

**UNIVERSIDAD COMPLUTENSE DE MADRID**  
**FACULTAD DE CIENCIAS POLÍTICAS Y SOCIOLOGÍA**



**TESIS DOCTORAL**

**Political influence in public procurement: balancing between legality  
and illegality**

**MEMORIA PARA OPTAR AL GRADO DE DOCTOR**

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**POLITICAL INFLUENCE IN PUBLIC PROCUREMENT: BALANCING BETWEEN  
LEGALITY AND ILLEGALITY**

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## Table of contents

<b>1</b>	<b>Executive summary</b> .....	<b>9</b>
1.1	Research objectives and methodology .....	9
1.2	Main findings .....	10
1.3	Recommendations .....	12
<b>1</b>	<b>Resumen ejecutivo</b> .....	<b>14</b>
1.1	Objetivos de la investigación y metodología .....	14
1.2	Resultados principales .....	15
1.3	Recomendaciones.....	18
<b>2</b>	<b>Introduction</b> .....	<b>21</b>
2.1	Research Objectives .....	22
2.1.1	Hypothesis I .....	23
2.1.2	Hypothesis II .....	25
2.2	Methodology.....	25
2.2.1	Study area 1.....	26
2.2.2	Study area 2.....	26
2.2.3	Study area 3.....	27
2.2.4	Case study design.....	27
2.2.5	Data collection and assessment tools .....	30
2.2.6	Report structure.....	35
<b>3</b>	<b>Justification and scope of this study</b> .....	<b>37</b>
3.1	EU public procurement.....	38
3.2	EU procurement rules.....	41
3.3	Corruption in public procurement .....	43
3.4	European Structural and Investment Funds .....	47
<b>4</b>	<b>Part I – Collective action for corruption and public procurement</b> .....	<b>53</b>
4.1	Corruption .....	53
4.1.1	Conceptualising corruption .....	55
4.1.2	Supply and demand-side of corruption .....	59
4.1.3	Between petty, grand and systemic corruption .....	65
4.1.4	Balancing between legality and illegality .....	68
4.2	Causes of corruption .....	70
4.2.1	Social processes leading to corruption.....	72
4.2.2	Principal-agent perspective on corruption .....	78

4.2.3	Collective action perspective on corruption.....	91
4.2.4	Principle-agent and collective action .....	96
<b>4.3</b>	<b>Corruption prevention .....</b>	<b>101</b>
4.3.1	Legal versus regulatory prevention.....	102
4.3.2	Fostering a culture of compliance.....	105
4.3.3	Collective action as a corruption prevention tool .....	112
<b>4.4</b>	<b>Public procurement.....</b>	<b>118</b>
4.4.1	Public procurement .....	118
4.4.2	Key principles of public procurement relating corruption.....	130
4.4.3	Public procurement on the EU level .....	132
<b>4.5</b>	<b>Corruption in public procurement .....</b>	<b>136</b>
4.5.1	Forms of corruption in public procurement .....	140
4.5.2	Vulnerability of the public procurement process.....	141
4.5.3	Irregularities in public procurement.....	145
4.5.4	Interface of public and private stakeholders .....	147
<b>4.6</b>	<b>Anti-corruption in public procurement .....</b>	<b>149</b>
4.6.1	Considerations to address political interference in public procurement.....	151
4.6.2	Anti-corruption developments in public procurement on the EU level.....	154
4.6.3	Collective action against corruption in public procurement .....	159
<b>4.7</b>	<b>Collective action for EU procurement and the transparency deficit.....</b>	<b>173</b>
<b>5</b>	<b>Part II – Integrity Pacts as collective action .....</b>	<b>181</b>
<b>5.1</b>	<b>Integrity Pact cases.....</b>	<b>183</b>
5.1.1	Integrity Pacts across the world .....	183
5.1.2	Integrity Pacts in Europe.....	197
5.1.3	Others .....	207
<b>5.2</b>	<b>Integrity Pact structure.....</b>	<b>211</b>
5.2.1	Design of the Integrity Pact .....	211
5.2.2	Implementation of the Integrity Pact .....	218
<b>5.3</b>	<b>Context of Integrity Pacts.....</b>	<b>219</b>
5.3.1	Governance and economic conditions .....	220
5.3.2	Public procurement conditions.....	227
5.3.3	Legal conditions .....	233
5.3.4	Implementation arrangements.....	236
5.3.5	Global and European overview of conditions.....	256
<b>5.4</b>	<b>Collective action of Integrity Pacts .....</b>	<b>258</b>
5.4.1	Group size .....	260

5.4.2	Repeated interaction.....	261
5.4.3	Trust and good reputation .....	267
5.4.4	Group interdependence .....	269
5.4.5	Heuristics/norms .....	270
5.4.6	Monitoring and transparency .....	274
5.4.7	Long-term horizons.....	283
5.4.8	Salience of the collective good .....	286
<b>6</b>	<b>Part III Integrity Pact as an approach to prevent corruption in public procurement</b>	<b>291</b>
<b>6.1</b>	<b>Integrity Pact evaluation.....</b>	<b>292</b>
<b>6.2</b>	<b>Integrity Pact indicators of change.....</b>	<b>300</b>
6.2.1	Value for money.....	302
6.2.2	Trust .....	303
6.2.3	Social accountability.....	304
6.2.4	Monitoring and transparency .....	305
6.2.5	Level playing field .....	306
6.2.6	Heuristics and norms.....	306
<b>7</b>	<b>Conclusions .....</b>	<b>309</b>
7.1	Reflections on collective action for corruption and EU public procurement .....	309
7.2	Reflections on the Integrity Pact main take-away.....	313
7.2.1	Governance and economic context .....	314
7.2.2	Prevention of corruption .....	314
7.2.3	Integrity Pact monitor .....	315
7.3	Reflections on an approach for the Integrity Pact .....	319
7.4	Reflections on the Integrity Pact for EU procurement.....	320
7.5	Concluding remarks.....	327
<b>8</b>	<b>Bibliography .....</b>	<b>331</b>
<b>9</b>	<b>Annex I surveys .....</b>	<b>345</b>
<b>10</b>	<b>Annex II Interviews .....</b>	<b>369</b>
10.1	List of interviews.....	369
10.2	Interview questions European review.....	373
10.3	Interview questions global review .....	382

## List of tables

Table 1: EU Member States overview Corruption Perception Index and World Bank Income groups .....	40
Table 2: Integrity Pacts Latvia .....	199
Table 3: Integrity Pacts Hungary .....	201
Table 4: Integrity Pacts Bulgaria .....	203
Table 5: Governance and economic conditions .....	221
Table 6: Monitoring conditions .....	257
Table 7: Access to information Integrity Pact Hungary .....	280
Table 8: European Union Member States governance indicators .....	321
Table 9: European Union Member States corruption perception .....	322
Table 10: ESI funds and Integrity Pacts in the European Union .....	325

## List of figures

Figure 1: Interview categories European review .....	33
Figure 2: Interview categories global review .....	34
Figure 3: World Governance Indicators Spain .....	226
Figure 4: Integrity Pact clauses for civil society organisations .....	241
Figure 5: Integrity Pact clauses for contracting authorities .....	241
Figure 6: Integrity Pact use of sanctions .....	252
Figure 7: Theory of change Integrity Pact .....	297
Figure 8: Results chain Integrity Pact .....	299

## List of abbreviations

CoST	Construction Sector Transparency Initiative
CPI	Corruption Perceptions Index
CSR	Corporate Social Responsibility
EU	European Union
EUR	Euro
FCPA	Foreign Corrupt Practices Act
GDP	Gross Domestic Product
ICT	Information and Communication Technology
MoU	Memorandum of Understanding
NLL	National Library of Latvia
OECD	Organisation for Economic Co-operation and Development
PPP	Purchasing Power Parity
UNCAC	United Nations Convention Against Corruption
USD	United States Dollar
WGI	Worldwide Governance Indicators

# **1 Executive summary**

The estimated damage of corruption in public procurement on the European Union (EU) level runs into the billions of Euros. Procurement irregularities are one of the most common causes of administrative errors and financial corrections relating to EU funding. As a result, the EU procurement rules establish a EU-wide legislative framework aiming to enhance transparency. Nonetheless, in 2015, the European Commission launched a project in order to involve civil society in promoting transparency, preventing corruption and creating a culture of integrity in public procurement of EU funds. The project launched in 2016 the design and implementation of seventeen collective action initiatives in eleven EU Member States. The tool used for these initiatives is the Integrity Pact. This is a collective action tool on the basis of an agreement between contracting authorities and companies participating in a procurement process. Participants are to abstain from bribery, collusion and other corrupt practices for the extent of the contract. A third party to the Integrity Pact, often a civil society organisation is assigned to monitor all the activities.

## **1.1 Research objectives and methodology**

This research study looks at understanding the effect of the Integrity Pact as an anti-corruption collective action tool for public procurement through the EU funds and the role of civil society organisations, businesses and contracting authorities in preventing corruption through collective action. The first hypothesis for this study is that the structure for EU funding poses corruption challenges in public procurement for EU Member States that can more effectively be addressed through collective action. The second hypothesis for this study is that an independent monitor, in the form of a civil society organisation through the Integrity Pact, can play an effective role in the prevention of corruption and enhancing of transparency in public procurement.

The study is divided in three areas. The first provides a theoretical analysis and framework to prevent corruption in public procurement in the context of the EU Single Market and through the use of collective action. The second identifies conditions that affect the effectiveness of civil society organisations to prevent corruption through collective action on the basis of a qualitative multi-case study analysis of the Integrity Pact in six EU and ten non-EU countries. The third area presents a first integrated approach for the Integrity Pact to prevent corruption in public procurement of EU Funds through collective action. Data has been collected

through desk research, interviews and surveys. For the assessment of the Integrity Pact cases, this study uses a qualitative multi-case study analysis.

## 1.2 Main findings

Debates concerning the lack of effectiveness of strategies based on the principle-agent approach to anti-corruption have pointed to considering corruption as a collective action problem instead. When “principles” can share in the benefits of corruption or are simply indifferent about the problem, normative constraints do not work. Normally these constraints should endorse ethical universalism and monitor and prevent deviation from the norms. Instead, with the lack of “principled principles”, particularism enables an environment in which allocation of public resources is based on a connection between the one in power and the one receiving the public goods. This study argues that in the EU there is no one-size-fits-all solution to corruption and therefore perhaps the principle-agent strategies against corruption are not necessarily incompatible with collective action theories in this diverse environment.

Political and economic integration of the EU increased for companies and political parties competitive pressure. The economic differences in the EU Member States explain how corporations resort to criminal behaviour under economic pressure in a climate of increased competition. In line with the market integration, the EU developed an extensive procurement legislative framework, providing for provisions to prevent corruption and enhance transparency, but at the same time generating competitive pressure on the procurement market in Member States, particularly affecting local businesses. At the same time, different attitudes towards corruption in Member States in combination with weaknesses in the EU’s accountability structure have a counter-effect on the normative constraints. Concerning the latter, this study discussed how EU integration increases competition and associated societal situations in which material success is promoted but means to achieve this are not equally accessible for all. For example, with the enlargement of the EU, new Member States were to adopt vast amounts of European laws and legislation designed *de facto* for countries with different economic and political characteristics and where corruption could be conceptualised on the basis of principle-agent theories. Today, the corruption problem is still significant in EU Member States that newly joined the European Union. This study argues that this is partially due to the need to conceptualise corruption in those countries as a collective action problem. This calls into question whether the EU’s procurement legislative framework can be

effective for all Member States. In addition, EU expenditure largely depends on a shared management system where the EU has limited control over how EU Member States spend funds. It is against this background that the European Commission launched the Integrity Pact initiative. This study supports the hypothesis that the structure for EU funding poses corruption challenges in public procurement for EU Member States that can more effectively be addressed through collective action. The Integrity Pact tool targets an area vulnerable for corruption, namely EU public procurement which affects a large part of EU expenditure and over which the European Commission has limited control. It targets businesses that can be disproportionately affected by corruption such as small and medium enterprises, and can be used on different business sectors, on different governmental levels and across regions. The Integrity Pact aims to promote best public procurement practices, which could help harmonising the implementation of EU procurement rules across the EU Member States and ensure an equal level playing field for businesses, which could ensure more cross-border public procurement activity and this way complete the functioning of the Single Market.

The main challenge, however, is that the effect or impact of collective action initiatives is difficult to determine and that collective action initiatives particularly fair well in endemic corrupt environments. Despite that collective action initiatives can also be used in non-endemic corrupt environments; the question asked is which conditions favour the effective use of the Integrity Pact. The contextual analysis done through the multi-case study analysis supports collective action views that it is in the best interest of individuals in the group to act collectively towards shared objectives, which lies at the core of the Integrity Pact multi-stakeholder approach. The analysis also points out that elements of the Integrity Pact aim to overcome the temptations of short-run self-interest through reciprocity, reputation and trust, in order to build conditions to allow individuals to achieve results that are better than rational. The sanctions available in the Integrity Pact give impetus to groups to achieve suboptimal results and function as deterrence through the commitment to punish those that do not adhere to the Integrity Pact. This study finds that an independent monitor, in the form of a civil society organisation through the Integrity Pact, can play an effective role in the prevention of corruption and enhancing of transparency in public procurement. Three conditions are predominantly important for this: the monitor requirements, monitoring arrangements/activities, and the selection of the monitor.

Concerning the monitoring requirements, this study has, *inter alia*, finds that the monitor should be accountable to the civil society organisations as well as to the bidders, contracting authorities and to the public. Ensuring this “fourfold” accountability to stakeholders, with different and sometimes opposite interests, is difficult to operationalize. Further, repeated interaction between stakeholders is set in formal legislative processes, i.e. the bidding phases, or less formalised processes such as contract implementation phases. Within the formal procurement framework and the less formal contract implementation framework, parties to the Integrity Pact have a degree of manoeuvrability. This study finds that this manoeuvrability is in itself a risk area for irregularities and therefore subject to monitoring. Concerning the implementation arrangements and monitor activities, this study, *inter alia*, finds that monitors conduct a wide variety of activities and that the way monitors have access to information, as well as the frequency and intensity of contact affects the level of trust between parties to the Integrity Pact. Concerning the selection of the monitor, this study, *inter alia*, finds that on the basis of the economic and governance conditions in a country it can prove difficult to identify a monitor with the requirements needed such as good reputation. Ensuring good reputation is difficult in a country with weak governance.

The multi-case study analysis has shown that Integrity Pacts have been designed and implemented by different civil society organisations, contracting authorities, companies, involving different donor organisations, procurement projects, market sectors, etc. Today, a key question posed is how to inform policy-makers on the best ways to scale-up the use of the tool on the basis of past learnings. This study presents an evaluation framework in order to shape an approach that would support the implementation of the Integrity Pact tool on the EU level in order to prevent public procurement corruption. The choice for this framework as an approach to prevent corruption in public procurement is based on the need for a flexible tool that can be adapted to the contextual conditions in which an Integrity Pact can be designed. While the development of this approach in this study is based on findings from past Integrity Pacts, the objective is that by using this approach data will be more systematically collected in the future and help civil society organisations, donors, and academia to better assess in the future the effectiveness of the Integrity Pact as a collective action tool.

### **1.3 Recommendations**

This study combines both theoretical considerations as well as practical considerations on the use of the Integrity Pact as a tool to prevent corruption in public procurement. Collective

action initiatives for the fight against corruption are increasingly used by a multitude of stakeholders around the world. With emphasising the relevance of monitoring and evaluating these initiatives, this study hopes to contribute to further the understanding of the effectiveness on prevention of corruption. It therefore recommends parties to the Integrity Pact to:

1. Ensure multi-stakeholder engagement by actively involving all parties to the Integrity Pact from the design phase up until the end of the collective action initiative.
2. Incorporate greater social control mechanisms by considering the inclusion of the Integrity Pact as a project-based initiative into a wider array of collective action initiatives aiming for long-term change.
3. Ensure strong design of the collective action initiative by establishing a rigorous methodology and evaluation framework in order to capture baseline assumptions and the change that the intervention created.
4. Consider the implementation arrangements by establishing a clear set of procedures for the imposition of sanctions. This should include a process for screening the complaints (and delineation of who can submit them), assessment criteria for the complaint, a resolution approach, escalation criteria and procedures in cases where the involvement of legal authorities is required, and recourse procedures in cases of disputes. The procedures should be transparent and disseminated to all stakeholders.
5. Optimise the role of the monitor by developing capacity to assemble a monitoring team that can draw on a variety of expertise when necessary.

## **1 Resumen ejecutivo**

El daño causado a nivel Europeo por la corrupción en la contratación pública se sitúa en miles de millones de euros. Las irregularidades en la contratación pública son una de las causas más comunes de errores administrativos y correcciones financieras relacionadas con la financiación de la Unión Europea (UE). En consecuencia, las normas de la UE en materia de contratación pública establecen un marco legislativo a escala Europea destinado a mejorar la transparencia. En 2015, la Comisión Europea lanzó un proyecto para implicar a la sociedad civil en la promoción de la transparencia, la prevención de la corrupción y la creación de una cultura de integridad en la contratación pública a través de los fondos Europeos. El proyecto puso en marcha en 2016 el diseño y la ejecución de 17 iniciativas de acción colectiva en 11 estados miembros de la UE. El instrumento utilizado para estas iniciativas es el Pacto de Integridad. Se trata de un instrumento de acción colectiva basada en un acuerdo entre las autoridades de contratación pública y las empresas que participan en un proceso de contratación pública. Los participantes se abstendrán del soborno, la colusión y otras prácticas corruptas durante el proceso de contratación y a lo largo de la implementación del contrato. El tercer actor del Pacto de Integridad es normalmente una organización de la sociedad civil que se encarga de supervisar todas las actividades.

### **1.1 Objetivos de la investigación y metodología**

Este estudio de investigación busca entender el efecto del Pacto de Integridad como instrumento de acción colectiva contra la corrupción en la contratación pública de los fondos Europeos así como entender el papel de las organizaciones de la sociedad civil, las empresas y las autoridades públicas en la prevención de la corrupción mediante la acción colectiva. La primera hipótesis para este estudio es que la estructura de los fondos Europeos plantea para a estados miembros de la UE retos de corrupción en la contratación pública que pueden ser abordados de manera más efectiva a través de la acción colectiva. La segunda hipótesis es que un monitor independiente, en forma de organización de la sociedad civil a través del Pacto de Integridad, puede desempeñar un papel efectivo en la prevención de la corrupción y el aumento de la transparencia en la contratación pública.

El estudio se divide en tres áreas de investigación. La primera proporciona un análisis teórico para prevenir la corrupción en la contratación pública en el contexto del Mercado Único de la UE y mediante el uso de una estrategia de acción colectiva. La segunda parte identifica las

condiciones que afectan a la eficacia de las organizaciones de la sociedad civil para prevenir la corrupción a través de una estrategia de acción colectiva. Esta parte se base en un análisis cualitativo de múltiples casos del Pacto de Integridad en seis países de la UE y diez países no pertenecientes de la UE. La tercera área presenta una primera estrategia integrada del Pacto de Integridad para prevenir la corrupción en la contratación pública de fondos Europeos. Los datos se han recogido a través de investigación documental, entrevistas y encuestas. Para la evaluación de los casos del Pacto de Integridad este estudio utiliza un análisis cualitativo de múltiples casos de estudio.

## **1.2 Resultados principales**

Los debates acerca de la falta de efectividad de las estrategias basadas en el planteamiento del agente principal en la lucha contra la corrupción han señalado que la corrupción podría ser más un problema de acción colectiva. Cuando los “principales” comparten los beneficios de la corrupción o son simplemente indiferentes sobre el problema, las limitaciones normativas no funcionan. Normalmente, estas restricciones deben respaldar el universalismo ético y vigilar y prevenir la desviación de las normas. En cambio, con la falta de “principales con principios” el particularismo permite un entorno en el que la asignación de recursos públicos se basa en una conexión entre el que está en el poder y el que recibe los bienes públicos. Este estudio argumenta que en la UE no existe una solución única contra la corrupción y, por lo tanto en este entorno tan diverso, las estrategias de agente principal contra la corrupción no son necesariamente incompatibles con las teorías de acción colectiva.

La integración política y económica de la UE aumentó la presión competitiva para las empresas y los partidos políticos. Las variedad económica en los estados miembros de la UE explica cómo las empresas recurren al comportamiento criminal bajo la presión económica en un clima de mayor competencia. En consonancia con la integración del mercado, la UE desarrolló un amplio marco legislativo en materia de contratación pública, que prevé disposiciones para prevenir la corrupción y aumentar la transparencia. Esto resultó en una presión competitiva en el mercado de la contratación pública. Al mismo tiempo, las diferentes actitudes hacia la corrupción en los estados miembros junto con las debilidades de la estructura de rendición de cuentas de la UE generan un efecto contrario a las limitaciones normativas. Este estudio explica cómo la integración de la UE aumenta la competencia y las situaciones sociales asociadas en las que se promueve el éxito material, pero los medios para lograrlo no son igualmente accesibles para todos. Por ejemplo, con la ampliación de la UE,

los nuevos estados miembros adoptarán normas europeas diseñadas de facto para países con características económicas y políticas diferentes y donde se basa el concepto de la corrupción en las teorías del agente principal. Hoy en día, el problema de la corrupción sigue siendo grave en muchos de los nuevos estados miembros de la UE. Este estudio argumenta que esto se debe en parte a la necesidad de conceptualizar la corrupción en esos países como un problema de acción colectiva. Esto pone en duda si el marco legislativo de la UE para la contratación pública puede ser efectivo para todos los estados miembros. Además, los gastos de la UE dependen en gran medida de un sistema de gestión compartida en el que la UE tenga un control limitado sobre la forma en que los estados miembros invierten los fondos Europeos. En este contexto, la Comisión Europea lanzó la iniciativa del Pacto de Integridad. Este estudio apoya la hipótesis de que la estructura para la financiación de la UE plantea retos de corrupción en la contratación pública para los estados miembros de la UE que pueden ser abordados de manera más efectiva a través de una estrategia de acción colectiva. El Pacto de Integridad se dirige a un área vulnerable de la corrupción como es la contratación pública de la UE que afecta a gran parte de los gastos de la UE y sobre los que la Comisión Europea tiene un control limitado. El Pacto de Integridad también está dirigido a empresas que pueden verse afectadas de manera desproporcionada por la corrupción como son las pequeñas y medianas empresas y se puede utilizar en diferentes sectores empresariales, a distintos niveles gubernamentales y en distintas regiones. El Pacto de Integridad tiene como objetivo promover las mejores prácticas de contratación pública, lo que podría ayudar a armonizar la implementación de las normas de la UE en materia de contratación pública en los estados miembros de la UE. Asimismo podría asegurar una igualdad de condiciones para las empresas y así fomentar el funcionamiento de un mercado único.

Sin embargo, el principal reto del Pacto de Integridad es que el efecto o impacto de las iniciativas de acción colectiva es difícil de determinar y que las iniciativas son particularmente adecuadas para entornos de nivel alto de corrupción. A pesar de que las iniciativas de acción colectiva también se pueden utilizar en entornos de nivel bajo o medio de corrupción, la cuestión que se plantea es cuáles son las condiciones que favorecen el uso efectivo del Pacto de Integridad. El análisis contextual realizado a través del estudio de casos, respalda la posición de la acción colectiva que afirma que el óptimo para los individuos en el grupo es actuar de manera colectiva hacia objetivos compartidos. El análisis también señala que ciertos elementos del Pacto de Integridad pretenden superar tentaciones de interés propio

a corto plazo a través de la reciprocidad, la reputación y la confianza, a fin de construir condiciones que permitan a los individuos lograr resultados mejores que racionales. Las sanciones disponibles en el Pacto de Integridad dan impulso a los grupos para lograr resultados sub-óptimos y funcionan como disuasión a través del compromiso de castigar a aquellos que no se adhieran al Pacto de Integridad. Este estudio considera que un monitor independiente, en forma de organización de la sociedad civil a través del Pacto de Integridad, puede desempeñar un papel eficaz en la prevención de la corrupción y el aumento de la transparencia en la contratación pública. Tres condiciones son predominantemente importantes: los requisitos del monitor, los modos de implementación/actividades de monitoreo y la selección del monitor.

Este estudio ha determinado que el monitor debe rendir cuentas a las organizaciones de la sociedad civil, así como a las autoridades de la contratación pública, los licitadores y al público. Garantizar esta “cuádruple” rendición de cuentas a los miembros del Pacto de Integridad, con intereses diferentes, y a veces opuestos, es difícil de operar. Además, la interacción repetida entre los miembros se establece en los procesos legislativos formales, es decir, en las fases de licitación o en procesos menos formalizados, como las fases de ejecución del contrato. Dentro del marco formal de la contratación y del marco menos formal de la ejecución del contrato, los miembros del Pacto de Integridad tienen un grado de maniobrabilidad. Este estudio considera esta maniobrabilidad es en sí misma un área de riesgo para irregularidades y por tanto sujeto a monitoreo. Con respecto a los modos de implementación y actividades de monitoreo, este estudio, encuentra entre otras cosas, que los monitores realizan una amplia variedad de actividades y que el modo en el cual los monitores tienen acceso a la información, así como la frecuencia e intensidad del contacto afecta al nivel de confianza de los miembros del grupo. Sobre la selección del monitor, este estudio considera que las condiciones económicas y de gobernanza en un país pueden afectar a la habilidad de identificar un monitor con los requisitos necesarios. Asegurarse de que el monitor dispone de una buena reputación es difícil en un país con gobernabilidad débil.

El análisis de los casos ha demostrado que los Pactos de Integridad han sido diseñados e implementados por diferentes organizaciones de la sociedad civil, autoridades públicas y empresas involucrando a diferentes organizaciones donantes, proyectos de contratación, sectores de mercado, etc. Hoy en día, la clave es desarrollar maneras para que los políticos y

tomadores de decisiones pueden ampliar el uso de este instrumento en base a aprendizajes pasados. Este estudio presenta un marco de evaluación que pretende dar forma al planteamiento de aplicación del Pacto de Integridad a nivel de la UE. El marco de evaluación se basa en la necesidad de un instrumento flexible que pueda adaptarse a las condiciones contextuales en las que se puede diseñar un Pacto de Integridad. El desarrollo del planteamiento en este estudio parte de los hallazgos de pasados Pactos de Integridad, sin embargo el objetivo es que su uso plantee una recopilación de datos de manera más sistemática en el futuro. Asimismo ayuda a las organizaciones de la sociedad civil, donantes y académicos a evaluar mejor la eficacia del Pacto de Integridad como instrumento de acción colectiva para prevenir la corrupción en la contratación pública.

### **1.3 Recomendaciones**

Este estudio combina tanto consideraciones teóricas como prácticas sobre el uso del Pacto de Integridad como instrumento para prevenir la corrupción en la contratación pública. Las iniciativas de acción colectiva para la lucha contra la corrupción son cada vez más utilizadas por una multitud de actores relevantes en todo el mundo. Con el énfasis en la relevancia de monitorear y evaluar estas iniciativas, este estudio espera contribuir a la comprensión de la efectividad en la prevención de la corrupción. Por lo tanto, este estudio recomienda a los actores relevantes del Pacto de Integridad, entre otras cosas:

1. Garantizar la participación de múltiples actores interesados mediante la participación activa de todas las partes en el Pacto de Integridad desde la fase de diseño hasta el final de la iniciativa de acción colectiva.
2. Incorporar mecanismos de control social al considerar la inclusión del Pacto de Integridad como una iniciativa basada en proyectos en una serie de iniciativas de acción colectiva más amplia que apuntan a un cambio a largo plazo.
3. Asegurar un diseño sólido de la iniciativa de acción colectiva estableciendo un riguroso marco común de seguimiento y evaluación para poder captar una base de referencia y el cambio fomentado por la intervención.
4. Examinar las modalidades de ejecución para establecer un conjunto de procedimientos claros para la imposición de sanciones. Esto debe incluir un proceso de evaluación de reclamaciones (y una delimitación de quien puede presentarlas), los criterios de

evaluación de la reclamación, un proceso de escalado en los casos en que se requiera la participación de autoridades legales. Los procedimientos deben ser transparentes y estar disponibles para todos los actores relevantes en el Pacto de Integridad.

5. Optimizar el papel del monitor, desarrollando su capacidad de crear un equipo de monitoreo que disponga de conocimiento en diversas materias.



## 2 Introduction

Total expenditure in the European Union (EU) on public works, goods and services has increased over the last years reaching almost one fifth of EU Gross Domestic Product (GDP) every year<sup>1</sup>. Procurement irregularities are one of the most common causes of administrative errors and financial corrections relating to EU funding<sup>2</sup>. Such irregularities affect all stages of the procurement process. The EU stresses the vulnerability to corruption, linking this specifically to abuse of public office for private gain and political party financing<sup>3</sup>. A study from 2013 conducted by the EU's anti-fraud office OLAF states that the overall direct costs of corruption for five sectors in eight Member States was between EUR 1,4 and 2,2 billion<sup>4</sup>. As a consequence, the EU promotes various initiatives to address irregularities and prevent fraud and corruption. *Inter alia*, this includes training of officials, the use of e-procurement, and application of ex-ante conditionality for public procurement in order leverage administrative capacity improvements. Specifically dealing with corruption, the EU is looking at involving civil society in promoting transparency in public procurement<sup>5</sup>. Specific focus has been placed on a collective action tool developed by Transparency International, called the Integrity Pact.

The following sections present the study's objectives, the methodology, and the structure of the report.

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<sup>1</sup> EUROPEAN COMMISSION (2012). *Commission Staff Working Document: Annual Public Procurement Implementation Review 2012* [WWW]. Available from:

[http://ec.europa.eu/internal\\_market/publicprocurement/docs/implementation/20121011-staff-working-document\\_en.pdf](http://ec.europa.eu/internal_market/publicprocurement/docs/implementation/20121011-staff-working-document_en.pdf) [Accessed on 13/06/2013].

<sup>2</sup> EUROPEAN COMMISSION (n.d.). *Public procurement strategy* [WWW]. Available from: <http://ec.europa.eu/growth/single-market/public-procurement/strategy/> [Accessed on 13/06/2013].

<sup>3</sup> Ibid.

<sup>4</sup> PWC (2013). *Public procurement: costs we pay for corruption: Identifying and Reducing Corruption in Public Procurement in the EU* [WWW]. [http://ec.europa.eu/anti\\_fraud/documents/anti-fraud-policy/research-and-studies/pwc\\_olaf\\_study\\_en.pdf](http://ec.europa.eu/anti_fraud/documents/anti-fraud-policy/research-and-studies/pwc_olaf_study_en.pdf) [Accessed on 15/07/2015].

<sup>5</sup> EUROPEAN COMMISSION (n.d.). *Integrity Pacts* [WWW]. Available from: [http://ec.europa.eu/regional\\_policy/es/policy/how/improving-investment/integrity-pacts/](http://ec.europa.eu/regional_policy/es/policy/how/improving-investment/integrity-pacts/) [Accessed on 12-10-2016].

## 2.1 Research Objectives

The purpose of this research study is to further enhance understanding of the effect of anti-corruption initiatives for public procurement and the role of civil society organisations, businesses and contracting authorities in preventing corruption through collective action. The main research question posed is:

### **To which extent are collective action initiatives effective instruments in the fight against corruption in public procurement?**

The research will focus primarily on the EU as public procurement in Europe is highly influenced by the Single Market<sup>6</sup>. Corruption in public procurement on the EU level is recognised by governments and EU institutions (such as the European Commission and the European Parliament) as a problem<sup>7</sup>. Therefore the EU prioritises prevention of corruption and the creation of a culture of integrity in EU procurement<sup>8</sup>. In practice this is primarily translated through the EU procurement rules that establish a EU-wide framework aiming to enhance transparency of procurement procedures and processes. As argued by scholars, anti-corruption measures address problems, such as bribery, by conceptualizing corruption as a principal-agent problem<sup>9</sup>. However, the problem of corruption in Europe varies between countries, with some EU Member States experiencing more serious forms of (systemic)

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<sup>6</sup> EUROPEAN COMMISSION (n.d.). *Public Procurement* [WWW]. Available from: [https://ec.europa.eu/growth/single-market/public-procurement\\_en](https://ec.europa.eu/growth/single-market/public-procurement_en) [Accessed on 12-06-2016].

<sup>7</sup> EUROPEAN COMMISSION (n.d.). *Anti-corruption report* [WWW]. Available from: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/index_en.htm) [Accessed on 12-06-2016].

<sup>8</sup> EUROPEAN COMMISSION (n.d.). *Public Procurement* [WWW]. Available from: [https://ec.europa.eu/growth/single-market/public-procurement\\_en](https://ec.europa.eu/growth/single-market/public-procurement_en) [Accessed on 12-06-2016].

<sup>9</sup> PERSSON, A., ROTHSTEIN, B., and TEORELL, J. (2013). *Why anti-corruption reforms fail – Systemic corruption as a collective action problem* [WWW]. Governance, Volume 23, Issue 3, p. 343-558. Available at: [https://www.researchgate.net/publication/264645578\\_Why\\_Anti-Corruption\\_Reforms\\_Fail-Systemic\\_Corruption\\_as\\_a\\_Collective\\_Action\\_Problem](https://www.researchgate.net/publication/264645578_Why_Anti-Corruption_Reforms_Fail-Systemic_Corruption_as_a_Collective_Action_Problem) [Accessed on 16-01-2016].

MILLER, W. L., GRØDELAND, A.B., and KOSHECHKINA, T. (2001). *A Culture of Corruption? Coping with Government in Post-Communist Europe*. Budapest, Hungary: Central European University Press.

corruption<sup>10</sup>. For example, according to research, post-communist countries in Eastern Europe experience corruption rather like a collective action problem, meaning that stakeholders fail as a group to prevent corruption when individual interests of stakeholders conflict<sup>11</sup>. The collective action approach differs from the principal-agent approach in the sense that the latter takes the existence of non-corruptible principals for granted<sup>12</sup>, while the former does not assume that “principled principals” exist and are willing to hold corrupt officials accountable. Such a scenario gives reason to doubt whether EU procurement rules, in line with the principal-agent anti-corruption framework, are effective since there is a lack of incentive to enforce them. For example, the European Commission’s management of EU funds is shared with Member States<sup>13</sup>. The EU procurement rules are to be transposed to the national level and aim, if properly implemented, to prevent corruption in public procurement. However, ultimately the European Commission is dependent on the (political) will of the Member States to implement EU rules and ensure that EU funds are not ending up in the pockets of corrupt officials and businesses.

### 2.1.1 Hypothesis I

**The first hypothesis for this study to explore is that the structure for EU funding poses corruption challenges in public procurement for EU countries that can more effectively be addressed through collective action.**

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<sup>10</sup> See for example the CPI scores or the European Anti-corruption report. TRANSPARENCY INTERNATIONAL (n.d.). *Corruption Perceptions Index* [WWW]. Available from: <http://www.transparency.org/research/cpi/overview> [Accessed on 12-10-2016].

EUROPEAN COMMISSION (n.d.). *Anti-corruption report* [WWW]. Available from: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/index_en.htm) [Accessed on 12-06-2016].

<sup>11</sup> WARNER, C. (2014). *Sources of corruption in the European Union*. In *The Routledge Handbook of Policial Corruption*, ed. P. M. Heywood.

<sup>12</sup> PERSSON, A., ROTHSTEIN, B., and TEORELL, J. (2013). *Why anti-corruption reforms fail – Systemic corruption as a collective action problem* [WWW]. *Governance*, Volume 23, Issue 3, p. 343-558. Available at: [https://www.researchgate.net/publication/264645578\\_Why\\_Anti-Corruption\\_Reforms\\_Fail-Systemic\\_Corruption\\_as\\_a\\_Collective\\_Action\\_Problem](https://www.researchgate.net/publication/264645578_Why_Anti-Corruption_Reforms_Fail-Systemic_Corruption_as_a_Collective_Action_Problem) [Accessed on 16-01-2016].

MARQUETTE, H., PEIFFER, C. (2015). *Corruption and collective action* [WWW]. Available from: <http://www.dlprog.org/research/corruption-and-collective-action.php> [Accessed on 16-10-2016].

<sup>13</sup> EUROPEAN COMMISSION (n.d.). *Shared management* [WWW]. Available from: [http://ec.europa.eu/regional\\_policy/en/policy/what/glossary/s/shared-management](http://ec.europa.eu/regional_policy/en/policy/what/glossary/s/shared-management) [Accessed on 12-02-2016].

The European Commission launched an initiative to fight corruption in public procurement through the collective action initiative called the Integrity Pact tool<sup>14</sup>. The tool uses an independent broker, normally a civil society organisation, to monitor procurement in close collaboration with businesses and contracting authorities<sup>15</sup>. The initiative can be seen as an approach in which the European Commission relies on “principled principles” that are willing to hold officials accountable in a scenario where normative constraints of the law fail. The question is however, whether there is a role for civil society organisations and businesses to fight corruption and enhance transparency in public procurement, especially when EU procurement rules already cover these issues<sup>16</sup>. Also, questions are raised whether more sophisticated forms of corruption, such as undue influence, can be prevented through collective action initiatives for public procurement. On the one hand, it can be argued that a strong anti-corruption legislative framework provides for sufficient safeguards to prevent corruption in procurement. Introducing additional control could be inefficient, costly, and undermine other procurement objectives such as value for money. This would make collective action monitoring tools obsolete and not recommendable for public procurement in the European Union. On the other hand, the legislative framework might not prevent all forms of corruption, especially those hidden from plain sight where damage is difficult to determine, or those that extend beyond the legal definitions. The (potential) damage of corruption could outweigh the costs of having an independent broker monitoring procurement. And based on this cost-benefit analysis and on certain external best practices the European Commission is interested in exploring the applicability of the Integrity Pact as a civil society-monitoring tool for public procurement of the European Structural and Cohesion funds.

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<sup>14</sup> EUROPEAN COMMISSION (n.d.). *Integrity Pacts* [WWW]. Available from: [http://ec.europa.eu/regional\\_policy/es/policy/how/improving-investment/integrity-pacts/](http://ec.europa.eu/regional_policy/es/policy/how/improving-investment/integrity-pacts/) [Accessed on 12-10-2016].

<sup>15</sup> TRANSPARENCY INTERNATIONAL (n.d.). *Integrity Pacts* [WWW]. Available from: [http://www.transparency.org/whatwedo/tools/integrity\\_pacts](http://www.transparency.org/whatwedo/tools/integrity_pacts) [Accessed on 12-10-2016].

<sup>16</sup> EUROPEAN COMMISSION (n.d.). Legal Rules and Implementation [WWW]. Available from: [https://ec.europa.eu/growth/single-market/public-procurement/rules-implementation\\_en](https://ec.europa.eu/growth/single-market/public-procurement/rules-implementation_en) [Accessed on 21-10-2016].

### 2.1.2 Hypothesis II

**The second hypothesis for this study is that an independent broker, in form of a civil society organisation through the Integrity Pact, can play an effective role in the prevention of corruption and enhancing of transparency in public procurement.**

This study will test these hypotheses by 1) first defining the theoretic framework of collective action to prevent public procurement corruption. After this, 2) the case of Integrity Pacts will be studied in order to identify conditions that positively or negatively determine the role of civil society organisations in the prevention of corruption in public procurement. Finally 3) this will provide for an evidence-based approach to determine in which way collective action can optimally perform in the prevention of corruption in public procurement for EU funds.

The following points elaborate on the understanding of the main areas of the study:

1. The first area aims to develop a theoretic framework of collective action in order to prevent corruption in public procurement. This will be done by: 1) defining corruption; 2) determining the incentives and disincentives of corrupt behaviour; 3) determining collective action approaches to prevent corruption.
2. The second area aims to identify conditions that affect the effectiveness of civil society organisations to prevent corruption in public procurement through collective action initiatives. This will be done by: 1) describing the Integrity Pact tool; 2) a multiple-case study analysis of the implementation of the tool; 3) determining the performance and potential of the tool.
3. The third area aims to provide the conditions required that allow the tool to be translated into an integrated approach in which civil society can prevent corruption in public procurement on the EU level.

## 2.2 Methodology

This section outlines the methodology for the development of the present study. First the overall approach adopted for delivering this study is presented. After this, a description will be given on the tools for data collection and assessment.

The study questions have been divided in three areas:

- Study area 1 – Corruption in public procurement as a collective action problem in the EU
- Study area 2 – The use of the Integrity Pact tool
- Study area 3 – Civil society’s role as monitor in preventing corruption

### 2.2.1 Study area 1

The first study area covers the description corruption in public procurement. It aims to develop a theoretic framework to prevent corruption in public procurement in the context of the EU Single Market and through the use of collective action. First, the definition, forms and methods of corruption will be discussed which will expose the different levels of analysis (i.e. individual, institutional, societal) used in order to determine an integrated approach to deal with corruption in public procurement. After this, the causes of corruption will be discussed and linked to principal-agent and collective action prevention measures. In its entirety this presents a theoretic framework against which the Integrity Pact tool is analysed in order to identify conditions that positively or negatively determine the role of civil society organisations in the prevention of corruption in public procurement.

The main study questions are:

- How can corruption be defined?
- What are the main causes of corruption?
- How does corruption affect public procurement?
- What measures are considered most appropriate to prevent corruption in public procurement?

### 2.2.2 Study area 2

The second study area aims to identify conditions that affect the effectiveness of civil society organisations to prevent corruption in public procurement through collective action initiatives. This will be done by: 1) describing the Integrity Pact tool; 2) analysing cases of the implementation of the tool in European and non-European countries; 3) determining the performance and potential of the tool. The tool is used to provide multiple-case study evidence on the role of civil society to prevent corruption in public procurement. With this information, areas can be exposed in which civil society monitoring of public procurement

plays a preventive role outside the confines of the existing anti-corruption principal-agent framework to prevent corruption in public procurement. The exploratory approach for this multiple-case study analysis should also assist in developing a framework for assessing the effectiveness of the collective action tool.

