WARNING ON CRIME

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EU LEGISLATIVE FRAMEWORK ON ORGANISED CRIME, CORRUPTION AND PUBLIC PROCUREMENT

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1. Introduction: The evolution of EU legal framework on criminal matters

This background paper is based mainly on desk research. Legal texts at EU level together with the literature were reviewed, selecting the information relevant for the issue of the project. It is beyond the purpose of this study to recall the whole evolution of EU legal and policy framework on criminal matters. It will focus the attention on the aspects more important for the issue addressed by the project (the criminal infiltration in the public procurement) and for the further steps of the project, in particular the questionnaire for the 28 MS.
The EU has, over the years, developed a range of legal and policy instruments in criminal matters. Those instruments evolved together with the European Union competencies on justice and police area and they keep changing as a consequence of the recent entry into force of the Lisbon Treaty.

From Maastricht to Lisbon: the growing EU role in criminal matters

In 1992 the **Maastricht Treaty** gave the EU a role in police and judicial cooperation in criminal matters. However, the decision-making process was that of the intergovernmental cooperation and not the so called community method. It meant that the European Commission had a right to initiative, which was shared with the Member States and the Council. The latter played a key role because it decides unanimously. The European Parliament had a mere consultative role.

In 1997 the **Treaty of Amsterdam** introduced the concept of the Area of Freedom, Security and Justice (AFSJ) that incorporates migration law, family reunion law, asylum law, police cooperation and cooperation in criminal law. This Treaty also introduced the principle of approximation of the criminal law (see Calderoni, 2010, for a discussion on this term).
This means the possibility to adopt "measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking" (article 31 para. 1).
The Amsterdam Treaty also foresaw the Framework Decision as the legal instrument for the purpose of approximation of laws and regulations of the Member States, which completed the legal instruments necessary to make interventions in the area of judicial and police cooperation in criminal matters (common positions and decisions).

In 2009 the **Lisbon Treaty** entered into force, changing significantly the constitutional basis of the European Union: the so-called third pillar was abolished, and the intergovernmental cooperation

as a decision-making process was replaced by the Community method, already operating in the former first pillar. The ordinary procedure now foresees the monopoly of the right of initiative by the European Commission and the need of consent by the Parliament (who has the power to bring a proposal to an end). Unlike the Treaty of Maastricht, the Council decides by a qualified majority and unanimity is no longer required.

According to The Treaty on the Functioning of the European Union (TFEU), directives providing minimum rules concerning the definition of criminal offences and sanctions may be established "in the areas of particularly serious crimes with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. These areas of crime include: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime" (article 83 para.1 TFEU)[1]. Moreover article 83 para.2 TFEU[2] further enlarges the area of common criminal offences and sanctions when it is "essential to ensure the effective implementation of a Union policy".

In addition to these major changes, it is worth recalling that from 1 December 2014, the Commission has the power to bring legal action against Member States for failure to transpose measures adopted under the former third pillar of the Treaty. Over the following years, if the Commission will use this power, a change may happen in the enforcement of the EU measures.

Article 83 TFEU: common criminal offences in serious crimes and ensuring the effective implementation of Union policy

2. EU legal & policy framework on organised crime and corruption

2.1 Looking for an organised crime offence

During the nineties it appeared crystal clear that the different approaches in tackling organised crime among Member States could represent a flaw in the fight against it. For this reason, in 1998 the European Union approved a **Joint Action (98/733/JHA)** "on making it a criminal offence to participate in a criminal organisation in the Member States of the EU".
After giving a definition[3] of criminal organisation in Article 1, the Article 2 para. 1 requires that the Member States introduce "proportionate and dissuasive criminal penalties" for the active participation in a criminal organisation (the so called civil law model) or, alternatively, for the conspiracy to commit any offences stated in the article 1 of the Joint Action (the so called common law model).[4]

