in very different forms. It is often linked with the use of illicit funds, or the illicit use of public funds in public contracts. All that harms the global economic and political system and "undermines foreign aid, drains currency reserves, reduces the tax base, harms competition, undermines free trade, and increases poverty levels."(162)

(160) OECD, *Phase 3 Report*, *op. cit.* (fn. 142).

(161) False Claims Act, 31 U.S.C., paras. 3729-3733.

(162) United Nations General Assembly, Global Study on the Transfer of Funds of Illicit Origin, Especially Funds Derived from Acts of Corruption (28 November 2002).

Unfortunately, there are still corrupt leaders and public officials in many countries who risk the future and the development of their countries for their own enrichment.(163)

The government of any country is based on a political process whose goal should be the empowerment of people in order to guarantee them further well-being. All leaders should find efficient tools and funds to promote the economic growth and the social development for their citizens(164) and should govern in a corruption-free environment.

In absence of this, citizens themselves may be victims of corruption without being aware of it.(165) As economists have underlined, in underdeveloped countries, corruption is a way to maintain power inside a restricted group, while in developed countries corruption can ensure loyalty to political parties that provide institutional stability and advantages to their members. A lack of trust in political parties undermines their legitimacy and can encourage a culture of corruption throughout public administration and the public sector and mainly in public procurement.(166) Corruption also undermines the correct functioning of the private sector(167) because it has become larger than the public one as a consequence of privatization and outsourcing processes.(168) In both sectors the lack of integrity would be reduced if policies and rules were

(163) The General Assembly of the UN aimed to sign a resolution concerning the "illegally transferred funds and the repatriation of such funds", see WEBB, *op. cit.* (fn. 19), 191-229.

(164) J. SCHULTZ and T. SØREIDE, *Corruption in Emergency Procurement*, Chr. Michelsen Institute, Issue U4 (july 2006), available at www.u4.no/publications/corruption-in-aid-funded-emergency-procurement/ (last visited 10 November 2013)

(165) In underdeveloped countries, corruption is a way to maintain power inside a restricted group, while in developed countries corruption becomes a means to ensure loyalty to political parties that ensure institutional stability and advantages to their members. The message is that a lack of trust in political parties undermines their legitimacy and can encourage a culture of corruption throughout public administration and the public sector. It has been pointed out that when large amounts of money reach a politician, there is a temptation to divert the funds for personal use. Even if the donations are not diverted, they can be used in fact to "purchase" an elected official's support or vote on legislation; see WEBB, *op. cit.* (fn. 19), 191-229; E. COLOMBATTO, "Virtù e Miserie della Corruzione in il Coraggio della Libertà", in E. COLOMBATTO and A. MINGARDI (eds.), *Saggi in Onore di Sergio Ricossa*, 145-163 (2002).

(166) ROSE-ACKERMAN, *op. cit.* (fn. 41), 21-23; S. ROSE-ACKERMAN, "Introduction: The Role of International Actors in Fighting Corruption", in S. ROSE-ACKERMAN and P. CARRINGTON (eds.), *Anti-Corruption Policy*, 11-12 (2013).

(167) In this field, the action of FATF (Financial Action Task Force) has played a key-role. The FATF was established as an inter-governmental body in 1989 during the G7 Meeting in Paris by the Ministers of its Member jurisdictions. The FAFT is deputised to the combat the money laundering through its black-listening activity and strengthening through sanctions the principle fixed by the UN Conventions too. Moreover the FAFT has recently adopted a Reference Guide and Information Note on the use of the FATF Recommendations to support the fight against Corruption (October 2012) in which countries are encouraged to fight corruption implementing the mechanism provided by the FATF Recommendations in the last decades.

(168) WEBB, *op. cit.* (fn. 19), 191-229 (stating that "in the UK, 82 percent of all workforce jobs were in the private sector in 2000. In the US, 86 percent of state agencies said they either increased or maintained the level of privatization activity from 1993-98").

clear, transparent and correctly monitored. All countries should adopt a common international and national anti-corruption strategy, with a firm political commitment. Multinational corporations could actively participate in the fight against corruption, internally through compliance systems and externally in their relationship with all the countries in which they operate.

For this reason, international companies could be an efficient instrument to fight bribery if they are encouraged to do so. Corruption has been represented as a war between two or more powerful enemies: the national interests of different countries, or of different companies and individuals, to gain contracts and thwart fair competition against the interest of citizens in a correct use of public funds and in a fair competition.

In this sense, countries should efficiently cooperate within European and international bodies in order to join forces and strengthen their stance towards this dangerous phenomenon, which causes evident economic and social problems and violations of human rights.(169) The commitment should be strong as funds derived from corruption can strongly influence policies and strategies and individual success. All countries, institutions and citizens, in all their roles, should tackle corruption and understand the negative consequences of corruption in order to be ready to eradicate it. To make this fight effective, it would be essential to make corruption no longer convenient for anyone, or at least much too risky for the reputation of countries, companies and individuals.

The internationalization of public contracts might therefore be considered as a chance for strengthening the fight against corruption in any legal context adopting the most advanced levels of both regulation and monitoring. An international perspective can enable countries with weaker procurement systems and monitoring procedures to be aware of other measures and catch up with other countries. Any effort in such direction would allow a better use of the scarce public resources and provide the quality of the performances for the benefit of the worldwide citizens.

(169) ROSE-ACKERMAN, *op. cit.* (fn. 166), 13 et seq.; G.M. RACCA and R. CAVALLO PERIN, "Corruption as a Violation of Fundamental Rights: Reputation Risk as a Deterrent to the Lack of Loyalty", in RACCA and YUKINS, *op. cit.* (fn. 1), 23-47.