The main study questions are:

- How is the Integrity Pact tool set up?
- How is the Integrity Pact tool applied in practice?
- What are limitations, strengths and weaknesses of the Integrity tool?

### 2.2.3 Study area 3

The third study area is where the tool to prevent corruption is translated into an approach to prevent corruption. By providing the conditions required for civil society organisations to monitor public procurement, an integrated approach is developed to prevent corruption in public procurement of EU funds.

The main study questions are:

- Which conditions are required for an integrated approach for civil society organisations to effectively monitor public procurement?

### 2.2.4 Case study design

The choice for a multiple case study design for this study is based on the limited availability and access to information on the use of the Integrity Pact. Assessing the Integrity Pact poses methodological challenges, in particular when assessing the impact of civil monitoring mechanisms<sup>17</sup> for public procurement. Integrity Pacts are believed to have reduced corruption, improved the quality of procurement, and strengthened the call for more long-

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<sup>17</sup> For the purpose of this report the concept includes a wide range of social accountability related interventions aimed at mobilising/involving citizens, beneficiaries, communities, civil society, in the monitoring of public procurement.

term reform. However, evidence is largely anecdotal. The main methodological challenges faced were:

- Few impact studies have been done and these often are limited to one specific initiative, each with their specific characteristics;
- Establishing the preventive effect of Integrity Pacts is difficult due to the lack of a clear-cut way to measure corruption;
- Civil society organisations that implement Integrity Pacts frequently face resource restraints, which have effect on the quality of collected data. Establishing baseline information to allow for comparison over time is not always evident;
- It is difficult to attribute change to specific actions (the attribution problem of causes to effects).

Adopting for this study a multi-case study design allows for researching multiple instances of a change programme such as the Integrity Pact. Cases are studied in real-life context, which allows for better understanding how these influence and are influenced by the context. Through the design, this study looks to untangle causal complexity in which many relevant factors could be determined but only observed in certain instances<sup>18</sup>. The unit of analysis is the Integrity Pact tool. The scattered availability and access to information on the use of the Integrity Pact complicates the extent to which generalizability is possible. Considering that the approach for this study is more directed to practitioner data, rather than deducting through testing hypothesis from existing theories, this study is based mainly in grounded theory<sup>19</sup>. Such research virtually always includes a sponsor that is interested in applied theory, which was also the case in the work conducted on the basis of the global and European reviews on the Integrity Pact.

This study has followed a sequential mixed method in order to determine effectiveness of civil society to prevent corruption in public procurement. This was done through desk research, interviews and surveys from concrete Integrity Pact experiences inside and outside

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<sup>18</sup> GEORGE, A. L., and BENNET, A. (2005). *Case studies and theory development in the social sciences*. Cambridge, MA: The MIT Press.

YIN, R. K. (2009). *Doing case study research*. 4th ed. Thousand Oaks, CA: Sage.

<sup>19</sup> CHARMAZ, K. (2006). *Constructing Grounding Theory*. 1st ed. Los Angeles: SAGE publications.

the EU. This method should allow for a field-influenced learning curve that is valuable for enhancing theory and practice<sup>20</sup>. However, the perception of stakeholders that implemented Integrity Pacts on what constitutes effectiveness and impact differs. Views on what constitutes success of an Integrity Pact in some instances is based on performance indicators such as whether the project was implemented within the available budget or that all planned activities were conducted. In other instances, stakeholders determined success by the extent to which irregularities were detected in a procurement process or whether the Integrity Pact promoted further reform against corruption. This study attempts to isolate specific conditions that can be considered favourable for an effective role of civil society to prevent corruption in public procurement. However, it has to be noted that for this study activities across Integrity Pact projects have been bundled in order to be better able to attribute cause to effect.

Particular challenges for this study is to measure a counterfactual, in this case the absence of corruption. This quickly precludes the establishment of strong evidence-based findings. It is therefore that the study chooses to present a set of cases which as a whole present evidence of the effectiveness or impact of civil society organisations in preventing corruption in public procurement. Interviewed stakeholders in some instances assert that the Integrity Pact reduces corruption due to instilled confidence among bidders and few incidences disrupting the procurement process. However, largely these claims are anecdotal with at the same time interviewees confirming there is lack of evidence of direct contributions of the Integrity Pact to reducing corruption. At the same time, increased incidences could also be a sign that due to the Integrity Pact the system of control is working better and therefor more effective.

From an implementation viewpoint, it is noted that the information collected from the different Integrity Pacts varies due to the level of access to information as well as the quantity and quality of information kept by the different stakeholders that have implemented Integrity Pacts. As a result it is difficult to filter out those conditions that favour corruption prevention by civil society organisations. Also, for the purpose of this study it is important to keep in mind that the two reviews conducted for Transparency International about the Integrity Pact above all showed that the tool or approach is of a flexible nature and does not benefit from a

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<sup>20</sup> AGRANOFF, R. (2014). *Reconstructing Bureaucracy for Service Innovation in the Governance Era.* In Christopher Ansell and Jacob Torfing (ed.) *Public Innovation Through Collaboration and Design*. London: Routledge.

set of pre-established success indicators. From the different perceptions on success, a broad list of indicators have been established which eventually are determined by each implementer of the Integrity Pact.

Finally, it should be noted that despite the EU legal procurement system, the quality and effectiveness of each country's procurement system could vary. For example, it is challenging to determine in each Integrity Pact case discussed in this study whether the particular legal context of the country makes an Integrity Pact more or less effective in reducing corruption.

### 2.2.5 Data collection and assessment tools

Research for this study has been collected through desk research, interviews and survey work. Part of this data collection has been done in light of studies we conducted in 2013, 2015 and 2016, respectively on corruption in public procurement in the EU and on the use of the Integrity Pact tool. The first report was conducted for the European Parliament<sup>21</sup>. The other two reports for the civil society organisation Transparency International. One concerned a review of the use and implementation of the Integrity Pact in Europe<sup>22</sup>. The other report reviewed the Integrity Pact on a global level<sup>23</sup>. For the purpose of this study, the two Learning Reviews will be referred to as “European review” and “global review” All reports, including the data used for this study coming from these reports, are publically available online<sup>24</sup>. This data has been complemented for this study with additional desk research and interviews to ensure validation of findings for the purpose of this study.

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<sup>21</sup> BEKE, M., CARDONA, F., BLOMEYER, R. (2013). *Political and other forms of corruption in the attribution of public procurement contracts and allocation of EU funds: Extent of the phenomenon and overview of practices* [WWW]. European Parliament. Available at: [http://www.europarl.europa.eu/thinktank/es/document.html?reference=IPOL-JOIN\\_ET\(2013\)490676](http://www.europarl.europa.eu/thinktank/es/document.html?reference=IPOL-JOIN_ET(2013)490676) [Accessed on 12-11-2013].

<sup>22</sup> BEKE, M., BLOMEYER, R., CARDONA, F. (2015). *Integrity Pacts for Public Procurement* [WWW]. Available at: <https://www.transparency.org/whoweare/accountability/evaluations/4/> [Accessed on 11-07-2016].

<sup>23</sup> NERO, W., BEKE, M. (2015). *Learning review: Transparency International's Integrity Pacts for public procurement* [WWW]. Available at: <https://www.transparency.org/whoweare/accountability/evaluations/4/> [Accessed on 11-07-2016].

<sup>24</sup> The data collected for the European Parliament study and the European review of the Integrity Pact have been entirely collected, processed and analysed by the author of this study. The data collected for the global review of

## *1. Desk research.*

Data used for this study varies between legislation, official documents and secondary sources. Primary documentation on Integrity Pacts was collected from Transparency International Secretariat and the national chapters. Additional documentation was collected from academia and civil society organisations other than Transparency International that deal specifically with Integrity Pacts or similar initiatives on monitoring of public procurement. The desk research established a preliminary factual basis for answering the research questions, further substantiated with information derived from the interviews and surveys.

A full list of consulted documents has been included in the bibliography.

## *2. Surveys*

Data has been used for this study coming from three different surveys conducted for the European and global review reports between in 2015/2016 using the online survey tool SurveyMonkey. The first and second survey were conducted in 2015 in light of the European review of the Integrity Pact conducted commissioned by Transparency International. One targeted a list of representatives of national chapters of Transparency International in the EU. This was meant to gather basic data on experience with civil monitoring tools for public procurement. Respondents were asked to map risks in public procurement in their respective countries. The same risk mapping exercise was presented in the third survey that targeted local correspondents of the anti-corruption network established by the European Commission in order to support the development of the European anti-corruption report. A third survey was launched in 2015 targeting representatives of national chapters of Transparency International also outside the EU.

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the Integrity Pact has been partially collected by the author of this study in collaboration with the co-author of the Global Learning Review. All data has been processed and analysed by both author of this study and the co-author of the Global Learning Review. Reference will be made in this study whenever data was not collected at first hand.

The first survey resulted in thirteen responses from eleven countries<sup>25</sup>. The second survey resulted in nine responses from nine countries<sup>26</sup> and the third survey resulted in twelve respondents from twelve countries<sup>27</sup>.

The full surveys have been included in Annex 2.

### *3. Interviews*

In light of the study on public procurement corruption for the European Parliament, feedback has been collected from stakeholders from the public and private sector as well as academia and civil society. Focus was placed on experts on EU affairs as well as the national level. The main stakeholders consulted come from the European Parliament, European Commission, including the EU's Anti-Fraud Office (OLAF), universities and the private sector consultants dealing with public procurement. The consultation aimed to explore the view of professionals from the EU Member States on anti-corruption tools used in public procurement. This resulted in seven responses from six countries<sup>28</sup>.

For the multiple case-study analysis on the Integrity Pacts, feedback from a total of 66 stakeholders has been analysed. Stakeholders were consulted by the author of this study in face-to-face or telephone and/or Skype meetings (44 stakeholders) and one focus group meeting (22 stakeholders). The main purpose was to gather information about the actual practices of institutional behaviour in working on public procurement and anti-corruption. Since this necessarily involved subjective views and assessments, data collection aimed for a balanced sample of interviews. This included semi-structured interviews with representatives of civil society, independent public procurement monitors, contracting authorities (national and local level), bidders (construction and information technology sector), and external experts.

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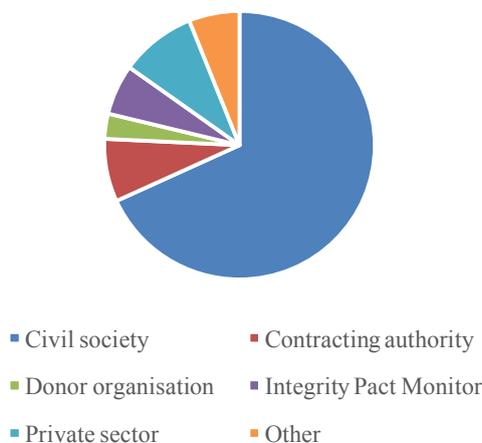
<sup>25</sup> This included Greece, Romania, Italy, Latvia, Portugal, Bulgaria, Czech Republic, Hungary, Croatia, Slovenia, and Austria.

<sup>26</sup> This included Croatia, Slovakia, Spain, Poland, Hungary, Germany, Slovenia, Estonia and Austria.

<sup>27</sup> This included Argentina, China, Colombia, Ecuador, Germany, India, Indonesia, Italy, Latvia, Mexico, Pakistan, and South Korea.

<sup>28</sup> This included Spain, Italy, Slovakia, France, Estonia, and Hungary.

Figure 1: Interview categories European review



Interviews were conducted in the form of individual and group interviews. Face-to-face interviews have been conducted at on-site meetings with Transparency International Secretariat, and national chapters of Transparency International. Initial feedback from the chapters was collected during a focus group meeting in Berlin on 23 February 2015 in which fifteen European Transparency International chapters participated, Transparency International Secretariat staff and a representative of European Commission Directorate General Regional Policy. Additional interviews were conducted over the telephone and/or Skype.

A full list of consulted stakeholders has been included in Annex 3.

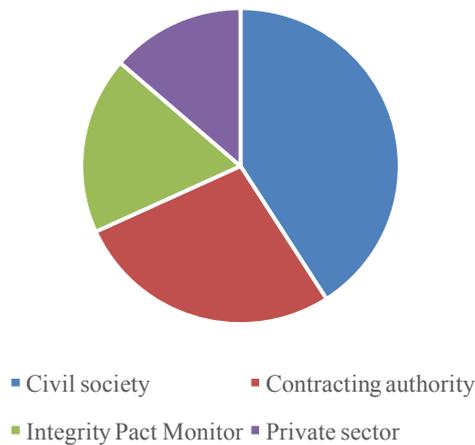
For the global review of the Integrity Pact, roughly 21 stakeholders from Transparency International chapters, contracting authorities, civil society and private sector participants were additionally interviewed either face-to-face during on-site meetings or via telephone and/or Skype by the co-author of the review<sup>29</sup>. Group discussions were used to gather further information on actual practices and behaviours in Integrity Pacts and public procurement. In addition, semi-structured interviews allowed for in-depth discussions on current expectations of the tool within the Transparency International movement and other civil society organisations. For the purpose of this study, findings from these interviews have been incorporated in the multiple-case study analysis. Whenever findings are presented from the

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<sup>29</sup> A selection of the total interviews has been conducted by the co-author of the global review, William Nero.

global review that have not be collected first-hand by the author of this study, this will be clarified in this report. A variety of stakeholders were contacted in this process in order to establish a balanced range of perspectives and in an attempt to mitigate bias.

Figure 2: Interview categories global review



A full list of consulted stakeholders has been included in Annex 3.

### 3. *Field visits*

For the European review of the Integrity Pact three on-site country missions were carried out to allow for in-depth study of specific Integrity Pact projects. Visits were conducted to Hungary, Latvia and Bulgaria. For the global review of the Integrity Pact, two on-site country missions were carried out in India and Mexico<sup>30</sup>. Discussions were held in a combination of focus group meetings as well as individual interviews. The India on-site mission coincided with an international conference held by the local Transparency International chapter, bringing together practitioners and experts from around the globe to discuss Indian experiences with Integrity Pacts. The mission to Mexico focused on government initiatives that allow for independent monitors, so-called Social Witnesses, to participate in public procurement processes. The local Transparency International chapter facilitated meetings

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<sup>30</sup> The on-site mission to India was carried out by the co-author of the global review, William Nero. Whenever findings are presented from the global review that have not be collected first-hand by the author of this study, this will be clarified in the study.

with government representatives, independent monitors, and politicians involved in the implementation of these initiatives.

### 2.2.6 Report structure

This study is structured as follows:

Part I – Collective action for corruption and public procurement in the EU

Part II – Integrity Pacts as collective action approach

Part III - Integrity Pacts as an approach to prevent corruption in public procurement

Before presenting the main parts of this study, the next chapter will first outline the justification for this study and limitations of the scope of research.



### 3 Justification and scope of this study

This section will present the background against which this study has been developed. It will give an overview of European debates concerning corruption in procurement and a brief overview of the most important pieces of EU legislation in this area.

The EU's single market seeks to ensure the free movement of goods, capital, services and people between all EU Member States. As a territory without internal borders or any other regulatory obstacles, a functioning single market according to the European Commission "*stimulates competition and trade, improves efficiency, raises quality, and help cut prices*"<sup>31</sup>. Through the Single Market Strategy the European Commission aims to boost trade and competition. Specific measures aim to create more transparent, efficient and accountable public procurement. This should create business opportunities and contribute to more efficient public administration, growth and job creation<sup>32</sup>.

According to the European Commission, over 250,000 public authorities in the EU spend an estimated 14% of GDP on the purchase of services, works and supplies<sup>33</sup>. Procurement covers a wide variety of sectors where public authorities (contracting authorities) purchase works, goods or services from companies. The EU sets out minimum harmonised public procurement rules in order to create a level playing field for all businesses in the EU. The rules are transposed to national legislation and apply to tenders above a certain monetary threshold<sup>34</sup>.

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<sup>31</sup> EUROPEAN COMMISSION (n.d.). *The European Single Market* [WWW]. Available from: [http://ec.europa.eu/growth/single-market/index\\_en.htm](http://ec.europa.eu/growth/single-market/index_en.htm) [Accessed on 12-09-2016].

<sup>32</sup> EUROPEAN COMMISSION (n.d.). *The Single Market Strategy* [WWW]. Available from: [http://ec.europa.eu/growth/single-market/strategy/index\\_en.htm#enhance\\_access](http://ec.europa.eu/growth/single-market/strategy/index_en.htm#enhance_access) [Accessed on 12-09-2016].

<sup>33</sup> EUROPEAN COMMISSION (n.d.). *Public procurement strategy* [WWW]. Available from: <http://ec.europa.eu/growth/single-market/public-procurement/strategy/> [Accessed on 13/06/2013].

<sup>34</sup> For tenders below these monetary thresholds, national rules apply. However, these rules need to respect the general principles of EU law.

The EU centres better governance in its public procurement strategy<sup>35</sup>. This includes professionalization of procurement staff, simplification of procedures (cutting red-tape) and making better use of technological developments (e-procurement). This should generate transparent, fair and competitive public procurement with public administrations that operate more efficiently, effectively and citizen- and business- friendly. The wider impact of this would be that the public sector can use procurement to drive the EU2020 horizontal policies such as those aiming to create innovative, green and socially inclusive economy.

### 3.1 EU public procurement

Total expenditure in the EU on public works, goods and services has increased over the last years reaching almost one fifth of EU GDP every year<sup>36</sup>. The EU public procurement Action Plan for 2014-2020 highlights that procurement irregularities are one of the most common causes of administrative errors and financial corrections relating to European Structural and Investment (ESI) Funds<sup>37</sup>. Such irregularities affect all stages of the procurement process. At the same time, the EU stresses the vulnerability to corruption, linking this specifically to abuse of public office for private gain and political party financing. A study from 2013 conducted by PwC for the EU's anti-fraud office OLAF, states that the overall direct costs of corruption for five sectors in eight Member States was between EUR 1,4 and 2,2 billion<sup>38</sup>. On the basis of potential financial damage, the EU promotes various initiatives to address irregularities and prevent fraud and corruption. *Inter alia*, this includes training of officials, the use of e-procurement, and application of ex-ante conditionality for public procurement in order leverage administrative capacity improvements. Specifically dealing with corruption, the EU promotes the use of the so-called ARACHNE tool for public authorities to help

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<sup>35</sup> EUROPEAN COMMISSION (n.d.). *Public procurement strategy* [WWW]. Available from: <http://ec.europa.eu/growth/single-market/public-procurement/strategy/> [Accessed on 13/06/2013].

<sup>36</sup> EUROPEAN COMMISSION (2012). *Commission Staff Working Document: Annual Public Procurement Implementation Review 2012* [WWW]. Available from: [http://ec.europa.eu/internal\\_market/publicprocurement/docs/implementation/20121011-staff-working-document\\_en.pdf](http://ec.europa.eu/internal_market/publicprocurement/docs/implementation/20121011-staff-working-document_en.pdf) [Accessed 13/06/2013].

<sup>37</sup> EUROPEAN COMMISSION (n.d.). *Public procurement strategy* [WWW]. Available from: <http://ec.europa.eu/growth/single-market/public-procurement/strategy/> [Accessed on 13/06/2013].

<sup>38</sup> PWC (2011). *Public Procurement in Europe: Cost and effectiveness* [WWW]. Available from: [http://ec.europa.eu/internal\\_market/publicprocurement/docs/modernising\\_rules/cost-effectiveness\\_en.pdf](http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/cost-effectiveness_en.pdf) [Accessed 12/06/2013].

assessing control systems and identifying red flags in public procurement. The EU ARACHNE project “*aims at providing the MS authorities involved in management of the Structural Funds with an operation tool to identify their most risky projects*”<sup>39</sup>. In more specific terms, ARACHNE supports “*the Management and Control Systems of the OPs [Operational Programmes], to lower the error rate and strengthen fraud prevention and detection*”. In addition, ARACHNE facilitates “*the continuous monitoring/overview of the internal and external data regarding projects, beneficiaries and contracts/contractors*”. Apart from this, the EU wants to involve civil society organisations in promoting transparency in public procurement. The European Commission looks for this at a tool developed by the civil society organisation Transparency International called the Integrity Pact. The EU has tasked the Directorate-General GROW and REGIO with piloting the Integrity Pact for ESI Funds projects in collaboration with Transparency International.

The potential reach of the Integrity Pact on the EU-level is significant from the perspective of amount of money involved (EUR 454 billion on ESI Funds for the period 2014-2020), geographical spread (28 Member States), number of businesses involved (supports more than 2 million businesses), and types of procurement as well as investment areas. In other words, the promotion by the EU of these tools presents an opportunity to fight corruption in public procurement on a large scale. However, the impact of the tools is not easy to determine.

The overall objective of the EU for this initiative is to:

*“explore and promote the use of Integrity Pacts for safeguarding EU funds against fraud and corruption and as a tool to increase transparency and accountability, enhance trust in public authorities and government contracting, contribute to a good reputation of contracting authorities, bring cost savings and improve competition through better procurement”*<sup>40</sup>.

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<sup>39</sup> Ibid.

<sup>40</sup> EUROPEAN COMMISSION (n.d.). Public Procurement Action Plan [WWW]. Available from: [https://www.google.es/url?sa=t&rct=j&q=&esrc=s&source=web&cd=5&ved=0ahUKEWjcotaVmIbMAhWHchQKHd8xBZUQFggzMAQ&url=http%3A%2F%2Fec.europa.eu%2FDocsRoom%2Fdocuments%2F14341%2Fattachments%2F1%2Ftranslations%2Fen%2Frenditions%2Fnative&usq=AFQjCNFtyqX3yN2bdcyIVTU\\_rby7XDpwMg&sig2=65N5fN3p4oELa-8KXS6a3A](https://www.google.es/url?sa=t&rct=j&q=&esrc=s&source=web&cd=5&ved=0ahUKEWjcotaVmIbMAhWHchQKHd8xBZUQFggzMAQ&url=http%3A%2F%2Fec.europa.eu%2FDocsRoom%2Fdocuments%2F14341%2Fattachments%2F1%2Ftranslations%2Fen%2Frenditions%2Fnative&usq=AFQjCNFtyqX3yN2bdcyIVTU_rby7XDpwMg&sig2=65N5fN3p4oELa-8KXS6a3A) [Accessed on 25-10-2016].

The data on public procurement shows the large quantity of money involved. Waste of public resources or misuse, fraud and corruption are apparent risks and should be avoided. The value of tenders published in the electronic database Tender European Daily (TED) in 2013 was approximately 423 billion euros, 3.7% of the EU's GDP<sup>41</sup>. Overall, almost half of the contracts in TED concern services followed by supplies and works. The works, however, usually concern higher sums than for example supply contracts. In 2010, around nine out of ten of the notices concern classic public procurement sectors while the remaining concern utilities. Data from 2006 to 2010 shows that three out of four public contracts are procured through open procurement procedures, constituting more than half of the contracts total value<sup>42</sup>. The restricted procedure for procurement was used in one out of ten public contracts, worth a quarter of the contracts total value. The EU Public Procurement Directives set common standards in order to minimise these risks. However, EU rules are only applicable to one fifth of total EU procurement. The remaining billions of public spending remain under the EU's radar. This could undermine the principles of the Single Market as it obstructs easy access for all companies to public procurement. Also it risks limiting effective control, increasing the risk for corruption.

**Table 1: EU Member States overview Corruption Perception Index and World Bank Income groups**

EU Member State	Corruption Perception Index Transparency International (2015)	Income group according to World Bank (as of July 2016)
Denmark	91	High income
Finland	90	High income
Sweden	89	High income
Netherlands	87	High income
Germany	81	High income
Luxembourg	81	High income
United Kingdom	81	High income

<sup>41</sup> EUROPEAN COMMISSION (2013). *European Commission Public Procurement Indicators 2013* [WWW]. Available at: <http://ec.europa.eu/DocsRoom/documents/11022/attachments/1/translations/en/renditions/native> [Accessed on 22-09-2016].

<sup>42</sup> PWC (2011). *Public Procurement in Europe: Cost and effectiveness* [WWW]. Available from: [http://ec.europa.eu/internal\\_market/publicprocurement/docs/modernising\\_rules/cost-effectiveness\\_en.pdf](http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/cost-effectiveness_en.pdf) [Accessed 12/06/2013].

Belgium	77	High income
Austria	76	High income
Ireland	75	High income
Estonia	70	High income
France	70	High income
Portugal	63	High income
Poland	62	High income
Cyprus	61	High income
Lithuania	61	High income
Slovenia	60	High income
Spain	58	High income
Czech Republic	56	High income
Malta	56	N/A
Latvia	55	High income
Croatia	51	High income
Hungary	51	High income
Slovakia	51	High income
Greece	46	High income
Romania	46	Upper middle income
Italy	44	High income
Bulgaria	41	Upper middle income

Source: own elaboration

### 3.2 EU procurement rules

New EU procurement rules have been in force since April 2016. The old rules included four relevant EU directives. The change in EU procurement rules aimed to simplify rules and make the procurement system more efficient. The reform also included the aim to provide best value for money while respecting the principle of transparency and competition.

Since the first EU directives were put in place, transparent and non-discriminatory procedures have been incrementally included to ensure companies to enjoy fundamental freedoms in the competition for public procurement contracts. Public procurement in the EU needs to be in line with principles of free movement of goods, the right of establishment and the freedom to provide services. When public contracts exceed certain amounts, EU coordination of national procedures is necessary in order to ensure competition and protect the functioning of the internal market.

The old EU directives have been replaced from 18 April 2016 by new directives that intend to simplify procurement procedures and make these more flexible. It should:

- Allow contracting authorities to be better able to negotiate terms of contracts;
- Shorten deadlines for procedures; and
- Decrease tender documentation.

The new system should also allow contracting authorities to implement environmental policies, as well as those governing social integration and innovation. In other words, public procurement is becoming a policy strategy instrument. The effort to reduce administrative burden is pursued by replacing the differing processes that currently exist in Member States to tender for public contracts. The new rules aim to simplify access of companies to cross-border tendering procedures and reduce administrative burden in relation to tendering administrative paperwork. Concerning transparency and anti-corruption, the new rules include various measures. The concept of “conflicts of interest” is defined at EU level. This aims to simplify the identification and management of fraud and conflict of interest cases. EU Member States are asked to take appropriate measures to effectively prevent, identify and remedy such cases. The definition reads:

*“A situation in which persons involved in, or able to influence, the procedure by which a purchaser awards a contract have a direct or indirect financial, economic or other personal interest that could jeopardise their impartiality and independence in that procedure”<sup>43</sup>.*

Also transparency has a key role in fighting corruption in procurement. *Inter alia*, EU Member States must meet monitoring requirements and report violations to the respective national authorities, publicise monitoring activities, and submit a report to the European Commission every three years including feedback on sources of misapplication or legal uncertainty. This includes any problems in the application of rules, the level of participation by small-medium enterprises, the prevention, the detection and the monitoring of fraud, corruption, conflict of interest and other cases with serious irregularities.

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<sup>43</sup> EUROPEAN COMMISSION (2015). Preventing corruption – new public procurement rules as of April 2016 [WWW]. Available from: [http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item\\_id=8594](http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=8594) [Accessed on 12-09-2016].

### 3.3 Corruption in public procurement

Determining the level and damage of corruption in public procurement is challenging. Nonetheless, it is widely recognized that corruption occurs in public procurement and that the impact of corruption is large. It can cost lives, people's freedom, health and money. Mediatised scandals and the recent financial and economic crisis that affected the global and EU economy have placed corruption on the international political and public agenda and especially the important role of corruption in preventing development has generated strong demand of establishing reliable indicators to measure the scale of the problem. For this study it is important to reflect on the level and potential damage of corruption in public procurement as it influences the relevance of civil society participation to prevent corruption as well as influences the benefits of this participation compared to possible costs (i.e. administrative burden for public procurement processes). Difficulties to define straightforward economic indicators for measurement require more elaborated constructions arguably based on subjective inputs<sup>44</sup>.

Determining the level of corruption depends largely on three different approaches that have dominated the debate:

- Collection of views of stakeholders such as businesses, public officials, civil society organisations and citizens;
- Assessments of national institutional systems which provides for information on weaknesses and strengths in preventing corruption;
- Audits of particular projects in which concrete anomalies can be identified.

The measurements closest to objectiveness are for example experience-based surveys in which stakeholders are asked about their experiences with corruption. Also comparing individual public procurement projects can generate significant objective measurement of corruption, for example between regions. Opinion-based surveys and polls are more subjective in which stakeholders are asked about perceived levels of corruption. The fact that

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<sup>44</sup> URR, F. (2007). *Assessing Corruption - An Analytical Review of Corruption Measurement and its Problems: Perception, Error and Utility*. Edmund A. Walsh School of Foreign Service: Georgetown University.

this is subjective does not necessary mean it is not important. For example, high perception of corruption can affect popular trust of citizens in political and government institutions.

Determining the damage of corruption commonly is identified on various levels: political, social, economic and environmental.

### *1. Political and social damage*

Corruption and abuse of power by the political representatives challenge the rule of law and quality of democracy. It delegitimizes public institutions, affecting the quality of government. It is considered that achieving quality of government is the foundation to ensure a solid rule of law and with this a society with low levels of corruption and, finally, democratic quality<sup>45</sup>. Corruption erodes the social fabric of society. High popular perception of corruption undermines trust of citizens in the political system and delegitimizes its institutions. Surveys in Europe<sup>46</sup> show decreasing or fluctuating trust in politics and increasing perception of corruption. This trend is closely linked to the sense of immorality. In many developed countries it seems that a majority believes that most members of their society, and in particular those in power, do not comply with the formal norms and act corrupt to obtain privileges that most do not receive. A sense of impunity could generate a strong incentive for citizens to breach norms. Recent studies do indeed indicate that perception of corruption correlates with institutional and interpersonal distrust, while this at the same time undermines the culture of legality<sup>47</sup>. In other words, high perception of corruption means less interpersonal and institutional trust and a risk of higher public tolerance or legal disobedience. Corruption deteriorates society's social fabric and favours more corruption. The departing point or threshold after which this deteriorating process is initiated still has to be empirically determined. Further, research shows that opacity in combination with weak accountability generates a higher perception of corruption. The behaviour of politicians is

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<sup>45</sup> ROTHSTEIN, B. (2011). *The Quality of Government*. The University of Chicago Press, Chicago.

ALEXANDER, A.C., INGLEHART, R., WENZEL, Ch. (2012). *Measuring effective democracy: A defense*. International Political Science Review, vol. 33 (1): 41-62.

<sup>46</sup> EUROPEAN COMMISSION (n.d.). *Public Opinion* [WWW]. Available from: [http://ec.europa.eu/public\\_opinion/index\\_en.htm](http://ec.europa.eu/public_opinion/index_en.htm) [Accessed on 22-09-2016].

<sup>47</sup> VILLORIA, M., RYZIN VAN, G., LAVENA, C. (2013). *Social consequences of government corruption: A study of institutional disaffection in Spain*. Public Administration Review Volume 73, Issue 1, pages 85–94.

what influences popular perception the most. Subsequently, if one wishes to lower this perception, transparency should be improved and accountability strengthened (especially of the political class). Serious anti-corruption measures, complemented with collective action initiatives could be a step in the right direction.

## 2. *Environmental damage*

Natural resources and the environment are particularly vulnerable for corruption considering there is the conflict between private interests in revenue coming from natural resources and public interest in a healthy environment<sup>48</sup>. The environment is collective good, posing challenges in terms of allocating resources to the benefit of the public. Areas such as urban development and environmental corruption involve primarily governmental institutions. The granting of building permits and classification of land are areas vulnerable for corrupt practices. For example, a mayor receives a bribe from a businessman to classify a terrain as equipped for construction while in fact this area should be protected due to fragile wildlife. Studies conducted on the causes of environmental damage due to urban development point to institutions basing development on cost-benefit analysis looking at the physical impact of construction. In other words, rather than looking at damages to the environment in economic terms, urban planners tend to look at economic benefit from construction against physical impact of destruction. Addressing corruption in the environmental sector includes a combination of law enforcement, prevention and sustainability.

## 3. *Financial and economic damage*<sup>49</sup>

Despite the difficulty to measure the level of corruption, efforts are made to develop measurement approaches and collect data to estimate of the size of the problem. Worldwide surveys of businesses allow for data collection on bribes paid, but also governance and anti-corruption perception surveys. However, trying to measure the quantity of bribes alone does not include large sums of public money embezzled, theft or misuse of public resources, i.e. through public procurement. The World Bank estimates that the annual worldwide bribery is

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<sup>48</sup> WINBOURNE, S. (2002). *Corruption and the environment* [WWW]. Available from: [http://pdf.usaid.gov/pdf\\_docs/PNACT876.pdf](http://pdf.usaid.gov/pdf_docs/PNACT876.pdf) [Accessed on 22-09-2016].

<sup>49</sup> Note that this section outlines the various methods used to measure the economic costs of corruption in EU funding.

about USD 1 trillion and around USD 200 billion is paid on a yearly basis for bribing public procurement<sup>50</sup>. This corresponds to an estimated overall annual volume of USD 1,5 trillion of public procurement effected by bribery. Corruption can have serious consequences for economic development. It could make a difference of 3% annual growth for businesses if they operate in low corrupt environments. Also, the choice for foreign economic operators to participate in public procurement can change depending on the corruption environment<sup>51</sup>. For example, corruption can make local bureaucracy less transparent what would suggest that a safer approach for a foreign company is setting up a joint venture rather than a subsidiary when aiming to compete in public procurement. This allows the foreign company to use a local partner that understands the country's bureaucratic red tape. At the same time, a corrupt environment decreases the foreign company's protection of assets. After all, the probability that disputes between the foreign investor and the domestic partners are adjudicated fairly decreases<sup>52</sup>. Corruption could in other words deter cross-border public procurement, which would undermine in the EU case the Single Market. Investment barriers also have effects on the success in attracting EU funding. Countries with higher corruption levels are less successful in attracting funding, spending this and getting reimbursed by the EU from the structural and cohesion funds<sup>53</sup>.

Corruption in public procurement includes the risk that public expenditure is directed towards individual projects favouring private contractors and this way obstructing social investment in areas favouring public interest, such as health care<sup>54</sup>. The data shows that countries perceived as more corrupt have lower government expenditure on health care and higher

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<sup>50</sup> U4 ANTI-CORRUPTION RESOURCE CENTRE (2013). Literature review on costs of corruption for the poor [WWW]. Available from: <http://www.u4.no/publications/literature-review-on-costs-of-corruption-for-the-poor/downloadasset/3165> [Accessed on 21-10-2016].

<sup>51</sup> SMARZYNSKA, B., Wei, S. (2000). *Corruption and Composition of Foreign Direct Investment: Firm-Level Evidence* [WWW]. Available from: <http://www.brookings.edu/~media/research/files/papers/2000/10/01macroeconomics%20smarzyńska/20001001> [Accessed on 11-06-2013].

<sup>52</sup> Ibid.

<sup>53</sup> MUNGIU-PIPPIDI, A. (2013). *The good, the bad and the ugly: Controlling corruption in the European Union* [WWW]. Available from: <http://www.againstcorruption.eu/wp-content/uploads/2013/03/ANTICORRP-Policy-Paper-on-Lessons-Learntfinal.pdf> [Accessed on 02-06-2013].

<sup>54</sup> Ibid.

government investment in capital formation<sup>55</sup>. On top of this, the health care sector is reckoned to be particularly vulnerable to corruption<sup>56</sup>. Under spending could fuel related problems. In other words, corruption could generate increased government expenditure in capital formation given that corrupt officials tend to channel funds to projects that benefit private interest. As a consequence there is less room for sufficient government expenditure in social welfare affecting areas such as health care, increasing risks of corruption. In case countries have excessive expenditure in capital formation and in social expenditure, budget deficits could occur.

Public procurement constitutes large part of government spending throughout the EU. This on itself highlights potential risks for financial damage given the large sums involved. However, the amount of spending is not necessarily an indicator for more corruption. In fact, corruption opportunities seem to rather be fuelled by the absence of adequate constraints<sup>57</sup>. For example, in case overspending due to corruption creates budget deficits, an effective tax collection system could minimise damages. However, data shows that tax collection is weak in countries perceived more corrupt. Absence of adequate constraints is therefore facilitating tax evasion. The influential anti-corruption researcher Alina Mungiu-Pippidi estimates that EUR 323 billion, twice the EU yearly budget, failed to be collected across the EU in 2010<sup>58</sup>.

### **3.4 European Structural and Investment Funds**

The European Structural and Investment (ESI) Funds have a budget of EUR 454 billion for 2014 to 2020<sup>59</sup>. The ESI Funds are the EU's main investment policy tool. ESI Funds consist of the European Regional Development Fund (ERDF), European Social Fund (ESF),

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<sup>55</sup> Ibid.

<sup>56</sup> EUROPEAN COMMISSION (2013). Study on Corruption in the healthcare sector [WWW]. Available from: [http://ec.europa.eu/dgs/home-affairs/what-is-new/news/news/docs/20131219\\_study\\_on\\_corruption\\_in\\_the\\_healthcare\\_sector\\_-\\_summary\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-is-new/news/news/docs/20131219_study_on_corruption_in_the_healthcare_sector_-_summary_en.pdf) [Accessed on 14-10-2016].

<sup>57</sup> MUNGIU-PIPPIDI, A. (2013). *The good, the bad and the ugly: Controlling corruption in the European Union* [WWW]. Available from: <http://www.againstcorruption.eu/wp-content/uploads/2013/03/ANTICORRP-Policy-Paper-on-Lessons-Learntfinal.pdf> [Accessed on 02-06-2013].

<sup>58</sup> Ibid.

<sup>59</sup> EUROPEAN COMMISSION (n.d.). European Structural and Investment Funds: EU overview [WWW]. Available from: <https://cohesiondata.ec.europa.eu/overview> [Accessed on 12-10-2016].

Cohesion Fund, European Agricultural Fund for Rural Development (EAFRD), European Maritime and Fisheries Fund (EMFF) and the Youth Employment Initiative (YEI). Investment themes vary in size with most money going to competitiveness of Small Medium Enterprises, Environment Protection and Resource Efficiency, and Network Infrastructures in Transport and Energy. The most money in absolute numbers is reserved for Poland, Italy, Spain, Romania, and Germany. Each fund regulates the administration of the funds through individual regulations. Each Member State “*administers the funds on a decentralised basis through shared management*”<sup>60</sup>. This corresponds to approximately 80% of the EU budget management being shared between the European Commission and Member States. The rest is directly or indirectly managed by the European Commission. The overall responsibility of budget implementation always remains with the European Commission.

Through the ESI Funds, more than one third of the EU budget is allocated. The shared management between the European Commission and Member States translates in practice into regional and national authorities managing three-quarters of the funding. The priorities are established at the EU level<sup>61</sup>. Member States set out their policy framework including national objectives<sup>62</sup>. Operational Programmes are established per region or theme, reflecting their specific needs. The European Commission approves the national objectives and Operational Programmes after negotiation with the Member States and based on the EU priorities. The Member States are responsible for the selecting, controlling and assessing of projects while the European Commission monitors the overall programme, makes the payments after expenditure is approved, and verifies national control systems.

The process of allocating funds has checks and balances built in to avoid errors. National authorities are required to thoroughly check eligibility of expenditure before submitting payment claims to the European Commission. First of all, the efficiency and effectiveness of the checks and balances established in this process depend on the functioning and independence of the different authorities. For example, in case that Member States incorporate procurement and control authorities under one ministry, independency might be

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<sup>60</sup> EUROPEAN COMMISSION (n.d.). European Structural & Investment Funds [WWW]. Available from: [http://ec.europa.eu/contracts\\_grants/funds\\_en.htm](http://ec.europa.eu/contracts_grants/funds_en.htm) [Accessed on 12-09-2016].

<sup>61</sup> For the 2014-2020 period this is called the Common Strategic Framework.

<sup>62</sup> For the 2014-2020 period these are called the Partnership Contracts.

jeopardised. Secondly, the European Commission has limited control over the individual project implementation, as this is the responsibility of the Member States. In other words, the European Commission's effectiveness in controlling spending is partially dependent on the quality of national control. Thirdly, the European Commission lacks the human resources to monitor all the projects on the ground. In this context there could be a good reason to propose the involvement of civil society organisations to monitor how EU money is being spend.

The European Commission stated in March 2013 that throughout the EU an estimated EUR 120 billion is lost to corruption. According to the European Commission, this amounts to 20-25% of the value of public contracts<sup>63</sup>. Regarding corruption affecting EU funding or its institutions, OLAF and the European Court of Auditors (ECA) are seen to be the principle institutions addressing the problem. Data from OLAF shows that in 2012, the EU anti-fraud office opened 718 cases and closed 465. Most cases were relating to the Structural Funds followed by external aid and EU staff related cases<sup>64</sup>. The recommendations made based on the investigations were primarily financial followed by judicial, disciplinary and administrative. OLAF recommended a total of EUR 284 million for recovery of which around EUR 100 million related to the Structural and Agricultural funds. An amount of EUR 94,5 million was recovered in 2012 as a result of investigations. In 2015, OLAF recorded 1372 incoming items of information opened 219 new investigations and 305 investigations were concluded<sup>65</sup>. Also in 2015 OLAF focused most activity on the Structural and Social Funds. A total of 364 recommendations were made to the EU and national authorities to recover EUR 888 million. Eurojust reports that corruption was observed in thirty cases registered at the organisation in 2012 and 27 cases as crimes against the financial interests of the EU.<sup>66</sup> Several corruption cases handled by the organisation concerned public procurement involving EU funds or tender procedures.