1 Article 83(1) TFEU states: The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament.

2 Article 83(2) TFEU states: If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned.

3 See working paper "The infiltration of criminal groups into public works: strategies and methods" par.2.

4 Article 2 (1) describes the conduct to be punished as follows: (a) conduct by any person who, with intent and with knowledge of either the aim and general criminal activity of the organisation or the intention of the organisation to commit the offences in question, actively takes part in: - the organisation's criminal activities falling within Article 1, even where that person does not take part in the actual execution of the offences concerned and, subject to the general principles of the criminal law of the Member State concerned, even where the offences concerned are not actually committed, - the organisation's other activities in the further knowledge that his participation will contribute to the achievement of the organisation's criminal activities falling within Article 1; (b) conduct by any person consisting in an agreement with one or more persons that an activity should be pursued which, if carried out, would amount to the commission of offences falling within Article 1, even if that person does not take part in the actual execution of the activity.

The civil law model includes both (1) the participation in the organisation's criminal activity and (2) the participation in the organisation's other activities. The formulation adopted makes the participation in the organisation's activities a crime in itself with no need to contribute to the execution of them. This allows to punish the participants for every crime committed by the organisation. Moreover, the punishment for the performing of other activities is not further defined but it could allow the criminalisation of the legal activities supporting the organisation, such as those of lawyers, accountants, entrepreneurs, etc. (see for more details Aleo 2002; Mitsilegas 2001).
The alternative common law model allows to punish the sole agreement between at least two people to commit one offence falling within Article 1.
This option was introduced in order to obtain the consensus of the common law countries. The result was a formulation that allows the Member States to choose not only the sanctions, but also which conduct has to be punished. Consequently the possibilities to harmonise the MS legislation and to strengthen the police and judicial cooperation were very limited.

As a matter of fact, in **2004** the EU Commission released a **Communication**[5] affirming that the Joint Action needed to be reviewed, after the entry into force of the Amsterdam Treaty - which introduced the Framework Decision as a more effective tool to harmonise legislation - and the adoption, in 2000, of the UN Palermo Convention.

Conspiracy or active participation? The EU organised crime offence does not find the way

These technical reasons and the attention given to the cooperation and the fight against terrorism after September 11 pushed for the adoption of a new legal instrument.

The **Council Framework Decision 2008/841/JHA** of 24 October 2008 on the fight against organised crime replaced the Joint Action but few innovations were introduced.

After having defined a criminal organisation, the Framework Decision maintained the dual approach of punishing the active participation as well as the mere agreement to commit a crime. This, again, was the result of the pressure from the common law Member States. It is worth recalling that the Commission (whose original proposal opted for the civil law model) joined by Italy and France firmly opposed this solution and released a harsh statement annexed to the Framework Decision affirming that the objective to enhance the harmonisation of Member States legislation had failed.[6]

The novelties of the Framework Decision are the introduction of minimum sanctions ("at least between two and five years"), the treatment of the crime committed within the framework of a criminal organisation as an aggravating circumstance and standard provisions on liability of legal persons and jurisdiction.

The Framework Decision improved some details of the previous regulation but it does not seem to foster the harmonisation of Member States' legislation (Calderoni 2010; Mitsilegas 2011). Therefore, the vagueness of the definition of organized crime, the dual approach to the criminalisation of the

5 Communication from the Commission to the Council and the European Parliament on measures to be taken to combat terrorism and other forms of serious crime, in particular to improve exchanges of information COM (2004) 0221 final. Available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52004DC0221

6 It states that: The Commission considers that the Framework Decision on the fight against organised crime fails to achieve the objective sought by the Commission in relation to Joint Action 98/733/JHA on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union, and in relation to the United Nations Convention Against Transnational Organised Crime, adopted on 15 November 2000, to which the Community has been a party since 29 April 2004. The Framework Decision does not achieve the minimum degree of approximation of acts of directing or participating in a criminal organisation on the basis of a single concept of such an organisation, as proposed by the Commission and as already adopted in Framework Decision 2002/475/JHA on the fight against terrorism. Furthermore, the Framework Decision enables Member States not to introduce the concept of criminal organisation but to continue to apply existing national criminal law by having recourse to general rules on participation in and preparation of specific offences. The Commission is therefore obliged to note that the Framework Decision does not achieve the objective of the approximation of legislation on the fight against transnational organised crime as provided for in the Hague Programme. The statement is available at http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%209067%202006%20INIT

conducts and the lack of enforceability of the Framework Decision did not bring any significant change in the Member States legislation.