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<sup>63</sup> EUROPEAN COMMISSION (2013). Fighting corruption: From intentions to results [WWW]. Available from: [http://europa.eu/rapid/press-release\\_SPEECH-13-187\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-13-187_en.htm) [Accessed on 02-02-2014].

<sup>64</sup> OLAF (2012). *The OLAF report 2012* [WWW]. Available at [http://ec.europa.eu/anti\\_fraud/documents/reports-olaf/2012/olaf\\_report\\_2012\\_en.pdf](http://ec.europa.eu/anti_fraud/documents/reports-olaf/2012/olaf_report_2012_en.pdf) [Accessed on 12-12-2013].

<sup>65</sup> OLAF (2012). *The OLAF report 2015* [WWW]. Available at: [http://ec.europa.eu/anti-fraud/sites/antifraud/files/olaf\\_report\\_2015\\_en.pdf](http://ec.europa.eu/anti-fraud/sites/antifraud/files/olaf_report_2015_en.pdf) [Accessed on 23-09-2016].

<sup>66</sup> EUROJUST (2012). *Annual Report 2012* [WWW]. Available from: <http://eurojust.europa.eu/doclibrary/corporate/eurojust%20Annual%20Reports/Annual%20Report%202012/Annual-Report-2012-EN.pdf> [Accessed on 12-12-2013].

To date, efforts to address irregularities and fraud in the Structural Funds have been dominated by a control and audit approach. Starting with the programming period 2000-2006, the control and audit arrangements governing the Structural Funds have been strengthened substantially. The European Commission pioneered these efforts, addressing demands from the European Parliament's Committee on Budgetary Control, the latter reacting to ECA findings of high error rates affecting the Structural Funds<sup>67</sup>. For the period 2014-2020, the European Commission prioritises administrative capacity development. This is founded on the notion that Member States gain most from cohesion policy if ESI Funds are effectively managed. In addition, the European Commission expressed interest in the Integrity Pact as a tool to prevent potential irregularities with regard to procurement.

The Integrity Pact initiative is noteworthy, since the efforts to date on the EU level have been of a “punitive” rather than “constructive” nature. Member State authorities expressed concerns relating possible administrative burden/cost associated with financial control and audit. Considering that the regulatory framework for the current programming period 2014-2020 has introduced a series of new management and control requirements, the success of the Integrity Pact initiative will depend strongly on demonstrating that benefits outweigh any additional administrative burden. The experience, in the programming period 2000-2006, with “Contracts of Confidence” might provide some useful inspiration for the Integrity Pact initiative. The Contracts of Confidence were agreements between the European Commission and a Member State or regional EU funds authorities on the quality of the concerned authority's audit work and enabling the European Commission to rely on national/regional audit work. For the 2000-2006 programming period, contracts of confidence were established in Wales, Austria, Denmark, Estonia, Slovenia and Portugal<sup>68</sup>.

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<sup>67</sup> BLOMEYER & SANZ (2011). *What are implications of the current legislation for cost effectiveness and quality control in structural fund spending? What role for performance auditing?* [WWW]. European Parliament. Available from: [http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL-JOIN\\_ET\(2011\)453227](http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL-JOIN_ET(2011)453227) [Accessed on 02-04-2015].

<sup>68</sup> EUROPEAN COMMISSION (2004). *Communication on contracts of confidence* (SEC(2004)632/2) [WWW]. Available from: <https://www.google.es/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0ahUKEWjUxo6KsvHPAhXGbRQKHcE8B->

Currently the European Commission and Transparency International are collaborating to launch pilot Integrity Pacts dealing with EU funds. These efforts could allow researchers to draw in the near future comparative lessons from implementation of Integrity Pacts across the EU. For the European Commission, positive impact from Integrity Pacts could result in:

- Reduced credit risks;
- Better return on investments;
- Funds provided are more likely to achieve objectives; and
- A greater likelihood that funds will achieve stated regional development impacts.

To sum up, an important challenge when analysing corruption in public procurement is the diversity in which procurement is managed between jurisdictions. Also it is challenging to determine the role of civil society organisations in preventing corruption given that attributing cause and effect is difficult. By focusing on the ESI Funds, this study aims to narrow down the scope and overcome legal differences in managing procurement. At the same time, the added value of focusing on the EU is that it allows for keeping an EU wide approach and draw comparative findings from the experiences in different countries which increases utility of this study's findings in case used to prevent corruption in EU public procurement. The EU funds' common legislative framework, EU-wide coverage, variety of businesses involved, different investment sectors and types of procurement justify the research focus of this study and immediately set the boundaries for this analysis. The EU Member States are very diverse but share a common history of EU integration, and in particular the integration of the internal market. In addition, the role of civil society organisations in fighting corruption in the different Member States can be narrowed down by specifically looking at a tool, the Integrity Pact, that targets corrupt practices in procurement processes.



## 4 Part I – Collective action for corruption and public procurement

The first study area covers the description corruption in public procurement. It aims to develop a theoretic framework to prevent corruption in public procurement in the context of the EU Single Market and through the use of collective action. First, the definition, forms and methods of corruption will be discussed which will expose the different levels of analysis (i.e. individual, institutional, societal) used in order to determine an integrated approach to deal with corruption in public procurement. After this, the causes of corruption will be discussed and linked to principal-agent and collective action prevention measures. In its entirety this presents a theoretic framework against which the Integrity Pact tool is analysed in order to identify conditions that positively or negatively determine the role of civil society organisations in the prevention of corruption in public procurement.

The main study questions are:

- How can corruption be defined?
- What are the main causes of corruption?
- How does corruption affect public procurement?
- What measures are considered most appropriate to prevent corruption in public procurement?

### 4.1 Corruption

Scholars repeatedly introduce the concept of corruption by citing the complexity of determining the definition<sup>69</sup>. The complexity becomes visible when considering the political, social and economic conditions that could influence the number and variety of corruption cases. For example, the number of opportunities for corrupt behaviour increases with the

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<sup>69</sup> ZIMRING, F.E., and JOHNSON, D.T. (2007). *On the comparative study on corruption*. In International Handbook of white-collar crime and corporate crime, eds. H.N. Pontell and G. Geis. New York: Springer.

KAUFMANN, D., Vicente, P. C. (2005). *Legal Corruption* [WWW]. Available from:

[http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/Legal\\_Corruption.pdf](http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/Legal_Corruption.pdf) [Accessed on 27-05-2013].

amount of power allocated to persons in the political and social system, and at the same time the complexity of the mechanisms to check and balance this. Also the economic system is important when thinking about the number of times decisions have to be taken that affect the economic interest of people. The complexity of the system also affects the quantity and diversity of people, all exercising certain roles of decision-making power. For example, in public procurement many actors might exercise bits and pieces of power (i.e. there are politicians, procurement officials, auditors, entrepreneurs, consumers, etc.), together making for a network of relationships in which individuals have personal interests and pursue different goals. Without normative limits or other kinds of constraint on the exercise of power, a fertile ground is created for corrupt behaviour<sup>70</sup>.

However, the complexity of a society does not necessarily mean more corruption takes place. For example, economic and political less developed countries are arguably less complex and tend to show higher levels of corruption<sup>71</sup>. This gives reason to question whether the rate of corruption increases in function of the number of opportunities. For example, it could be that the complexity of systems can immediately enhance performance of monitoring and deter misbehaviour (i.e. through transparency and accountability). Also, one could argue that the exercise of power can be restrained by social factors. Responsible behaviour can be learned in a complex society in which people are constantly in contact (i.e. through participation) and, not to forget, can get punished (formally or informally) for violating the boundaries of power. Finally it is important to consider that in complex social systems, corruption is less visible. Corruption evolves and hides as a result of the measures and sense of responsibility that grow with the complexity of societies. This gives reason to believe that 1) developed societies actually experience less corruption but also that 2) the “dark numbers” of corruption in developed societies are higher than in less complex systems. The damage of corruption is difficult to determine when visibility is limited. However, scandals and corruption-related crime is detected. This results in criminal prosecutions against politicians and companies and has effect on public opinion and consequently has political implications. Scandals also

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<sup>70</sup> MARQUETTE, H., PEIFFER, C. (2015). Collective action and systemic corruption. Paper presented at the ECPR Joint Sessions of Workshops, University of Warsaw 29 March-2 April 2015. p. 7

<sup>71</sup> See for example the CPI scores. TRANSPARENCY INTERNATIONAL (n.d.). Corruption Perceptions Index [WWW]. Available from: <http://www.transparency.org/research/cpi/overview> [Accessed on 12-10-2016].

generate more debate on crime prevention<sup>72</sup>. However, research on prevention of such crimes is scarce, possibly due to the complexity of the subject; its connections to other fields such as law and public policy, and lack of reliable data<sup>73</sup>. Diane Vaughan (2007) argues in Pontell and Geis' famous *International Handbook of White-collar and Corporate Crime* that social life is a consequence of macro- and micro-level forces, and to better understand crime committed by those in power, she adds to this also meso-level analysis, in particular formal and complex organisations<sup>74</sup>. She notes that organisations “*provide a window into culture, showing how culture mediates between institutional forces, organizational goals and processes, and individual illegality so that deviance becomes normalized in organizational settings*”. A combination of sociological theory with research on white-collar crime can help understanding how people in organizations make decisions to violate rules.

The following sections will situate the on-going debate on the connections between the different levels of analysis by explaining corruption committed by white-collar criminals such as corporate executives, politicians and public officials.

#### 4.1.1 Conceptualising corruption

Criminal law distinguishes at least four ways to wrongfully obtain control over property or personal interests of others<sup>75</sup>: through theft; through threat; through fraud; or obtaining control through use of social or institutional power. The latter refers to persons that are granted power for restricted purposes and use this instead for unauthorized personal gain. For example, a procurement official can award a public contract to the company with the best offer (granted power for restricted purposes) but instead awards the public contract to the company that bribes (use of granted power for unauthorised personal gain). The wrongful obtaining of property or personal interest of others means in this case that the offender uses its power for restricted purposes in prohibited ways.

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<sup>72</sup> ALVESALO, A., TOMBS, S., VIRTA, E., and WHYTE, D. (2006). *Re-imagining crime prevention: Controlling corporate crime?* Crime, Law and Social Change 45(1): 1–25.

<sup>73</sup> VAUGHAN, D. (2007). *Beyond macro- and micro-levels of analysis, organizations, and the cultural fix*. In *International Handbook of White-Collar and Corporate Crime*, eds. H.N. Pontell and G. Geis.

<sup>74</sup> Ibid.

<sup>75</sup> ZIMRING, F.E., and JOHNSON, D.T. (2007). *On the comparative study on corruption*. In *International Handbook of white-collar crime and corporate crime*, eds. H.N. Pontell and G. Geis. New York: Springer.

The definition of corruption most commonly used by international organizations, governments, academia and civil society is the abuse of entrusted power for private gain<sup>76</sup>. This definition includes three elements:

- Corrupt acts occur in the private and public sector;
- There is abuse of power held by a public institution or private organization;
- The ‘corrupted’ and the ‘corruptor’ benefit from the corrupt act.

The elements above present challenges when further conceptualising corruption. For example, what defines a corrupt act and when is such an act an abuse of power? It also raises questions on who are the offenders or the victims? For example, there might be a fine line between what is considered a bribe or a legitimate exchange of money for a service or a gift. From a legal perspective, the difference could depend on whether the consideration for the payment is considered forbidden by law. In addition, there might be moral concerns in relation to legal behaviour. Another question for debate is the line between private versus public gain. For example, an authority could manipulate a procurement process to favour a local instead of a foreign company. This raises the question whether this is corrupt or not. After all, the official might not act for private gain but rather for the interest of the local economy. Finally, one should also consider unintended behaviour, which could be against the rules. For example, the procurement official might not be aware of the fact that certain behaviour is corrupt or can result in corruption allegations. In other words, there is a fine line between intended and unintended corrupt behaviour, especially considering that people can make honest mistakes.

Karstedt and Farral (2006) point to the grey zone of legality versus morality, seen for example between aggressive tax planning and illegal tax evasion<sup>77</sup>. They also point out that the public shares moral intuitions that allow for widely held justifications, such as the common argument “*everybody does it*”. The difference between right and wrong can cause,

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<sup>76</sup> TRANSPARENCY INTERNATIONAL (2012). *Corruption Q&As* [WWW]. Available from: <http://www.transparency.org/whatwedo/corruptionqas> [Accessed 30-05-2013].

<sup>77</sup> KARSTEDT, S., and FARRALL, S. (2006). *The moral economy of everyday crime: Markets, consumers and citizens*. British Journal of Criminology, 46(6): 1011-1036.

according to Karstedt and Farral, for uninhibited discussions of such behaviour among relatives and friends. Kaufmann and Vicente (2005) describe that corruption includes collusion between public and private sector players and that may be illegal versus legal<sup>78</sup>. For example, they explain that “*legal lobbying contributions by the private sector in exchange of passage of particular legislation – biased in favour of those agents – or allocation of procurement contracts may be regarded as example of interaction of both private and public sector representatives, where the second makes use of her publicly invested power at the expense of broader public welfare*”<sup>79</sup>.

Anti-corruption rules as a response to undesired behaviour help determining right from wrong. Byrne (2007) argues that corrupt behaviour can be seen as the deterioration of self-regulated behaviour<sup>80</sup>. However, it focuses on the legality of behaviour rather than on the morality. When behaviour does not self-regulate due to low morality, and falls within the boundaries of the law, legal forms of corruption could occur. Some scholars warn that these forms of corruption might even be more prevalent than illegal forms of behaviour<sup>81</sup>. Based on this, it could be argued that rather than only creating laws against corruption, also cultural changes should be promoted in order to address the problem. A key concept here is for example the promotion of ethical leadership and professionalism.

Zimring and Johnson (2007) note that despite conceptual and definitional questions concerning corruption, most scholars agree that corruption involves deviant behaviour from certain standards<sup>82</sup>. Three principal approaches to defining corruption dominate: the legal approach; public interest approach; and public opinion approach.

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<sup>78</sup> KAUFMANN, D., Vicente, P. C. (2005). *Legal Corruption* [WWW]. Available from: [http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/Legal\\_Corruption.pdf](http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/Legal_Corruption.pdf) [Accessed on 27-05-2013].

<sup>79</sup> Ibid.

<sup>80</sup> BYRNE, E. (2007). *The Moral and Legal Development of Corruption: Nineteenth and Twentieth Century Corruption in Ireland*. PhD Thesis. University of Limerick.

<sup>81</sup> KAUFMANN, D. (2006). *Corruption, Governance and Security. Global Competitiveness Report 2004/2005*. World Economic Forum.

<sup>82</sup> ZIMRING, F.E., and JOHNSON, D.T. (2007). *On the comparative study on corruption*. In International Handbook of white-collar crime and corporate crime, eds. H.N. Pontell and G. Geis. New York: Springer.

The legal approach defines corruption on the basis of judicial interpretation; in other words, an act is only corrupt if prescribed by law. The public interest approach looks at the effects of behaviour. This means that an act is corrupt once it is harmful to the public. On the other hand this also means that an illegal act that is beneficial to the public is not corrupt. The public opinion approach points to the perception of the public to determine whether certain behaviour is corrupt. Here a distinction is made between; “black corruption”, meaning it is perceived as such by the majority of the elite and the mass; “grey corruption”, meaning only some (e.g. the elite) perceive certain behaviour as corrupt; and “white corruption”, meaning the majority tolerates certain behaviour.

For the purpose of this study it is important to keep in mind the conceptual differences when analysing the approach adopted by civil society organisations to fight corruption in public procurement through the Integrity Pact. For example, the civil society organisation implementing the Integrity Pact might adopt a strictly legal approach when scrutinizing a procurement process. In such a scenario, the added value of the tool compared to the existing procurement legal framework can be questionable. However, as an anti-corruption watchdog, it might also consider adopting a public opinion approach, which allows for the tool to impact behaviour beyond the legal definitions of corrupt behaviour. Most likely, this study will identify examples of Integrity Pacts that combine different approaches to define corruption. Another potential challenge here is that public opinion might differ from the concept adopted by the civil society organisations. For example, citizens could tolerate corrupt behaviour of public procurement officials in case a corrupt contract award generates employment.

Further, it is important to consider whether unintended illegal acts fall within the scope of the definition for corruption. For example, when a civil society organisation scrutinizes a public procurement process and identifies an unintended act that can be considered against the law, it needs to respond. Mistakes made in a procurement process can perhaps result in some form of liability but arguably are not criminal. It might therefore be reasonable that also civil society organizations implementing an Integrity Pact adopt a *mens rea* approach, which restricts the definition of corruption to only intended corruption. But, perhaps just as important is the consideration what to do with the damage caused by the corrupt act. As a civil society organization one might consider the damage done as a result of the corrupt act to decide how and to what extent there must be a response. This is further complicated by the fact that with corruption, as opposed to most conventional crimes, it is difficult to identify victims. There

might also be cultural factors in place that affect the condemning of some acts differently than others.

#### 4.1.2 Supply and demand-side of corruption

Corruption scandals often point to bribed-elected officials or embezzling civil servants. However, the reciprocity that characterises corruption transactions also implies that someone paid or offered the bribe in exchange for a favour. It is therefore also important to look at the supply-side of corruption, often embodied in the form of corporations and its workers. The following sections will introduce the concept of white-collar crime and affiliated concepts of corporate, governmental and state-corporate crime, each of which allows us to define corruption from the perspective of the offenders.

The “father” of white-collar crime studies was the esteemed American criminologist Edwin H. Sutherland (1883-1950). In 1939 he introduced the term into literature and since then numerous scholars have debated the definition of white-collar crime. Sutherland talked about “*crime in the upper or white-collar class, composed of respected business and professional men*”<sup>83</sup>. He also referred to the “*violation of delegated or implied trust*”. Besides pointing to the damage of white-collar crime, Sutherland importantly advocated for the recognition of white-collar crime as a “real” crime and warned for the influence of upper classes on the formulation of criminal laws as well as the means white-collar criminals have at their disposal to minimize chances of conviction. Since he introduced the concept of white-collar crime, more than six decades have passed and numerous closely related terms and concepts have been associated to white-collar crime, creating confusion about the definition. Despite the confusion, those that study white-collar crime do generally agree that<sup>84</sup>:

- It occurs in a legitimate occupational context;
- It is motivated by economic gain or occupational success; and
- That it is not characterised by direct, intentional violence (as opposed to conventional types of crime such as murder or robberies).

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<sup>83</sup> SUTHERLAND, E.H. (1949). *White Collar Crime*. New York: Dryden. p.1.

<sup>84</sup> FRIEDRICHS, D.O. (1996). *Trusted Criminals: White Collar Crime in Contemporary Society*. Belmont: Wadsworth Pub. Co. p. 5.

Types of white-collar crimes can be violent for example when workers or consumers/citizens are exposed to harmful conditions or products<sup>85</sup>. High profile public scandals concern toxic waste or air pollution cases, food or pharmaceutical product scams, but also unsafe automobiles. Common types of white-collar violence against workers can concern poor health and safety conditions on the work floor, which can have deadly consequences. Non-violent white-collar crimes concern the abuse of power, fraud and economic exploitation<sup>86</sup>. Prevalent types of fraud involving companies concern trade restraints; financial manipulation, copyright violations, unfair labour practices, etc. Abuse of power includes corruption of political processes through for example bribery. White-collar crimes against the public could take the form of tax evasion or unfair obtaining of public contracts. Non-violent crimes directed at consumers include price fixing or manipulation, false advertising, etc. Against employees, forms of non-violent crimes include economic exploitation, theft from employees, or corporate surveillance. Finally, crimes can also affect other competitors for example through monopolistic practices, corporate espionage and theft of trade secrets.

For this study, it is relevant to consider three distinct typologies related to white-collar crime which include activities relating corruption and focus on the different roles offenders can play. These are: corporate crime; governmental crime; and state-corporate crime.

### *1. Corporate crime*

From a criminological perspective, corporate crime includes crime committed by a business or individuals acting on behalf of a business<sup>87</sup>. The concept closely interlinks with other types of crime such as organized crime, white-collar crime and state-corporate crime<sup>88</sup>. The types of crime share one important commonality, namely the debate on how to address the

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<sup>85</sup> FRIEDRICHS, D.O. (1996). *Trusted Criminals: White Collar Crime in Contemporary Society*. Belmont: Wadsworth Pub. Co. p. 64-77

<sup>86</sup> FRIEDRICHS, D.O. (1996). *Trusted Criminals: White Collar Crime in Contemporary Society*. Belmont: Wadsworth Pub. Co. p. 77-91

<sup>87</sup> PONTELL, H. N., and GEIS, G. (2007). *International Handbook of White-Collar and Corporate Crime*. New York: Springer.

<sup>88</sup> FRIEDRICHS, D.O. (1996). *Trusted Criminals: White Collar Crime in Contemporary Society*. Belmont: Wadsworth Pub. Co. p. 5.

behaviour associated to the crimes. Different forms of corporate crime include: corporate violence; corporate theft; corporate financial manipulation; and corporate political corruption or meddling. It is perhaps no surprise that given the diversity and complexity of what constitutes corporate crime, countries differ in how they choose to regulate corporate offences through criminal or civil law. In addition, some might perceive acts by companies and their employees as criminal without these legally being characterized as such. In other words, some forms of legal corporate behaviour can also be considered as unethical or immoral. Debates on the ethics of corporate behaviour and how to respond to criminal behaviour especially became relevant during the recent global economic and financial crisis<sup>89</sup>. This is for example visible when looking at the formation of grass-root movements, such as the Occupy Wall Street Movement in the USA<sup>90</sup> or the 15-M Movement in Spain<sup>91</sup>. With the financial and economic crisis, fuelled by risk behaviour in the financial and banking sectors and political corruption scandals involving public money, the call for more political accountability and transparency, less corporate power and the criminalization of corporate offenders increased. The crisis exposed the delicate line between legal corporate behaviour versus perceived immoral corporate behaviour.

The concept of corporate crime arguably originates from the introduction of white-collar crime in 1939 by Sutherland. Sutherland exposed the fact that crime was not only stemming solely from the lower social classes but also from persons in higher social and economic classes, such as the business sector. The broad definition of white-collar criminals is narrowed down when speaking of corporate crime which links the criminal behaviour to companies as well as the economic system. Corporate crime according to Clinard and Quinney can be defined as “*offenses committed by corporate officials for their corporation and the offenses of the corporation itself*”<sup>92</sup>. It distinguishes itself from occupational crime in

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<sup>89</sup> HUISMAN, W. (2011). *Corporate crime and crisis: Causation scenarios*. In *Economic Crisis and Crime*. Sociology of Crime, Law and Deviance, Volume 16, ed. M. Deflem, 107–125. Emerald Group Publishing Limited.

<sup>90</sup> See for example Occupy Wallstreet. OCCUPY WALLSTREET (n.d.). Available from: <http://occupywallst.org/> [Accessed on 23-09-2016].

<sup>91</sup> See for example Movimiento 15M. MOVIMIENTO 15M (n.d.). Available from: <http://www.movimiento15m.org/> [Accessed on 23-09-2016].

<sup>92</sup> CLINARD, M., and QUINNEY, R. (1973). *Criminal Behavior Systems: A Typology*. Holt, Rinehart and Winston. p. 188.

the sense that it concerns mostly crime in the economic interest of the company and involving executives from the corporation and/or the corporation itself. Occupational crime goes beyond the scope and refers more to crimes committed by persons when exercising their job. Corporate crime can involve different types of criminal acts that generally are characterised by low detection by law enforcement or visibility for the public. Illegal activities often take place within the framework of legal activities. In fact, offenders and victims are not clearly identifiable, especially the latter given this is often embodied in a collective of individuals, i.e. the public or other companies<sup>93</sup>. Kagan and Scholz categorize corporate offenders as “*amoral calculators, who break laws to maximize profit; political citizens, who disagree in principle with regulatory rules or laws; and the organizational incompetent, whose law-breaking is a product of mismanagement and incompetence.*”<sup>94</sup>”

## 2. Governmental crime

Violent crimes committed by individuals in the name of the government have caused millions of casualties in the last century alone<sup>95</sup>. Governments as criminal offenders are discerning, especially considering that governments are entrusted with power to protect society from such behaviour. But crime by governments is not always violent as it can also concern acts for political and economic gain. When we speak of governmental crime, the debate on legality and illegality of corruption becomes particularly relevant considering it are the governments who decide on what is legally constituted corrupt. In other words, when considering governments as offenders there is reason to adopt a definition of corruption beyond the legal approach. A distinction can be made between state crime, which is carried out on behalf of a state agency, or political white-collar crime, which is carried out by officials and politicians for direct personal benefit<sup>96</sup>. It is arguably the latter which best fits the EU context.

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<sup>93</sup> ETZIONI, A., and MITCHELL, D. (2007). *Corporate Crime*, in H. N. Pontell, and G. Geis (eds.), *International Handbook of White-Collar and Corporate Crime*. New York: Springer.

<sup>94</sup> 1983; 288

<sup>95</sup> FRIEDRICHS, D.O. (1996). *Trusted Criminals: White Collar Crime in Contemporary Society*. Belmont: Wadsworth Pub. Co. p. 127.

<sup>96</sup> FRIEDRICHS, D.O. (1996). *Trusted Criminals: White Collar Crime in Contemporary Society*. Belmont: Wadsworth Pub. Co. p. 128.

Political white-collar crime can be defined as “*governmental or political party officials engaging in illegal and improper activity for personal gain*” or gain on behalf of political parties<sup>97</sup>. The related activities aim for personal economic enrichment or for certain political advantages, such as to gain power of office. The financing of electoral processes and the related practices of lobbying are two parts of the political system that promote corruption, especially in democracies such as those in EU Member States. Large donations by private business to political parties (and candidates) are means to influence legislative decisions and/or to obtain lucrative public contracts. The line between a financial contribution (as a legal donation imbedding an unspoken understanding) and a bribe (as an illegal payoff for a public contract) is diffuse and highlights the importance of defining corruption. Regardless, it is in the realm of political white-collar crime, where the concept of political corruption is discussed.

### 3. *State-corporate crime*

The third concept discussed, concerns state-corporate crime, which combines corporate with governmental crime. The concept was introduced by Ronald Kramer and Ray Michalowski who defined this as “*illegal or socially injurious actions that occur when one or more institutions or political governance pursue a goal in direct cooperation with one or more institutions of economic production and distribution*”<sup>98</sup>. The relevance in the context for this study lies in challenges for society to manage complex economic sectors, such as energy and health care. In the EU a frequently chosen method for authorities is through public-private partnerships. Allowing private players to take part in these sectors could generate more economic efficiency given that slow public bureaucracy is substituted for fast profit seeking/business management. However, the specific services provided do not always lend themselves to market competition involving private players. For example, public utilities such as water management are essential for the wellbeing of the public and its distribution cannot be arbitrary. Bad governance could obstruct basic service delivery and have significant impact on the public trust and welfare. As a consequence there is political interest

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<sup>97</sup> FRIEDRICHS, D.O. (1996). *Trusted Criminals: White Collar Crime in Contemporary Society*. Belmont: Wadsworth Pub. Co. p. 147.

<sup>98</sup> KRAMER, R.C., and MICHALOWSKI, R.J. (1990). State-corporate crime. A paper presented at the Annual Meeting of the American Society of Criminology, November 7-12. p. 1.

in the good functioning of these sectors; hence governments resort to a form of interference in the markets.

Limiting competition in utilities markets might be necessary but this comes with the risk of undue influence on regulatory decisions by the private sector that would want to influence these decisions. Excessive private influence could result in decisions taken based on private rather than public interests, so-called regulatory capture. This capture could occur before or after the laws have been designed. In case the political elite is involved in securing the private interest, state capture is at risk. As a consequence of the eminent risk of governance failure in case of private-public partnerships, there is need for solid procedures. Supranational institutions such as the EU could address this issue.

Concessions contracts are a useful tool to balance the political sensitivity of public utilities service delivery with the opportunity to let the free market generate welfare. Its use allows for regulating an economic sector in order to protect consumers. However, the concessions market is not unfamiliar with irregularities involving undue political influence and collusion. The European Commission identified various sectors vulnerable for breaches in competition laws, such as the financial, pharmaceutical, energy and telecommunications sectors<sup>99</sup>. Their vulnerability lies in the fact that often some form of government interference is desired. First of all, the concession markets, being economies of scale, do not necessarily benefit from competition. Secondly, their provided services are essential to society and, thirdly, capital investment could depend largely on public funding. For public procurement of utilities, transparency is important but above all professionalism to ensure that long-term concession contracts are properly managed. Procurement officials need to manage complex processes, where close collaboration with the private sector is protracted and the risk of collusion increases. As a result, authorities have established specific controls, training and integrity mechanisms, such as codes of conduct, to guide officials and prevent corruption. At the same time, the private stakeholders involved in providing public services need to uphold the expectations of the people. In order to meet these expectations, quality needs to be delivered and potential reputations risks avoided. Consequently, companies have increasingly

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<sup>99</sup> EUROPEAN PARLIAMENT (2013). *Competition: Antitrust Sector Inquiries* [WWW]. Available from: [http://ec.europa.eu/competition/antitrust/sector\\_inquiries.html](http://ec.europa.eu/competition/antitrust/sector_inquiries.html) [Accessed on 03-06-2013].

introduced integrity standards, such as codes of conduct, whistleblowing and other compliance mechanisms.

#### 4.1.3 Between petty, grand and systemic corruption

As we have seen above, corrupt behaviour can imply the abuse of public power as well as private power. Profits from corruption can be kept by offenders (predatory) or shared with others (cooperative)<sup>100</sup>. The motivation of corrupt behaviour can be instrumental or affective. The former refers to a direct exchange of power, the latter to an indirect exchange of power. For example, a favour is transferred to a close affiliate such as the case for illegal political party financing. Common distinction is made between petty corruption, grand corruption and systemic or endemic corruption.

##### 1. *Petty corruption*

Petty corruption, also described as administrative corruption, refers to everyday corruption that takes place at the bottom of the chain where the civil servant meets the citizen<sup>101</sup>. Petty corruption often occurs at the stage of implementation of laws, rules and regulations. Rose-Ackermann (2006) refers to low-level corruption that is susceptible to several generic situations. For example, in a system where an official has the discretion to assign scarce public benefit, but is subject to quality control, a scenario is created in which qualified applicants with the highest willingness to pay and the fewest scruples will be able to get the benefit. The problem in such a scenario is that qualified applicants with high integrity standards are excluded. Transparent competitive bidding processes could tackle such a situation by simply selling the benefit to the highest bidder. Another scenario described by Rose-Ackermann (2006) refers to a situation in which low-level officials are requested to select qualified applicants but are not subject to control. Scarcity of public benefits in this case do not matter because without any quality control, the official can allocate in return for a bribe the public benefit to both qualified and unqualified applicants. The amount of corruption will in such a case depend on whether qualified applicants with integrity are able to approach an honest official instead. According to Rose-Ackermann (2006), this scenario

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<sup>100</sup> ZIMRING, F.E., and JOHNSON, D.T. (2007). *On the comparative study on corruption*. In International Handbook of white-collar crime and corporate crime, eds. H.N. Pontell and G. Geis. New York: Springer.

<sup>101</sup> ACKERMANN, R. (2006). International Handbook on the economics of corruption

can apply to public contracting in which a procurement official can collect bribes in return for a public contract. Control over the procurement official is limited as possible negative consequences of the transaction might be difficult to detect or will only reveal with time (i.e. once a poorly constructed building collapses). Officials collecting bribes might do this purely for personal gain and do not share in profits (predatory structures). The third scenario refers to the bureaucratic process that can create opportunities for corruption. For example, facilitation payments are transfers in which lower-level officials are paid a small amount to accelerate a decision for something that the payer would have the right to in any case (i.e. a building permit).

## 2. *Grand corruption and endemic corruption*

The involvement of top-level public officials and members of senior management of businesses characterize grand or political corruption. The bribes and financial benefits are often bigger but more importantly; the spoils from the corrupt act have greater consequences. For example, political corruption might influence the decision-making process during the procurement needs assessment stage, which results in unnecessary procurement. There is no clear division between where grand corruption begins and petty corruption ends. For example, offenders might collect bribes at lower levels and channel these through to high-level officials or to political party structures (cooperative structures).

Rose-Ackermann (2006) describes how the public sector can be organised as a rent-extraction machine through large-scale corrupt systems. For example, top-level officials collaborate with one specific company, *de facto* ensuring a monopoly on the market. At this level there could be some form of capture in which it is unclear who is running things. A second scenario by Rose-Ackermann concerns corrupt electoral systems in which money determines the outcome. Corruption can undermine and circumvent limits on political party financing. The third scenario relates to government that can use public procurement as a way to collect kickbacks from companies. Apart from procurement of works, goods and services, also concession contracts (i.e. for the exploitation of natural resources) are important, as well as privatization of state-owned companies.

The levels of grand corruption can become endemic when the state is captured by private interest. This brings us to the third classification of corruption, systemic corruption. This is a

form integrated as an essential aspect of the political, social and economic system. It is a situation in which institutions and processes of the state are used by corruptors on a continuous basis. Citizens are regularly confronted with corruption. The groups of corrupt decision-makers limit entry into economic activities and bind the interests of economic to political actors. Most petty and grand corrupt practices involve sporadic pursuit of private economic interest through the political process. In other words, economics corrupt politics. Although this can be damaging, systemic corruption's economic consequences can be bigger. Systemically corrupt governments limit access to markets and resources in order to ensure survival. By doing so, the interests of the ruling coalition are guaranteed. It destroys markets and prevents development. In other words, politics corrupts economics.

Again, here it is uncertain when grand corruption begins and systemic corruption ends. The Transparency International Corruption Perception Index considers countries endemically corrupt when scoring under 50 on a scale from 0 highly corrupt to 100 highly clean. Looking at the European Union, differences can be observed between the EU Member States with some scoring close to 50 or less. Most score above the 50 threshold, with Slovenia, Spain, Czech Republic, Malta, Latvia, Croatia, Hungary and Slovakia scoring between 51 and 60 on the 2015 CPI. Greece, Romania, Italy and Bulgaria score between 41 and 50, indicated levels of endemic corruption. Concerning petty corruption in Europe, the Transparency International Global Corruption Barometer in 2013 gives some insight, indicating that in some European Union Member States citizens are paying bribes for public services in the education system, judicial system, medical and health services, police, registry and permit services, utilities, tax, and land services<sup>102</sup>. On a global scale, the EU Member States score relatively well in the Transparency International perception studies. When looking at the National Integrity System Assessments of anti-corruption watchdog, the picture already becomes more nuanced, with significant systemic integrity challenges facing EU Member States<sup>103</sup>.

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<sup>102</sup> TRANSPARENCY INTERNATIONAL (2013). *Global Corruption Barometer 2013* [WWW]. Available from: <http://www.transparency.org/gcb2013/results> [Accessed on 14-04-2015].

<sup>103</sup> TRANSPARENCY INTERNATIONAL (2014). *Money, Politics, Power: Corruption risks in Europe* [WWW]. Available from: <http://www.transparency.org/enis> [Accessed on 14-04-2015].

#### 4.1.4 Balancing between legality and illegality

Various corruption methods are identified throughout this study. The following section presents some methods of particular relevance to corruption in public procurement.

##### 1. *Bribery*

Shichor and Geis (2007) note that key challenges with regard to bribery is that it is characterised by reciprocity and almost always a consensual act. Most countries have criminalised bribery but the ways bribery is perceived differs across the spectrum. For example, some consider bribery morally wrong as it gives one an unfair advantage over the other, while others consider bribery merely an economic transaction. Nonetheless, the legal definition most commonly used refers to: “<sup>104</sup>”.

Bribery violates the explicit or implicit trust bestowed upon a public official. Arnold Heidenheim distinguishes three bribery categories based on perception in countries<sup>105</sup>. “White bribery” refers to acts that are socially tolerated, often seen in societies based on family ties and patron-client relationships. “Grey bribery” is generally seen immoral by society but not by those offering and receiving *payments for a positively unlawful act; the imperfect performance of a duty; and failure to perform a required duty* the bribes. A striking example are facilitation payments. “Black bribery” acts are generally against the law, subject to punishment and perceived as such by most. Bribery can be explained by Cloward and Ohlin’s differential opportunity theory, which argues that persons need to possess the opportunities to influence decisions. Political lobbying, campaign funding and political party financing activities show similar characteristics of bribery but are commonly not considered illegal.

##### 2. *Political party financing*

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<sup>104</sup> SHICHOR, D., and GEIS, G. (2007). The Itching Palm: the crimes of bribery and extortion. In International Handbook of white-collar crime and corporate crime, eds. H.N. Pontell and G. Geis. New York: Springer.

<sup>105</sup> HEIDENHEIMER, A.J. (ed.) (1970). Political corruption: readings in comparative analysis. New York; Holt; Reinhart; Winston.

Various international organizations identify political party financing as a serious problem area associated with corruption and in particular bribery<sup>106</sup>. Throughout the EU, examples can be found of corruption in public procurement linked to financing of political parties. For example, parties seek control over procurement in order to finance themselves. Particular weakness lies in private players that seek to gain access to politicians and influence decision-making, including the awarding of public contracts, through financial donations. Such donations are mostly legal and regulated through national party financing legislation. Although not explicitly demanding political influence, these donations imbed an implicit understanding between the politician and the businessman that in case of decision-making, the individual interests are taken into account. When legal donations result in adjudication of public contracts this can be considered a bribe.

The fact that companies resort to donating funds to political parties implies a particular interest in maintaining political ties and confirms its benefit for private stakeholders. However, proving the latter is difficult as the impact of political donations on decision-making is difficult to measure. When asked, politicians will most likely deny to have taken a decision based on private corporate interests. After all, the legal consequences differ when accepting illegal donations without specifying the end goal or accepting illegal donations in return for a specific public contract. The prior can be considered as fiscal fraud, while the latter as bribery, generally a more serious crime. The same counts for procurement officials whom would most likely claim to have based their decisions on technical criteria and for the welfare of the general public.

### 3. *Lobbying activities*

The excessive influence of lobby groups could influence decision-making in favour of private interest to the expense of public welfare. Lobbying can also result in bias adjudication of public contracts, which could undermine procurement objectives such as value for money, effectiveness and efficiency and competition. Due to being part of the democratic process, lobby activities are often considered according to the law. However, public perception towards lobbying can be negative in which citizens see this as unethical and corrupt

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<sup>106</sup> OECD (2007). *Bribery in Public Procurement* [WWW]. Available from:

<http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/44956834.pdf> [Accessed 3-06-2013].

behaviour. Some international organisations have linked excessive lobbying activities of the financial institutions in order to promote risk-lending practices to the origin of today's economic and financial crisis<sup>107</sup>.

Since the establishing of the European Single Market, lobbying activities have increased significantly in the EU<sup>108</sup>. While the EU's competencies augmented to policy areas relating health, employment, environment, and consumer protection, the interest of the private economic operators to influence decision-making intensified. Estimated figures place over 5,000 special interest groups and 15,000 lobbyists in Brussels. The majority represent business and only one-fifth represent citizens and public organisations. The EU decision-making lends itself to lobbying as regulatory bodies rely on technical information from third parties due to relatively small budgets and sparse numbers of staff as well as the geographical spread of the Member States. Besides, EU decision-making is structurally complex and fragmented which provides for multiple channels to influence decision-making.

## 4.2 Causes of corruption

In line with the definitional problems when describing corruption, measuring the scale, and determining the methods of corruption, also different research perspectives aim to explain the causes of corruption. One dominant approach to studying corruption is the principal-agent theory, which emphasises rational choice of individuals. This approach has hence dominated the anti-corruption strategies adopted during the last decades, especially by the international

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<sup>107</sup> OECD (n.d.). *Fighting corruption in the public sector: Lobbying*. [WWW]. Available from: <http://www.oecd.org/gov/ethics/lobbying.htm> [Accessed 3-06-2013].

<sup>108</sup> See for example: TRANSPARENCY INTERNATIONAL (2015). *Lobbying in Europe: hidden influence, privileged Access* [WWW]. Available from:

[http://www.transparency.org/whatwedo/publication/lobbying\\_in\\_europe](http://www.transparency.org/whatwedo/publication/lobbying_in_europe) [Accessed on 14-10-2016].

TRANSPARENCY INTERNATIONAL EU (n.d.). *EU Lobbying* [WWW]. Available from:

[http://www.transparencyinternational.eu/focus\\_areas/lobbying-the-eu/](http://www.transparencyinternational.eu/focus_areas/lobbying-the-eu/) [Accessed on 14-07-2016].

LOBBYFACTS.EU (n.d.). *Lobbyfacts.eu* [WWW]. Available from: <https://lobbyfacts.eu/> [Accessed on 12-10-2016].

CORPORATE EUROPE OBSERVATORY (n.d.). *The power of lobbies* [WWW]. Available from:

<https://corporateeurope.org/power-lobbies> [Accessed on 12-10-2106].

community<sup>109</sup>. However, failure to address (especially systemic) corruption has shifted the debate pointing to corruption as a collective action problem. The main point of discussion is the assumption of principal-agent theories that there are “principled principles” that are willing to hold agents accountable. This is contested by collective action theories that refer to systemic corruption scenarios in which principles can share in the proceeds of corruption or are simply indifferent about the issue. The lack of normative constraints implies that existing societal norms supporting ethical universalism do not work<sup>110</sup>. Normative constraints endorse ethical universalism and permanently and effectively monitor deviation from norms. Instead, with the lack of “principled principles”, particularism creates a scenario in which allocation of public resources is based on a connection between the one in power and the one receiving the public goods. For the purpose of this study it is important to consider both the principle-agent theory as well as collective action in an EU context. We could argue that the two approaches are not incompatible especially when aiming to address corruption as a cross-border problem in the EU. It is safe to say that the diversity in the EU makes that there is no one-size-fits-all solution to corruption. However anti-corruption measures based on principle-agent might work for some countries suffering less political corruption (for example northern European countries), while collective action initiatives are more adequate for others suffering more systemic forms of corruption (for example eastern European countries).

This section will start by discussing the main approaches that aim to explain criminal behaviour. By considering the social processes that lead to white-collar criminal behaviour, we should be able to better understand the two dominant approaches to anti-corruption. First, the relation between white-collar crime and corruption will be discussed. Studying white-collar crime will help us to look apart from the demand-side of corruption (which focuses

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<sup>109</sup> PERSSON, A., ROTHSTEIN, B., and TEORELL, J. (2013). *Why anti-corruption reforms fail – Systemic corruption as a collective action problem* [WWW]. Governance, Volume 23, Issue 3, p. 343-558. Available at: [https://www.researchgate.net/publication/264645578\\_Why\\_Anti-Corruption\\_Reforms\\_Fail-Systemic\\_Corruption\\_as\\_a\\_Collective\\_Action\\_Problem](https://www.researchgate.net/publication/264645578_Why_Anti-Corruption_Reforms_Fail-Systemic_Corruption_as_a_Collective_Action_Problem) [Accessed on 16-01-2016].

MARQUETTE, H., PEIFFER, C. (2015). *Corruption and collective action* [WWW]. Available from: <http://www.dlprog.org/research/corruption-and-collective-action.php> [Accessed on 16-10-2016].

<sup>110</sup> MINGIU-PIPPIDI, A., and DADASOV, R. (2016). *Measuring control of corruption by a new index of public integrity* [WWW]. Available from: [www.againstcorruption.eu](http://www.againstcorruption.eu) [Accessed on 13-10-2016].

strongly on the public sector and its institutional structure) also at the supply-side of corruption (which places emphasis on corporate criminal behaviour). For the purpose of looking at procurement corruption it is important to understand why and how companies and their workers come to collude or bribe officials for public contracts. It is also the research on criminal behaviour that takes the leap between micro and macro levels to meso levels of analysis. This allows us to better situate the debate between the principal-agent and collective actions theories to explain corruption.

#### 4.2.1 Social processes leading to corruption

For criminologists, corruption crime falls within the research area of white-collar crime. Since the initial introduction of the concept of white-collar crime by Edwin H. Sutherland (1883-1950), a variety of closely-related concepts have been discussed by criminologists, such as: corporate crime, occupational crime, governmental crime, state-corporate crime, and entrepreneurial crime, etc.... According to Zimring and Johnson (2007), research on white-collar crime can be relevant to the study of corruption given similarities between crimes and its offenders, as well as from the fact that both white-collar crime and corruption suffer research challenges when trying to define concepts<sup>111</sup>.

Gobert and Punch (2003) note that a company can provide the context, opportunities, means and incentives for criminal behaviour. For example, political party donations or active lobby activities of companies to influence legislators give reason to believe that companies aim to control the legal and regulatory environment in which they operate. The opportunities to deviate are created in a business environment that constantly tries to explore new market opportunities created by regulatory weaknesses<sup>112</sup>, such as those in public procurement legislation. Conventional crimes (for example burglary or assault) are considered more accessible for larger groups of people (such as groups of young people), require for many types a limited skill set or planning, and can be rather opportunistic in nature<sup>113</sup>. Corporate

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<sup>111</sup> ZIMRING, F.E., and JOHNSON, D.T. (2007). *On the comparative study on corruption*. In International Handbook of white-collar crime and corporate crime, eds. H.N. Pontell and G. Geis. New York: Springer.

<sup>112</sup> GOBERT, J., and PUNCH, M. (2003). *Rethinking Corporate Crime*. London: Butterworths/LexisNexis. p. 299.

<sup>113</sup> MAGUIRE, M. (1997). *Crime statistics, patterns, and trends: Changing perceptions and their implications*. In The Oxford Handbook of Criminology, eds. M. Maguire et al. Oxford: Clarendon Press.

crimes on the other hand are often restricted to a selection of white-collar executives that are in a position within the company to exploit unique opportunities<sup>114</sup>. Sutherland (1947) developed the social processing theory of differential association<sup>115</sup>. This theory suggests that white-collar workers operate in an environment that provides learning opportunities for law-breaking behaviour. Whether persons adopt criminal behaviour, when associated with other persons that show such behaviour, depends on factors such as the intensity, frequency, and duration of contact. The intensity, frequency, and duration of contact between the persons allows for an environment in which techniques are learned on how to commit criminal acts. The American psychologist, B.F. Skinner (1904-1990) adds to this the social process theory of operant learning. This refers to criminal behaviour that is learned and continues if there are no negative consequences (such as punishment) that outweigh the positive consequences (such as economic gain or the approval of the business environment in which one operates). Negative consequences can break a pattern of deviant behaviour. The operant learning theory also can be linked to repeat offenders as the absence of identifiable consequences can lead to operant behaviour. For corruption this would mean that once it goes unnoticed there is reason to believe the pattern will not be broken and behaviour does not self-regulate. A limitation to the social learning and process theories according to Goode (2008) is that learning criminal behaviour through the interaction with others does not address criminal behaviour of those that act on an individual basis, nor the fact that white-collar criminals might in other walks of life behave in line with the law<sup>116</sup>. According to Geis and Goff (1987), it does neither address the structural origin or cause of criminal behaviour, but rather focuses on the process of involvement in such behaviour<sup>117</sup>.

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<sup>114</sup> GOBERT, J., and PUNCH, M. (2007). *Because they can—Motivations and intent of whitecollar criminals*. In *International Handbook of White-Collar and Corporate Crime*, eds. H. Pontell and G. Geis. New York: Springer.

CLINARD, M., and YEAGER, P. (1980). *Corporate Crime*. New York: Free Press.

<sup>115</sup> SUTHERLAND, E. H. (1947). *Principles of criminology* (4th ed.). Philadelphia: Lippincott.

<sup>116</sup> GOODE, E. (2008). *Out of Control: Assessing the General Theory of Crime*. Stanford: Stanford Social Sciences.

<sup>117</sup> GEIS, G., and GOFF, C. (1986). Edwin H. Sutherland's white-collar crime in America: An essay in *historical criminology*. *Criminal Justice History* 7: 1–31.

This brings me to the theory of anomie developed by Robert Merton (1957)<sup>118</sup>. Merton's theory builds on Émile Durkheim's concept of anomie, which refers to social instability caused by the erosion of standards and values. Merton refers to societal situations in which material success is promoted but means to achieve this are not equally accessible for all. As a consequence, some pursue material success through criminal behaviour. For example, this has been observed for former Soviet states in Eastern Europe that made the transition from communism to free-market based economies<sup>119</sup>. The sometimes-chaotic societal change in those countries, in combination with opportunities to plunder public assets and total lack of regulation or control, resulted in 'innovative' ways (such as corruption, fraud and embezzlement) for white-collar criminals to enrich. Anomie could explain why companies resort to illegal means to achieve goals that cannot be achieved legally. However, Merton's theory is challenged by the fact that white-collar criminals often do have the means to achieve the desired societal goals and therefore fall outside of the scope of his explanation which seems more suited for explaining crime of socio-economically lower classes that want to achieve wealth.

The economic (general) strain theory has also been used to explain behaviour of corporations that resort to criminal behaviour under economic pressure in a climate of competition. Apart from the need to economically perform to survive, Robert Agnew's (1992) strain theory also explains more emotional decisions to drive for criminal behaviour, for example when companies resort to crime due to stress they experience from competitors<sup>120</sup>. Such a scenario could be present when looking at the integration of the EU single market. Finally, Lilly, Cullen and Ball (2011) refer to a breakdown of conventional behaviour in times of rapid social change<sup>121</sup>. This brings us to the debates concerning the question why normal counteracting forces in the private or public sector environments do not prevent persons from

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<sup>118</sup> MERTON, R. (1957). *Social theory and anomie*. *American Sociological Review* 3: 672–682.

<sup>119</sup> NOVOLSELEC, P., ROKSANDIC VIDLICKA, S., and MARSVELSKI, A. (2015). *Retroactive prosecution of transitional economic crimes in Croatia*. In *The Routledge Handbook of White-Collar and Corporate Crime in Europe*, eds. J. Erp et al. p. 565.

<sup>120</sup> AGNEW, R. (1992). *Foundation for a general strain theory of crime and delinquency*. *Criminology* 30(1): 47–87.

<sup>121</sup> LILLY, J., CULLEN, F., and BALL, R. (2011). *Criminological Theory: Context and Consequences*. Thousand Oaks, CA: SAGE Publications.

committing corruption crimes. Grasham Sykes and David Matza (1957) remind us that offenders are generally accepting of social norms and values but deviate under certain circumstances<sup>122</sup>. This way people rationalise criminal behaviour based on good self-perception. Vaughan (2007) refers to normalization of deviance, which shows a pattern of behaviour that is perhaps perceived by outsiders as wrong but not in the eyes of those taking decisions<sup>123</sup>. The difference with Sykes and Matza's views here is that the offenders are not justifying behaviour they know is wrong, but actually believe what they do is right until it backfires. "*Deviant actions are viewed as normal because they fit with and conform to cultural mandates of the group to which the actor belongs*"<sup>124</sup>. Sykes and Matza's techniques of neutralization are supposed to follow the differential association patterns by Sutherland and distinguish five types: denial of responsibility; denial of substantial harm; denial of victimization; condemnation of law enforcement; and invocation of higher principles. Techniques of neutralization are in a sense counter to the theory of delinquent subculture, which argues that criminals have their own values and rules that differ from the rest of society<sup>125</sup>. While their focus is primarily on conventional crime, Steven Box (1983) looked at the corporate environment and argued that offenders could deny responsibility by claiming ambiguity in the law, arguing the act was accidental or shifting blame to third parties<sup>126</sup>. In addition, Box notes that corporate offenders might argue that their acts are economically beneficial and deny any victims exist as a result of their behaviour. Alternatively, corporations might criticise the law and law enforcement by claiming this goes against the rules of the free market. Finally, Box argues that corporate offenders might use the neutralization technique of invoking 'higher loyalties'; such as affirming they service the needs of the corporation and its stockholders. Engaging in such techniques serves to facilitate the creation of sub-culture behaviour, which according to Shover and Hochstetler (2006), can

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<sup>122</sup> SYKES, G., and MATZA, D. (1957). Techniques of neutralization: A theory of delinquency. *American Sociological Review* 22(6): 664–670.

<sup>123</sup> VAUGHAN, D. (2007). Beyond macro- and micro-levels of analysis, organizations, and the cultural fix. In *International Handbook of White-Collar and Corporate Crime*, eds. H.N. Pontell and G. Geis.

<sup>124</sup> SYKES, G., and MATZA, D. (1957). Techniques of neutralization: A theory of delinquency. *American Sociological Review* 22(6): 664–670.

<sup>125</sup> VAUGHAN, D. (2007). *Beyond macro- and micro-levels of analysis, organizations, and the cultural fix*. In *International Handbook of White-Collar and Corporate Crime*, eds. H.N. Pontell and G. Geis.

<sup>126</sup> BOX, S. (1983). *Power, Crime and Mystification*. London: Travistock.

be described as a culture of non-compliance<sup>127</sup>. The type of rationalisation used by offenders might differ per offense type.

Cloward and Ohlin (1960) present the differential opportunity theory, which sees criminal behaviour in function of the structure of opportunity<sup>128</sup>. To this end, the Australian criminologist John Braithwaite (1992) added to this that especially white-collar criminals have in addition the skills to create such opportunities<sup>129</sup>. This touches upon the conception that white-collar crime is a response to a situation in which benefits of crime outweigh behaving within the boundaries of the law. In turn, this reflects on the regulatory environment, which aims to ensure corporate compliance. This environment adds to the socialization of opportunities also the fact that regulations, and in particular the threat of punishment, influence criminal opportunity.

Control theorists use a different lens to explain corporate criminal behaviour. Their focus shifts to questioning why persons *do not* commit a crime in spite of the right opportunity. The influential American sociologist, Travis Hirschi and his social control theory has been used to explain how persons with strong attachment to others, commitment to achievement, involvement in conventional activities, and belief in moral validity of rules, are restrained from engaging in criminal activity<sup>130</sup>. The belief component is criticised when looking at white-collar crime, especially in relation with the culture of non-compliance. If criminal behaviour is part of the culture within a business environment, the moral rationality of the law is constantly violated. In addition, people perceive the gravity of crime types differently, for example between economic crimes and violent crimes. Also between corporate offenders and the general public there are differences in perception. As discussed earlier in this study, the difference between illegal and unethical behaviour is blurry. Hirschi, together with

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<sup>127</sup> SHOVER, N., and HOCHSTETLER, A. (2006). *Choosing White-Collar Crime*. Cambridge, UK: Cambridge University Press.

<sup>128</sup> CLOWARD, R., and OHLIN, L. (1960). *Delinquency and Opportunity: A Theory of Delinquent Gangs*. Glencoe, IL: Free Press.

<sup>129</sup> BRAITHWAITE, J. (1992). *Poverty, power, white-collar crime and the paradoxes of criminological theory*. *Australian & New Zealand Journal of Criminology* 24(1): 40–58.

<sup>130</sup> HIRSCHI, T. (1986). On the Compatibility of Rational Choice and Social Control Theories of Crime (From Reasoning Criminal, P 105-118, 1986, Derek B Cornish and Ronal V Clarke, eds. - See NCJ-102282).

Gottfredson, later developed the theory of self-control, which argues that low self-control causes persons to commit crimes (1989)<sup>131</sup>. Charles Tittle (1995) adds to this that also too much control can lead to crime and therefore control should be balanced<sup>132</sup>. Tittle's control balance ratio refers to the amount of exercised control versus the amount of imposed control. Both a surplus and a deficit could cause criminal behaviour. This can be related to the scenario described by Rose-Ackerman concerning the bureaucratic process.

Finally, it is important to address the economic theory of crime in which the rational choice model embodies a commonly accepted explanation of human criminal behaviour<sup>133</sup>. Criminal offenders are seen to plan and reason, adapt to circumstances and weigh benefits against costs. The low likelihood of sanctions in combination with high-expected gains increases the likelihood of criminal behaviour. The rational choice model for criminal justice originates in the work of Italian nobleman Cesare Beccaria (1774), as well as the English Philosopher Jeremy Bentham (1789) who developed the utilitarian view that people engage in a calculus to maximise profits and minimize pain. More recent use of the model comes from Gary Becker (1968) who argues that there is no difference between criminal and noncriminal behaviour and that the main reason to choose one or the other relates to the costs-benefit calculus. A subtype of the rational choice model is deterrence, which argues that criminal behaviour is inhibited due to the possible punishment that is associated with this. While deterrence in the time of Beccaria and Bentham looked at the threat of legal punishment, modern day deterrence also looks at informal types. Formal punishments include fines, and imprisonment while informal punishments could include shame, guilty feelings and embarrassment.

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<sup>131</sup> HIRSCHI, T., and GOTTFREDSON, M. (1989). The significance of white-collar crime for a general theory of crime. *Criminology* 27: 359–371.

<sup>132</sup> Tittle, C. (1995). *Control Balance: Toward a General Theory of Deviance*. Boulder, CO: Westview.

<sup>133</sup> CLARKE, R.V., and FELSON, M. (1993). Introduction: Criminology, Routine Activity, and Rational Choice. In *Routine Activity and Rational Choice: Advances in Criminological Theory*, R.V. Clarke and M. Felson, Volume 5, p 1-14, 1993.

HIRSCHI, T. (1986). On the Compatibility of Rational Choice and Social Control Theories of Crime. In *Reasoning Criminal*, D.B. Cornish and R.V. Clarke, eds, p 105-118, 1986.

In the range of theories presented above; although they each offer an explanation by which to explain behaviour of white-collar crime, not only do they vary in their scope and testability but it is clear that no one theory fits all solutions to combatting corruption. As Vaughan (2015) points out, “*in the historical trajectory of theories of cause in the sociology of crime and deviance [...], each theory of cause suggested a particular strategy of control that targeted the causal elements identified in that theory*”<sup>134</sup>. Regardless of this, Vaughan does note that strategies for control of white-collar crime should target the causes of a problem. Responses may address social control, opportunistic structures or cognitive states<sup>135</sup>. In addition, the response to white-collar crime, as with most crimes, run the gambit of being preventative in orientation; creating regulatory controls, or attempting to apply punitive sanctions against corporate offenders. Arguably, the approach against corruption should include a variety of measures, together aiming to reduce the motivation for committing the act, address the conditions that provide for opportunity and promote a moral climate that does not tolerate such behaviour<sup>136</sup>.

#### 4.2.2 Principal-agent perspective on corruption

From the macro- and micro-level connections, we now add meso-levels of analysis to better understand the causes of corruption. Diane Vaughan argues that “*a social actor’s position in a structure affects that actor’s understandings, choices, actions, and outcomes*”<sup>137</sup>. Vaughan in particular refers to new institutionalism and the socially embedded character of economic action as key theoretical approaches to better understanding this context. The social actor could be an individual, organisation or network; the structure could be the social actor’s location such as its occupation or institutional environment. When introducing the concept ‘white-collar crime’, Sutherland focused on individuals of high status and this way turned away the focus from the organisations as violators. Not until the 1960s, this turned when

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<sup>134</sup> VAUGHAN, D. (2007). *Beyond macro- and micro-levels of analysis, organizations, and the cultural fix*. In International Handbook of White-Collar and Corporate Crime , eds. H.N. Pontell and G. Geis.

<sup>135</sup> FRIEDRICHS, D.O. (1996). *Trusted Criminals: White Collar Crime in Contemporary Society*. Belmont: Wadsworth Pub. Co. p. 347.

<sup>136</sup> REISS, A.J. (1966). The study of deviant behaviour: where the action is. *Ohio Valley Sociologist* 21, 1966, pp- 60-66.

<sup>137</sup> VAUGHAN, D. (2007). *Beyond macro- and micro-levels of analysis, organizations, and the cultural fix*. In International Handbook of White-Collar and Corporate Crime , eds. H.N. Pontell and G. Geis.

Albert Reiss (1966) initiated the concept of organizational deviance<sup>138</sup>. Christopher Stone's work was important for initiating the concept corporate social responsibility, in which he took into account complete organizational structures. The work of Sally Simpson<sup>139</sup>, as well as that of Marshall Clinard and Peter Yeager<sup>140</sup>, looked at violations and industries. These, and other, scholars have since tried to understand the criminal decision-making of people in their organisational roles. People, who are well-educated, have opportunities and are generally law-abiding citizens.

Corruption is generally seen as a social phenomenon but originates from the decision of individuals, groups of individuals and institutions. In order to understand corruption in public procurement, the following section will outline the theoretical framework from an organizational angle, which with an eye on EU economic, political and institutional integration is of relevance.

### *1. Institutionalism*

After the Second World War the study of political science through a behavioural or rational-choice approach gained ground. The shift originated from criticism on studying the formal institutional structures in a comparative perspective, an approach coined "old-institutionalism". This approach studied the legal and administrative structures of governments with as a primary objective to provide an explanation of its functioning and to what degree it lived up to democratic norms<sup>141</sup>. However, the approach failed to address more informal relations between the institutions and the government. It failed to understand the behaviour of institutions and in particular that of the individuals inside them.

After several decades of dominant behavioural and rational-choice political science research, institutions found their way back. A new approach to institutional behaviour was promoted

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<sup>138</sup> REISS, A.J. (1966). The study of deviant behaviour: where the action is. *Ohio Valley Sociologist* 21, 1966, pp- 60-66.

<sup>139</sup> SIMPSON, S. (1986). The Decomposition of Anti-Trust: Testing a Multi-level Longitudinal Model of Profit Squeeze," *American Sociological Review* 51, 1986, pp. 859–79.

<sup>140</sup> MARSHALL, B., CLINARD and Yeager, P.C. (1980). *Corporate Crime*. New York: Free Press.

<sup>141</sup> RHODES, R. (1995). The Institutional Approach, in Marsh, D. and Stoker, G. (eds). *Theory and Methods in Political Science*, London: Macmillan.

on the outset of the economic crisis in the 1980s. This approach was coined “new-institutionalism”. Especially the different ways the countries responded to the challenges posed by the crisis could be explained by institutional factors<sup>142</sup>. More importantly, scholars reckoned the increasing importance (and complexity) to collective life of social, political and economic institutions<sup>143</sup>. European integration could be seen as a core instigator for this.

Numerous scholars have recognised reinstating the institution as an essential variable in understanding economic development and the functioning of the political system since.<sup>144</sup> Also the World Bank recognized that the function of norms and rules on the state level and the organisations that implement them are key for economic development and social cohesion.

Three dominant (and for this study relevant) schools of new institutionalism emerged, namely the normative, rational-choice and historical. Normative and sociological institutionalists emphasise the “shaping role” of institutions, which follows a perspective in which participating actors base their decisions on the appropriateness of the response to the given situation. March and Olsen (1984) refer to this as the “logic of appropriateness”<sup>145</sup>. It parts from an open-ended approach to defining the preferences of the participating actors. Despite institutional constraints, the actors do have the ability to take decisions. This way normative institutionalism in a sense takes rationality serious by permitting the identification of preferences through rational but embedded models. However, the ways in which to make

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<sup>142</sup> THELEN, K., STEINMO, S. (1992). Historical Institutionalism in Comparative Perspective, in THELEN, K. and Steinmo, S. (eds). Structuring Politics: Historical Institutionalism in Comparative Analysis, Cambridge: Cambridge University Press.

<sup>143</sup> MARCH, J., OLSEN, J. (1984) The New Institutionalism: Organisational Factors in Political Life, *American Political Science Review*, 78: 734-49.

<sup>144</sup> NORTH, D. (1990). *Institutions, Institutional Change, and Economic Performance*. Cambridge: Cambridge University Press.

MARCH, J., OLSEN, J. (1989). *Rediscovering Institutions: The Organizational Basis of Politics*. New York: The Free Press.

WILLIAMSON, O (2000). The New Institutional Economics: Taking Stock, Looking Ahead, in the *Journal of Economic Literature*, volume 38, No 3: 595-613.

<sup>145</sup> MARCH, J., OLSEN, J. (1984). The new institutionalism: organizational factors in political life, in *American Political Science Review*, No 78, pp. 734-749.

decisions differs. For the normative institutionalism it is important to understand the ideas which lie at the cause of certain behaviour and to understand why certain decisions are preferred over others.

An important concept in historical institutionalism is so-called “path dependence”. This concept is crucial in understanding European integration and with this the designed regulation relating public procurement. Path dependence originates from the historical approach in which conditions under which a trajectory has developed have been essential in shaping its path<sup>146</sup>. In other words, once actors have ventured down a road, they find it difficult (if not impossible) to turn back. For example, an economic crisis in relation with political disparity but bureaucratic unity results in steps towards European integration rather than fragmentation.

Rational choice institutionalism assumes that behaviour and decisions of the actors are rational. Their behaviour is selfish and self-interested. Their preferences are determined by the institutional context in which their choices are taken. The institution functions as a structure that provides incentives or disincentives for certain choices based on its formal and informal rules. Institutions do not only cause certain behaviour but also are an effect of behaviour. They are shaped and changed according to the selfish needs of the participating actors. Historical institutionalists contest this notion by questioning the likelihood of participating actors having influence on the shaping of institutions<sup>147</sup>. They argue that individuals are embedded in many social, economic and political relationships and that it is beyond their control to be rational. In other words, their rationality is dependent on the environment.

The importance of rational choice institutionalism for studying corruption lies in its reference to institutions reducing transaction or information costs associated with market functioning. Also, institutions can support contract enforcement and monitoring and this way avoiding

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<sup>146</sup> PIERSON, P., SKOCPOL, T. (2002). Historical Institutionalism in Contemporary Political Science, in Ira Katznelson and Helen V. Milner (eds). *Political Science: State of the Discipline*. New York: W.W. Norton: 693-721.

<sup>147</sup> HALL, P., TAYLOR, R. (1996). Political Science and the Three New Institutionalisms, *Political Studies*, XLIV: 936-57.

that corporations withdraw from the open economy into the shadow economy<sup>148</sup>. An important related concept is the principal agent model.

This model adopts that a “principal” enters into an agreement (contractual) with an “agent”. Responsibility is delegated to the agent whom fulfils an important role for the principal. The power that comes with this could cause problems as the agent might accumulate disproportionate amounts of information. As a consequence the agent could enter into self-interested behaviour conflicting with the principal. The question is now how this behaviour can be controlled. The principal-agent model of corruption falls under the neo-institutional economical theories. It parts from the notion that institutional factors affect the decisions of individuals. Institutions structure and bound the decisions made by individuals, in other words, collectively bind the working rules. Within neo-institutional economics, this translates to three branches: the property rights branch; transaction costs branch; principal-agent branch.

The property rights branch refers to the notion that individuals base their economic decisions on the existing property rights of the goods. Institutions include these rights and provide individuals with means to defend themselves against possible infringements. The transaction costs branch refers to costs involved when allocating resources as well as the structure of economic organisation. Such costs can be incurred *ex ante* when negotiating an agreement or *ex post* when executing the contract. This concept will be further explained after which the principal-agent approach to corruption will be discussed in more detail.

## 2. *Transaction costs branch*

Alina Mungiu-Pippidi (2013) shows that there is a correlation between “red tape” and corruption as well as trade barriers and corruption<sup>149</sup>. According to her research, excessive

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<sup>148</sup> ZALD, M. (1987). The New Institutionalism in Economics’, *American Journal of Sociology*, 93: 701-8.

WILLIAMSON, O. (1985). *The Economic Institutions of Capitalism*, New York, Free Press.

NORTH, D. (1990). *Institutions, Institutional Change and Economic Performance*. Cambridge: Cambridge University Press.

<sup>149</sup> MUNGIU-PIPIDI, A. (2013). The good, the bad and the ugly: Controlling corruption in the European Union [WWW]. Available from: <http://www.againstcorruption.eu/wp-content/uploads/2013/03/ANTICORRP-Policy-Paper-on-Lessons-Learntfinal.pdf> [Accessed on 02-06-2013].

regulation facilitates administrative discretion and this way corrupt behaviour. The countries in the EU that score low on control of corruption, according to the World Bank Governance Indicators, score at the same time worse in the International Bank for Reconstruction and Development index on ease of doing business. The same counts for data concerning control of corruption and time to import based on data from the World Bank. This brings us to the bargaining model of bribery described by Fisman and Gatti<sup>150</sup>. It considers that a bargaining situation occurs between a businessman and a public official. The former is confronted with a number of regulatory requirements, which bear certain costs. Such regulatory requirements could be, for example, upholding social and environmental standards. The company could either comply with these requirements or pay a bribe in order to avoid them. The official might be able to skew the regulation without bearing any costs. In other words, a bribe agreement between the official and the company benefits both parties. However, important is the time spent on negotiating the bribe. Time costs will most likely be lower in some bureaucracies given that the time spend to come to such an agreement is less. On the other hand, negotiations could also be complicated by the fact that companies function as economies of scale and therefore seek operational efficiency. However, as shown by the data from Mungiu-Pippidi, excessive “red tape” does correlate with high levels of corruption. Such barriers force businesses to operate outside the official economy.

The costs of exchange refer to the opportunity costs (such as money, time and goods) of an individual to obtain a specific good using a given form of exchange within a given institutional setting. These costs could be non-market oriented and refer to resources spent in cutting “red tape” and bribing officials. Lambsdorff (2002) details how this behaviour results from<sup>151</sup>:

- Searching for the appropriate partner; and
- Designing an enforceable contract that will minimize opportunistic behaviour during and after the corrupt transaction.

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<sup>150</sup> FISMAN, R., GATTI, R. (2002). Decentralization and corruption: evidence across countries. *Journal of Public Economics* 83 (2), 325–345.

<sup>151</sup> LAMBSDORFF, J. (2002). Making corrupt deals: contracting in the shadow of the law. *Journal of Economic Behaviour and Organization*, Volume 48, No 3, pp. 221-241 (21).

The latter is of special importance as it refers to the increasing interdependence between the corrupted and corruptor.

Lambsdorff (2002) distinguishes between market corruption and parochial corruption<sup>152</sup>. The former qualifies as a competitive form with relatively high transparency. The associated relations often focus on petty corrupt acts between contractors. Actors that want to commit illegal practices, such as facilitation payments for a speedy delivery of a building permit. They are confronted with transparent price systems and the opportunity to choose between suppliers of the adequate service<sup>153</sup>. Parochial corruption does not foresee in a simple choice of contractors. It experiences limited entry and exit and therefore choosing a partner in crime is a careful process. Consequently the transaction costs for parochial corruption are higher. Its process limits competition given that *“the number of contractors sought can be assumed to be optimal once the marginal transaction costs of searching for another partner are equal to the expected gains resulting from a potential better deal with another competitor”*<sup>154</sup>. With higher costs, less potential partners will be sought. After all, efforts are required to search for potential partners and carefully explore their willingness to engage in corrupt business.

According to Lambsdorff (2002), three stages exist where transaction costs can arise<sup>155</sup>. First, the stage in which information concerning the required service is gathered in order to initiate the contract. At this point no resources are allocated yet and therefore the proceeds cannot yet be collected. Second, arrangements have to be made regarding the execution and enforcement of the contract. Thirdly, as opposed to legal business dealings, the transaction is not finished after the service has been delivered. The corrupt act binds the parties as both possess damaging information on the other.

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<sup>152</sup> Ibid.

<sup>153</sup> LAMBSDORFF, J. (2002). Making corrupt deals: contracting in the shadow of the law. *Journal of Economic Behaviour and Organization*, Volume 48, No 3, pp. 221-241 (21). p. 222

<sup>154</sup> Ibid.

<sup>155</sup> Ibid.

In the first stage, two parts to initiating the contract are identified, namely seeking the partner and determining contract conditions<sup>156</sup>. As mentioned above, the process of seeking an adequate partner is difficult. First of all, the partner needs to possess the qualities to actually deliver the required goods or services. Especially when dealing with public contracts there is a sense of public and political sensitivity towards the output of the project. This process does not necessarily have to be discrete and can be transparent. However, as mentioned before, when illicit benefits are sought, the search for a limited group of potential partners might be preferred as this ensures that the marginal transaction costs do not outweigh the expected gains. Secondly, as soon as the potential partners are identified, one has to find out whether they are willing to engage in corrupt behaviour. In other words, do they want to provide the service in return for a favour? This process is delicate as direct inquiry can be precarious given that partners can decide to denounce the request. As opposed to the first step in seeking a partner, this process needs to be done discretely. After all, one cannot publicly advertise a request for corrupt behaviour. This highlights once more the opaque nature of corruption. Disseminating the request for corrupt arrangements needs to be disguised. A common practice is the use of middlemen or companies that enjoy a high level of trust. The latter is common given it highlights the opportunism of corruption. Already established legal arrangements could develop into illegal arrangements.

The process of determining the contract conditions is the second part of the initiation of the corrupt arrangement. It highlights, for example, the complexity of establishing an adequate value of the bribe. Blowing the whistle on corruption could be beneficial for one's reputation, especially when the gain of the offered bribe is too little. Another reason for blowing the whistle could be the risk of detection. When this is higher than the potential proceeds of the corrupt act, one could be deterred from entering into the agreement and even denounce the offering. Apart from establishing the value of the bribe, it is also important to agree on the type, for example a gift, trip or money. The type of bribe is important when looking at the public perception. Some societies are more lenient towards travels, gifts, etc. than towards money as a type of bribe. Also the window-dressing of the bribe is essential. It makes investigation and prosecution difficult when the bribe is not being specified. Besides, instead

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<sup>156</sup> LAMBSDORFF, J. (2002). Making corrupt deals: contracting in the shadow of the law. *Journal of Economic Behaviour and Organization*, Volume 48, No 3, pp. 221-241 (21).

of a money gift, one could decide to grant a loan with favourable conditions. For example, this practice can be seen with donations or loans to political parties in order to circumvent legislative party financing requirements. Finally, when deciding on the contract conditions it is important for the parties to decide upon the enforceability of the contract. After all, a conflict concerning a bribe cannot be adjudicated in court. This brings us to the second stage on the enforcement of corrupt contracts.

In the second stage, public procurement is subject to a process with different procedures. Corruption tends to extend throughout the process and the act often cannot be reduced to a specific effort in time. In other words, the corrupt service may be continuous or needs to be expanded, meaning possible additional bribes are needed or parties to the scheme decide to default on their obligations. So how can one secure corrupt arrangements? Lambsdorff (2002) identifies various mechanisms<sup>157</sup>: legal enforcement; hostages; reputation; repetition; vertical integration; and social embeddedness. In case parties engaging in corrupt arrangements do not need to fear prosecutions, they might opt for the use of legal institutions in enforcing contracts. This could be the case in societies with politicized and/or corrupt judiciary systems or when legislation is insufficient or poorly implemented. An example is the legal enforcement of the OECD Anti-Bribery Convention. Another reason to opt for legal enforcement is when no concrete evidence is kept on the corrupt arrangement. When legal ways are void in enforcing corrupt contracts, parties need to ensure these arrangements are self-enforcing. “Hostages” are seen as an instrument to facilitate this. For example, Actor A transfers a valuable asset to Actor B in order to ensure that Actor A does not benefit from dropping out of the arrangement. In case the corrupt contract is infringed, Actor B keeps the assets. It functions as a sort of threat and resembles forms of down payments. Public procurement tends to be vulnerable to these practices as it concerns public funds. This is because the down payment is made to a corrupt company, covering risks for this actor, after which a commission is forwarded to the corrupt official, subsequently covering their risk. In other words, both corrupt parties benefit from this arrangement while with public money the third party (society) carries the risk of non-compliance with contractual obligations. The third mechanism, “reputation”, concerns the benefit of honesty when being corrupt. Ironically,

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<sup>157</sup> LAMBSDORFF, J. (2002). Making corrupt deals: contracting in the shadow of the law. *Journal of Economic Behaviour and Organization*, Volume 48, No 3, pp. 221-241 (21).

corrupt actors that are trustworthy and not opportunistic in the execution of their contracts tend to be good partners for corruption<sup>158</sup>. The opposite behaviour might generate a bad reputation and jeopardise future contracts. It is therefore argued that honesty might actually reinforce corrupt behaviour and that rather weak morality lies at the core of its cause. In other words, “*a negative attitude towards opportunism and a positive attitude towards reciprocity could promote corruption more than it helps to inhibit it*”<sup>159</sup>. It sure does strengthen the enforcement of corrupt contracts. The fourth mechanism concerns repetition of arrangements with partners that have proven to be trustworthy and willing to engage in corrupt behaviour in the past. The mere threat of cancelling future collaboration avoids opportunism from partners. Especially long-standing relations including economic sectors with limited competition (such as the utilities markets) are vulnerable for these deterrents. “Vertical integration” is a mechanism in which the actors design common ownership over contracts. For example, politicians are given an option to buy shares in a joint-venture with public contracts. Both partners in a corrupt arrangement are this way inclined to follow the terms in order to ensure profits. Similar as with repetition as an enforcement mechanism, also here concession industries are vulnerable to such organisational structures. Finally, “social embeddedness” refers to the hierarchical relationships and ownership structures that serve as safeguards against opportunism. The more partners within one’s organization are involved, the more likely opportunism is avoided as these individuals are automatically relying on each other for future business<sup>160</sup>. The social structures of individuals are essential and could be identified as a business, family, political party or organised crime groups. The latter is of particular importance due to its capability to resort to violence in order to avoid opportunism.

The third and last stage of the transaction costs model described by Lambsdorff (2002) refers to the post-contract relations. The previous stages deal with mechanisms to enforce the

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<sup>158</sup> ROSE-ACKERMAN, S. (1999). *Corruption and Government: Causes; Consequences and Reform*. Cambridge: Cambridge University Press.

<sup>159</sup> LAMBSDORFF, J. (2002). Making corrupt deals: contracting in the shadow of the law. *Journal of Economic Behaviour and Organization*, Volume 48, No 3, pp. 221-241 (21). p. 230

<sup>160</sup> ROSE-ACKERMAN, S. (1999). *Corruption and Government: Causes; Consequences and Reform*. Cambridge: Cambridge University Press.

execution of corrupt contracts. However, as soon as a contract is finalized, the relation between the two actors does not end, contrary to normal legal contracts. Both actors became mutually dependent as they can still be judicially pursued for their corrupt acts. As a consequence the parties possess the power to denounce the other for their own benefit<sup>161</sup>. The reasons for denouncing a corrupt act vary. One could resort to blowing the whistle in case this person has notion of the corrupt arrangement but has no risk of prosecution. Another reason could be out of revenge for wrongdoing that was stowed upon the person. But not only blowing the whistle might have an advantage for a corrupt party, also threatening to blow the whistle. This could be used to extort the other party. On top of that, some actors, such as media corporations, are willing to pay money for information. Also, prosecutors could provide immunity in return for witness testimonies. An important concept in the post-contract stage is the ‘asymmetric dependency’ of the partners. This means that the potential damage of getting caught might be bigger for one party than for the other. An effect of this might be that one party is placed at the other party’s mercy. For example, when a public official accepts a first gift from a businessman, a subsequent request for a favour is difficult to refuse. After all, the initial acceptance of the gift could be used against the official to spread allegations of further misconduct.

### *3. Principal-agent branch*

The principal-agent theory stems from the assumption that the agent and principal have diverging interests and the former has more information than the latter, which is called “information asymmetry”. The agent is required to provide certain services on behalf of the principal. The latter delegates authority to the former. A recurring problem is the case in which divergence arises between the two actor’s interest due to the agent seeking to maximize utility. This “moral hazard” reflects the main problem. The discretion enjoyed by the agent could generate asymmetric possession of information, which might conflict with the principle’s interests. The principle in turn can prescribe the rules against which the agent needs to operate.

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<sup>161</sup> LAMBSDORFF, J. (2002). Making corrupt deals: contracting in the shadow of the law. *Journal of Economic Behaviour and Organization*, Volume 48, No 3, pp. 221-241 (21).

The principal-agent problem can occur between the public (principles) and public officials (agents) but also between the politicians (principles) and civil servants (agents). The particular importance of the principle-agent model for this study relates to accountability mechanisms that avoid corruption. Public officials (agent) receive the authority from elected officials (principle) to allocate resources through formal procurement procedures. In order to provide this service a certain level of professionalism from the public authorities is required. The benefit for the elected official is that their political activity expands when permitting professional bureaucrats to formulate policies for which they themselves do not possess the knowledge and understanding<sup>162</sup>. Absence of control of public officials increases the likelihood of them including personal preferences in decision-making. The challenge is therefore to implement control mechanisms that do not increase the costs for the principle to the extent that these outweigh the benefits of using agents.

Defining obligations and duties of agents is best done through procedural requirements. It is a form of *ex ante* control aiming to uphold the objectives set for the respective policy or provided service. Such mechanisms reduce opportunities for incompetency, either intentionally or unintentionally. Procedural requirements can be standard-setting or rule-based<sup>163</sup>. The former allows an agent to meet the objectives in alignment with the situation. The latter is more rigid of nature and sets in advance the required conduct for officials in order to respond to certain situations. It leaves no discretion to the agent and it could be argued that it leaves little room for misconduct.

*Ex post* control can be in the form of direct principle oversight over the agent. An example is parliamentary oversight through hearings, investigations and sanctions or oversight through the appointment of a supervisory committee. Most commonly the *ex post* control is executed by the judiciary if all other mechanisms are exhausted. Direct supervision from a ministry or parliament has as strength its public legitimacy as well as power to sanction effectively. Its main weakness lies in the risk of undue influence from pressure groups affecting their supervision over agents. The control by committees partially solves this problem as these enjoy a certain level of independence. Also these bodies are more professionalized as their

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<sup>162</sup> SOURDY, O. (2007). A principal-agent analysis of accountability in public procurement [WWW]. Available from: [http://www.ippa.org/IPPC2/BOOK/Chapter\\_19.pdf](http://www.ippa.org/IPPC2/BOOK/Chapter_19.pdf) [Accessed on 02-06-2013].

<sup>163</sup> Ibid.

focus is more narrowed down than for example is the case for politicians. A supervisory committee could be internally or externally set up. A risk for using internal supervisory bodies is that a similar principle-agent relation evolves. Judicial control is mainly used after all other mechanisms failed. Its strength is the independence, however often the courts can only act upon request and are therefore more reactive rather than proactive. Their working methods do address an important risk of the principle-agent model, namely the asymmetric information aspect. After all, courts examine all the sides of the coin when adjudicating a case.