Unfortunately there is no study carried out after 11 May 2010, the deadline for the implementation of the Framework Decision. The only existing cross-national analysis of organised crime legislation (Calderoni, 2010) showed that many countries already comply with the majority of the requirements of the Framework Decision. According to this study, if the majority of Member States adopts the broad and vague definition of the EU instrument the result will be a loss in terms of legality, proportionality, clarity and precision of the criminal offence.

The end of organised crime and the dawn of serious crimes

In conclusion, defining organised crime and build a EU organised crime offence proved to be a very difficult task. In order to agree upon a common definition of organised criminal group (how many people, degree of organisation and structure of these groups) and on the mens rea requirements, the offence proposed was highly ineffective as explained before.

However, these difficulties have not prevented EU bodies from enlarging the domain of organised crime. The etiquette "organised crime" has been strategically connected with drug trafficking, trafficking in human beings, money laundering and terrorism financing, according to policy choices and emerging hot topics. Quite interestingly the Council Decision of 6 April 2009[7] which establishes the European Police Office (EUROPOL)[8] changed the article on Europol's competence stating that "Europol's competence shall cover organised crime, terrorism and other forms of serious crime as listed in the Annex affecting two or more Member States in such a way as to require a common approach by the Member States owing to the scale, significance and consequences of the offences" (Article 4 Council Decision 6 April 2009).
As underlined in the introduction, a similar choice has been made in the Treaty of Lisbon. Maybe this is not the end of organised crime (Dorn 2009), but the EU policies seem to have abandoned the idea to define organised crime and introduce a common offence in favour of giving EU a chance to play an important role in case of crimes that damage its own policy interests.

2.2 Focusing attention on corruption

Corruption is a relevant issue in a project focusing on criminal infiltration in public procurement, taking into consideration the key role of public servant and businessmen.
Since the nineties, corruption crimes received a high degree of attention at international level, with a flourishing of initiatives introducing new offences and enhancing the cooperation among States. Notwithstanding differences among national contexts, all EU Member States seem to have a common understanding of the relevance of corruption, for its impact on competition in the free market and on good governance. Despite this, the EU legal framework is far from being effective.

Between the end of the nineties and the beginning of the 2000s, the EU promoted several initiatives aimed at addressing some specific aspects of corruption in the public sector and then in the private one. The first instrument that criminalised corruption in the public sector linked corruption to the protection of the EC financial interest from fraud. The **first additional protocol to the 1996 EU Fraud Convention**[9] (entered into force on 17 October 2022) defines, in article 1, the concept of Community

7 Council Decision of 6 April 2009 establishing the European Police Office (Europol) 2009/371/JHA (Official Journal L 121, 15 May 2009) Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:121:0037:0066:EN:PDF

8 The Council Decision replaced the Europol Convention.

9 Protocol drawn up on the basis of Article K.3 of the Treaty on European Union to the Convention on the protection of the European Communities' financial interests (Official Journal C 313 of 23.10.1996). Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:1996:313:TOC

official and describes the conducts of passive corruption[10] (article 2) and active corruption[11] (article 3). It refers to the national legislation for the definition of national official and leaves to the Member States the choice of how to ensure that the conducts described are made a criminal offence.
In addition, the **second additional protocol to the 1996 EU Fraud Convention**[12] (entered into force on 19 May 2009) criminalised the laundering of proceeds of corruption and introduced the liability of the legal persons for fraud, active corruption and money laundering, asking the Member States to establish "effective, dissuasive and proportionate sanctions".