The dominance of the principle-agent theory in corruption research has been highlighted by researchers<sup>164</sup>, as well as the way it has shaped most anti-corruption programs<sup>165</sup>. The approach emphasises the rational choices made by individuals and implies that policies can address corruption by reducing discretion by the agents (including their individual incentive calculus) and allowing principles to monitor and sanction agents. Marguette and Peiffer (2015) highlight that therefore anti-corruption interventions, guided by the principle-agent model, focus on better aligning the incentives of agents with their respective principles, primarily by<sup>166</sup>:

- Reducing the discretion of civil servants;
- Increasing monitoring mechanisms;
- Promoting transparency in government; supporting anti-corruption civil society groups to serve as watchdogs;

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<sup>164</sup> UGUR, M., and DASGUPTA, N. (2011). Evidence of the economic growth impacts of corruption in low-income countries and above [WWW]. Available from:

[https://www.google.es/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwiW3o7C7vvPAhUIaRQKHSaCA0kQFggeMAA&url=https%3A%2F%2Fassets.publishing.service.gov.uk%2Fmedia%2F57a08ab3e5274a27b2000709%2FCorruption\\_impact\\_2011\\_Ugur\\_report.pdf&usg=AFQjCNEweQtMp4K60J-DM9d4YzbB1yZYpw&sig2=4U7mA2R52siBJmUCEiSxXQ](https://www.google.es/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwiW3o7C7vvPAhUIaRQKHSaCA0kQFggeMAA&url=https%3A%2F%2Fassets.publishing.service.gov.uk%2Fmedia%2F57a08ab3e5274a27b2000709%2FCorruption_impact_2011_Ugur_report.pdf&usg=AFQjCNEweQtMp4K60J-DM9d4YzbB1yZYpw&sig2=4U7mA2R52siBJmUCEiSxXQ) [Accessed on 12-002-2015].

<sup>165</sup> PERSSON, A., ROTHSTEIN, B., and TEORELL, J. (2013). *Why anti-corruption reforms fail – Systemic corruption as a collective action problem* [WWW]. Governance, Volume 23, Issue 3, p. 343-558. Available at: [https://www.researchgate.net/publication/264645578\\_Why\\_Anti-Corruption\\_Reforms\\_Fail-Systemic\\_Corruption\\_as\\_a\\_Collective\\_Action\\_Problem](https://www.researchgate.net/publication/264645578_Why_Anti-Corruption_Reforms_Fail-Systemic_Corruption_as_a_Collective_Action_Problem) [Accessed on 16-01-2016].

<sup>166</sup> MARQUETTE, H., PEIFFER, C. (2015). *Corruption and collective action* [WWW]. Available from: <http://www.dlprog.org/research/corruption-and-collective-action.php> [Accessed on 16-10-2016].

- And strengthening sanctions on those who engage in corruption.

However, despite the significant effort to invest in principle-agent guided anti-corruption interventions, the evidence supporting the effectiveness is weak. Johnson et al. (2012) expose gaps in anti-corruption measures and argue that interventions based on a theoretical misunderstanding of the nature of corruption fall short in providing viable solutions<sup>167</sup>. An important argument raised for the failure of interventions is the lack of political will. This implies that principles (politicians) who are expected, according to the principle-agent theory, to be willing to monitor and hold agents accountable are in fact not necessarily willing to do so. In other words, the willingness of principles is a condition required for the principal-agent intervention to be effective.

#### 4.2.3 Collective action perspective on corruption

This brings us to the collective action theories, which can cover the gap identified when looking at corruption and the principle-agent theory. The American economist Mancur Olson (1932-1998) described the classic collective action problem in his influential book of 1965 titled *The Logic of Collective Action*. Olson explains how there is a high incentive to free-ride on the efforts of others and to provide a suboptimal level of good<sup>168</sup>. When analysing the decision from the individual point of view to provide a collective good, it explains that if everyone acts in such a way, very little of the collective good will be supplied to the group as a whole. Olsen argues that it is in the best interest of the individuals in the group to act collectively towards shared objectives. However, members of the group do not do this and instead pursue their own interest by doing as little as possible or nothing at all. As a consequence, collective benefits are not realised to its fullest potential.

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<sup>167</sup> JOHNSON, J., TAXELL, N., and ZAUM, D. (2012). Mapping evidence gaps in anti-corruption: Assessment the state of the operationally relevant evidence on donors' actions and approaches to reducing corruption [WWW]. Available from: <http://www.u4.no/publications/mapping-evidence-gaps-in-anti-corruption-assessing-the-state-of-the-operationally-relevant-evidence-on-donors-actions-and-approaches-to-reducing-corruption/> [Accessed on 27-10-2016].

<sup>168</sup> OLSON, M. (1971). The logic of collective action: Public Goods and the Theory of Groups. Harvard Economic Studies 124.

The influential American economist Elinor Ostrom (1933-2012) highlighted the crucial role of studying collective action to better understand the ways in which rational behaviour affects dealing with social dilemmas (1998)<sup>169</sup>. “*Social dilemmas occur whenever individuals in interdependent situations face choices in which the maximization of short-term self-interests yields outcomes leaving all participants worse off than feasible alternatives*”. Ostrom highlights that social dilemmas are called many names from collective good problem, the free-rider problem, moral hazard, the credible commitment dilemma, generalised social exchange, the tragedy of the commons and exchanges of threats and violent confrontations. She also notes that the best-known social dilemma has become the prisoners’ dilemma. To overcome the temptations of short-run self-interest, Ostrom cites that reciprocity; reputation and trust can help building conditions to allow individuals to achieve results that are better than rational.

Social dilemma refers to a large number of situations in which individuals make independent choices in an interdependent situation<sup>170</sup>. In a dilemma, members of the group have the choice to contribute or not contribute to a joint benefit. In practice, members actually have the choice to decide how much they are willing to contribute. If everyone contributes the group will get a net positive benefit. However, all individuals face the temptation to shift from the group of contributors to the group of non-contributors. No person is independently motivated to change his or her position due to the choices of other participants. These are dilemmas because a conflict is posed between the individual and the group rationality. The challenge is to find ways to move the collective towards optimal participation. Ostrom lists four assumptions that are prevalent in most models of social dilemmas:

*“(1) All participants have common knowledge of the exogenously fixed structure of the situation and of the payoffs to be received by all individuals under all combinations of strategies. (2) Decisions about strategies are made independently, often simultaneously. (3) In a symmetric game, all participants have available the same*

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<sup>169</sup> OSTROM, E. (1998). *A behavioural approach to the Rational Choice Theory of Collective Action*. Presidential Address, American Political Science Association, 1997.

<sup>170</sup> OSTROM, E. (1998). *A behavioural approach to the Rational Choice Theory of Collective Action*. Presidential Address, American Political Science Association, 1997. p. 3

*strategies. (4) No external actor (or central authority) is present to enforce agreements among participants about their choices.”<sup>171</sup>.*

To yield groups from achieving suboptimal results, players could self-enforce equilibrium by committing themselves to punish non co-operators as a form of deterrence. However, groups are dynamic which carries the probability of irrational players that reciprocate cooperation with cooperation. This makes rational players cooperate in the early stage of the game and shift to non-cooperation in the end.

Ostrom highlights in her work that communication is an important element that shows how individuals can obtain results that are substantially better than rational. Levels of cooperation increase substantially when members of the groups are allowed to communicate face-to-face before each decision round. It also has a positive effect on cooperation levels when individuals are not provided with feedback on group discussion after every round. In the view of Ostrom, computerized communication does not show the same level of effectiveness compared to face-to-face communication. The reasons why communication facilitates cooperation include:

*“(1) transferring information from those who can figure out an optimal strategy to those who do not fully understand what strategy would be optimal, (2) exchanging mutual commitment, (3) increasing trust and thus affecting expectations of others’ behaviour, (4) adding additional values to the subjective payoff structure, (5) reinforcement of prior normative values, and (6) developing a group identity”<sup>172</sup>.*

However, in order to transfer information, one does need to be able to communicate. Also, as the stakes increase and monitoring becomes more difficult, communication becomes less efficacious<sup>173</sup>.

The second element Ostrom highlights is innovation in rules that aim to govern common-pool resources and change the structure of underlying social-dilemma situations. Few groups rely

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<sup>171</sup> Ibid. p. 4

<sup>172</sup> Ibid. p. 7

<sup>173</sup> Ibid. p. 7

on communication alone and therefor establish rules with consequences in case of violations. Rules vary to reflect the respective circumstances but commonly include clear monitoring mechanisms and graduated sanctions to enforce compliance. Those who incidentally violate the rules might receive a modest sanction to explain that the violation has been observed and are afterwards allowed to return to the group. Repeat offenders might be sanctioned more severely with the ultimate exclusion from the group. Studies show how individuals with low trust are willing to contribute to sanctioning systems and respond subsequently more to change in the structure of the game than those who are initially more trusting.

Ostrom explains how individuals are “boundedly rational” and do not oversee the complete set of strategies available to them for each situation. She notes that individuals use rules of thumb that they have learned over time. If frequently confronted with a situation, individuals will learn and tailor their rules of thumb to given scenarios. This learning will also allow individuals to learn to adopt and use norms and rules. Reciprocity as a strategy can according to Ostrom be used in social dilemmas involving:

*“(1) an effort to identify who else is involved, (2) an assessment of the likelihood that others are conditional co-operators, (3) a decision to cooperate initially with others if others are trusted to be conditional co-operators, (4) a refusal to cooperate with those who do not reciprocate, and (5) punishment of those who betray trust.”<sup>174</sup>.*

Reciprocity norms are learned but can differ between individuals. As a result, this is vulnerable for abuse. Ostrom argues that *“individuals vary substantially in the probability that they will use particular norms, in how structural variables affect their level of trust and willingness to reciprocate cooperation in a particular situation, and in how they develop their own reputation”<sup>175</sup>*. Six reciprocity norms are identified when confronted with a social dilemma:

- 1. “Always cooperate first; stop cooperating if others do not reciprocate; punish noncooperators if feasible.”*

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<sup>174</sup> Ibid. p. 10

<sup>175</sup> Ibid. p. 10

2. *Cooperate immediately only if one judges other to be trustworthy; stop cooperating if others do not reciprocate; punish noncooperators if feasible.*
3. *Once cooperation is established by others, cooperate oneself; stop cooperating if others do not reciprocate; punish noncooperators if feasible.*
4. *Never cooperate*
5. *Mimic (1) and (2), but stop cooperating if one can successfully free ride on others.*
6. *Always cooperate (an extremely rare norm in all cultures)”.*

Levels of trust can be increased by: (1) providing individuals with an opportunity to see one another; (2) allow individuals to choose to enter or exit a social dilemma game; (3) sharing costs equally; (4) providing opportunities for distinct punishments for nonreciprocators; and (5) provide opportunities for face-to-face communication.

To sum up, Ostrom shows that *“at the core of a behavioural explanation are the links between the trust that individuals have in others, the investment others make in trustworthy reputations, and the probability that participants will use reciprocity norms”*<sup>176</sup>. Face-to-face communication can change the structure of a situation. It can allow individuals to increase or decrease their trust. If successful, individuals will increase their initial expectations to a higher probability that others will reciprocate trust and cooperation. When individuals are symmetric in assets and payoffs, agreements to share levels of contribution equally are more easily made resulting in outcomes closer to optimal levels. If there is asymmetry, the agreement is more difficult to make but fairness norms can reduce the time and effort needed to achieve this. In case of non-cooperation, punishment can be used but this needs to guarantee one’s own reputation and sustain the initial cooperation. A measured reaction as opposed to the grim trigger allows for mild punishment for the cheater without punishing all individuals in the group. If immediately using the grim trigger, the agreement will be terminated and benefits will be lost over time. It is also important to note the dark side of reciprocity norms<sup>177</sup>. If punishment is used to escalate retribution, groups become limited to smaller, closed circles of friends. This can result in discrimination to outsider and a focus on the return of favours can be the foundation of corruption.

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<sup>176</sup> Ibid. p. 12

<sup>177</sup> Ibid. p. 17

Marquette and Peiffer discuss how corruption in collective action theory can be described as the manifestation of free riding<sup>178</sup>. Corrupt behaviour refers to putting personal interest ahead of the larger group's collective interest, such as good quality of government. Largely based on the work of Elinor Ostrom, Marquette and Peiffer (2015) list eleven variables that arguably are important when looking at collective action theories and corruption: group size; group heterogeneity; face-to-face communication; repeated interaction; trust / good reputations; group interdependence; voluntary group membership; heuristics / norms; monitoring / transparency (contributions and collective good); long time horizons; salience of collective good. For the purpose of this study these variable can play an important role in determining the favourable conditions for the prevention of corruption through collective action. For example, the group size may affect collective action when groups are larger which gives members an opportunity to get away with free riding. In addition, in larger groups, members can feel that their potential contribution will not make much of a difference in the effort to reach a collective benefit. Also, with more members it may be difficult to come to an internal agreement on how to coordinate the collective activity. Important is also that smaller groups may be challenged by difficulties in mobilizing resources to engage in effective collective action. Heuristics are relevant considering group members learn heuristic strategies on how to get certain outcomes through personal experiences and from other people. The norms learned attach a certain value to a given strategy or outcome. The norms and heuristics can affect collective action when an individual's willingness is enhanced to side-line immediate personal goals in the interest of the collective good.

#### 4.2.4 Principle-agent and collective action

Persson et al. (2013) note that the international community prescribes a holistic anti-corruption strategy that aims to reduce the opportunities and incentives for corruption, which falls in line with the logic of the principal-agent framework<sup>179</sup>. This targets:

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<sup>178</sup> MARQUETTE, H., PEIFFER, C. (2015). *Corruption and collective action* [WWW]. Available from: <http://www.dlprog.org/research/corruption-and-collective-action.php> [Accessed on 16-10-2016]. p. 4

<sup>179</sup> PERSSON, A., ROTHSTEIN, B., and TEORELL, J. (2013). *Why anti-corruption reforms fail – Systemic corruption as a collective action problem* [WWW]. Governance, Volume 23, Issue 3, p. 343-558. Available at: [https://www.researchgate.net/publication/264645578\\_Why\\_Anti-Corruption\\_Reforms\\_Fail-Systemic\\_Corruption\\_as\\_a\\_Collective\\_Action\\_Problem](https://www.researchgate.net/publication/264645578_Why_Anti-Corruption_Reforms_Fail-Systemic_Corruption_as_a_Collective_Action_Problem) [Accessed on 16-01-2016].

- Reducing discretion of public officials through privatisation, deregulation, and meritocratic recruitment;
- Reducing monopoly by promoting political and economic competition;
- Increasing accountability by supporting democratization and increased public awareness (for political accountability) and bureaucratisation (for administrative accountability);
- Improving salaries of public officials, thereby increasing the opportunity costs of corruption if detected;
- Improving the rule of law so that corrupt bureaucrats and politicians can be prosecuted and punished.
- Encouraging greater transparency of government decision making through deepening decentralization, increased public oversight through parliament, independent media, as well as through the creation and encouragement of civil society watchdogs.

The success of the principal-agent strategy against corruption is questioned, especially in developing countries. Examples are ample of countries reforming legal and institutional frameworks but continuing to suffer from endemic forms of corruption. A key challenge is that countries might have a strong legal anti-corruption framework but still struggle to effectively implement the laws. Persson, Rothstein and Teorell (2013) discuss that anti-corruption reforms fail as a result of absence of stakeholders that are willing to act as principles and as such enforce effective implementation of the laws. This, according to the authors, can be illustrated by the list of scandals in developing countries despite reforms, cases of re-election of corrupt politicians, as well as the fact that reporting and conviction of corrupt cases remain low. Both the public and politicians do not always play the role of principled principles as assumed by the principle-agent model. And, considering that the effectiveness of the model ultimately relies on the willingness of principles to hold agents accountable, the limited success in fighting corruption in developing countries does not come as a surprise. The collective action theory challenges the assumption that “*strategic situations in themselves give the actors the answer to the question what strategy is most rational to opt for*”<sup>180</sup>. Instead, it depends on shared expectation about how other individuals in an

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<sup>180</sup> PERSSON, A., ROTHSTEIN, B., and TEORELL, J. (2013). *Why anti-corruption reforms fail – Systemic corruption as a collective action problem* [WWW]. Governance, Volume 23, Issue 3, p. 343-558. Available at:

interaction will behave. The reward of corruption, in other words, will depend on how many other individuals are expected to be corrupt. Karstedt and Farral (2006) point out that the public shares moral intuitions that allow for widely held justification, such as the common argument “everybody does it”<sup>181</sup>. If it is the case that the shared expectation is that other will be corrupt, everybody should be expected to act as such, regardless of whether they are principle or agent. This is even the case in a scenario where the majority morally rejects corruption and understands that as a group they loose by these practices. However, choosing not to be corrupt risks losing in the short-term out on possible gains: “If everybody does it, why shouldn’t I”.

To sum up, it is argued that the principle-agent theory mistakenly assumes that there are “principled principals” that are willing to hold agents accountable for criminal behaviour. This is not the case for collective action in which individuals are in principle assumed to pursue self-interests. However, Marquette and Peiffer (2015) point out that this is not entirely accurate as the principle-agent theory does not claim principles are motivated by principles but rather by interests. In other words, there is no such thing as a “principled principle”. They remind us that the problem in applying the principle-agent model to government is that officials in principle do not own public assets or have a material stake in them. The principle-agent model therefor aims to find a way to create this ownership and align interests of the agent and the principle. According to Marguette and Peiffer “*it is not at all inconsistent with principal-agent theory to suggest that where principles do not have a stake in the intended outcome they will not be willing to play this role*”<sup>182</sup>. They also note that the collective action approach is not entirely incompatible with a principal-agent interpretation of corruption. Both describe individual calculations made when deciding whether to not deviate. Both assume decisions are based on (bounded) rationality in the pursuit of self-interest. Both approaches assume that decisions are motivated by the perception of likelihood of being held accountable. Both conclude that more effective monitoring and sanctioning can increase

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[https://www.researchgate.net/publication/264645578\\_Why\\_Anti-Corruption\\_Reforms\\_Fail-Systemic\\_Corruption\\_as\\_a\\_Collective\\_Action\\_Problem](https://www.researchgate.net/publication/264645578_Why_Anti-Corruption_Reforms_Fail-Systemic_Corruption_as_a_Collective_Action_Problem) [Accessed on 16-01-2016].

<sup>181</sup> KARSTEDT, S., and FARRALL, S. (2006). *The moral economy of everyday crime: Markets, consumers and citizens*. British Journal of Criminology, 46(6): 1011-1036.

<sup>182</sup> MARQUETTE, H., PEIFFER, C. (2015). *Corruption and collective action* [WWW]. Available from: <http://www.dlprog.org/research/corruption-and-collective-action.php> [Accessed on 16-10-2016]. p. 6

accountability and reduce corruption. Marguette and Peiffer (2015) warn that anti-corruption should not be reviewed through one theory only as both can contribute to conceptualizing the problem. Arguably this assumption fits within the scope of this study, not the least when looking at the European Union.

In the *Routledge Handbook of Political Corruption*, Carolyn Warner describes how corruption in the EU “exists and persists because competitive pressures lead some firms to seek an edge against competition through illegal means”<sup>183</sup>. Where market liberalisation was thought to reduce corruption, the increased competitive pressure due to the formation of the Single Market caused companies to resort to bribery. Privatisation and decentralisation provide for corruption opportunities not the least because of political parties and politicians that may seek funds for campaigns and party financing. Warner stresses that market liberalisation was thought to address corruption because lack of competition can lead to collusion given that companies have little incentive to cut costs. Competition would either make companies stop bribing or push corrupt companies out of the market. At the same time, politicians that partially dependent on domestic companies would have to stop seeking bribes to allow companies to remain in competition and employ voters and pay tax. In other words, market integration is expected to break the existing cycles of corruption<sup>184</sup>.

However, in the EU this has not necessarily been the case. Corruption in a way adapted to the situation, arguably due to the weak accountability inherent to the EU’s institutional structure as well as the possible differences in attitudes towards corruption in Member States. For example, when looking at the ESI funds, the Member States have delegated to themselves management of the funds. In the words of the principal-agent theory, the principles (the Member State) are for a large portion also the agents. At the same time, the Member States also manage the regulatory structure. At the foundation of this arrangement lies the debate on the difficulty for Member States to sign away sovereignty to European institutions and procedures that should have the power and resources to address corruption. On the national level one could add a political establishment that might be 1) concerned about international

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<sup>183</sup> WARNER, C. (2014). *Sources of corruption in the European Union*. In *The Routledge Handbook of Political Corruption*, ed. P. M. Heywood. p. 121

<sup>184</sup> WARNER, C. (2014). *Sources of corruption in the European Union*. In *The Routledge Handbook of Political Corruption*, ed. P. M. Heywood. p. 122

competition and 2) not necessarily willing to strengthen their own institutions to fight corruption. Warner reminds us that the legal and political economist views imply that EU fraud is due to a corruptible bureaucracy, existence of programmes vulnerable for third parties and too few checks and balances to address administrative monopolies. However, as we established, the EU has a governance structure that is different from normal, includes many different attitudes towards corruption, and does not necessarily promote free-market principles in all sectors (for example think about the economic public investments through the structural funds). From a rational-choice point of view, Member States would rely on the EU institutions if by doing so they can promote their own interests. However, this is provided that there are rules to punish non-cooperative behaviour. Warner continues by arguing that countries would in principle never agree to cooperate and delegate sovereignty if there was no way of detecting and punishing non-cooperative behaviour. However this way of control is inherently weak due to the assumed fear of countries to delegate sovereignty. In such a scenario it would only be rational for states to agree to an international regime if 1) the benefits of organisation would outweigh the risks of others cheating or if 2) the state sees benefits in cheating others. In other words, Member States could see fraud and corruption as a marginal cost compared to the benefits from participating. However, one must keep in mind that the benefit could actually be the corruption itself. What Warner describes in this scenario combines principal-agent dilemmas but also collective action problems. The EU can be described as an organisation playing to host various principal-agent relations, for example when assuming the Member State as principles and the European Commission as agent. However, the ESI Funds show that Member States have largely delegated management to themselves, making them the principals and agent. This in itself generates opportunity for corruption. The collective action problem lies in Member States that “*are able to free ride on, or defraud, the EU because the harm caused is dispersed across all the members, while the gains are country-specific*”<sup>185</sup>.

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<sup>185</sup> WARNER, C. (2014). *Sources of corruption in the European Union*. In *The Routledge Handbook of Policial Corruption*, ed. P. M. Heywood. p. 125

### 4.3 Corruption prevention

Historically, the legislative response to forms of white-collar criminal behaviour predominantly included legal controls, often after scandals surfaced<sup>186</sup>. Legal controls commonly ensure compliance through sanctioning measures that aim to minimize the harm done by crime. These measures depend on the jurisdiction and type of crime, and sanctions include the use of fines and if possible imprisonment. An important challenge when sanctioning corruption from the supply-side is the ability to attribute responsibility to those causing the crime, so-called legal accountability. Because it is difficult to attribute responsibility to a company, countries have attempted through legal systems to govern risk-creating activities of and with businesses. In the twentieth century, laws were developed to pursue social change in which employers were forced to manage risks. Also internal compliance was promoted while inspection and enforcement systems were set up. Regulatory law, instead of criminal law, was used to deal with a legal response to severe offences that affected health and safety of workers. Not until the last decades, countries started shifting towards criminal law to deal with forms of corporate crimes against workers. But legal traditions differ when looking at issues such as criminal liability. Some common-law jurisdictions such as Australia, Canada, and the United States of America have pursued initiatives to legally criminalize corporations. EU Member States with civil law traditions have for a long time resisted the corporate criminal liability, strictly seeing criminal law to be applicable to natural persons. However, initiatives to deal with corporate crime, i.e. on issues such as bribery, from the EU, United Nations and the OECD have pressured countries to converge. Today, several countries have pioneered in Europe with measures to address corporate liability, for example, the Netherlands, Denmark and France. Countries that followed were Austria, Belgium, Estonia, Finland, Lithuania, Luxembourg, Portugal, Romania and Slovenia. Italy and Spain indirectly adopted corporate liability, bypassing this way any limitations within their legal systems. Germany, Sweden and the Czech Republic have not adopted corporate criminal liability and continue to apply administrative liability.

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<sup>186</sup> FRIEDRICHS, D.O. (1996). *Trusted Criminals: White Collar Crime in Contemporary Society*. Belmont: Wadsworth Pub. Co. p. 61

### 4.3.1 Legal versus regulatory prevention

While approaches differ from country-to-country in the EU, there is a general tendency to rely on formal legal responses as a sanctioning means of corporate crime and serve as a quasi-regulatory measure<sup>187</sup>. An important factor explaining this approach is that conventional crimes, such as burglary and assault, are perceived as destructive and opposite to socially desired behaviour. Crimes committed by companies on the other hand closely interact with behaviour that is productive and desirable from a social and economic point of view. This is particularly evident when looking at corruption cases that challenge decision-makers to undo investments that were based on criminal transactions. For example, in Spain the importance of tourism in coastal areas weighs on the decision of judges to order the destruction of hotels that are built through corrupt practices (i.e. with illegally obtained building permits)<sup>188</sup>. In times of high unemployment, this would mean the destruction of jobs, which in the eyes of politicians and the public likely is undesired.

Control strategies against deviant behaviour vary depending on which causal elements have to be targeted. For example, in order to control individual decision-making, a rational choice approach would be to alter the way in which people weigh benefits against costs, such as an appropriate punishment system. Other forms could be ethics training or forced resignation, both of which are preventive and pointing to responsible individuals<sup>189</sup>. However, focussing solely on individuals might risk not addressing more systemic factors that cause corruption. Marxist theories might aim to control crime by targeting the state and redistribute power. Institutional factors, such as competitive pressures, professional and organisational cultures might have effect on behaviour. Failing to address systemic factors risks that corruption repeats itself. In other words, control should target the causes of a problem. As mentioned earlier, the dominant legal response to white-collar and in particular corporate crime is regulatory rather than criminal. The perception that corporate behaviour (and crime) is closely associated with productivity and activities considered socially desirable makes

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<sup>187</sup> MIDDLETON D. J. (2005). The Legal and Regulatory Response to Solicitors Involved in Serious Fraud Is Regulatory Action More Effective than Criminal Prosecution?. *British Journal of Criminology*, 45, 810–36.

<sup>188</sup> JIMÉNEZ, F. (2009). Building boom and political corruption in Spain, *South European Society and Politics*, Volume 14 Issue 3: 255-272.

<sup>189</sup> VAUGHAN, D. (2007). *Beyond macro- and micro-levels of analysis, organizations, and the cultural fix*. In *International Handbook of White-Collar and Corporate Crime*, eds. H.N. Pontell and G. Geis.

responding in a punitive manner to corporate crime difficult as this could create an opposite effect of productivity. Friedrichs (2010), among others, has observed, that an important difference between regulatory versus penal enforcement is that the former has a “*lower profile and is less likely to involve an adversarial confrontation between two parties*”, a preferred option for decision-makers due to the political sensitivity with which corporate (bad or good) behaviour is addressed<sup>190</sup>.

Orbach (2012) defines regulation as a “*government intervention in the private domain or a legal rule that implements such intervention*”, which implies that rules intend to shape behaviour<sup>191</sup>. Although, the evidence is compelling in stating that while rules and regulations may be designed to shape behaviour, there is a virtual inverse correlation between the numbers of laws a country has and the amount of crime it has. An example of this is seen in Spain concerning the legislative framework against corruption. The European Commission notes in its 2014 European Anti-corruption Report that Spain’s anti-corruption legal framework is largely in place and that law enforcement made good progress in investigating corrupt practices<sup>192</sup>. Regardless, the country has seen during recent years large-scale corruption cases, which revealed corruption in public funds and financing of political parties. Particular vulnerable sectors are public procurement and urban planning. The reporting of the European Commission exposes deficiencies in the implementation of legislation as well as more general deficiencies in checks and balances. When coupling this to the business sector, regulations can address the functioning of the market, for example to prevent corporate cartels from forming or public procurement fraud. Enforcement of violations of regulations differs as well as the assessment of whether a specific action is considered compliant or noncompliant with regulations. When enforcing regulations, enforcers are confronted with

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<sup>190</sup> FRIEDRICHS, D.O. (1996). *Trusted Criminals: White Collar Crime in Contemporary Society*. Belmont: Wadsworth Pub. Co. p. 283.

<sup>191</sup> ORBACH, B. (2012) What Is Regulation?. 30 *Yale Journal on Regulation Online* 1 (2012); *Arizona Legal Studies Discussion Paper No. 12-27*. p 6

<sup>192</sup> EUROPEAN COMMISSION (n.d.). *Anti-corruption report* [WWW]. Available from: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/index_en.htm) [Accessed on 12-06-2016]. Country chapter on Spain, p. 14.

the decision to focus on compliance, or deterrence. Depending on the type of behaviour, one or the other approach might be preferred or expected.

The decision to denominate an act as a violation, followed by the decision to enforce can hold a degree of discretion by the decision-maker<sup>193</sup>. For example, an official might have a rulebook that stipulates which criteria are needed before a case can be named a violation. However, such a rulebook cannot be expected to provide an answer to every situation, meaning that the decision depends partially on the perception of the official. At the same time, this decision has consequences, for example it could result in criminal investigation (and prosecution) into the doings of a corporation or directly result in an administrative penalty. In other words, the official has a degree of decision-making power, which without the proper control lends itself for abuse. Government regulation can according to Frank (1984) differentiate between regulatory agencies that persuade and cooperate and those that prosecute and punish. The dividing line between these styles is not always clear as regulatory agencies often adopt a joint approach between persuasion and prosecution. In addition, the approach could vary in practice based on the problems encountered when implementing regulations. Important factors are the political climate in which the regulatory agency operates, the public and agency opinion of the regulated company as well as the potential damage of non-compliance.

According to Simpson (2002), the typical responses to white-collar and conventional types of crime overlap<sup>194</sup>. Popular perception is strongest when asked about the severity of environmental crime. After this, people perceive worker's health and safety crimes to be serious followed by price fixing and finally insider trading. Concerning sanctions, Simpson highlights that the public prefers more severe sanctions when the offender is a company as opposed to a single individual. Such attitudes vary "*by the degree of harm and the culpability of the act*"<sup>195</sup>. The same is noted for criminal justice authorities that, according to Benson and Cullen (1998), perceive corporate crime differently in function of community

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<sup>193</sup> VAN DE BUNT, H.G., HUISMAN, W. (2007). Organizational crime in the Netherlands, *Crime & Justice*, 32:477-493.

<sup>194</sup> SIMPSON, S. (2002) *Corporate Crime, Law, and Social Control*. Cambridge Studies in Criminology

<sup>195</sup> *Ibid.* p. 4

characteristics<sup>196</sup>. For example, prosecutors in more urban areas perceive corporate crime as a ‘very’ or ‘somewhat serious’ problem<sup>197</sup>. While a criminal justice response is seen as a strong deterrent for corporate crime (especially with possible imprisonment) and widely used, Simpson raises the question whether criminal law has the capacity to prevent and control corporate crime<sup>198</sup>. The threat of criminal punishment ignores other potential kinds of control that deter persons from criminal behaviour, such as “*threats to reputation, current and future employment, access to competitive resources (e.g. bids, contracts), friendship networks or associations, and family attachments*”<sup>199</sup>.

In 1975, Stone argued that criminal law will fail to address corporate crime given it is not flexible enough “*to adjust to and permeate dynamic business organizations*”<sup>200</sup>. Various reasons why this does not have the desired effect are “*limited liability, the lack of congruence between the incentives of top executives and the incentives of “the corporation”, the organisation’s proclivity to buffer itself against external, especially legal threats*”<sup>201</sup>. Stone presents a set of alternatives to criminal law approaches against corporate crime primarily focusing on tackling liability questions as well as enhancing corporate social responsibility. Stone also argues that the law or profit-making partially dictates corporate behaviour.

#### 4.3.2 Fostering a culture of compliance

Types of interventions might have different effect depending on the characteristics of the offense type. Apart from the nature of the crime (e.g. corruption, fraud, violence, etc.), also other characteristics are relevant such as the type of victims (e.g. consumers, employees, the public or other corporations, etc.) and the type of corporation (e.g. big, small, local, international, private or semi-public, etc.).

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<sup>196</sup> BENSON, M., and CULLEN, F. (1998). *Combatting Corporate Crime: Local Prosecutors at Work*. Boston: Northeastern University Press.

<sup>197</sup> Ibid.

<sup>198</sup> SIMPSON, S. (2002) *Corporate Crime, Law, and Social Control*. Cambridge Studies in Criminology. p. 9

<sup>199</sup> Ibid.

<sup>200</sup> STONE, C.D. (1975). *Where the Law Ends*. New York: Harper and Row. p. 93

<sup>201</sup> Ibid.

Responding to “violence” committed by companies could require a different approach compared to responding to “abuse of power” committed by companies. In both types of offences there is a systemic element embedded when trying to understand the causes of crimes. Illegal dumping of toxic waste can for example be traced back to the (opportunistic) behaviour of a specific individual but penalizing this person might not address the more systemic problem, which is the need to dispose of toxic waste in a responsible manner. Add to this a business environment that is driven by maximising profits and a risk potential is present for corporate crime. Thus responding to dumping of toxic waste by imprisonment might deter individuals from repeating their crimes but it does not address the systemic conditions that have facilitated and driven this behaviour in the first place and therefore does not prevent others from making the same mistakes. The same can be argued when responding to abuse of power, such as fraud and corruption, by corporations.

Abuse of power differs from the more conventional types of crime in the sense that damage is difficult to determine and evidence of criminal behaviour is difficult to detect. Most importantly, abuse of power can blatantly go unnoticed. Also in this case, the conditions in which organizations operate provide for a climate in which abuse of power can occur. This is for example explained by Fisman and Gatti’s bargaining model of bribery (2002) described earlier in this study. Etzioni and Mitchell (2010) note that literature on preventing corporate crime highlight the importance of fostering a culture of respect for the law within businesses and creating internal controls to prevent misbehaviour<sup>202</sup>. Business schools have according to Etzioni and Mitchell a role to play in preventing corporate crime through educating future corporate executives. However, including ethics in the school curriculum is not necessarily straightforward as definitions and values can differ. Distinction is made between so-called command-and-control strategies and self-regulation approaches<sup>203</sup>. Concerning the former, here the authorities dictate the terms of compliance, which often also includes specific formal sanctions in case of non-compliance. Severe sanctions as a deterrent for crime is a frequently opted approach in response to conventional crimes. However, arguably severe punishment of

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<sup>202</sup> ETZIONI, A., and MITCHELL, D. (2007). *Corporate Crime*, in H. N. Pontell, and G. Geis (eds.), *International Handbook of White-Collar and Corporate Crime*. New York: Springer.

<sup>203</sup> SIMPSON, S., GIBBS, C., RORIE, M., SLOCUM, L.A., COHEN, M.A., and VANDENBERGH, M. (2013). An empirical assessment of corporate environmental crime-control strategies. *Journal of Criminal Law and Criminology*. p. 232.

corporate crime alone does not work without also ensuring proper inspection. In fact, Simpson (2002) argues that inspection frequency is more important than severe sanctioning. In other words, reducing the risk of corporate crime can be addressed by detection strategies in combination with punishment. Friedrich (2010) emphasises more the conditions when looking at crime prevention such as time, place, offender and victim<sup>204</sup>. The identification of offenders arguably does not have the same priority in white-collar crime as it has in conventional crime. The fact that corruption is often hidden within normal or legal business procedures makes a case for first focusing on ensuring that the crime itself can be detected. As mentioned above, techniques can be formal (i.e. through law enforcement) or informal (i.e. through company compliance systems). For example, techniques that can be used are monitoring systems that red flag possible irregularities or safety mechanisms such as compliance systems that strengthen control within business processes<sup>205</sup>. The interesting contemporary element in these techniques is the use of new technologies that allow for real time surveillance of complex processes. For example, the use of open data on public procurement can allow law enforcement but also normal citizens to identify anomalies in public spending<sup>206</sup>. The use of compliance systems with its tools such as codes of conduct, or whistle-blower channels, also supports those workers that want to advocate corporate responsibility to act in the interest of the public. Repeatedly, citizens are asked and motivated to report suspicious behaviour of companies, for example relating tax evasion or pollution. Such techniques are not uncommon in case of conventional crime, for example through neighbourhood watch schemes<sup>207</sup>.

Whistleblowing is most commonly defined as the “*disclosure by organization members (former or current) of illegal, immoral or illegitimate practices under the control of their employees, to persons or organizations that may be able to effect action*”<sup>208</sup>. Kölber (2015)

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<sup>204</sup> FRIEDRICHS, D.O. (1996). *Trusted Criminals: White Collar Crime in Contemporary Society*. Belmont: Wadsworth Pub. Co.

<sup>205</sup> See for example Open Contracting Partnership. OPEN CONTRACTING PARTNERSHIP (n.d.). [WWW]. Available from: <http://www.open-contracting.org/> [Accessed on 12-02-2016].

<sup>206</sup> Ibid.

<sup>207</sup> ALVESALO, A., TOMBS, S., VIRTA, E., and WHYTE, D. (2006). Re-imagining crime prevention: Controlling corporate crime? *Crime, Law and Social Change* 45(1): 1–25.

<sup>208</sup> NEAR, J.P., and MICELI, M.P. J (1985) *Bus Ethics*. 4: 1. doi:10.1007/BF00382668 . p. 4

presents a comparative overview of legal frameworks in Europe to deal with whistleblowing. He highlights how systems differ between countries, with Anglo-American countries especially have institutionalised systems. Transparency International considers whistleblowing a direct method of exposing corruption. However, the organisation highlights that whistle-blowers commonly face retaliation, such as harassment, firing, blacklisting, threats and physical violence. Aside from this, the functioning of the whistle-blower mechanism is challenged by the fear of retaliation<sup>209</sup>, which raises the question as to whether people should be legally protected from this.

Self-regulation is frequently seen as a complementary system to command-and-control strategies enforced by the authorities<sup>210</sup>. Corporations can set up compliance systems, establish ethical guidelines and adopt informal sanctioning structures. Its objective is to reduce crime opportunities. Self-regulation parts from the notion that the corporations themselves are best placed to detect and deter crime. The difficulty with self-regulation is that its effect is dependent on the internal accountability structures<sup>211</sup>. In other words, in order for structures within a corporation to be able to reduce crime risks an adequate balance of power is needed. We could criticise self-regulation on the account of risk for weak enforceability. The government can play a role in enforcing self-regulation but the concept does not necessarily rely on formal regulation. Braithwaite (1992) talks about the family model of crime control in which workers when confronted with crime opportunities make a decision based on their understanding of right and wrong, but also the impact of such behaviour on their reputation<sup>212</sup>. This, in other words, challenges rational choice assumptions that see offenders as persons that weigh costs against benefits. Self-regulation is therefor seen as a form of organizational social responsibility in combination with the norms and values of individual workers. The reputational damage or negative publicity as a deterrent for criminal

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<sup>209</sup> KÖLBEL, R. (2015). Whistleblowing in Europe: regulatory frameworks and empirical research, in Avn Erp et al (eds), *The Routledge handbook of white-collar and corporate crime in Europe*. Oxon: Routledge.

<sup>210</sup> SIMPSON, S., GIBBS, C., RORIE, M., SLOCUM, L.A., COHEN, M.A., and VANDENBERGH, M. (2013). An empirical assessment of corporate environmental crime-control strategies. *Journal of Criminal Law and Criminology*. p. 232.

<sup>211</sup> SOUDRY, O. (2007). A principal-agent analysis of accountability in public procurement [WWW]. Available from: [http://www.ippc.org/IPPC2/BOOK/Chapter\\_19.pdf](http://www.ippc.org/IPPC2/BOOK/Chapter_19.pdf) [Accessed on 02-06-2013].

<sup>212</sup> BRAITHWAITE, J. (1992). *Poverty, power, white-collar crime and the paradoxes of criminological theory*. *Australian & New Zealand Journal of Criminology* 24(1): 40–58.

behaviour has been mentioned several times in this study. Arguably, entrepreneurs and politicians could suffer negative consequences from allegations, let alone from former investigations and prosecution cases. It could have affect on the public image, election outcomes, on the market price of corporations, stock prices or sales<sup>213</sup>. The question whether the stigma associated with criminal behaviour weighs equally for conventional and corporate offenders and has the same affect in reducing crime risks is uncertain. The labelling theory provides some additional insight into the process of how society responds to perceived crime<sup>214</sup>. White-collar criminals arguably differ in the fact that these politicians and entrepreneurs can have access to means to avoid negative labelling or influence the degree of stigmatisation that comes with being labelled as a criminal. For politicians this is seen when looking at data on re-election and corruption allegations. In the private sector this is visible for bribery settlement cases where companies are willing to pay large sums of money to avoid legal prosecution<sup>215</sup>. An important part of the settlement negotiations concerns the question whether corporations can settle without acknowledging wrongdoing. This has partially to do with the desire of corporations to not be stigmatised as corrupt.

The call for businesses to operate in an ethical manner is increasingly reaffirmed on the national level through its legal system, but also on the international level through conventions such as the 1999 OECD Anti-Bribery Convention and the United National Convention Against Corruption (UNCAC). High media-visibility of corruption or fraud scandals, such as the Siemens bribery case or the recent Volkswagen CO2 emissions scandals, have made companies aware of risks to their reputation. Public pressure, in combination with risks of financial sanctions, arguably is a compelling reason for companies to act ethically and take proper measures to ensure compliance. An example of corporate self-regulation integrated into a business model is corporate social responsibility (CSR). With CSR a company can monitor and enforce compliance with the law, as well as ethical standards or national and international norms. Self-regulation to prevent corporate crime is a contested approach as opponents might argue this is a form of window-dressing to the outside world. Proponents

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<sup>213</sup> ORLITZKY, M., SCHMIDT, F. L., RYNES, S. (2003) Corporate Social and Financial Performance: A Meta-Analysis

<sup>214</sup> SCHUR, E.M. (1971). Labeling deviant behaviour-Its sociological implications. New York: Harper & Row.

<sup>215</sup> HONG, H.G., and LISKOVICH, I. (2016). Crime, Punishment and the Value of Corporate Social Responsibility. Available at SSRN: <http://ssrn.com/abstract=2492202>.

might argue that this fits into long-term business strategies aiming for sustainability and therefor desirable. Regardless of the desirability of self-regulation of the business sector, research on its effects is contested. For example, Orlitzky, Schmidt and Rynes (2003) conducted a meta-analysis of 52 studies and find that corporate social performance is likely to positively effect financial performance<sup>216</sup>. However, this does not necessarily imply that it prevents criminal behaviour from occurring, especially if we take in account rational-choice models in which corporations might decide based on maximising profits. In fact, Hong and Liskovich (2016) point out that socially responsible companies could receive more lenient settlements from prosecutors after being caught bribing<sup>217</sup>.

In order to target specific interventions to prevent opportunistic corporate criminal behaviour, it is important to consider the conditions under which corrupt and fraudulent behaviour by corporations takes place. Taking preventive measures such as establishing whistle-blower channels and ensuring whistle-blower protection provides for an environment in which persons can come forward about undue behaviour. Another element to take into account is that corruption can be linked to opportunistic behaviour in which trust between stakeholders is important. Transparency and accountability measures are important here, widely advocated to reduce the risk of abuse of power and facilitate a business culture less perceptive to criminal behaviour.

Globalization and the integration of economies place prevention of corporate crime in a different perspective. The cross-border element of corporate crime is, and has become ever more important when discussing deterrence and compliance. Since the 1970s, corporations operate increasingly across borders, making white-collar crime also cross-border problems<sup>218</sup>. This adds different challenges to classical deterrence models on the national level that assume that sanctioning risks and consequences are bigger than the benefits from criminal behaviour. First of all, different enforcement of national models could shift the problem from one

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<sup>216</sup> ORLITZKY, M., SCHMIDT, F. L., RYNES, S. (2003) Corporate Social and Financial Performance: A Meta-Analysis

<sup>217</sup> HONG, H.G., and LISKOVICH, I. (2016). Crime, Punishment and the Value of Corporate Social Responsibility. Available at SSRN: <http://ssrn.com/abstract=2492202>.

<sup>218</sup> BRAITHWAITE, J., and DRAHOS, P. (2000). Global Business Regulation. Cambridge, UK: Cambridge University Press.

jurisdiction to the next. In other words, offenders might migrate to jurisdictions where enforcement of deterrence models are weaker. For example, anti-corruption watch dogs see the bribery of foreign officials in less developed countries by corporations from developed countries as a form of corporate crime due to uneven enforcement of law<sup>219</sup>. Secondly, corporations operating in multiple jurisdictions can more easily hide activities and complicate law enforcement due to complex company structure<sup>220</sup>. For example, a corporation might use shell companies in different jurisdictions for various reasons, i.e. tax evasion (e.g. in the Panama papers scandal).

The debate about the relevance of criminal sanctions to prevent white-collar crime has been on-going since the start of the globalization in the 1970s up until today. Agencies of social control and regulation face challenges to deal with new forms of white-collar crime and increasingly powerful globally operating corporations. Initially international forms of regulation promoted market liberalization and privatisation, however increasingly calls became louder for re-regulation coupled with self-regulation<sup>221</sup>. Command-and-control strategies were replaced by forms of co-regulation made up of ‘hard’ and ‘soft’ law standards that involved the design, implementation and monitoring by state and non-state actors<sup>222</sup>. In Europe, the transition of many eastern European countries after the collapse of the Soviet Union resulted in new market opportunities for multinational corporations, immediately having effect on the control and regulation of corporate crime when challenging existing regulatory mechanisms. As an example, Friedrichs (2010) points to international financial institutions that were established to regulate international finance but failed to do so in light of scandals such as the infamous LIBOR case<sup>223</sup>. Pieth et al. (2012) point to the soft law standards and peer pressure enforcement mechanisms of the Financial Action Task Force

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<sup>219</sup> See for example Transparency International reports on the implementation of the OECD Anti-Bribery Convention

<sup>220</sup> VAN WINGERDE, K. (2015). The limits of environmental regulation in a globalized economy: Lessons from the Probo Koala case. In *The Routledge Handbook of White-Collar and Corporate Crime in Europe*, eds. J. Erp et al.

<sup>221</sup> PIETH, M. (2012). *Collective action: Innovative Strategies to Prevent Corruption*. Dike Verlag AG. p. 5.

<sup>222</sup> PIETH, M. (2012). *Collective action: Innovative Strategies to Prevent Corruption*. Dike Verlag AG. p. 6.

<sup>223</sup> FRIEDRICHS, D.O. (1996). *Trusted Criminals: White Collar Crime in Contemporary Society*. Belmont: Wadsworth Pub. Co.

(FATF)<sup>224</sup>. This mechanism started with focusing on anti-money laundering and soon extended to terrorism financing, corruption and eventually tax fraud. Pieth et al. (2012) also point out that soon after in 1989 the OECD adopted the FATF working methodology and initiated the OECD Working Group on Bribery (OECD-WGB) which resulted in the OECD Anti-Bribery Convention (and recommendations) in 1997 aiming to criminalize corruption. In 1999 the Council of Europe followed with the Criminal Law Convention on Corruption and eventually in 2003 the UN adopted the UNCAC. A key element returning in all these mechanisms is the use of peer reviewing.

Apart from enforcement challenges, a next step in this context of a globalized world would be to look at whether criminal sanctions are relevant when dealing with corporate crime. Firstly, the potential deterrent effect of criminal sanctions might weigh less on corporate offenders as these can be powerful and this way reduce the severity and likelihood of a criminal sanction. In addition, a secondary effect of (fear of) criminal sanctions, such as reputational loss can be of importance. We have also seen that is an incentive for companies to initiate corporate social responsibility programmes.

#### 4.3.3 Collective action as a corruption prevention tool

In ‘A Practical Guide for Collective Action against Corruption’ by the United Nations Global Compact, the authors remind us that “*even though all companies would benefit from a more transparent and competitive business environment, not all of them will be willing to individually invest their resources or risk their continuity to build such an environment*”<sup>225</sup>. Individual interest could lead companies to act against collective interest. And, in order to prevent corruption, which could enhance business opportunities, one should find ways of cooperation, provide incentives to participate in common effort and minimise costs disproportionate to each individual actor’s disproportional share of group benefits.

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<sup>224</sup> PIETH, M. (2012). Collective action: Innovative Strategies to Prevent Corruption. Dike Verlag AG. p. 7.

<sup>225</sup> UNITED NATIONS GLOBAL COMPACT (2015). A practical guide for Collective Action against Corruption [WWW]. Available from: <https://www.unglobalcompact.org/library/1781> [Accessed on 28-10-2016]. p. 13

The World Bank Institute defines collective action as a “*collaborative and sustained process of cooperation among stakeholders*”<sup>226</sup>. According to the guide for businesses developed by the World Bank Institute, collective action can increase the impact and credibility of individual action, bring vulnerable individual players into an alliance of like-minded organizations and level the playing field between competitors. “*Collective action can complement or temporarily substitute for and strengthen weak local laws and anti-corruption practices*”<sup>227</sup>. In particular, small-medium enterprises (SMEs) can benefit from collective action initiatives, as these businesses risk being disproportionately affected by the effects of corruption due to their size<sup>228</sup>. Also, collective action could ensure that SMEs with less human and financial resources are able to install anti-corruption systems, interact with others and collectively address level playing field challenges in both non- and endemically corrupt business environments. SMEs in endemically corrupt business environments face the challenge that the company most likely to pay a bribe has an unfair advantage over those that do not resort to such practices. As discussed earlier in this study, a common response by businesses is denying responsibility: “if we do not bribe, someone else would”. In addition, not necessarily only pertaining to endemic corrupt environments, businesses could also argue justification based on higher moral grounds such as bribing is a part of free-market forces of supply and demand. Collective action initiatives embrace the neutralization techniques used by companies (as well as public officials) to resist tackling the problem of corruption. For example, Michael Wiehen and Cobus de Swardt discuss this in their reflections on the Integrity Pact as a collective action tool<sup>229</sup>. They argue that the prevalence of corruption disheartens individual companies and even whole nations to take the first step against corruption. Companies are facing prisoner’s dilemma scenarios and risk ending up empty-handed when being the one deciding to conduct clean business while their competitors continue bribing. Wiehen and de Swardt acknowledge the problems and note: “*nobody in*

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<sup>226</sup> WORLD BANK INSTITUTE (2008) Fighting Corruption through Collective Action [WWW]. Available from: <http://www.fcpablog.com/blog/2014/11/6/collective-action-a-new-approach-to-combat-corruption-part-8.html> [Accessed on 12-10-2016]. Slide 4

<sup>227</sup> Ibid.

<sup>228</sup> WORLD BANK INSTITUTE (2008) Fighting Corruption through Collective Action [WWW]. Available from: <http://www.fcpablog.com/blog/2014/11/6/collective-action-a-new-approach-to-combat-corruption-part-8.html> [Accessed on 12-10-2016]. Slide 13

<sup>229</sup> PIETH, M. (2012). Collective action: Innovative Strategies to Prevent Corruption. Dike Verlag AG. p. 87

*business or government can operate globally without recognizing their role, their responsibility, and their risk when it comes to corruption*”<sup>230</sup>. Hence, they suggest collective action (in particular the Integrity Pact) as tool to drive economic operators and contracting authorities to take steps in doing clean business, to enforce this via an independent broker (i.e. civil society) and lay the foundation for an equal level playing field.

The Practical Guide for Collective Action against Corruption by UN Global Compact states that collective action initiatives rest on three pillars<sup>231</sup>:

1. Multiple parties enter into formal collective action agreements;
2. Trusted third parties act as facilitators;
3. Public sector agencies participate as parties and / or promoters.

The World Bank Institute presents three levels at which companies may fight corruption<sup>232</sup>. The first and second levels depend on the companies themselves and involves internal and external activities. Internal activities include: the assessment of corruption risks; implementation of anti-corruption policies; and provision of specific guidance to managers. The second level concern activities in which companies share internal policies, best practices, experiences and success stories with external stakeholders. The third level at which companies may fight corruption is more advanced and refers to collective action in which companies reach out to industry peers, suppliers and other stakeholders via neutral facilitators and initiate joint activities to fight corruption.

For the internal activities, companies should, according to the World Bank Institute, focus on corruption risks by establishing an ethical culture and implementing a strong anti-corruption policy. Such risks include: requests for gifts, travel, political contributions, bribes, facilitation

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<sup>230</sup> PIETH, M. (2012). Collective action: Innovative Strategies to Prevent Corruption. Dike Verlag AG. p. 84

<sup>231</sup> UNITED NATIONS GLOBAL COMPACT (2015). A practical guide for Collective Action against Corruption [WWW]. Available from: <https://www.unglobalcompact.org/library/1781> [Accessed on 28-10-2016]. p. 13

<sup>232</sup> WORLD BANK INSTITUTE (2008) Fighting Corruption through Collective Action [WWW]. Available from: <http://www.fcablog.com/blog/2014/11/6/collective-action-a-new-approach-to-combat-corruption-part-8.html> [Accessed on 12-10-2016].

payments; requests to overpay commission; money laundering and payments to offshore locations; dishonest or incompetent staff, dishonest third-parties (e.g. partners, agents or brokers); and dishonest public officials. An ethical corporate culture and strong implementation of anti-corruption policy should help protecting corporate assets (e.g. people, property, reputation, etc.). Success of corporate compliance programs is determined by leadership commitment (or a strong will from the top), as well as a business culture that values good sales, and practices and processes that are practical. Important for leadership are actions that visibly and consistently support the program and its underlying principles. Leadership should avoid double standards of behaviour. Compliance needs to be part of operations and as such recognized as supporting corporate sales. Practical practices and processes should reflect business circumstances. The World Bank Institute presents a set of underlying principles for an effective corporate compliance program. This includes: standards and procedures to prevent and detect misbehaviour; oversight from a knowledgeable Board of Directors; program management by senior personnel with operational responsibility and clear lines of authority; preventive operational safeguards consisting of codes of conduct, internal controls and audit, etc.; communication and training to support the program; incentive and discipline mechanisms to reinforce appropriate behaviour; lessons learned responses to incidents; engagement with other businesses and stakeholders; and separation of internal functions and responsibilities. The process in place to continuously improve a compliance program should include: the assessment of corruption risks; prevention through policies and procedures, communication and training; detection through compliance controls and audits; and responses to misconduct through sanctioning mechanisms, global case tracking and application of lessons learned.

External activities for companies includes communication of company standards and policies to outside External communication, according to the World Bank Institute guide, means that companies make a clear note of their principles and policies and set expectations that business partners adhere to these. It includes external activities such as reporting to stakeholders on internal activities to fight corruption. For example, companies could report in annual report, corporate social responsibility reports, etc. The added value of external communication includes sharing best practices, a stronger reputation, but also support to employees to withstand outside pressure to bribe.

Despite the possible benefits of internal and external anti-corruption efforts, companies are facing collective action problems. They can still suffer negative consequences of corruption if and when competitors do not adhere to corrupt-free business practices. It is therefore that the World Bank Institute advocates for collective action initiatives to be able to isolate the actors that have bad intentions and promote compliance as the norm. Such initiatives: ensure sustainable and collaborative cooperation between stakeholders; increase impact and credibility of individual anti-corruption efforts; bring vulnerable individual players into an alliance of like-minded organisations; level the playing field between competitors; and complement local laws and anti-corruption practices. The World Bank Institute notes that the main objectives of collective action are to: strengthen anti-corruption commitments between stakeholders; create incentives to avoid corruption in the business environment both inside and outside the respective companies or authorities.

According to the World Bank Institute, the benefits from collective action vary for the different stakeholders. Companies increase their chances to enter markets and to be selected as suppliers in a fair manner (i.e. in public procurement). Companies protect themselves from legal sanctions for corruption, save costs, enhance reputations, etc. Public authorities can benefit from collective action by enhancing transparency, strengthening rule of law, increasing credibility and political stability, improving the investment climate, improving effective governance and procurement. Also civil society benefits ultimately from collective action initiatives. For example, there can be improved access to essential resources, better quality products and services, increased trust in government and business work, enforcement of regulations and more transparency and less corruption. The role of civil society organisations is particularly highlighted when acting as an independent broker. Although not required, the use of an independent facilitator in collective action initiatives is beneficial in order to avoid possible anti-trust concerns when only companies convene in collective action. Also, an independent facilitator can ensure that outcomes of the initiative are less likely to be biased. The facilitators can bring the stakeholders together in a neutral setting and moderate the sharing of best practices. Also the independent facilitator can nominate an external monitor or auditor.

Collective action initiatives can be applied on a project basis or longer term. The former can be an ethical commitment such as an anti-corruption declaration, a kind of public commitment that can be enforced through peer pressure. Another project-based initiative can

be the Integrity Pact, which rests on external enforcement, for example by a civil society organisation in case of non-compliance. The Integrity Pact includes a formal, written contract between stakeholders to refrain from certain corrupt practices. The latter can also include ethical commitments such as principle-based initiatives. Another long-term initiative can be certified business coalitions.

### *1. Project-based – anti-corruption declarations*

The objectives of an anti-corruption declaration can be the prevention of corruption in individual projects or business transactions. It can initiate debates about corruption and collectively set behaviour expectations for stakeholders. It can reduce the risk of corruption due to more awareness and standards can be publicized to ensure that other business-levels such as sub-contractors. Anti-corruption declarations can include standards on transparency, anti-corruption (including no bribery), fair business conduct. Generally anti-corruption declarations do not include sanctions provisions.

### *2. Project-based – Integrity Pacts*

The Integrity Pact functions as a formal contract that is externally monitored by an independent party. The objectives can include the reduction of corruption risks in individual projects (e.g. procurement) or business transactions. Integrity Pacts can create a level playing field for companies operating on a market and provide sanctions for corruption. They also shield stakeholders from pressure to be corrupt and send a visible message to the public. An Integrity Pact is a formal contract that established mutual rights and obligations between parties. It includes similar provision as in the anti-corruption declaration with the difference of having an independent broker monitoring the projects or transactions and sanctions in case of non-compliance.

### *3. Long-term – Principle-based initiative*

The concept aims to promote on the long-term the appropriate business conduct within a sector or country. As with anti-corruption declarations, principle-based initiatives rely on leverage from public or peer pressure to address collective good problems. On the long-term such initiatives could push for legal reform. According to the World Bank Institute, the core

elements of such initiatives are the shared principles. Optional elements can be advocacy and external communication elements, training programs or exchange of best practices.

#### 4. *Long-term – Certifying business coalition*

Certifying business coalitions aim to promote standards of business conduct within a country or sector. An important element is that standards are positioned as a competitive advantage. As for principle-based initiatives, also here the core element is the shared principles, however an additional element is the verification of compliance and resulting certification. This certification can give members certain advantages in terms of showing that compliance measures meet tendering requirements.

### **4.4 Public procurement**

While the first part of the chapter (sections 4.1 - 4.3) focused on situating the theoretical debate on corruption, causes and prevention, the following section will further detail corruption in public procurement and prevention, specifically on the EU level. The term public procurement is used to refer to purchasing activities of goods and services by governments, which need this to carry out their functions<sup>233</sup>. In EU legislation reference is made to “public procurement” while other organisations use the terms “government purchases”, “government procurement”, “public contracts” or “government contracts”.

#### 4.4.1 Public procurement

Public procurement is a highly legal topic, mostly regulated by procurement legislation and civil law systems. The prior applies primarily to the procurement phase in which a contractor is chosen while the latter applies primarily to the contractual management after a contract has been awarded. Three common categories of procurement types are identified: goods; works; and services. Procured goods could be simple office supplies, but also more complex and expensive products such as defence missiles. Works often refer to construction activities such as bridges, roads and buildings. Services can be relating construction such as engineering

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<sup>233</sup> ARROWSMITH, S. (2010). *Public Procurement Regulation: An introduction* [WWW]. Available from: <http://www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/publicprocurementregulationintroduction.pdf> [Accessed on 29-05-2013].

activities, but also legal and consultancy services. Various forms of contracts are signed between the public and private sector. These contracts can be short or long term, involving a one-time service, a single product or granting exploitation rights. The latter refers to concession contracts, used by governments to give private stakeholders the exclusive right to operate, maintain and invest in public utilities for a period of time. These utilities could concern water or electricity supply, but also the exploitation of public national resources such as gas and oil. Concession agreements often involve a close relationship between the public and private sector, also called public-private partnership (PPP). In theory, in a PPP, a private party provides a public service for which it also needs to invest own resources and therefore adopting part of the financial risk in doing so. Costs are either carried by the end-users or by taxpayers. Public procurement regulations generally cover all public contracts for goods, works and services entered into by public authorities. Important are the exceptions made, primarily in case of extreme urgency or issues relating national security. The defence sector is such an exceptional procurement area and important given it accounts for large parts of government spending. Other important areas of public expenditures are the health, infrastructure and energy sectors.

Most systems of public procurement in the EU are based on shared objectives and implemented through legal and regulatory rules. These objectives are<sup>234</sup>: value for money; integrity; accountability; efficiency in the procurement process; equal opportunities and treatment of providers; fair treatment of providers; efficient implementation of industrial, social and environmental objectives; and access for international trade on public markets. The first two objectives are especially relevant. The value for money objective touches upon the need for efficiency and effectiveness. It is important that the purchased goods meet the requirements under the best possible terms. Value for money dominates most procurement systems in EU Member States. Objectives such as equal opportunities, fair treatment and access for international trade strongly influences EU procurement as a whole in promoting the functioning of the single market.

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<sup>234</sup> ARROWSMITH, S. (2010). *Public Procurement Regulation: An introduction* [WWW]. Available from: <http://www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/publicprocurementregulationintroduction.pdf> [Accessed on 29-05-2013].

The objective of maintaining integrity throughout the procurement process refers to the notion of avoiding corruption. Corruption in procurement can occur in different forms and in different stages of the process. Integrity is closely interlinked with the other objectives. For example, bribes may prevent governments from contracting the best provider and thus affecting the value for money objective. Further, strengthening integrity also ensures fair and equal treatment as corruption could prevent providers from participating in the bidding process. Integrity in the procurement process is important for the government's functioning as well as the trust it receives from the public. The objective of accountability refers to the mechanisms in place to ensure control of the procurement process. Such mechanisms could be internal and external, such as allowing the general public to scrutinise the process. The efficiency objective could be undermined by the objective to ensure integrity. For example, rigid anti-corruption measures could carry financial costs that outweigh the benefits from avoiding corruption. Nonetheless governments might value non-financial objectives more than for example the private sector.

The public procurement process includes three phases: pre-bidding phase; bidding phase; post-bidding phase. The pre-bidding phase refers to decision-making or planning process on which goods and services are to be purchased and when. The bidding phase deals with the notification of procurement, the decision of who will be contracted and under which conditions. The post-bidding phase refers to the administering of the contract and its management to ensure effective performance. Each phase consists of several stages and activities.

The procurement regulations commonly include financial thresholds indicating from which value a specific procedure has to be followed. Each procedure dictates to the contracting authority the required level of transparency. Also, the procedures include exclusion criteria covering areas that are exempted. For example, in case of contracts declared to be sensitive for national security. Regulations also include rules applicable to contracts, establishing contract award criteria, rules on publication and transparency, technical specifications, anti-fraud conditions and means of communication. Finally, procurement regulations specify the different procedures in place. The most common procurement procedures in the EU are the: open procedure; restricted procedure; negotiated procedure and the competitive dialogue.

The procedures set the accessibility for companies to participate, time limits for the process and transparency and publicity requirements. The open procedure allows all interested stakeholders to submit a tender while the restricted procedure allows companies to participate upon invitation. The advantage of this for procurement authorities is that a good number of bids can be attracted. On the other hand, the restricted competition demands for more transparency and time limits in order to allow fair treatment and equal opportunities. This can be time-consuming as well as costly for the contracting authorities. The negotiated procedure implies that contracting authorities contact the companies (or economic operators) of their choice and negotiate the terms. The benefit of this procedure is that complex problems can be addressed in case the contracting authority has no clear view on how to present a solution. However, the process is lengthy and especially costly for the companies involved. Similar to this procedure is the competitive dialogue in which the contracting authority enters into talks with several economic operators in order to come to a solution for a complex problem. The last two procedures both pose a problem given its lengthy process, however, could be useful under certain circumstances.

The EU Treaties provide the general principles applicable to public procurement law. The main articles are:

- Article 34 TFEU on the free movement of goods within the EU;
- Article 49 TFEU on the right of establishment in another Member State;
- Article 56 TFEU on the right to provide services in another Member State;
- and Article 18 TFEU on the prohibition of all forms of discrimination on grounds of nationality.

Directive 71/305/EEC was the first of a list that regulates public procurement on the EU level. Since then, transparent and non-discriminatory procedures have been put in place to ensure companies to enjoy fundamental freedoms in the competition for public procurement contracts. The context against which public procurement unfolds has to be in line with principles of free movement of goods, the right of establishment and the freedom to provide services. When public contracts exceed certain amounts, EU coordination of national procedures is necessary in order to ensure competition and protect the functioning of the internal market.

At the stage of drafting this study, the principal pieces of EU legislation were:

- Directive 2004/18/EC for the public sector;
- Directive 2004/17/EC for contracts awards by utilities;
- Directive 2009/81/EC for contracts awards on defence and security;
- and Directive 2007/66/EC on remedies.

The Single Market Act prioritises the reform of EU public procurement legislation, hence the EC published three proposals in 2011 (COM(2011)896 and COM(2011)895) to replace the first two Directives. Further, the European Commission introduced a new Directive on concession contracts (COM(2011)897). In February 2014 the European Parliament and the Council of the European Union adopted the new Directives. Member States have had until April 2016 to transpose the new rules into national law with the exception for rules relating e-procurement, which was extended to October 2018.

### *1. Classic sector public procurement*

Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contract, public supply contracts and public service contracts is of particular importance in the process and named the “Classical Directive”. It applies to public contracts deployed by a contracting authority for supplies, services and works.<sup>235</sup> The scope of the Directive defines thresholds and excluded or reserved contracts.

The thresholds are pre-established by the European Commission every number of years and apply to public contracts estimated (excluding Value Added Tax) to be no less than a certain (X) amount of EUR for public supply and service contracts awarded by central government authorities (ministries, national public establishments); X amount of EUR for public supply and service contracts awarded by other contracting authorities (covering certain products in the defence sector, research and development, telecommunications, etc.); and X amount of EUR for works contracts.

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<sup>235</sup> The Classical Directive applies to public contracts in sectors other than the water, energy, transport and postal services sectors.

The excluded contracts refer to those covered by special sectors such as telecommunication network exploitation; contracts declared to be secret or affecting the interest of a Member State; contracts after international agreements; and contracts concerning, for example, acquisition or rental of existing buildings, purchase, sale or transfer of financial instruments, service concessions, etc.

Public contracting is subject to a set of rules defined as: contract award criteria; publication and transparency rules; technical specifications; anti-fraud and corruption conditions; traditional and electronic means of communication; and electronic auctions.

Contract award criteria are either based on the lowest price only or in combination with various linked criteria such as quality-price, technical merit, aesthetic and functional characteristics, environmental characteristics, etc. When these criteria are set, the contracting authority is to specify relative weighting.

The European Commission has set standards to transparency and publication of information on public contracting. Overall this implies that a contracting authority informs the European Commission and/or publishes notices nationally. Essential is the timely notification of decision taken on contract awards. This should include grounds for not awarding contracts and if requested by the economic operator reasons for the rejection.

The technical specifications set the characteristics of the required service, supply or material. Important is that these specification do not create an unjustified obstacle to competition and that the contract delivers according to the needs of the contracting authority.

Economic operators are subject to conditions that aim to check their economic and financial capacity, and technical and professional knowledge or abilities. These conditions aim to combat fraud and corruption and can exclude companies that have been found guilty of participating in a criminal organisation, money laundering, corruption or fraud. Companies may also be excluded based on bankruptcy, prior convictions, grave professional misconduct, unpaid taxes or social security contributions or other false declarations.

The Classical Directive also specifies different public procurement procedures, namely: open procedure; restricted procedure; negotiated procedure; and competitive dialogue.

The open procedure means that all economic operators are allowed to submit a tender. Time limits are set to minimum amount of days from the date on which the contract notice was published. The restricted procedure decides that companies need to request participation in the procedure and, only after invitation, are able to submit a tender. The negotiated procedure allows the contracting authority to consult the economic operators of its choice and negotiate terms with them. This is subject to justification. The contracting authority can use the procedure with prior publication of a contract notice under specific circumstances, such as “*following another procedure, which revealed the presence of irregular tenders*”.<sup>236</sup> The competitive dialogue refers to complex project contracts in which the contracting authority does not possess the knowledge to define technical solutions. A minimum of number of candidates is to be invited to discuss solutions for the contract based on award criteria. At the end of the dialogue, the companies submit tenders / bids.

Works or service concessions refer to contracts in which the source of revenue for the economic operator consists either in the right of exploitation solely or this in combination with a payment. Public works concessions of a value exceeding a certain monetary threshold are subject to specific rules.

## *2. Special sector public procurement*

This refers to Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors. As with the “Classical Directive”, the so-called “Sectors Directive” also applies to supplies, services and works. An important difference is that in this case an additional stakeholder can be involved, namely a public undertaking. The nature of the special sectors, often delivering primary public services, could result in a close

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<sup>236</sup> EUROPA (2012). *Public procurement in the water, energy, transport and postal service sector* [WWW].

Available from:

[http://europa.eu/legislation\\_summaries/internal\\_market/businesses/public\\_procurement/122010\\_en.htm](http://europa.eu/legislation_summaries/internal_market/businesses/public_procurement/122010_en.htm)

[Accessed on 05-06-2013].

collaboration between the contracting authority and the public undertaking. The prior tends to exercise a dominant influence of the latter, either through financial participation, ownership or governance. The Directive particularly “*aims to preserve equal treatment between public sector and private sector contracting bodies*”<sup>237</sup>.

The Utilities Directive applies to areas such as:

- Service delivery to the public in connection to production, transport or distribution of gas, heat or electricity;
- Service delivery to the public in connection to production, transport or distribution of water;
- Water management activities, e.g. land drainage, irrigation, hydraulic engineering projects and sewage treatment;
- Service delivery to the public in transport by railway, bus, tramways, etc.;
- Postal services reserved under the terms of Directive 97/67/EC;
- Exploitation of a geographical area for exploring for or extracting oil, gas, coal or other solid fuels, as well as the provision of airports, ports, etc.

If effective competition exists in the sector, public contracts are no longer subject to the Directive. The scope of the Directive defines thresholds and excluded or reserved contracts.

Also here, the thresholds are pre-established by the European Commission every X number of years and apply to public contracts estimated (excluding VAT) to be no less than a fixed amount of EUR in case of supply and service contracts and X amount of EUR for works contracts. The excluded and reserved contracts are those dealing with, for example, works and service concession in the sectors, secret contracts that require special security measures or are pursuant to international rules, contracts awarded in the fields of defence and security covered by Directive 2009/81/EC, etc.

The rules applicable to the contract are similar to the rules explained above for the Classical Directive. A difference is that in case of special sector, the contracting authority can reject

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<sup>237</sup> Ibid.

tenders that are abnormally low, for example because the tenderer obtained state aid which was granted illegally. Also, tenders that contain products amounting to over 50% of its value, which originate in third countries without EU market access agreements. The public procurement procedures are similar to the one for the Classic Directive. A difference is that in case of special sector, no competitive dialogue has been introduced.

### *3. Defense sector public procurement*

This refers to Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC. It applies to public contracts in the fields of defence and security for works, supplies and services related to military or sensitive equipment. The 2005 Green Paper on defence procurement highlighted the importance of creating a European market for defence equipment<sup>238</sup>.

Monetary thresholds for defence procurement are fixed for supply and service contracts and for works contracts. The Directive excludes contracts governed by procedures pursuant to an international agreement, contracts involving exchange of secret information, intelligence services, foreign missions, etc.

The procedures available for the defence sector are the restricted and negotiated. The open procedure is excluded, but Member States may use competitive dialogue in the case of particularly complex contracts. Besides, the Directive allows for framework contracts not exceeding a specific duration of years. The rules for transparency state that contracting authorities may publish prior information notice on their buyer profiles or on TED. However, the contracting authorities are obliged to publish contract notices on TED, except for exceptional negotiated procedures without publication of a contract notice.

### *4. Remedies directives*

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<sup>238</sup> EUR-LEX (2004). Defence Procurement [WWW]. Available from: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3A122013> [Accessed on 25-10-2016].

The Remedies Directives<sup>239</sup> have as a main objective the national review systems, imposing some common standards intended to ensure that rapid and effective means of redress are available in all EU countries in cases where bidders consider that contracts have been awarded unfairly. Before 2007 there were two remedies directives: Remedies Directive for the utilities sector (Directive 92/13/EEC) and Remedies Directive for the public sector (Directive 89/665/EEC).

The above Directives were substantially amended by Directive 2007/66/EC, which introduced two main features. The first feature is a ‘standstill period’, meaning that contracting authorities need to wait for at least ten days after deciding who has won the public contract and before the contract can actually be signed. This period gives bidders time to examine the decision and decide whether to initiate a review procedure. The second feature is more stringent rules against illegal direct awards of public contracts. National courts will be able to render these contracts ineffective if they have been illegally awarded without transparency and prior competitive tendering. The basic objective of the amendment was to improve the national review procedures that businesses can use when they consider that a public authority has awarded a contract unfairly.

##### 5. *New EU procurement system*

The Classical Directive (Directive 2004/18/EC) and the Sectors Directive (Directive 2004/17/EC) are replaced from 18 April 2016 by respectively Directive 2014/24/EU on public procurement and Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors. The new rules are intended to simplify procurement procedures and make these more flexible. It should: allow contracting authorities to be better able to negotiate terms of contracts; shorten deadlines for procedures; and decrease tender documentation. The new system should also allow contracting authorities

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<sup>239</sup> EUROPEAN COMMISSION (2012). *Remedies* [WWW]. Available from: [http://ec.europa.eu/internal\\_market/publicprocurement/infringements/remedies/index\\_en.htm](http://ec.europa.eu/internal_market/publicprocurement/infringements/remedies/index_en.htm) [Accessed on 13-06-2013].

EUROPEAN COMMISSION (2007). *Public procurement: Commission welcomes adoption of Directive improving rights of rejected bidders* [WWW]. Available from: [http://europa.eu/rapid/press-release\\_IP-07-1700\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-07-1700_en.htm?locale=en) [Accessed 13-06-2013].

to implement environmental policies, as well as those governing social integration and innovation. In other words, public procurement is becoming a policy strategy instrument. Part of the effort to reduce administrative burden reflects on the European Commission adopted European Single Procurement Document (ESPD) on 5 January 2016<sup>240</sup>. The ESPD replaces the differing processes that currently exist in Member States to tender for public contracts, it will simplify access of economic operators to cross-border tendering procedures and reduce administrative burden in relation to tendering administrative paperwork.

Concerning transparency and anti-corruption, the new public procurement Directives include various measures. The concept of ‘conflicts of interest’ is defined at EU level. This aims to simplify the identification and management of fraud and conflict of interest cases. EU Member States are asked to take appropriate measures to effectively prevent, identify and remedy such cases. The definition reads: “*a situation in which persons involved in, or able to influence, the procedure by which a purchaser awards a contract have a direct or indirect financial, economic or other personal interest that could jeopardise their impartiality and independence in that procedure*”<sup>241</sup>.

Further, prior consultations in which economic operators interact with contracting authorities could lead to distortion of competition. The new Directives aim to better regulate such consultations by requiring the contracting authorities to take steps to ensure this does not affect competition. For example, any information that is shared with the consulted economic operator should be sent to other participating companies. If fair competition cannot be guaranteed, as a last resort, companies may be excluded. Grounds for exclusion are strengthened and extended. Currently companies can be excluded on grounds of conviction for fraud and corruption. Added to this are also situations in which companies unduly influence the decision-making process leading to the award of a contract. Also false statements in connection with the procedure for the award of a contract may provide ground

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<sup>240</sup> EUROPEAN COMMISSION (n.d.). European Single Procurement Document and e-Certis [WWW]. Available from: [https://ec.europa.eu/growth/single-market/public-procurement/e-procurement/espd\\_en](https://ec.europa.eu/growth/single-market/public-procurement/e-procurement/espd_en) [Accessed on 21-10-2016].

<sup>241</sup> EUROPEAN COMMISSION (2015). Preventing corruption – new public procurement rules as of April 2016 [WWW]. Available from: [http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item\\_id=8594](http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=8594) [Accessed on 12-09-2016].

for exclusion. Contracting authorities and Member States may impose exclusion but companies do have the right to demonstrate trustworthiness by providing evidence of the steps taken to correct the problem or repair damage caused.

The new public procurement Directives also clarify rules on modifications of contracts during their term without calling for a new tender procedure. For example, new calls for tender are not required for modification that are not substantive, in other words, do not change the nature or the economic balance of the contract. Also in case the value does not exceed the thresholds for application of the directives and is less than 10% of the value of the original contract for goods, services and 15% for work. Further, modifications are allowed that are specified in the contract or arising from unforeseen events or relating to additional work that can only be done by the contracted company, as long as this does not increase the price with 50% of the initial contract.

Also transparency has a key role in fighting corruption in procurement. For example, EU Member States must meet monitoring requirements and report violations to the respective national authorities, publicise monitoring activities, and submit a report to the European Commission every three years including feedback on sources of misapplication or legal uncertainty. This includes any problems in the application of rules, the level of participation by small-medium enterprises, the prevention, the detection and the monitoring of fraud, corruption, conflict of interest and other cases with serious irregularities. Also contracting authorities must keep copies of contracts for amounts greater than EUR 1 million for service and supply, and EUR 10 million for works, throughout the duration of the respective contract. Contracts should be available to the public unless national rules on access to information or data protection prevent this. Finally, contracting authorities should issue specific reports for each public procurement award procedure that explains the main decisions relating the procedure concerned, report any conflicts of interest detected and steps taken in this regards, and forward this to the European Commission and national authorities on request.

In May 2016, the European Commission notified twenty-one EU Member States that they have failed to fully transpose the three directives on public procurement and concession into national law<sup>242</sup>.

#### 4.4.2 Key principles of public procurement relating corruption

Various principles related to public procurement are important to establish context for corruption, such as integrity, transparency, accountability and competition.

The OECD defines integrity in public procurement as follows:

*“the use of funds, resources, assets, and authority, according to the intended official purposes, to be used in line with public interest”*<sup>243</sup>.

This means that: *“procurement procedures are transparent and promote fair and equal treatment of suppliers/bidders”*; *“procurement practitioners behaviour is in line with the public purpose of their organisation”*; *“systems are in place to challenge procurement decisions, ensure accountability and promote public scrutiny”*. Violation of integrity may lead to various forms of illicit behaviour: corruption; fraud and theft of resources; conflict of interest; collusion; abuse and manipulation of information; discriminatory treatment in the public procurement process; waste and abuse of organisational resources.

Transparency is considered a key tool to achieve the objectives of public procurement and it is considered most effective in the prevention of corruption<sup>244</sup>. Arrowsmith, Linarelli and Wallace (2000) highlight that transparency implies publicity of contract opportunities as well as rules that govern each step in the procurement procedure (i.e. disclosure of award criteria)

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<sup>242</sup> EUROPEAN COMMISSION (2016). *Public procurement: Commission requests 21 Member States to transpose new EU rules on public procurement and concessions* [WWW]. Available from:

[http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item\\_id=8826&lang=en&tpa\\_id=1038&title=Public-procurement%3A-Commission-requests-21-Member-States-to-transpose-new-EU-rules-on-public-procurement-and-concessions](http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=8826&lang=en&tpa_id=1038&title=Public-procurement%3A-Commission-requests-21-Member-States-to-transpose-new-EU-rules-on-public-procurement-and-concessions)

[Accessed on 08-06-2016].

<sup>243</sup> OECD (2008). *Enhancing integrity on public procurement: a checklist* [WWW]. Available from:

<http://www.oecd.org/gov/41760991.pdf> [Accessed 31/05/2013].

<sup>244</sup> ARROWSMITH, S., LINARELLI, J., WALLACE, D. (2000). *Regulating public procurement national and international perspectives*. Kluwer Law International, The Hague.

<sup>245</sup>. This allows for equality among all bidders enabling them to sufficiently prepare their participation in the procedure. Further, transparency supports rule-based decision-making that limits the discretion of procuring entities or officers. Limiting discretion prevents poor decision-making and abuse. Finally, transparency allows for better verification and enforcement of rules.

Transparency in public procurement is a contested objective given that the implementation of the principle bears costs, which could weaken procurement economic objectives. Open procedures could carry bigger costs in bid preparation and evaluation, which reflects on both the contracting authority and the economic operators. The public sector places high value on avoiding corruption but also on accountability in decision-making. Not only the economic efficiency in procurement is important, but also in the public sector the perceived legitimacy of public decisions. This legitimacy is fostered by due procedures in awarding public contracts even if due processes may represent more economic costs (i.e. less economic efficiency).

Political and administrative accountability refers to responsibilities of the government, politicians and civil servants to the public through the legally established accountability mechanisms. Accountability is together with transparency key in developing strong procurement capacity<sup>246</sup>. For example, this parts from the assumption that elected officials delegate decision-making power to procurement officials in order to achieve professionalism. After all, the latter has greater knowledge and experience as to what goods, services and works are required for the public and under which terms<sup>247</sup>. Weak accountability in public procurement can first of all result in waste of resources, corruption, misconduct, etc. In addition, it distorts incentives of would-be providers to participate in public procurement given that weak accountability of officials renders bidders defenceless in case of arbitrariness

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<sup>245</sup> Ibid.

<sup>246</sup> PROCUREMENT CAPACITY DEVELOPMENT CENTRE (2010). Accountability in public procurement – transparency and the role of civil society [WWW]. Available from: <http://www.unpcdc.org/media/142496/story%20of%20an%20institution%20-%20accountability.pdf> [Accessed on 02-06-2013].

<sup>247</sup> SOUDRY, O. (2007). A principal-agent analysis of accountability in public procurement [WWW]. Available from: [http://www.ippa.org/IPPC2/BOOK/Chapter\\_19.pdf](http://www.ippa.org/IPPC2/BOOK/Chapter_19.pdf) [Accessed on 02-06-2013].

in procurement decisions. Finally, weak accountability affects society as end-users of potential economically irrational procured goods, services and works.

Finally, besides transparency, fair competition is considered an important tool to achieve the objectives of public procurement. Competition prevents corruption and discrimination. At the same time it affects the quality of procurement decisions and, more crucially, the final price of the goods or services procured because that price will be more adapted to actual market trends. Competition is essential in guaranteeing access of would-be bidders to public markets, fair treatment and equal opportunities. As with transparency, also the level of desired competition is debated. For example, open procedures could prevent long-term relationships to develop between an economic operator and the government. But, long-term cooperation could be beneficial and incentivise better performance. Also, open procedures complicate bargain deals that governments can strike with economic operators. However, despite all economic inefficiencies that competitive procedures may bear, competition adds to legitimacy of public actions and decisions in procurement.

#### 4.4.3 Public procurement on the EU level

Public procurement plays an important role in the interaction between key actors in most policy areas. Of particular importance are the health sector, economic and defence policy sectors in which a network of state (elected and public officials) and non-state (economic operators and interest groups) interact and negotiate shares of power and, of course, resources. Institutional actors strongly influence the interactions between policy actors, particularly relevant when looking at the EU level that includes a multi-level governance structure. Therefore it is important to understand the form and function of policy networks. When applying institutionalism to policy network analysis in the European Union it could be argued that a pressure pluralist network applies. This type of network identifies low government organization as well as low organization of societal interests. No actor is pre-eminent as the state is fragmented and accessible to exogenous demands and pressures. There is limited capacity for centralised coordination. Non-state actors are also fragmented and numerous with relatively weak internal leadership. The EU displays these characteristics in which national non-state interest groups rarely advocate unity and allow national interests to dominate their agenda. At the same time the state actors display similar characteristics. The decision-making on the European political landscape reflects either ideological patterns based on national interests or patterns of pro/anti European integration.