The flourishing of initiatives in the nineties

One step further was the **1997 Convention on corruption**[13], which maintained the main elements of the definitions foreseen in the First Protocol, but without involving the (risk of) damage to the EC financial interests.
Besides the protection of its own financial interests, EU main concern was to secure that Member States' criminal provisions against corruption punished bribery involving public officials of the European Communities and those from other EU countries, no matter which kind of advantages they could obtain.

Notwithstanding the institutional changes since 1997, no legal acts have been adopted by the EU on corruption in the public sector. As described further, EU seems to drive its effort more in influencing and supporting the international framework and in establishing a monitoring mechanism than in providing a comprehensive system of corruption.
As regards the private sector, the EU adopted the Joint Action 98/742/JHA[14], then replaced by the **Council Framework Decision 2003/568/JHA of 22 July 2003**[15].
This text better defined active and passive corruption[16] (article 2) introducing a broad criminalisation of corruption with the sole limit of being carried out in the course of business activities.
It also foresaw rules on the liability of legal person and on jurisdiction. However, the Decision left to national legislations the definition of "breach of duty" concept and allowed a Member State to limit the scope of active corruption to conduct which involves, or could involve, a distortion of competition in relation to the purchase of goods or commercial services.

10 Passive corruption is defined as: the deliberate action of an official, who, directly or through an intermediary, requests or receives advantages of any kind whatsoever, for himself or for a third party, or accepts a promise of such an advantage, to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties in a way which damages or is likely to damage the European Communities' financial interests.

11 Active corruption is defined as "the deliberate action of whosoever promises or gives, directly or through an intermediary, an advantage of any kind whatsoever to an official for himself or for a third party for him to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties in a way which damages or is likely to damage the European Communities' financial interests".

12 Second Protocol drawn up on the basis of Article K.3 of the Treaty on European Union to the Convention on the protection of the European Communities' financial interests (Official Journal C 221 of 19.7.1997). Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:1997:221:TOC

13 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 (Official Journal C 195 25.05.1997). Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1420385939401&uri=CELEX:41997A0625(01)

14 Joint Action 98/742/JHA of 22 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on corruption in the private sector (Official Journal L 358, 31.12.1998). Available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31998F0742

15 Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector (Official Journal C 184, 02.08.2002). Available at http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32003F0568

16 Article 2 states: Member States shall take the necessary measures to ensure that the following intentional conduct constitutes a criminal offence, when it is carried out in the course of business activities: (a) promising, offering or giving, directly or through an intermediary, to a person who in any capacity directs or works for a private-sector entity an undue advantage of any kind, for that person or for a third party, in order that that person should perform or refrain from performing any act, in breach of that person's duties; (b) directly or through an intermediary, requesting or receiving an undue advantage of any kind, or accepting the promise of such an advantage, for oneself or for a third party, while in any capacity directing or working for a private-sector entity, in order to perform or refrain from performing any act, in breach of one's duties.

The lack of enforcement in the Member States

The 2007[17] and 2011[18] Commission reports on the implementation of the Framework Decision presented a discouraging picture. In 2007, only two Member States have fully transposed article 2 an d in 2011 this number rose to nine out of 25. This proved, once again, that the implementation of broad and complex criminal offences definition in domestic legislation is rather difficult to reach.
The **Communication on a comprehensive EU policy**[19] against corruption was adopted in 2003, which not only included prevention measures but also clarified the EU position on international instruments addressing corruption.
The Commission affirmed that duplicating measures can bind unnecessary resources and even be counterproductive. Consequently, the EU should concentrate on those measures "which are not already substantially covered, or not with the same degree of mandatory character as EU instruments, by international organisations. This goes in particular for initiatives of the United Nations, the OECD and the Council of Europe, where the EU has been playing a leading role and should continue to do so".
As regards prevention, the Communication affirmed that a broader definition of corruption, including integrity, transparency, accountability and good governance has to be considered. It claims for more political commitment from decision makers and for minimum standards and benchmarks in administration integrity and good governance. There is a specific mention to the public procurement, suggesting the use of a black-list and the exclusion from the procedure of any tenderer who has been convicted for corruption, fraud or participation in the activities of a criminal organisation.

From legal rules to monitoring mechanisms

Not much seems to have changed and the EU Commission in **2011** released a new **Communication**[20] stressing the uneven enforcement of the anti-corruption legal framework among Member States and the lack of political commitment. So, the Commission - somehow responding to scholars' suggestion (see Mitsilegas, 2011) - introduced a new mechanism, the EU Anti-corruption report, to monitor and assess Member States' efforts against corruption and EU participation in the Group of States against Corruption, i.e. GRECO (see below). The EU Anti-Corruption Report will be issued every two years, starting in 2013, and it will address some common issues relevant at EU level and specific problems at Member State level. In 2013 a thematic session of the report has been devoted to corruption and public procurement.
The principle behind the report is that there is "no 'one-size-fits-all' solution to fighting corruption, but corruption is a concern for all EU Member States (…). The mechanism, applicable equally to all Member States, will provide a clearer overview of the existence and effectiveness of anti-corruption efforts in the EU, help identify specific causes of corruption, and thus provide grounds for sound preparation of future EU policy actions. It will moreover act as a 'crisis alert' to mitigate the potential risks of deeply-rooted problems which could evolve into a crisis". Since 2011 EU efforts seem to have been concentrated on prevention and monitoring Member States efforts to tackle corruption, whereas EU legal framework on corruption remains fragmented and limited. In addition, EU better supports some of the existing international instruments and standards.

As a matter of fact, across the years, OECD, the Council of Europe and the United Nations, put in place instruments to tackle corruption.
The oldest one is the **1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions**, which is currently adopted by 34 OECD Members and

17 COM (2007) 328 final - Report from the Commission to the Council based on Article 9 of the Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector. Available at http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52007DC0328

18 COM (2011) 309 final - 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. Available at http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52011DC0309

19 COM (2003) 317 final - Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on a comprehensive EU policy against corruption. Available at http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52003DC0317

20 COM (2011) 308 final - Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee "Fighting Corruption in the EU". Available at http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52011DC0308

seven non-member countries.[21] It aims at guaranteeing free competition in international business transactions and requires each State Party to make active bribery a crime, allowing them to decide how to implement it. According to the latest available data[22], its enforcement did not create any common measures among members. Moreover, it should be noted that most of the EU Member States did not actively enforce the Convention or did not even adopt it.

CoE initiatives and the new support coming from the EU

The strongest effort in tackling corruption has been done by the **Council of Europe**. In 1999 the Civil law Convention on Corruption and the Criminal Law Convention on Corruption were adopted, followed by the latter Addition Protocol in 2003. The Council of Europe adopted a very wide scope, aiming at ensuring that these instruments could be applied to all subjects, with no exception. Therefore the **Criminal Convention** adopted a very broad definition of public official and it punished active and passive bribery but also defined other forms of corrupt behaviour, such as private sector corruption, trading in influence and punished other related offences (money laundering of proceeds from corruption offences and account offences) closely linked to bribery and commonly understood as specific forms of corruption. In addition, it introduced the criminal liability of legal persons and some provisions on confiscation of crime proceeds, co-operation between authorities.
This broad spectrum of offences has its complementing measure in the **Civil Law Convention**, which introduced the right to compensation for damage resulting from an act of corruption.
The most effective instrument of CoE conventions is the monitoring mechanism named GRECO. It monitors State's compliance with Council of Europe anti-corruption standards through a dynamic process of mutual evaluation and peer pressure. It helps identify loopholes in national anti-corruption policies, prompting the necessary legislative, institutional and practical reforms.
The mutual evaluation procedure consists of an evaluation procedure, which leads to recommendations, followed by a compliance procedure designed to assess the measures taken.