Apart from playing an important role in policy network analysis, institutions also underline the state's capacity to achieve its goals and objectives. Given the policy network weakness in the EU, state capacity could be essential in addressing effectively the problem of corruption. The degree of state autonomy is important as it is an indicator of capacity of states to reform systems despite societal or political opposition<sup>248</sup>. At the same time it could enhance institutional means by which policy makers can adequately coordinate policy implementation. For this a professional bureaucracy should be developed with sufficient resources. Finally, states can best operate when understanding and including the needs of key social partners into their policy. Inclusiveness is essential in designing positive impact and avoiding deviant behaviour.

With the revival of institutionalism discussed earlier in this study, the importance of formal and informal rules for the functioning of a stable society has been rediscovered, but also the importance of the state in its role to create, reform and defend them. Institutions are today considered as rules of the game and regularized patterns of interaction that are understood, practiced and usually accepted by social partners<sup>249</sup>. The social partners expect these rules will be accepted and respected by the rest. Formal rules can be rigorously changed and enforced by the state contrary to informal rules. The latter are created, communicated and applied outside the official channels and more difficult for the state to alter<sup>250</sup>. Besides, informal rules can also be useful in response to the failing of formal rules in a certain situation<sup>251</sup>.

In order to channel interactions in an effective manner and avoiding inefficient behaviour, fraud and delinquency, a society needs "good institutions". This means legitimate, fair,

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<sup>248</sup> KRASNER, S. (1984). Approaches to the State: Alternative Conceptions and Historical Dynamics, in *Comparative Politics*, 16: 223-246.

<sup>249</sup> O'DONNELL, G. (1996) Otra institucionalización. *Revista Ágora*, 5: 5-28.

<sup>250</sup> HELMKE, G. and LEVITSKY, S. (2004). Informal Institutions and Comparative Politics: A Research Agenda. *Perspective on Politics* 2, 4: 725-740.

<sup>251</sup> OSTROM, E. (2005). *Understanding Institutional Diversity*. Princeton: Princeton University Press.

efficient, stable and flexible institutions<sup>252</sup>. These institutions are required to implement public policies while interact with and involve the government, society and private sector. “Good governance” is required from good institutions, which can result in economic development and social integration<sup>253</sup>.

Ensuring that economic development becomes sustainable can be achieved by strengthening the rule of law as well as a public sector free from corruption<sup>254</sup>. For this a high quality government is required meaning a professional bureaucracy, professional ethics and accountable political institutions<sup>255</sup>. It implies effectiveness and efficiency when attending public needs as well as impartiality, understood as equal treatment to all people regardless of personal relationships, and transparency<sup>256</sup>.

In short, quality of government, being responsible for the creation of good governance (and democratic quality), must generate a whole range of formal and informal rules that when being legitimate, fair, efficient, stable and flexible, constrain inefficient conduct, arbitrary, corrupt and illegal interaction between actors (such as principal and agents), and even encourage the opposite which is efficiency, impartiality and integrity. This set of rules specifies coherent processes for its implementation or logic of appropriateness<sup>257</sup>. Besides, it needs organizations that are not only rational actors in the institutional game, but also moral actors that accept the values and its purpose and come to respect and ensure the impartial

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<sup>252</sup> NORTH, D. (1990) *Institutions, Institutional Change, and Economic Performance*. Cambridge: Cambridge University Press.

<sup>253</sup> KAUFMANN, D., KRAAY, A. (2002). *Growth without governance*. Policy Research Working Paper, No 3077, World Bank: Washington DC.

<sup>254</sup> ALEXANDER, A. INGLEHART, R. and WENZEL, Ch. (2012). *International Political Science Review*, volume 33 (1): 41-62.

<sup>255</sup> WILSON, G. (2008). *The Quality of Government*. *Governance* volume 21 (2): 197-200.

<sup>256</sup> LONGO, F. (2008). *Quality Governance: Impartiality is not enough*. *Governance* Volume 21, No 2, pp. 191-196.

ROTHSTEIN, B., TEORELL, J. (2008). *What Is Quality of Government? A Theory of Impartial Government Institutions*. *Governance: An International Journal of Policy, Administration, and Institutions*, volume 21 (2): 165–190.

<sup>257</sup> MARCH, J., OLSEN, J (1984) *The New Institutionalism: Organisational Factors in Political Life*, *American Political Science Review*, 78: 734-49.

application of the rules and processes entrusted to them<sup>258</sup>. Considering the state is not the only actor for achieving good governance, quality government needs the support of a competitive, honest market and an active, vigilant civil society. For this one needs enforcement capabilities and incentives to be used wisely.

The EU plays an important role in facilitating international business and creating a level playing field. The EU Public Procurement Directives promote companies in Member States to procure across the national border. At the same time, the EU is an important player in negotiating access for EU companies to public procurement in third countries. This is especially important for securing jobs inside the EU. Being one of the world's biggest public procurement markets, the EU has leverage when negotiating with third countries and at the same time possesses normative power to promote positive changes in third countries. Promoting EU procurement objectives such as integrity, accountability and value for money in third countries will help creating a global level playing field. Also, the EU could play an important role in informing European companies how to access public procurement markets in third countries. It is important, however, that the EU executes these activities carefully without undermining the procurement principles that are promoted inside the EU. After all, supporting EU companies in securing business abroad could be perceived as exerting undue political influence.

Public procurement is increasingly seen as a possible lever within a strategy for wider economic, social and environmental change. Rather than being a simple business transaction, public procurement expanded its scope and now includes sustainability criteria, environmental standards and respect for labour conditions. In this sense, public procurement is acquiring a strategic dimension. This complicates the safeguarding of integrity in the procurement process. Supranational institutions, such as the EU and the WTO, are challenged with the question as to which international regulations allow for the inclusion of economic, social and environmental considerations in the procurement process while at the same time ensuring fair and transparent governmental decision-making. In other words, the procurement

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<sup>258</sup> SELZNICK, Ph. (1992). *The Moral Commonwealth: Social Theory and the Promise of Community*, Berkeley, University of California Press.

policy requirements, such as economic, environmental and social goals, could conflict with management requirements, such as quality, timeliness, costs, competition and transparency.

#### 4.5 Corruption in public procurement

Corruption in public procurement can affect economic performance and state functioning<sup>259</sup>. While determining the damage of corruption is difficult, scholars do warn that the objectives of public procurement, be it social, economic or environmental, are difficult to attain once corruption is involved<sup>260</sup>. Bribery-induced violations of procurement procedures can be carried out in many different ways but that overall these can be categorized in two groups: hidden violations of procurement rules; legitimate deviations from procurement rules<sup>261</sup>.

Determining corruption in public procurement is a challenging task. There are examples available where corruption is thought to have caused budget overruns. However, while some might be caused by corruption, other factors also weigh in such as miscalculation or unpredicted external factors. Flyvbjerg and Molloy (2011) list cost overruns as a result of strategic underbidding or manipulation by officials to gain approval for favoured projects<sup>262</sup>. Overruns are especially discerning as it can more easily hide kickbacks, mainly because oversight is more rigorous during the assigning of contracts. Inflated costs can already appear at the start of a procurement project and possible damage can perhaps only be observed by benchmarking costs against other similar projects.

Rose-Ackerman describes three scenarios for corruption in public procurement<sup>263</sup>. The first involves a scenario in which both costs and characteristics of the purchase are known ahead

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<sup>259</sup> ROSE-ACKERMAN, S., and PALIFKA, B. (2016). *Corruption and Government: Causes, Consequences and Reform*. Second edition. Cambridge University Press.

<sup>260</sup> Ibid.

<sup>261</sup> SOREIDE, T. (2002). *Corruption in Public Procurement, cause, consequence and cures* [WWW]. Available from: <http://www.gsdr.org/document-library/corruption-in-public-procurement-causes-consequences-and-cures/> [Accessed on 08-10-2016].

<sup>262</sup> FLYVBJERG, B., and MOLLOY, E. (2011). *Delusion, Deception and Corruption in Major Infrastructure: Causes Consequences and Cures*. In Rose-Ackerman, S. And Soreide, T., eds., *International Handbook on the Economics of Corruption, Volume Two*. Cheltenham, UK: Edward Elgar.

<sup>263</sup> ROSE-ACKERMAN, S., and PALIFKA, B. (2016). *Corruption and Government: Causes, Consequences and Reform*. Second edition. Cambridge University Press.

of time. Bribes are used to give companies a bigger share of the profit. The second scenario refers to inflated budgets, which allow for bribes to be hidden in the extra costs. In practice this implies that bribes are paid with taxpayers money. The third scenario involves the modification of the nature of the project in ways that benefit corrupt companies. Such a scenario allows for creating also future payoff opportunities. It can severely limit competition as officials might prefer to work with corrupt companies. It might also drive the formation of cartels or bidding rings as “honest” companies might decide to exit the market.

Goods that are purchased for consumption might be more vulnerable for corruption considering that *ex post* it is difficult to discover whether goods were actually delivered. The same counts for services, while public works are more permanent and therefore can be scrutinised *ex post*. However, at the same time, public works can be very complex purchases, involving multiple stakeholders, and thus creating more corruption opportunities. According to Rose-Ackerman, various strategies are used by officials to corrupt public procurement<sup>264</sup>. For example, officials might procure goods, works or services that have no macro economic rationale. For example, high-capital investments simplify the possibility of obtaining kickbacks. One way to look at this is looking at the association between high levels of corruption and higher levels of public investment as a share of the GDP. More corrupt countries might spend less on maintenance and operations and have a lower quality of infrastructure<sup>265</sup>. Public investment might be preferred over private investment. Bel, Estache and Foucart (2014) showed that in Spain there has been so much construction that supply exceeds demand in many places, resulting in higher costs for government in the form of subsidies<sup>266</sup>. Politically well-connected construction companies benefitted while taxpayers paid. Another example is the purchase of cement. For example, Rose-Ackerman notes how in Italy the annual per capital consumption of cement has been double that of the US, triple that

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<sup>264</sup> ROSE-ACKERMAN, S., and PALIFKA, B. (2016). *Corruption and Government: Causes, Consequences and Reform*. Second edition. Cambridge University Press.

<sup>265</sup> TANZI, V., and DAVOODI, H.R. (1997). *Corruption, Public Investment, and Growth*. IMF Working Paper WP/97/139, Washington, DC: IMF, October.

<sup>266</sup> BEL, G., ESTACHE, A., and FOUCART, R. (2014). *Transport infrastructure failures in Spain: Mismanagement and Incompetence, or Political capture?*. In Soreide, T., and Williams, A., eds. *Corruption, Grabbing and Development: Real world challenges*. Cheltenham, UK and Northampton, MA: Edward Elgar, pp. 129-37.

of Germany and Great Britain<sup>267</sup>. Rose-Ackerman also comments on the notion that people tend to value the present more than the promise of any given thing in the future, the so-called “discount rate”. People who are more focused on the present have a higher discount rate. Officials that want to collect bribes for procurement projects might prefer an inefficient time path of net social benefits. Any negative consequences from the bribe might this way come to light in the future, perhaps when the official is already off scene. It is not uncommon for politicians in general to be accused of having high discount rates.

Rose-Ackerman (2016) highlights that officials and companies can select or design projects with corrupt opportunities, even if these are of little social value<sup>268</sup>. Projects might be designed that are difficult to monitor from the outside. Also, projects can be designed that generate big payoffs up front, which result in low long-term social benefits. Companies could induce officials (i.e. through lobbying) to underestimate environmental or social impact or overestimate demand. Bel et al. refer to the latter in the case of Spain’s investments in freight rail and roads<sup>269</sup>. As a consequence, most concessions awarded since the late 1990s are on the border of bankruptcy. Companies might pay to be included in the list of prequalified bidders and this way limit competition. Also official might be bribed to specify bidding specifications to one single corrupt bidder. More sophisticated forms of corruption could include colluding with competitors to submit high bids. Bribery can succeed in circumventing competitive bidding requirements, this way making effective use of laws that bypass competitive bidding. Another form of corruption may be intentionally in return for a commission leaving tasks off the specification lists, allowing this way for lower bids. Later these tasks can be included as unforeseen tasks which overruns the budget. Companies can also collude which needs to be addressed simultaneously with corruption. The reason is that if anti-corruption measures only target payments of bribes to officials, there might have less possibility to be bribed, but

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<sup>267</sup> DELLA PORTA, D., VANNUCCI, A. (1997). The Perverse Effects of Political Corruption. *Political Studies* 45: 516-38. p. 523

<sup>268</sup> ROSE-ACKERMAN, S., and PALIFKA, B. (2016). *Corruption and Government: Causes, Consequences and Reform*. Second edition. Cambridge University Press.

<sup>269</sup> BEL, G., ESTACHE, A., and FOUCART, R. (2014). Transport infrastructure failures in Spain: Mismanagement and Incompetence, or Political capture?. In Soreide, T., and Williams, A., eds. *Corruption, Grabbing and Development: Real world challenges*. Cheltenham, UK and Northampton, MA: Edward Elgar, pp. 129-37.

companies continue colluding to share the market. In fact, only focusing on the officials might even make cartel forming cheaper for companies. Andvig (1995) introduces the concept “uplift” referring to an official proposing to the lowest bidder to increase the offer before the deadline and this way sharing the profit once the lowest bidder is selected<sup>270</sup>. Another area for concern is when companies function as shadow companies and once awarded the contract subcontract other companies. These subcontracted companies might be affiliated to officials. A method used in procurement that can distort competition but is not necessarily corrupt is using offsets. This refers to contract provisions that promise to provide benefits to the contracting authority by using local suppliers. Offsets can undermine competition and harmful in case they are used to inflate costs and distort procurement objectives. Once a company wins a contract it might try to bribe to get prices inflated, to do extra work or to save on quality. A drive to award a contract to a bribe-paying company might also be that it provides for multiple opportunities to extort bribes given that contracts could be longer relationships.

According to Rose-Ackerman, systemic corruption can “*introduce inefficiencies that reduce competitiveness. It may limit the number of bidders, favour those with inside connections over the most efficient candidates, limit the information available to participants, and introduce added transaction costs*”<sup>271</sup>. The impact of corruption can be significant especially considering that concession contracts allow private players access to exploitation of public resources. Corruption can have severe impact on the resources, but also the earnings that government should get out of this. Impact of corrupt concession contracts is seen in the company’s time path of exploitation and unwillingness to invest in fixed capital. Also, the impact can be large on environmental, archaeological and social standards<sup>272</sup>. Also privatisations are vulnerable for corruption. First, it is difficult to value assets of large state enterprises. Weak conflict of interest laws make insider dealing easy. Second, corrupt

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<sup>270</sup> ANDVIG, J.C. (1995). Corruption in the North Sea Oil Industry: Issues and Assessments. *Crime, Law and Social Change* 23 (4): 289-313.

<sup>271</sup> ROSE-ACKERMAN, S., and PALIFKA, B. (2016). *Corruption and Government: Causes, Consequences and Reform*. Second edition. Cambridge University Press.

<sup>272</sup> CAMPOS, E., and BHARGACA, V. (2007). Introduction: Tackling a Social Pandemic. In Campos, E. and Pradhan, S., eds., *The Many Faces of Corruption: Tracking Vulnerabilities at the Sector level*. Washington, DC: The World Bank, pp. 1-25.

officials may present information to the public that undervalues public enterprises. Insiders are then informed about the actual value and offer. In addition, they could be offered lenient regulatory oversight. Third, privatised enterprises are worth more if they retain the monopoly they had when public. There is a conflict between revenue maximization and market competition but this can be circumvented through corrupt dealings. This way corrupt official can protect privatised companies for personal benefit. Fourth, privatised firms may continue to engage in corrupt behaviour.

#### 4.5.1 Forms of corruption in public procurement

According to the UNCAC, corruption in public procurement can take various forms: corrupt practice; fraudulent practice; collusive practice; coercive practice.

Corrupt practices refer to “*offering, giving, receiving, or soliciting, directly or indirectly, anything of value to influence the action of a public official in the selection process or in contract execution*”<sup>273</sup>. Bribery and facilitation payments can be given to an official in exchange for his or her use of entrusted powers. Bribing includes the involvement of two stakeholders: the one receiving the bribe and the one paying the bribe. The payment can be made to receive preferential treatment in a service the public official is already obliged to provide. Bribes can also be used to bypass laws and regulations or intentionally limit access to decision-making processes, such as public procurement.

Fraudulent practice refers to “*a misrepresentation or omission of facts in order to influence a selection process or the execution of a contract*”<sup>274</sup>. Trading influence or influence peddling is a common type of fraudulent behaviour. This is most commonly described as “*the situation where a person misuses his influence over the decision-making process for a third party (person, institution or government) in return for his loyalty, money or any other material or immaterial undue advantage*”<sup>275</sup>. These acts can be power-oriented, which focuses on

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<sup>273</sup> UNODC (2004). United Nations handbook on practical anti-corruption measures for prosecutors and investigators [WWW].

Available from: <http://www.unodc.org/pdf/crime/corruption/Handbook.pdf> [Accessed on 04-06-2013].

<sup>274</sup> Ibid.

<sup>275</sup> SLINGERLAND, W. (2010). Trading in Influence: Corruption Revisited [WWW]. Available from:

winning offices and influencing those who hold them, but also in pursuit of wealth, which is targeted at public contracts or policy implementation<sup>276</sup>.

Collusive practice refers to “*a scheme or arrangement between two or more respondents with or without the knowledge of the procuring entity, designed to establish prices at artificial, non-competitive levels*”<sup>277</sup>. Bid rigging is the most common type that falls under this form of corruption. This means that bidders form a horizontal relationship determining who amongst themselves should be awarded the contract. Collusive practices are often cartel offences and are prohibited by competition law.

Coercive or obstructive practices refer to “*harming or threatening to harm, directly or indirectly, persons or their property to influence their participation in a procurement process, or affect the execution of a contract*”<sup>278</sup>.

#### 4.5.2 Vulnerability of the public procurement process

Campos, Pradhan and Recanatini highlight that the procurement process is “*perhaps the single most corruption-prone area*”<sup>279</sup>. Ware et al. (2007) presents several nodes in the procurement process where corrupt benefits can be created. Understanding the weaknesses in the public procurement processes will be important to better understand measures that can be taken to confront corruption and highlight which areas can be strengthened. For example, public procurement vulnerabilities can be addressed by legislative means. Procurement legislation focuses mainly on the bidding process while contract law applies to the post-

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[http://www.law.kuleuven.be/integriteit/egpa/egpa2010/slingerland\\_trading-in-influence.pdf](http://www.law.kuleuven.be/integriteit/egpa/egpa2010/slingerland_trading-in-influence.pdf) [Accessed on 23-05-2013].

<sup>276</sup> JOHNSTON, M. (2005). *Syndromes of Corruption: Wealth Power and Democracy*. Cambridge University Press.

<sup>277</sup> UNODC (2004). *United Nations handbook on practical anti-corruption measures for prosecutors and investigators* [WWW].

Available from: <http://www.unodc.org/pdf/crime/corruption/Handbook.pdf> [Accessed 04-06-2013].

<sup>278</sup> UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (2008) *Conference of the States Parties to the United Nations Conventions against Corruption*: United Nations, p. 4.

<sup>279</sup> CAMPOS, J.E., PRADHAN, S., and RECANATINI, F. (2007). *Conclusion: Where to Next?*. In Campos, E. and Pradhan, S., eds., *The Many Faces of Corruption: Tracking Vulnerabilities at the Sector level*. Washington, DC: The World Bank, pp. 429-34. p. 430

bidding phase. This generates a certain level of transparency, less found in other areas of public procurement, such as the pre-bidding phase. For this phase it is particularly important to consider the political influence on this sector. Political interference in public procurement is an apparent challenge throughout the entire procurement cycle.

### *1. Pre-bidding phase*

The pre-bidding phase is particularly vulnerable for corruption due to the influence of external actors such as politicians, consultants and lobbyists<sup>280</sup>. According to the OECD, the most common risks include<sup>281</sup>:

#### *Lack of adequate needs assessment, planning, and budgeting of public procurement*

- The lack of adequate needs assessment, deficient business cases, poor procurement planning
- Failure to budget realistically, deficiency in the budget
- Procurement is not aligned with the overall investment decision-making process in departments
- Interference of high-level officials in the decision to procure
- Informal agreement on contract

#### *Requirements that are not adequately or objectively defined*

- Technical specifications
  - o Tailored for one bidder
  - o Vague or not based on performance requirements
- Selection and award criteria

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<sup>280</sup> TRANSPARENCY INTERNATIONAL (2006). *Curbing corruption in Public Procurement* [WWW].

Available from:

[http://www.transparency.org/whatwedo/pub/handbook\\_for\\_curbing\\_corruption\\_in\\_public\\_procurement](http://www.transparency.org/whatwedo/pub/handbook_for_curbing_corruption_in_public_procurement)

[Accessed on 27-05-2013].

<sup>281</sup> OECD (2009). *OECD principles for integrity in Public Procurement* [WWW]. Available from:

[http://www.keepeek.com/Digital-Asset-Management/oecd/governance/oecd-principles-for-integrity-in-publicprocurement\\_9789264056527-en](http://www.keepeek.com/Digital-Asset-Management/oecd/governance/oecd-principles-for-integrity-in-publicprocurement_9789264056527-en) [Accessed on 27-05-2013].

- Not clearly and objectively defined
- Not established and announced in advance of the closing of the bid
- Unqualified companies being licensed, for example through the provision of fraudulent tests or quality assurance certificates

*Inadequate or irregular choice of the procedure*

- Lack of procurement strategy for the use of non-competitive procedures based on the value and complexity of the procurement which creates administrative costs
- Abuse of non-competitive procedures on the basis of legal exceptions
  - Contract splitting in order to remain below monetary thresholds from which public competition is mandatory
  - Abuse of the “extreme urgency” clause to avoid competitive tendering
  - Abuse of other exceptions to competition based on a technicality or exclusive rights
  - Untested continuation of existing contracts

*Timeframe for the preparation of the bid is insufficient or not consistently applied across bidders*

- A time frame that is not consistently applied for all bidders, for example, information disclosed earlier for a specific bidder
- A time frame that is not sufficient for ensuring a level playing field

## 2. *Bidding phase*

The most common risks at the bidding process are:

*Invitation to bid*

- Information on the procurement opportunity is not provided in a consistent manner
- Absence of public notice for the invitation to bid
- Sensitive or non-public information disclosed
- Lack of competition or in some cases collusive bidding that leads to inadequate process or even illegal price fixing

### *Awarding of the contract*

- Conflict of interest and corruption in:
  - o The evaluation process (e.g. familiarity with bidders over the years, personal interests such as gifts or additional/secondary employment, no effective implementation of the four-eyes principle, etc.)
  - o The approval process: no effective separation of financial, contractual and project authorities in delegation of authority structure
- Lack of access to records on the procedure

### *3. Post-bidding phase*

The most common risks at the post-bidding phase are:

#### *Contract management*

- Failure to monitor performance of contractor, in particular lack of supervision over the quality and timing of the process, that results in:
  - o Substantial change in contract conditions to allow more time and higher prices for the bidder
  - o Product substitution or sub-standard work or service not meeting contract specifications
  - o Theft of new assets before delivery to end-user or before being recorded in the asset register
- Subcontractors and partners are chosen in a non-transparent way, or not kept accountable

#### *Order and payment*

- Deficient separation of duties and/or lack of supervision of public officials
  - o False accounting and cost misallocation or cost migration between contracts
  - o Late payments of invoices, postponement of payments to have prices reviewed to increase the economic value of the contract
  - o False or duplicate invoicing for goods and services not supplied and for interim payments in advance of entitlement

Apart from open procedures, several alternatives are defined such as restrictive and selective procedures as well as negotiated / limited procedures and competitive dialogue that can be used under strict conditions. Exceptions to competitive procedures are based on the specific nature of the contract (e.g. with technical or artistic qualifications), value of the contract, commodity trading, extreme urgencies and national security. Limiting competition on itself constitute a risk for irregularities which means special attention should be given to ensuring integrity.

#### 4.5.3 Irregularities in public procurement

Throughout all the stages of public procurement, types of corruption or fraudulent behaviour can occur. International organisations and civil society organisations, such as the Organisation of Economic Co-operation and Development (OECD) and Transparency International, but also governments, supreme audit authorities, tax agencies etc. have identified irregularities in public procurement processes.

##### *1. Pre-bidding phase*

###### *Needs assessment*

- The investment or purchase is unnecessary and benefits private interests
- New capacity is installed instead of systemic leak detection or grid loss reduction
- The investment is economically unjustified or environmentally damaging
- Goods or services are overestimated to favour a particular provider
- Contracts are included in the budget which favour political supporters
- Contracts are included in the budget for which kickbacks or bribes were paid
- Contracts are included in the budget that favour old employers

###### *Pre-bidding*

- Bidding document and terms of reference are designed to restrict competition and favour preselected providers
- Bidding documents and terms of reference are designed in an unnecessary complex manner to obstruct monitoring of the contract
- Grounds for direct contracting are abused (e.g. slicing the thresholds)

- Insider trading in influence (e.g. receiving the Terms of Reference before other potential bidders do)

## 2. *Bidding phase*

### *Contract awarding*

- Decision-makers are biased (e.g. due to kickbacks, bribes, ideology, political affinity or conflict of interest)
- Selection criteria are subjective which allows for biases in decision-making
- Particular bidders are given preferential treatment through the exchange of confidential information
- Particular bidders receive further clarification without sharing this information with other bidders
- The bid evaluation is not made public
- Unnecessarily high price as a result of limited or non-existent competition

## 3. *Post-bidding phase*

### *Contract implementation phase*

- Winning bidders deliver poor quality, for example to compensate for bribing costs
- Those who check the quality of the delivered goods are the same as those who defined that quality (i.e. management and control of the management are in the same hands)
- Contract renegotiation introduce substantial changes in the original contract
- Contract renegotiation increases significantly the costs of the contract
- Contract renegotiation is used which contradicts the essence of having a bidding process
- Changes in the orders are gradually introduced in order to avoid control mechanisms
- False or inexistent claims are filed
- Contract managers are bribed to look the other way

#### 4.5.4 Interface of public and private stakeholders

The ability of a public procurement system to meet its objectives is partially ensured through its regulations but it is influenced by various factors, such as the market forces, internal forces, legal and socio-economic factors, and the political environment<sup>282</sup>. The latter is of particular interest when analysing corruption in public procurement. It concerns the involvement in democracy of many different actors from the private and public sector with different interests, beliefs and objectives. These actors for example aim to influence legislative processes that change procurement laws, as well as their implementation. Also, actors try to influence the budget authorization and appropriations processes resulting in compromises between political actors, procurement officials and private economic operators<sup>283</sup>. These relations could involve political pressure on decisions taken by procurement officials or private economic operators lobbying political actors to influence contract allocation. It is here at the interface of political decision-makers, procurement officials and private economic operations where anti-corruption measures are to be tested. It reflects the challenges in public-private cooperation as well as issues beyond legislation such as qualification of civil servants and politicians.

The role of procurement officials becomes more complex with the increasing importance of public procurement. While initially the role was limited to facilitating a business transaction, now procurement officials are managing the entire process from the needs assessment to contract management and payment. Centralised authorities increasingly are responsible for managing new technologies and dissemination of knowledge on good practice in procurement. Research identifies various challenges for public procurement officials<sup>284</sup>. First of all, officials manage public procurement in an environment in which trade agreements allow for domestic and foreign companies to participate. In other words, they are requested to promote national economic development while at the same time select the best offer, even when this offer might come from a foreign economic operator. Secondly, despite that

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<sup>282</sup> THAI, K.V. (2001) Public procurement re-examined. [WWW]. Available from: <http://ippa.org/jopp/download/vol1/Thai.pdf> [Accessed 10/06/2013].

<sup>283</sup> Ibid. p. 35

<sup>284</sup> UNPCDC (2005). Challenges in Public Procurement [WWW]. Available from: <http://www.unpcdc.org/media/4899/challenges%20in%20public%20procurement.pdf> [Accessed on 03-06-2013].

economic objectives are prioritised, public procurement officials can also be requested to include complicated social, environmental and foreign policy commitments. The latter is seen frequently in defence procurement in which weapons are sold to other countries. Thirdly, procurement officials manage contracts in complex economic sectors in which (undue) political influence is not uncommon. These sectors experience close ties between public and private interests and tend to be politicised<sup>285</sup>.

The reason for politicization is that the performance of such sectors could be perceived as the responsibility of the governments. In case of failure it affects their political power, despite the fact that private players provide the public services. In other words, there is political interest in influencing procurement of public utilities even if this breaches competition rules. This influence exposes politicians to lobby activities of private players seeking lucrative public contracts. For companies, maintaining close ties to political actors, for example through bribing, could pay off<sup>286</sup>. The political influence over public procurement also creates an environment in which other conflicts of interest could play out. For example, when decision-makers decide on procurement activities that have impact on the sector of their former employees or use procurement to seek a future career in the private sector. This is why rules need to be established on revolving doors. Finally, special attention should be given to corruption and risks of state capture through political party financing.

Political influence over public procurement can be direct, with politicians interfering in the process in order to secure their personal or party interests. However, influence can also be indirect. Public procurement officials are requested to prioritise the general public welfare by following the established procedures. This however does not mean that officials are inconsiderate of political interests. For example, officials might anticipate difficulties and prevent interference by immediately including the political interests in their decision-making. Officials might also be aware that bidders have strong political ties and therefore evaluate

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<sup>285</sup> SOREIDE, T. (2012) Risks of corruption and collusion in the awarding of concession contracts [WWW].

Available from:

<http://www.europarl.europa.eu/document/activities/cont/201206/20120626ATT47717/20120626ATT47717EN.pdf> [Accessed 10-07-2013].

<sup>286</sup> WITKO, C. (2011) Campaign Contributions, Access, and Government Contracting. *Journal of Public Administration Research and Theory*. Oxford University Press.

their bids favourably in order to avoid conflict. In other words, procurement officials will often take balanced decisions that include their own objectives (such as efficiency, value for money, competition) but also the political objectives (such as the economic sector specific or electoral interests). The one does not necessary exclude the other. Nonetheless, the interaction between the political actors, private sector and public administrations is complex and the efforts to seek influence could balance between legality and illegality. After all, there is a thin line between a legal donation to a political party and an illegal bribe, both of which might seek influence over public decision-making.

#### **4.6 Anti-corruption in public procurement**

Campos et al. indeed note that the procurement process is a corruption-prone area but also highlight that it “*presents the most promising areas for which a set of concrete, quantifiable indicators can be developed, from the initial planning phase all the way through to contract award and implementation*”<sup>287</sup>. A common trend in anti-corruption reforms is to focus on reducing malfeasance but also on improving the efficiency of procurement decisions. Reforming procurement exposes a trade-off between avoiding corruption and giving official decision-making flexibility. Ware et al. show that procurement should be rule-based, competitive, transparent, accountable, economically and time efficient<sup>288</sup>. Rules can be too rigid but are needed to ensure processes against improper high-level influence. Piga (2011) argues for more discretion as long as this is exercised by professional procurement officials, and couples with *ex post* monitoring by the public through transparent online publication of procurement processes<sup>289</sup>. Piga also sees relevance in a point system based on passed performance. In the US, Steven Kelman designed a model to procure based on previous

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<sup>287</sup> CAMPOS, J.E., PRADHAN, S., and RECANATINI, F. (2007). Conclusion: Where to Next?. In Campos, E. and Pradhan, S., eds., *The Many Faces of Corruption: Tracking Vulnerabilities at the Sector level*. Washington, DC: The World Bank, pp. 429-34. p. 430

<sup>288</sup> WARE, G., MOSS, S., CAMPOS, E. (2007). *Corruption in Public Procurement: A Perennial Challenge*. In Campos J.E, S. Pradhan, ed., *The Many Faces of Corruption*, Washington DC, The International Bank for Reconstruction and Development / The World Bank. p. 68-9.

<sup>289</sup> PIGA, G. (2011). *A fighting chance against corruption in public procurement*. In Rose-Ackerman, S. And Soreide, T., eds., *International Handbook on the Economics of Corruption, Volume Two*. Cheltenham, UK: Edward Elgar.

performance indicators<sup>290</sup>. However, this system proved to be difficult to implement due to the lack of a generally accepted technique for evaluating performance. Contractors were to be evaluated based on their outcomes rather than input. Debarment processes based on corruption and organized crime connections are a widely used form of performance evaluation. Kelman's approach did not really address the issue of grand corruption as it focused on mid-level procurement decisions under the control of professional civil servants. However in the scenario where procurement decisions are shifted to career officials and tender boards, this method could prove useful. The American reforms moved away from perfecting the bidding process toward making the overall purchasing environment more efficient and effective.

According to Arrowsmith, three principles are found in most regulatory systems on public procurement, namely: transparency, competition and equal treatment<sup>291</sup>. The OECD identified so-called building blocks of public procurement to support good management and integrity.<sup>292</sup> These include: a legislative framework; solid administrative infrastructure to manage relations with bidders in a sound way; professional public procurement practitioners to whom procurement and guidelines are made available, established with their own involvement; a review and remedy system that identifies risks in the various points of the procurement procedure; internal management control and audit systems; an independent external audit; reinforcement of the parliamentary control on big infrastructure projects.

The exposure of trade-offs is also visible in some of these areas. Various overarching principles of public procurement could undermine achieving other important public procurement objectives. Establishing a certain level of transparency ensures competition and integrity. But it also has to be taken in account that transparency does bear costs and could

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<sup>290</sup> ROSE-ACKERMAN, S., and PALIFKA, B. (2016). *Corruption and Government: Causes, Consequences and Reform*. Second edition. Cambridge University Press.

<sup>291</sup> ARROWSMITH, S. (2010). *Public Procurement Regulation: An introduction* [WWW]. Available from: <http://www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/publicprocurementregulationintroduction.pdf> [Accessed on 29-05-2013].

<sup>292</sup> OECD (2013). *Building blocks of public procurement* [WWW]. Available from: [http://www.oecd.org/governance/procurement/toolbox/buildingblocksofpublicprocurement.htm#legal\\_framework](http://www.oecd.org/governance/procurement/toolbox/buildingblocksofpublicprocurement.htm#legal_framework) [Accessed 04-05-2013].

affect efficiency. However, the benefits of adequately defined transparency will most likely outweigh possible costs of corruption. In case transparency requirements do not focus on specific procurement areas, such as in the pre- and post-bidding phases and competition exceptions, other mechanisms could counter possible corruption risks. For example, in the case of exceptions to procedures, accountability and internal control mechanisms could counterbalance lack of competitiveness in the procedures. Finally, timely and consistent disclosure of information also limits room for collusion between bidders.

Public procurement is significant for successful management of public resources. Consequently, procurement should be seen as a professional strategy rather than an administrative function. The process is driven by the value for money principle, which means that governments need to rationalise and increase efficiency. The officials involved should therefore be equipped with adequate management and planning skills in order to take well-informed decisions. Enhancing professionalism should also include ethical guidance on how to deal with possible scenarios of conflict of interest.

Public procurement is increasingly seen as a core element of accountability of the government to the public. The money spend through procurement has potential impact on citizens. Therefore governments have set up internal and external control mechanisms, increasingly on a risk-based approach to prevent and detect corruption and identify vulnerabilities in the process. Apart from the judicial decisions, also alternative resolution systems have been promoted to resolve bid protests and avoid additional litigations expenses. Further, also other stakeholders are involved in the control of procurement through administrative complaint systems, such as whistleblowing mechanisms. Finally, promoting end-users, such as citizens, to scrutinise integrity of procurement process, could provide a social form of accountability.

#### 4.6.1 Considerations to address political interference in public procurement

Apart from the overarching principles that address corruption in public procurement, various specific measures could address immediate challenges, in particular related to political interference.

##### *1. Pre-bidding phase*

When referring to the weaknesses in the pre-bidding phase the following measures could be taken<sup>293</sup>:

*Lack of adequate needs assessment*

- Conduct an assessment on the need for procurement. Is there need to replace or improve existing resources? Is there need to procure for new resources?
- When validating procurement (especially for complex, sensitive and high value projects), ensure that multiple decision-makers are involved, including end-users.
- Ensure transparency in lobbying activities.

*Lack of planning and budgeting*

- Ensure that procurement is in line with the general long-term strategic objectives of the organisation. This avoids that short-term political interests undermine the procurement objectives.
- Prepare a realistic estimation of the budget and timeline applied to all phases of the procurement process.
- Prepare a strong business case (especially for complex, sensitive and high value projects) and include independent peer review.
- Create a sound procurement plan including management structures and costs, record keeping system, risks analysis and rules on decision-making.

*Requirements that are not adequately or objectively defined*

- Prevent possible conflicts of interest by obtaining declaration of private interest from elected and high-level public officials.
- Prevent possible conflicts of interest by informing officials on codes of conduct
- Inform officials on how to handle potential conflicts of interest.
- When drafting the specifications, involve economic operators and end-users (provided a representative sample is taken).

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<sup>293</sup> OECD (2009). OECD Principles for Integrity in Public Procurement. [WWW]Available from: <http://www.oecd.org/gov/ethics/48994520.pdf> [Accessed on 5-06-2013].

### *Inadequate or irregular choice of the procedure*

- Provide clear rules and guidance to choose a suitable procurement method.
- Provide clear rules in case of non-competitive, restricted and negotiated procurement procedures.

### *2. Bidding-phase*

Relating the weaknesses in the bidding phase, the following measures could be taken<sup>294</sup>:

#### *Invitation to bid*

- Ensure transparency when publishing the procurement opportunity. This includes, timely publishing of the notice and including specifications, timeframe, evaluation and award criteria, etc.

#### *Awarding of the contract*

- Establish a transparent procedure for opening the tender.
- Include multiple evaluators to avoid biased awarding.
- Evaluate the proposals according to the pre-set evaluation criteria.
- Document the evaluation reports.
- Avoid conflict of interest for the evaluators.
- Make the results of the award process public.
- Offer a resolve mechanism in case of disputes.
- Offer a debriefing session for tenderers.

### *3. Post-bidding phase*

Relating the weaknesses in the post-bidding phase, the following measures could be taken<sup>295</sup>:

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<sup>294</sup> OECD (2009) *OECD Principles for Integrity in Public Procurement*. [WWW]. Available from: <http://www.oecd.org/gov/ethics/48994520.pdf> [Accessed on 05-06-2013].

<sup>295</sup> Ibid.

### *Contract management*

- Clearly define expectations, roles and responsibilities for the management of the contract
- Supervise closely the performance and integrity of the suppliers
- Control all changes in the contract

### *Order and payment*

- Ensure that audits are independently conducted

#### 4.6.2 Anti-corruption developments in public procurement on the EU level

Starting with the supranational level, the EU Treaties foresee the European Commission to monitor and verify correct implementation of EU law into national law. The responsibility to implement correctly lies with the Member States. Article 258 TFEU and Article 260 TFEU give the European Commission the role as watchdog and allow the regulatory body to bring the case to the Court of Justice of the European Union. As a result, in 2012 the European Commission published for the first time the Annual Public Procurement Implementation Review, which monitors across the EU the application of the procurement rules.<sup>296</sup> In May 2016, the European Commission notified twenty-one EU Member States that they have failed to fully transpose the new directives on public procurement and concession into national law<sup>297</sup>. Further, the initiative of the European Anti-Fraud Office (OLAF) to develop a EU Evaluation Mechanism in the area of Anti-Corruption will strengthen focus on application of

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<sup>296</sup> EUROPEAN COMMISSION (2012). *Annual Public Procurement Implementation Review* 2012 [WWW]. Available from: [http://ec.europa.eu/internal\\_market/publicprocurement/docs/implementation/20121011-staff-workingdocument\\_en.pdf](http://ec.europa.eu/internal_market/publicprocurement/docs/implementation/20121011-staff-workingdocument_en.pdf) [Accessed on 12-06-2013].

<sup>297</sup> EUROPEAN COMMISSION (2016). *Public procurement: Commission requests 21 Member States to transpose new EU rules on public procurement and concessions* [WWW]. Available from: [http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item\\_id=8826&lang=en&tpa\\_id=1038&title=Public-procurement%3A-Commission-requests-21-Member-States-to-transpose-new-EU-rules-on-public-procurement-and-concessions](http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=8826&lang=en&tpa_id=1038&title=Public-procurement%3A-Commission-requests-21-Member-States-to-transpose-new-EU-rules-on-public-procurement-and-concessions) [Accessed on 08-06-2016].

procurement rules and identification and reducing costs of corruption in procurement involving EU funds. These EU initiatives are an important step forward in the mapping of the impact of corruption on public procurement. While at the stage of drafting this report consistent information on the impact of corruption on public procurement is missing, these initiatives are expected to change this for the future. Until that moment, this study outlines the state-of-play of EU Member States.<sup>298</sup>

Legislative instruments used to transpose EU law into national law are similar across the EU Member States with the government proposing a draft law and parliaments approving this. Most commonly the Ministry of Finance or Economics is responsible for transposing the EU directives on public procurement. EU rules have been mostly transposed by means of a unique legislative act covering all directives. Contracting authorities are generally responsible for implementing the procedures while central procurement bodies coordinate and harmonise efforts. An example is the Dutch government agency PIANOo<sup>299</sup>.