Each evaluation round focuses on a specific subject[23]. In 2012 the fourth evaluation round addressed the issue of prevention of corruption in respect of members of parliament, judges and prosecutors. It is common opinion that this initiative of the Council of Europe contributes to ensuring some minimum standards in the anti-corruption efforts, involving not only all the EU Member States but also the Candidate countries. In order to further support GRECO, in a 2012 Communication[24], EU had defined the modalities of its participation in GRECO. In a first phase, the agreement with the Council of Europe allows the EU's participation in GRECO's evaluation, a sort of mutual access to information and the possibility of flagging GRECO's recommendations relevant for EU. In a second phase the possibility for GRECO to evaluate EU's institutions will be assessed.

3. EU legal framework on public procurement

Public procurement in the EU is harmonised by a legislative framework, which has been recently renovated with three new directives (see Caranta and Dragos 2014 and Williams, 2014 for a brief overview of the changes).

21 http://www.oecd.org/daf/anti-bribery/WGBRatificationStatus.pdf

22 http://www.transparency.org/exporting_corruption

23 GRECO's first evaluation round (2000–2002) dealt with the independence, specialisation and means of national bodies engaged in the prevention and fight against corruption. It also dealt with the extent and scope of immunities of public officials from arrest, prosecution, etc. The second evaluation round (2003–2006) focused on the identification, seizure and confiscation of corruption proceeds, the prevention and detection of corruption in public administration and the prevention of legal persons (corporations, etc.) from being used as shields for corruption. The third evaluation round (launched in January 2007) addresses (a) the incriminations provided for in the Criminal Law Convention on Corruption and (b) the transparency of party funding. See for more details http://www.coe.int/t/dghl/monitoring/greco/evaluations/index_en.asp

24 COM (2012) 604 final - Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee Participation of the European Union in the Council of Europe Group of States against Corruption (GRECO). Available at http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/docs/com_eu_participation_in_greco_2012_604_final_en.pdf

These are:

- Directive on public procurement (2014/24/EC)[25], which repeals Directive 2004/18/EC on public works, supply and service contracts;
- Directive on procurement by entities operating in the water, energy, transport and postal services sectors (2014/25/EC)[26], which repeals Directive 2004/17/EC on procurement in the water, energy, transport and postal services sectors;
- Directive on the award of concession contracts (2014/23/CE)[27], which were marginally touched by the previous EU regulation.

Beyond the traditional objectives of guaranteeing fair competition, transparency, non-discrimination, these directives aim at reaching a general simplification, efficiency and flexibilisation of the regime. In addition, these directives envisage some rules to prevent (or at least try to contain) illegality and corruption, which is highly relevant for this overview.

The prevention of unsound business practices: a new field of interest for the EU

The issue of illegality in public procurement was firstly addressed in 2011 when the EC issued **The Green Paper on the modernisation of EU public procurement policy. Towards a more efficient European Procurement Market**[28]. This document dedicates one section named "Ensuring sound procedures" to address the issue of conflict of interests, favouritism and corruption. The guiding principle is that more effective mechanisms to prevent unsound business practices not only can ensure fair competition and the efficiency of public spending but also enhance the fight against economic crime (see Green Paper, p. 48).
The Commission underlines that in 2004 Directives this area was mainly left to the Member States, whose level of safeguards varies greatly.
The Green Paper identifies the integrity and the fairness of the process as desirable objectives. These objectives could be reached by measures that increase the level of transparency and accountability, such as a higher level of scrutiny of the personal and business situation of the public officials, a more transparent procedure that allows to scrutinise the taken decisions, clearer rules on reporting documents and protection of whistle blowers. Finally, the exclusion of bidders guilty of professional misconducts and serious crimes already envisaged in the 2004/18/EC Directive requires some clarification on the scope, interpretation, transposition and practical application.
However, because more procedural guarantees against unsound business practices at EU level entail additional administrative burden for procurers, these have to be weighed against a possible negative impact on simplification and fair competition.
For this reason the EC Green Paper suggests the possibility to adopt a self-cleaning procedure that allows the economic operators to solve a situation that may lead to their exclusion or to allow bidders in advantageous situation to participate if they disclose the privilege information they possess.

The **New Directive on public procurement** (2014/24/EC) takes notice of the suggestions of the Green Paper, proposing: some measures having the direct aim of preventing illegality in the procedure, others aimed at governing the procedure in order to enhance transparency and reduce opportunities for illegal behaviours and finally some rules on the governance, i.e. the monitoring of the directive application in the Member States. Most of these measures address the role of the contracting

25 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (Official Journal L 94, 28.3.2014, p. 65–242). Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32014L0024

26 Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (Official Journal L 94, 28.3.2014, p. 243–374. Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32014L0025

27 Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (Official Journal L 94, 28.3.2014, p. 1–64). Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.094.01.0001.01.ENG

28 COM (2011) 15 final "The Green Paper on the modernisation of EU public procurement policy. Towards a more efficient European Procurement Market". Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0015:FIN:EN:PDF

entities, others are designed for the bidders (for a similar classification of the measures in the Directive, see Di Cristina, 2014). In comparison with the previous directives, there is certainly a major attention to the integrity of the procedure and the need to fight corruptive or collusive conducts.

The following table summarises the measures suggested in the Directive.

Category of measures	Subject addressed	
	Contracting authority	Bidders
Preventing illegality in the procedure	Conflict of interests	Exclusion grounds
Enhancing transparency and reducing opportunities for illegal behaviours	- Publication of information - Aggregation of demand - Subcontracting	Subcontracting
Strengthening governance	Monitoring reports	

Exclusion grounds: the Directive maintains the distinction between mandatory and discretionary ground of exclusion, stating clearly the possibility for the Member States to implement all the grounds of exclusion as mandatory. Exclusion rules can be applied at any time during a public procurement procedure.

Exclusion rules, the main measure addressed to bidders

The grounds for mandatory exclusions (article 57, par.1 -3) are:

- Convictions by a final judgment for several offences.[29] The list of offences is longer than in 2004 and the references to how these offences are described in EU documents will require some Member States to redefine them to accomplish the Directive;
- Violations of obligations to pay taxes and social contributions. In comparison to 2004, in case a judicial or administrative decision having final and binding effect intervenes, the exclusion shall be mandatory. This new mandatory ground of exclusion underlines the relevance given to the payment of taxes and social contributions in terms of reliability of the bidders and how this behaviour is a red flag to identify environments prone to illegality. However, if the economic operator fulfils its obligation, he/she cannot be excluded. In case of minor violations, the Member States can derogate to the mandatory rule of exclusion.

In addition to the mandatory ones, new discretionary grounds of exclusions have been added or modified.

They can be classified in two categories: those[30] which are based on doubts regarding the bidders' reliability, capability or suitability and those which aim at avoiding distortion of competition. The latter include: 1) non-remediable conflicts of interests; 2) plausible indication of agreements among competitors; 3) prior involvement of the economic operators in the preparation of the procurement procedure which results in a non-remediable distortion of competition; 4) the exercise

29 These offences are: (a) participation in a criminal organisation, as defined in Article 2 of Council Framework Decision 2008/841/JHA; (b) corruption, as defined in Article 3 of the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union and Article 2(1) of Council Framework Decision 2003/568/JHA as well as corruption as defined in the national law of the contracting authority or the economic operator; (c) fraud within the meaning of Article 1 of the Convention on the protection of the European Communities' financial interests; (d) terrorist offences or offences linked to terrorist activities, as defined in Articles 1 and 3 of Council Framework Decision 2002/475/JHA respectively, or inciting or aiding or abetting or attempting to commit an offence, as referred to in Article 4 of that Framework Decision; (e) money laundering or terrorist financing, as defined in Article 1 of Directive 2005/60/EC of the European Parliament and of the Council; (f) child labour and other forms of trafficking in human beings as defined in Article 2 of Directive 2011/36/EU of the European Parliament and of the Council.

30 These are the exclusions on grounds of: a violation of environmental, social or labour law; bankruptcy or insolvency or winding-up proceedings; grave professional misconduct; deficiencies in the performance of a public contract; misrepresentation in the course of proceedings.

of undue influence on the decision-making process in order to obtain confidential information or to provide misleading information. This final ground of exclusion will often result into crimes (bribes, extortion, blackmail) but this is not necessary to exclude the bidders.

Measures to enhance transparency and reduce crime opportunities

In order to avoid an excessive rigidity, the New Directive introduces a possibility for the economic operators to avoid exclusion by taking responsibility and rehabilitate themselves proving that: a) they have paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct; b) they have clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and c) they have taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct. Member States have high discretion in the implementation of such self-cleaning measures although this certainly represents a step further in a more harmonized practice. But an effective implementation of such measures certainly requires an efficient public administration (For more details on exclusion grounds and self-cleaning measure, see Priess 2014)

Conflict of interests: according to the new Directive, it includes any situation in which officers involved in the procedure[31] "have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure" (article 24, 2). It is under the responsibility of the Member States to enact appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the procurement procedure.

Publication of information: the new directive clearly establishes the need to publish the prior information notice and the award contract notice. The publication at national level is allowed only after the one performed by the Publications Office of the European Union. Moreover, as general rules, procurement documents will be available electronically and free of charge from the date of publication.

Aggregation of demand: This includes several measures[32] whose main aim is to obtain more efficiency in terms of more professional procurement management, economies of scale, lower prices and transaction costs. Though there are some worries in terms of excessive concentration of purchasing power and preservation of transparency and competition, these measures could reduce the possibility for criminal groups and corrupters to exercise their influence.

Subcontracting: the Directive introduces stricter rules. For example the contracting authority can pay subcontractors directly. To allow this the main contractor has to indicate to the contracting authority the name, contact details and legal representatives of its subcontractors and notify any changes during the course of the contract.

Strengthening governance through monitoring reports

Monitoring reports: The new directive obliges the Member States to monitor the application of public procurement rules. Every three years (the first one by 18 April 2017), Member States shall send the Commission a monitoring report that includes "the prevention, detection and adequate reporting of cases of procurement fraud, corruption, conflict of interest and other serious irregularities" (article 83). The results of the monitoring shall be made available to the public through appropriate means of information. In case of problems, procedures need to be establish to "indicate those problems to national auditing authorities, courts or tribunals or other appropriate authorities or structures, such as the ombudsman, national parliaments or committees" (article 83).

Even though the new directive on public procurement introduced new measures, the success of this preventive system highly depends on the capacity of the public administration of leading the way.

31 According article 24 (2) officiers involved in the procedure are: staff members of the contracting authority or of a procurement service provider acting on behalf of the contracting authority who are involved in the conduct of the procurement procedure or may influence the outcome of that procedure.

32 Such as central purchasing bodies, aggregated procurement, framework contracts. See for more details Lichere and Richetto (2014), Racca (2014) and RIsvig Hamer (2014).

The public administration has to accept the challenge of assuming responsibilities, making decisions and taking full ownership of the process. In other words, in some Member States a successful public procurement system requires a relevant reform of the public administration in terms of efficiency and responsibility.

4. Concluding remarks

EU has enlarged its competencies on criminal matters over the years and since December 2014 the Commission has the power to bring legal action against Member States for failure to transpose measures adopted under the former Third Pillar of the Treaty. This could represent a major shift in the relevance of EU criminal legislation.

So far no common legal framework at EU level exists, neither on organised crime nor on corruption. However there is a major difference between the two issues. Whereas Member States do not share the same idea on organised crime and this makes close to zero the possibility for the EU to play a role in creating a common understanding at Member States level, corruption is nowadays a priority at EU and Member States level.

The EU is putting its efforts in monitoring and assessing Member States' efforts against corruption and in favouring the initiatives of the Council of Europe, which is certainly helping in ensuring some minimum standards in anti-corruption legislation and policies. Harmonisation of Member States legislation is far from being a reality but many steps have been carried out since the introduction of additional protocols to the EU antifraud convention.
As regards public procurements, the first EU anti-corruption report has devoted one chapter to public procurements and the new directives more clearly address the issue of illegality in public procurement procedure.

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