Internal and external audit offices supervise procurement procedures. These primarily focus on legality, accounting rules, financial efficiency and efficacy. Either specialised independent procurement bodies (i.e. Lithuania and Poland) or supreme audit bodies are used (i.e. Italy, Spain). Bodies set up to supervise awarding of contracts and especially execution of contracts are used to ensure compliance with transparency and competition principles. These bodies can sometimes impose sanctions or make non-binding recommendations.

Most countries have central purchasing bodies in place. Such bodies use framework contracts to supply administrations with certain goods and services. The main focus of these bodies is to rationalise expenditure through transparent and efficient procedures and to force price

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<sup>298</sup> The information used to outline the state-of-play originates from the European Commission's Annual Public Procurement Implementation Review 2012 and The Comparative survey on the national public procurement systems across the PPN of the Authority for the Supervision of Public Contracts and the Department for the coordination of European Union Policies.

<sup>299</sup> PIANOo (2013). *About Piano* [WWW]. Available from: <http://www.pianoo.nl/about-pianoo> [Accessed 08-06-2013].

reductions through massive purchasing of highly consumed commodities by public administrations<sup>300</sup>. An example is the Finnish body Hansel Ltd.

The EU rules had significant impact on the use of review systems across the European Union Member States<sup>301</sup>. Most countries use judicial reviewing, either administrative or civil in nature. Various countries (such as Spain, Denmark, Finland, Poland) use specific non-judicial review bodies on public procurement. In almost all EU countries the review bodies can suspend or cancel the decisions relating the award procedures. At the time of contractual review some countries can use nullification (*ex tunc* or *ex nunc*) or use alternative sanctions such as financial penalties or shortening of duration of contracts.

On the international level procurement standards have been developed by international organisations. First the United Nations Convention against Corruption will be discussed, followed by the OECD Anti-Bribery Convention, the G20 Anti-Corruption Plan and World Trade Organisation agreements on public procurement. Special emphasis will lie on the role of the EU as global economic trade partner and pioneer in international procurement standards.

### 1. UNCAC

The United Nations Convention against Corruption is one of the most important international treaties against corruption. Adopted in October 2003 by the UN General Assembly it bounds more than 160 countries to a framework aimed at harmonizing anti-corruption efforts across the globe. Most importantly, the UNCAC recognizes preventive and punitive measures and addresses the cross-border nature of the problem. The four highlights of the international convention are: prevention, criminalization, international cooperation and asset recovery<sup>302</sup>.

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<sup>300</sup> OECD (2011). *Centralised Purchasing Systems in the European Union* [WWW]. Available from:

[http://www.oecdilibrary.org/governance/centralised-purchasing-systems-in-the-european-union\\_5kgkqv703xw-en.jsessionid=gvfxxfbfq5ji.xoecd-live-01](http://www.oecdilibrary.org/governance/centralised-purchasing-systems-in-the-european-union_5kgkqv703xw-en.jsessionid=gvfxxfbfq5ji.xoecd-live-01) [Accessed on 05-06-2013].

<sup>301</sup> OECD (2007). *Public Procurement Review and Remedies in the European Union* [WWW]. Available from:

[http://www.oecdilibrary.org/governance/centralised-purchasing-systems-in-the-european-union\\_5kgkqv703xw-en.jsessionid=gvfxxfbfq5ji.xoecd-live-01](http://www.oecdilibrary.org/governance/centralised-purchasing-systems-in-the-european-union_5kgkqv703xw-en.jsessionid=gvfxxfbfq5ji.xoecd-live-01) [Accessed 05-06-2013].

<sup>302</sup> UNITED NATIONS (2004). *Convention Against Corruption* [WWW]. Available from:

UNCAC promotes model preventive measures directed at the private and public sector. Such measures call for countries to ensure that public services are efficient, transparent and that recruitment is based on merits rather than political affiliation. Public officials should be subject to codes of conduct and rules concerning financial disclosure. Besides, these rules should be controlled and disciplinary measures put in place to ensure compliance. UNCAC also specifies the need to promote transparency and accountability in matters of public financing, especially relating vulnerable areas such as the judiciary and public procurement. UNCAC requires countries to establish criminal and other offences to cover the wide range of corrupt acts, such as bribery, embezzlement, influence peddling and concealment of proceeds of corruption. Article 9 of UNCAC is dedicated to “*public procurement and management of public finances*”<sup>303</sup>. On public procurement it states that countries shall “*take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption*”<sup>304</sup>.

## 2. *OECD Anti-Bribery Convention*

On 17 December 1997, the Convention on Combating bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention) was signed<sup>305</sup>. The convention encourages sanctions against bribery in international business transactions carried out by companies in the member countries. The idea behind this was that large bribes were paid by big western multinationals in developing countries creating an unequal level playing field for international business. The signatories are required to criminalize the act of bribing foreign public officials. An important recommendation is to sanction bribe payers with “*temporary or permanent disqualification from participation in public procurement*”.

## 3. *G20 anti-corruption action plan 2010*

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[http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026\\_E.pdf](http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf) [Accessed on 04-06-2013].

<sup>303</sup> Ibid.

<sup>304</sup> Ibid.

<sup>305</sup> OECD (1997). *Anti-Bribery Act* [WWW]. Available from:

<http://www.oecd.org/corruption/oecdantibriberyconvention.htm> [Accessed on 04-06-2013].

In 2010 the G20 leaders established the Anti-corruption Working Group and endorsed the first Anti-Corruption Action Plan. Fighting corruption in public procurement is reckoned to be an important aspect but no concrete measures are proposed. The commitment states that an objective is “*ensuring we have in place systems of procurement based on transparency, competition and objective criteria in decision-making to prevent corruption*”. Nonetheless, in a common position paper of 5 March 2013, the G20 presents some concrete measures. For example, it states that “*G20 governments should adopt and urge all governments to promptly enact the standards for procurement and public financial management, consistent with Article 9 of the UNCAC and the OECD Principles on Enhancing Integrity in Public Procurement.*”

#### 4. WTO

The relevance for the international context lies in the importance of government procurement for domestic and foreign suppliers. Despite this, important international trade agreements, such as the General Agreement on Tariffs and Trade (GATT, 1947) and the General Agreement on Trade in Services (GATS, 1995), exclude public procurement. Nonetheless, countries have repeatedly addressed the issue resulting in: the Government Procurement Agreement (GPA); the negotiation on government procurement in services following Article XIII: 2 of GATS; the work on transparency in government procurement in the Working Group established by the Singapore Ministerial Conference in 1997.

The first GPA was signed in 1979 and entered into force on 1 January 1981. After broadening the scope of the agreement, in 1994 the members signed the new GPA including also purchases by sub-central governments as well as the construction services sector. In 2012, the Decision on the Outcomes of the Negotiations under Article XXIV: 7 of the GPA (GPA/113) was adopted by political decision. The agreement aims to open business to international competition. It is a multilateral agreement with 42<sup>306</sup> members and includes general rules and obligations as well as schedules of national entities in each member state whose procurement is subject to the GPA. The GPA is grounded on the notion that procurement systems have significant impact on the efficient use of public funds, which in turn affects good governance

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<sup>306</sup> Including the EU as a member.

and influences the public confidence in government. The principal requirements for public procurement are value for money, public access to information and fair competition.

The GATS does not subject members to obligations on market access or non-discrimination in public procurement. However, Article XIII does stipulate that there shall be multilateral negotiation on this issue. So far, WTO Members hold different views as to how to interpret the scope of the mandate for negotiations. Some see this involves market access and non-discrimination, including transparency, while others do not. At this stage, the recommendation to the WTO Members is to “*engage in more focused discussions and in this context put greater emphasis on proposals by Members, in accordance with Article XIII of the GATS*”.<sup>307</sup>

The Working Group on Transparency in Government Procurement analysed issues relating a potential agreement on transparency in government procurement. This included four areas: definition, scope and coverage; access to information and procedural matters; compliance mechanisms; and issues related to developing countries. Of particular interest are the areas on access to information and on compliance mechanisms. The prior discusses issues relevant for a possible agreement and relating transparency in procurement such as: procurement methods; publication of information on national legislation and procedures; information on opportunities, tendering and qualification procedures; time-periods; transparency of decision on qualification; transparency of decisions on contract awards. The latter deals with remedies such as Domestic Review Procedures and the WTO Dispute Settlement Procedures.

#### 4.6.3 Collective action against corruption in public procurement

The challenge with the different legislative mechanisms to fight corruption in public procurement described above is that their effectiveness is difficult to determine. In fact, Mungiu-Pippidi (2013) argues that failure of many approaches to-date is due to the top-down

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<sup>307</sup> WORLD TRADE ORGANIZATION (2005). *Annexes Hong Kong Ministerial Declaration* [WWW]. Available from: [http://www.wto.org/english/thewto\\_e/minist\\_e/min05\\_e/final\\_annex\\_e.htm#annexc4b](http://www.wto.org/english/thewto_e/minist_e/min05_e/final_annex_e.htm#annexc4b) [Accessed on 03-06-2013].

approach<sup>308</sup>. Instead, a combination with bottom-up is advocated to increase sustainability of reform and ensure that change occurs at all levels of society. Collective action hinges towards social learning theories in which the relevance of social or group dynamics to influence one's decisions is important. Trust in others and the real or perceived behaviour of other influences the way one looks at deviant behaviour. If corruption is seen as normal in a certain context, it also facilitates such behaviour. Collective action initiatives could break patterns when for example people stop bribing (supply) with the consequence that asking (demand) will become more difficult. The U4 Anti-Corruption Resource Centre (U4) and the international anti-corruption movement Transparency International (2015) define collective action as “*actions undertaken by individuals and/or groups towards a collective purpose or goal*” and highlight the growing support for such initiatives in order to fight corruption. According to the organisations, lack of political will undermines effectiveness of top-down anti-corruption approaches.

Various types of collective action are identified by U4 and Transparency International, ranging from individualistic to collectivistic, normative to non-normative and punishable to un-punishable. A further differentiation between persuasive and confrontational forms of collective action refers to those actions aiming to solve internal issues, for example through lobbying or petitioning, versus to those that directly target other parties, i.e. through demonstrations. The collective action tool primarily used for public procurement is the Integrity Pact. This tool was developed in the 1990s to improve procurement processes. By applying a collaborative approach, the tool aims to establish a level playing field in a contracting process. This is ensured by: encouraging companies to refrain from bribery; committing government agencies to prevent corruption; and following transparent procedures. Integrity Pacts include key criteria for anti-corruption in public procurement, such as transparency, professionalism and accountability. Applied since the 1990s, a solid sample of cases is available for review, covering countries across the world. The characteristics of each case differ, requiring the Integrity Pact model to be flexible in order to

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<sup>308</sup> MUNGIU-PIPPIDI, A. (2013). *The good, the bad and the ugly: Controlling corruption in the European Union* [WWW]. Available from: <http://www.againstcorruption.eu/wp-content/uploads/2013/03/ANTICORRP-Policy-Paper-on-Lessons-Learntfinal.pdf> [Accessed on 02-06-2013].

be an effective anti-corruption tool. At this stage, experience with Integrity Pacts shows that four main elements are crucial<sup>309</sup>:

- Political will of the authorities;
- Transparency and professionalism throughout the contracting process;
- External independent monitoring;
- And a participatory/multi-stakeholder involvement.

Rose-Ackerman (2016) suggests that to avoid corruption and collusion in public procurement, all potential bidders and the responsible authorities are to pledge to refrain from fraud and corruption. Integrity Pacts generally include clauses covering transparency and monitoring by civil society groups, enabling competing firms and outside parties to ensure fairness both in the bidding process and in the delivery. The no-bribery pledge is a variant of the prequalification processes by Kelman but with an anti-corruption twist. Transparency International prepared sample-bidding documents and descriptions of bidding procedures that inform companies of the procedure. Companies are to pledge to refrain from bribery and have internal compliance systems in place. Payments to agents must be disclosed. Rose-Ackerman notes that these pledges look redundant because corruption is in any case illegal, however they have the added value of highlighting the issue. Transparency International also recommends that countries express a commitment to impose sanctions. For example, if an Integrity Pact is signed in the context of the World Bank or any other International Financial Institution and if the official tries to extort bribes, Transparency International can point to the Integrity Pact and threaten with debarment if it engages in bribery. Especially if funding by financial institutions is involved, the Integrity Pact can be powerful for firms to resist extortion by officials. Rose-Ackerman warns that some fear that too few firms will bid on major projects that include prequalification procedures. However, a low amount of bids can be the result of less possible profit. Companies compare the fixed costs of a bid with the expected benefit or in other words the profit multiplied by the probability of winning the bid. More bidders could also be a sign of more corruption, as the profits might be higher. These reflections expose the difficulty of determining the effectiveness and impact of the tool to fight corruption. Of particular interest is the determination of which factors or conditions are

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<sup>309</sup> TRANSPARENCY INTERNATIONAL (n.d.). *Integrity Pacts* [WWW]. Available from: [http://www.transparency.org/whatwedo/tools/integrity\\_pacts](http://www.transparency.org/whatwedo/tools/integrity_pacts) [Accessed on 12-10-2016].

required for the tool to reach its full fullest potential as an anti-corruption measure. For example, if we look at some of the elements considered important for Integrity Pacts to work, we see various challenges. First, an adequate level of transparency should be defined, second, professionalism of contracting officials is desired and finally accountability needs to be ensured. Each challenge holds a set of best practices in order to confront corruption.

### *1. Transparency in public procurement*

Transparency is an important anti-corruption element but in public procurement arguably it has to be handled with care. In order to balance the need for transparency, procurement rules should ensure that when starting the process the sensitivity of information has been taken into account as well as the specificity and value of procurement. For example, in commercially and security sensitive information, transparency could be restricted. Also there is a certain principle of proportionality when publishing procurement opportunities. For example, big amount contracts may require either more transparency or more confidentiality depending on the matter at stake. In big-value contracts, at the pre-bidding phase, government officials could engage the private sector and citizens in dialogue to make suggestions in the drafting of specifications or support with market studies. This dialogue can be facilitated through online surveys or working groups, provided that sufficient and a variety of stakeholders participate. At the bidding phase, government officials could use new information and communication technologies. For example, ICT tools applicable could be e-procurement portals (for information on bids, specifications, etc.), contract management tools (for consulting and management of contracts, e-invoicing), information management systems (for the collection and storage of procurement statistics), electronic aggregation tools (for standardisation of goods and services), registers of suppliers (for suppliers repository) and e-catalogues (for information on products and services from registered suppliers). When inviting bidders to tender, contracting authorities could enhance transparency by ensuring clear documentation on the procurement opportunity (e.g. standard templates, guidelines) provide bidders with information about evaluation criteria and assure that bidders receive information at the same time in case of changes. Also, contracting authorities could ensure that bidders are able to request further clarification and receive sufficient time for preparation of bids. When awarding the contract, bidders could be notified in a transparent manner to ensure trust that the process was conducted fairly. Transparency when notifying the contract award could include the publication of the name of the winner and the reasons why bids were selected or

rejected. Debriefing the rejected bidders could benefit both supplier and buyer. A standstill period between the contract award notification and the start of the contract provides bidders with time to challenge any decisions taken by the contracting authority. At the post-bidding phase, internal management processes are required to deal with activities between the administration and the supplier. This is generally not covered by procurement law, but rather by contract and civil law. Integrity can be safeguarded through accountability and guidance mechanisms such as: adequate planning; risk management techniques; restriction and controls over change in the terms of the contract; accurate and timely supervision; new technologies to monitor the process; shared accountability such as performance bonds; and public scrutiny. When addressing exceptions to competitive procedures, a key challenge is ensuring equal treatment of bidders. Measures to ensure this can be: defining strict criteria for using non-competitive procedure; publication of an advance contract award notice; opening bids in an official manner; specific guidance to procurement officials; additional controls to verify justification of legal derogation in the approval phase; specific reporting requirements for using the exceptions; minimum transparency requirements. Low-value contracts, urgency procurement and defence procurement require specific efforts to ensure integrity.

## *2. Professional capacity in public procurement*

Enhancing professionalism to prevent integrity infractions in public procurement requires guidelines that ensure the use of public funds for the intended purpose, enable public officials to adapt to a changing environment and minimise corruption potential. Procurement could therefore be planned strategically, over the long term and with a transparent budget in order to ensure proper use of funds for the intended purpose. There is a need for governments to identify procurement goals, targets and milestones that link with their business plans, outputs and government objectives. Project-specific procurement plans could be an additional asset to minimise risks for large-scale projects. Appropriate budgeting is essential, this way for example financial commitments could be approved before starting the procurement. For example, parliaments could be given the opportunity to examine fiscal reports on public procurement. Strengthening internal responsibility mechanisms could be done by performance reporting, statements of responsibility by senior officials and improved internal financial control systems. Ensuring an appropriate segregation, such as separate functions to verify budget procurement, project and payment activities, and distinct reporting relationships could be used. Accountability can be extended from focusing on the purpose intended to the

outcomes achieved. Challenges concerning the definition of a budget consistent with the expected costs of a solution could be dealt with by referring to market prices (for example through commercial catalogues), dialogue with suppliers early in the process, or using existing knowledge from prior procurement processes.

Procurement develops from administrative tasks during the bidding phase to more contract management once the contract has been awarded. This requires different skills from officials. Daily management of public procurement is often the responsibility of individual public sector bodies. The overall oversight and coordination of public procurement activities can be centralised to an overarching entity. The development in the organisation of procurement systems depends on different factors such as the demand for more efficient government, technological changes and external commitments such as World Trade Organization and EU membership. Centralising procurement (or elements of procurement) could contribute to strengthening integrity. A central body could for example scrutinise relations between the contracting authority and the end-users, harmonise working methods and enhance transparency. Certification requirements and specific training could be deployed to prevent mismanagement. Public officials need the commercial expertise and required negotiation skills to operate in the economic market. This means that close contact is required with the private sector. Especially revolving-door situations in which public officials change career to the private sector increase risks of breaches of integrity. Cooling-off periods could be agreed upon, including rules on conduct.

According to the OECD, the prevention of conflict of interest and corruption is best addressed through management procedures and guidelines on ethical standards. The prior refers to ensuring separation of duties and authorisations between entities (for example between entities that require procurement and entities that procure), functions (such as strategic planning, budget and performance programme, accounting and reporting), stages of the procurement process, commercial and technical duties, as well as financial duties. Rotation of officials could be an effective mechanism or sharing responsibility, the so-called four-eyes principle. Ethical standards through for example codes of conduct could prevent conflicts of interest. Overall these codes can outline: standards concerning personal, family and business interests; rules concerning gifts and hospitality; political affiliation; disclosure of financial interests; and rules concerning revolving-door scenarios. The application of the standards starts with the selection process in which governments could decide to issue

security clearance for public procurement officials, verify their backgrounds and use public selection mechanisms. Also procurement authorities could request bidders to declare that they have financial resources to perform the contract as well as declaring that they hold a satisfactory record of integrity. Bidders that in the past have infringed incompatibility rules or have been convicted of corruption crimes could be denied access to the procurement process, so-called debarment.

### 3. *Accountability in public procurement*

Together with professionalism and transparency, public procurement should operate with mechanisms that ensure accountability in the process<sup>310</sup>. A pre-condition for the effective functioning of control mechanisms is the establishment of accurate track records. This can be seen as the procurement process' footprint in order to be able to trace back the decisions made. Such records ideally are kept digitally in order to allow for real-time monitoring of performance and integrity. Most important for keeping track of the procurement documentation is the internal audit and control mechanism. Another accountability approach focuses on risk analysis in which authorities try to identify vulnerable areas for irregularities.

Internal control mechanisms require a clear chain of responsibility in order to approve the use of funds throughout the various stages of the procurement process. High-ranking officials often play key roles in defining evaluation criteria, evaluations and contract awarding. An additional assurance could be the involvement of independent peer reviewers. The external audit function in public procurement is conducted by supreme audit institutions or courts of accounts. These institutions may play an essential role in detecting and investigation corruption. Their role extends to also suggesting systemic improvements. Supreme audit institutions should have sufficient capacity, in terms of resources and independence, to deal with public procurement auditing. Also, they should have transparent and accountable governance structures.

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<sup>310</sup> ARROWSMITH, S. (2010). *Public Procurement Regulation: An introduction* [WWW]. Available from: <http://www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/publicprocurementregulationintroduction.pdf> [Accessed on 29-05-2013].

Very important in controlling the procurement processes are the complaint and recourse mechanisms. Procedures should be put in place to allow officials to expose irregularities. On top of this, it is very recommendable to protect the people that report corruption, the “whistle-blowers”. Recourse systems function primarily as oversight mechanisms but should provide the opportunity for bidders to contest the process or verify its integrity. Dealing with these complaints should be done in a timely manner, independently, efficiently and offer adequate answers.

Finally, ensuring public scrutiny can be an accountability structure effective in fighting corruption in public procurement. Independent oversight bodies such as parliamentary committees relating public procurement or the Ombudsman are primarily used to identify and address irregularities in public procurement (top-down). A form of direct social control would be to include in the monitoring the private sector, end-users, citizens and civil society (bottom-up).

#### *4. Implementation tools*

Governments should ensure that their procurement systems are systemically strengthened. This means that an analysis is required of its overall capacity in terms of resources and legal framework and its governance in terms of transparency, accountability and professionalism. Once weaknesses have been identified, specific tools can be implemented. Regarding the governance, the OECD identified key recommendations to develop a policy framework:

##### 1. Transparency

- a. Provide an adequate degree of transparency in the entire procurement cycle
- b. Maximise transparency in competitive tendering
- c. Take precautionary measures to enhance integrity, in particular for exception to competitive tendering

##### 2. Good management

- a. Ensure that public funds are used according to the purposes intended

- b. Ensure that procurement officials meet high professional standards of knowledge, skills and integrity
3. Prevention of misconduct, compliance and monitoring
- a. Put mechanisms in place to prevent breaches in integrity
  - b. Encourage close cooperation between government and private sector
  - c. Provide specific mechanisms to monitor the process, detect irregularities and sanction accordingly
4. Accountability and control
- a. Establish a clear chain of responsibility
  - b. Handle complaints fairly and timely
  - c. Empower civil society, media and the wider public

Four practices in preventing corruption in procurement are particularly interesting given that these cover all integrity dimensions identified by the OECD, namely transparency, good management, prevention of misconduct and accountability. These practices are electronic record keeping, reporting guidelines for selecting procurement methods and in case of non-competitive tendering and guidelines in case of emergency procurement. Further, various tools are recommendable given their relevance throughout the entire procurement process, i.e. during the pre-bidding, bidding and post-bidding phases. These are: indicators of procurement risks; gifts and benefits checklist; registration of personal interests and a code of conduct for procurement practitioners.

Record keeping efforts are reckoned to be among the best practices in avoiding corruption in public procurement. This practice covers all dimensions discussed above and applies to the entire procurement process. It supports the principle of transparency, provided that access to information is allowed to relevant stakeholders and to the public at large. Regulations on access to information should be in place. Secondly, it allows for professionalism if procurement records allow officials to analyse the process and improve performance. Thirdly, records can be used to prevent, investigate and, if needed, sanction corruption. For the

optimal use of records it is recommended to digitalize them. The World Bank and the OECD provide information on which documents are essential in record keeping<sup>311</sup>:

#### *Pre-bidding phase*

- Need assessment reports and studies
- Deliberations of political bodies

#### *Bidding phase*

- Public notices
- Technical requirements, including justification in case of changes
- Documentation made available to the bidder
- Bid analysis documents
- Selection criteria
- Final bid evaluation report, including records on why certain bids were rejected, appeals
- Terms of the awarded contract

#### *Post-bidding phase*

- Records of changes in contract, i.e. affecting deadlines, performance, quantity, prices etc.
- Invoices and payments
- Certificates of inspection
- Records of claims and outcome
- Supplementary contract work

As with record keeping, setting criteria for selecting tender methods also covers all dimensions of good practices against possible corruption in procurement. Documenting

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<sup>311</sup> WORLD BANK (2013). Country Procurement Assessment Report [WWW]. Available from:

<http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,contentMDK:20105527~menuPK:84285~pagePK:84269~piPK:60001558~theSitePK:84266~isCURL:Y,00.html> [Accessed 28/05/2013].

OECD (2013). Checklist for record keeping [WWW]. Available from:

<http://www.oecd.org/governance/procurement/toolbox/checklistforrecordkeeping.htm> [Accessed 29/05/2013].

guidance to procurement officials on the choice of methods available is essential, especially when dealing with exceptions to the rules and non-competitive tendering. The latter should be clearly defined in order to limit irregularities. The selection of the tender methods takes place in the pre-bidding phase and should be based on a needs assessment. Framework agreements could be a good approach<sup>312</sup>. The EU rules define such an agreement as “*an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged*”. The advantage of framework agreements is that once awarding contracts through the agreement, no full procurement processes need to be followed.

When procurement officials decide to select non-competitive methods, it is recommended by the OECD to document this process including information on: why the contracting authority did not use competitive methods; and which procedures have been followed during the non-competitive tendering process. Special focus could lie on ensuring integrity in this process. Also, it is recommended to distribute this information to the central procurement authority in order for this body to monitor the process and use the experience to advice other contracting authorities. Ideally, governments establish clear guidelines on the use of non-competitive tendering including criteria for transparency, good management, corruption prevention and accountability.

The significant corruption risks of accelerated procurement procedures can be addressed by setting guidelines for its use. Such guidelines will enhance integrity in public procurement addressing all governance dimensions described above. The importance of preventing irregularities in this process lies especially in the immediate need of end-users of the procured goods, for example in case of a natural disaster. Accelerated procedures, such as in case of emergency, establish alternative procedures given governments need to act fast. Abuse of such circumstances occurs and therefore guidelines should establish clear criteria on when such procedures can be used and by which contracting authorities. But prior to this, it is recommendable to procure in advance the commonly used supplies and services. This

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<sup>312</sup> OECD (2011). Procurement tools [WWW]. Available from: <http://www.oecd.org/site/sigma/publicationsdocuments/47450487.pdf> [Accessed on 03-06-2013].

reduces incentives for corruption since normal procurement procedures can be followed. Also here, framework agreements can be useful<sup>313</sup>.

Red flag systems in public procurement could guide public procurement officials in the identification of corruption risks throughout every stage of the procurement cycle. Awareness during all steps is essential to prevent irregularities and improve good procurement practices. Central procurement bodies could play an important role in disseminating indicators and adapting these on the local procurement practices in general or even on a project basis. Besides raising awareness, public procurement officials (and also private stakeholders) should be supported in taking action against irregularities. Complementary to formal appeal mechanisms, an important tool is a whistle-blower system allowing staff to report irregularities. This should be backed-up with sufficient protection.

Public procurement officials should be guided on how to deal with gifts and other benefits, such as travels, conferences, etc. offered by private stakeholders. Accepting gifts could pose serious integrity problems as the line between a gift and a bribe is blurred. Electronic systems are reckoned to be most useful. In the case of receiving a gift, a public official can report this immediately online and receive proper guidance in case of possible conflict of interest.

The disclosure and registration of personal interests is important when identifying potential corruption risks and to avoid conflict of interest provided that these disclosures are duly verified. Further, transparency regarding this aspect can affect public perception. Such a tool could be applicable to civil servants but also politicians. The advantage of this is that potential conflicts between public positions and private interests can be identified already in the pre-bidding phase, for example during the needs assessment. It is important to note that besides promoting transparency and preventing conflict of interest, declaring assets and interests is also important to preclude false accusations of misconduct by civil servants and politicians.

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<sup>313</sup> SCHULTZ, J., SOREIDE, T., (2006). Corruption in Emergency Procurement [WWW]. Available from: <http://www.u4.no/publications/corruption-in-emergency-procurement/> [Accessed on 02-06-2013].

Establishing a clear code of conduct provides procurement officials with an understanding of what behaviour is expected, measures applicable in case of conflict of interest and rules on revolving-doors. Besides, a code of conduct is a tool that generates positive public perception. Given that many countries have codes in place applicable to public officials in general, it is recommendable to complement this with provisions directed to procurement officials. An important provision is one on efficiency and effectiveness requiring officials to reach the objectives relating public expenditure. A code should be clear in enforcement and sanctioning. It is recommendable to have an independent body in place to monitor compliance.

Other tools that can be used to address procurement weaknesses could direct particular elements in the procurement system. During the pre-bidding phase, stakeholders could: use public consultation of stakeholders when drafting the specifications; limited disclosure of sensitive procurement information (for example commercial or defence information); formally commit not to commit misconduct and corruption; establish procurement plans include post-bidding guidelines. During the bidding phase stakeholders could: use e-procurement tools; ensure wide dissemination of the bid notice; use standard/model templates for procurement documentation; establish clear evaluation criteria including weightings; report to bidders on changes in the bid; allow for bidders to request clarifications and disseminate these to all; provide for sufficient time to prepare; monitor the process through a procurement council; publish all relevant information once the contract is awarded (for example the name of the successful bidder, the nature of goods and services, the award criteria, contract award rationale, price of the winning bid, etc.); allow for contracts awards to be challenged; and to ensure a standstill period between the contract award and the start of the award. During the post-bidding phase stakeholders could: use e-procurement in the contract management; restrict and control changes in the terms of the contract; share accountability or risk between contractor and contracting authority; and ensure public access to procurement documents/records.

To ensure good management, in particular strengthen professionalism, and prevent misconduct various measures could be taken. For example, measures could include specific training for procurement officials on the use of new technologies, on integrity and anti-corruption or building capacity on commercial expertise. Another measure to ensure professionalism could be the enhancement of certification requirements of procurement

officials, as well as fair and stable labour conditions. Also developing the procurement 'memory' through a strong internal database including information on bidders, former procurement and the execution of the contract could help. An important measure could be the separation of duties and authorisations (e.g. between entities, functions, stage of procurement) as well as rotation of duties, codes of conduct for contractors and for procurement officials. Finally, the OECD also highlights partnership with civil society and private sector in monitoring procurement (for example an Integrity Pact). Specific accountability and control mechanisms are:

- Information systems including data on:
  - o Financial aspects of procurement;
  - o Characteristics of procurement processes (e.g. criteria, exceptions);
  - o Number of complaints and recourse mechanisms;
  - o Types of control.
- Public access to procurement information;
- Internal audit and financial control;
- Internal management control;
- Clear chain of responsibility;
- Independent examination of procurement;
- External audit control;
- Risk mapping tools;
- Whistleblowing systems and protection;
- Mechanisms to challenge the fairness of the procurement procedure (remedies scheme);
- Mechanisms to challenge procurement decisions;
- Independent complaints review system;
- Efficient resolution of complaints system;
- Informal problem solving;
- Independent oversight bodies (e.g., Ombudsman, parliamentary committee).

#### 4.7 Collective action for EU procurement and the transparency deficit

While challenges to ascertain the scale and impact of corruption in EU procurement remain an obstacle to determine the effectiveness of any anti-corruption measure, its potential damage as discussed above does legitimise looking into the role civil society could play in preventing corruption in public procurement. Also, this could be further justified by taking a look at some of the challenges procurement of EU funds is facing.

Transparency of EU budget and implementation lies at the core of this challenge. Documentation on the EU budget and implementation is largely accessible online. However, in order to get a full overview, data has to be collected from different sources. There is no centralised access point where documentation is collected in a standardised way. Instead there are different sources where important information concerning budget implementation is presented. For example, the European Commission has a dedicated website on the budget<sup>314</sup> containing figures on the multi-annual financial framework, annual budgets, programmes and funds available. An important addition to this is the Financial Transparency System portal<sup>315</sup> that contains data on beneficiaries directly managed by the European Commission. The open data portal on the ESI Funds<sup>316</sup> provides aggregated data on budget implementation in the EU, per fund, country and investment area.

The principle of transparency is embodied in Article 15 of the Treaty of the Functioning of the European Union (TFEU).<sup>317</sup> *“In order to promote good governance and ensure the participation of civil society, the Union’s institutions, bodies, offices and agencies shall conduct their work as openly as possible”*. In addition, Article 15 states *“any citizen of the Union [...] shall have a right of access to documents of Union [...]”*. The functioning of the transparency principle depends on regulations set forth by the European Parliament and the

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<sup>314</sup> EUROPEAN COMMISSION (n.d.). Budget [WWW]. Available from:

[http://ec.europa.eu/budget/index\\_en.cfm](http://ec.europa.eu/budget/index_en.cfm) [Accessed on 21-10-2016].

<sup>315</sup> EUROPEAN COMMISSION (n.d.). Financial Transparency System [WWW]. Available from:

[http://ec.europa.eu/budget/fts/index\\_en.htm](http://ec.europa.eu/budget/fts/index_en.htm) [Accessed on 21-10-2016].

<sup>316</sup> EUROPEAN COMMISSION (n.d.). European Structural and Investment Funds: EU overview [WWW].

Available from: <https://cohesiondata.ec.europa.eu/overview> [Accessed on 12-10-2016].

<sup>317</sup> See: EURLEX (2012). Consolidated version of the TFEU [WWW]. Available from: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT> [Accessed on 21-10-2016].

Council. Relating to the implementation of the EU budget, a key legislative instrument is the Financial Regulation<sup>318</sup>. From 1 January 2016, a new Financial Regulation is applied and accompanied by new Rules of Application. The latter includes the more detailed and technical rules, which manage day-to-day implementation of the Financial Regulation. Transparency on beneficiaries of funds depends on the management type or mode used for budget implementation, namely: direct management; indirect management; and shared management.

### *1. Direct management*

Data on funds directly managed by the European Commission are captured through the Financial Transparency System<sup>319</sup> in accordance to the Financial Regulation. The database includes information on beneficiaries of the EU budget directly administered by the European Commission departments, its staff in the EU delegation and through the executive agencies. In addition, the Financial Transparency System also includes information from the European Development Fund. Various types of funding mechanisms are published: grants; prizes; public procurement; financial instruments; budget support; and external experts. Information can be searched on: who receives funds; purpose of expenditure; location of beneficiary; amount and type of expenditure; responsible European Commission department; EU budget lines; and year. The database does not include information on public procurement contracts lower than EUR 15,000 or confidential information on the beneficiaries.

The legal basis for the Financial Transparency System is foreseen in Article 35 of the Financial Regulation<sup>320</sup>. It states that the European Commission “*shall make available, in an appropriate and timely manner, information on recipients, as well as the nature and purpose of the measure financed from the budget, where the latter is implemented directly in accordance with point (a) of Article 58(1), and information on recipients as provided by the entities, persons and Member States to which budget implementation tasks are entrusted*

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<sup>318</sup> EUROPEAN COMMISSION (n.d.). Financial Regulation and Rules of Application [WWW]. Available from: [http://ec.europa.eu/budget/biblio/documents/regulations/regulations\\_en.cfm](http://ec.europa.eu/budget/biblio/documents/regulations/regulations_en.cfm) [Accessed on 21-10-2016].

<sup>319</sup> EUROPEAN COMMISSION (n.d.). Budget [WWW]. Available from: [http://ec.europa.eu/budget/index\\_en.cfm](http://ec.europa.eu/budget/index_en.cfm) [Accessed on 21-10-2016].

<sup>320</sup> EUROPEAN COMMISSION (n.d.). Financial Regulation and Rules of Application [WWW]. Available from: [http://ec.europa.eu/budget/biblio/documents/regulations/regulations\\_en.cfm](http://ec.europa.eu/budget/biblio/documents/regulations/regulations_en.cfm) [Accessed on 21-10-2016].

*under other methods of implementation*". Point (a) of Article 58(1) refers to the direct management by departments, including staff in the Union Delegations under the authority of their respective Head of Delegation or through executive agencies. Article 35(3) states that information "*shall be made available with due observance of the requirements of confidentiality and security, in particular the protection of personal data*". More detailed rules on the publication of information on beneficiaries can be adopted through delegated acts by the European Commission.

The Rules of Application provides more details on application of Article 35 of the Financial Regulation. Article 21(1) of the Rules of Application states that "*information on recipients of Union's funds awarded under direct management shall be published on an internet site of the Union Institutions, no later than 30 June of the year following the financial year in which the funds were awarded*"<sup>321</sup>. In addition, it lists the information that has to be published.

## 2. Indirect management

Article 58(1) point (c) of the Financial Regulation sets out the definition of indirect management which refers to budget implementation tasks for: "*third countries or the bodies they have designated; international organisations and their agencies; the European Investment Bank and the European Investment Fund; bodies referred to in Articles 208 and 209; public law bodies; bodies governed by private law with a public service mission to the extent that they provide adequate financial guarantees; bodies governed by the private law of a Member State that are entrusted with the implementation of a public-private partnership and that provide adequate financial guarantees; persons entrusted with the implementation of specific action in there CFSP pursuant to Title V off the TEU, and identified in the relevant basic act*". Article 60 of the Financial Regulation details that persons entrusted with budget implementation tasks shall respect the principles of sound financial management, transparency and non-discriminations. Paragraph 5 states that the following information is to be provided to the European Commission: a report on the implementation of the tasks entrusted to them; accounts for the expenditure; a summary of the final audit reports.

## 3. Shared management

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<sup>321</sup> Ibid.

Article 59 of the Financial Regulation states that in case of shared management the European Commission delegates implementation tasks to the Member States. Principles such as sound financial management, transparency and non-discrimination have to be respected by the European Commission and the Member State. Each stakeholder has to fulfil respective roles concerning control and audit obligation. Complementary provisions can be laid out in sector-specific rules. Paragraph 5 requires bodies to provide the European Commission by 15 February of the following financial year with accounts on expenditure incurred. Those accounts are to include pre-financing and sums for which recovery procedures are underway or have been completed. Also, the European Commission is to receive an annual summary of the final audit reports and controls carried out, including an analysis of the nature and extent of errors and weaknesses identified in systems, as well as corrective action taken or planned. Member States “*may, at the appropriate level, publish the information referred to in this paragraph*”.

From the outset of the transparency provisions for each EU fund management type, it is clear that the European Commission has limited control over spending of the funds in the different Member States. This supports the relevance to explore the role of third parties in the control of public procurement of ESI Funds. Stakeholders from the public sector, as well as civil society and academia, have expressed concerns in relation to the EU budget transparency. For example, the platform *Openspending Community* concludes that one of the main transparency concerns is the “*missing link between the two major EU budgetary instruments (the seven years framework and the annual budget regulation) and the funds themselves*”<sup>322</sup>. Another concern is that there is no equivalent to the Financial Transparency System for beneficiaries funded through shared management, meaning that the level of transparency depends on the Member States’ “will” to deliver data in a transparent and accessible manner. As a consequence, public scrutiny of EU funding is limited to the national/case-by-case level (i.e. through a tool as the Integrity Pact) and EU-wide or comparative analysis is difficult. From the perspective of accessibility, Transparency International criticises the applicability of different data formats<sup>323</sup>. The Centre for Industrial Studies (CSIL) notes similar concerns in a

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<sup>322</sup> OPEN KNOWLEDGE INTERNATIONAL (n.d.). How Transparent is the EU budget [WWW]. Available from: <http://community.openspending.org/resources/eu/transparency/#fn.ftnt23> [Accessed on 24-10-2016].

<sup>323</sup> TRANSPARENCY INTERNATIONAL (n.d.). EU Funds & Budget [WWW]. Available from: [http://www.transparencyinternational.eu/focus\\_areas/eu-budget/](http://www.transparencyinternational.eu/focus_areas/eu-budget/) [Accessed on 24/01/2016].

study for the European Parliament conducted in 2009. The study found that many national websites provided data in formats (such as PDF) that do not support Open Data standards<sup>324</sup>. In addition, CSIL notes that the use of different languages and currencies complicated data comparison.

The promotion of the European Commission to fight corruption in ESI Funds contains two specific initiatives, one purposely allowing civil society to detect and prevent corruption in public procurement (Integrity Pact), another giving this role to the contracting authorities (ARACHNE). By analysing the use of the Integrity Pact tool to date this study aims to understand the role of civil society organisations in the fight against corruption but also identify to which extent this compares to providing the contracting authority with means to detect and prevent corruption. Integrity Pacts are agreements between government agencies (such as contracting authorities) and economic operators (such as bidders) participating in public procurement processes. The agreement commits parties to refrain from paying, offering, soliciting or accepting bribes, and from colluding with other bidders during the procurement process to frustrate the competition. A third party to the agreement (such as civil society) monitors compliance of the stakeholders. Integrity Pacts include key criteria for anti-corruption in public procurement, such as transparency, professionalism and accountability. The aims of the Integrity Pacts fall in line with public procurement objectives applied in the EU, namely ensuring a level playing field for all actors, and ensuring value for money by avoiding corruption<sup>325</sup>.

Integrity Pacts were developed by Transparency International in the 1990s as a tool to improve procurement processes. It adopts a collaborative or collective approach and aims to establish a level-playing field in a contracting process. Since its development, hundreds of cases have been implemented across the world by subsidiaries or local chapters of

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<sup>324</sup> CSIL (2009). The Data Transparency Initiative and its Impact on Cohesion Policy [WWW]. Available from: [http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL-REGI\\_ET%282009%29419102](http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL-REGI_ET%282009%29419102) [Accessed on 24-10-2016].

<sup>325</sup> ARROWSMITH, S., BORDALO FAUSTINO, P., HEUNINCKX, B., TREUMER, S., and FEJO, J. (2010). *EU public procurement law: an introduction* [WWW]. Available from: <https://www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/eupublicprocurementlawintroduction.pdf> [Accessed on 24-09-2016].

Transparency International, but also by third parties. Not all Integrity Pacts have been systematically documented but to date Integrity Pacts and similar projects have been conducted in over twenty countries across the globe. This includes: Argentina, Benin, China, Colombia, Ecuador, India, Indonesia, Mexico, Nepal, Pakistan, Panama, Paraguay, Peru, Rwanda, South Korea, Uganda and Zambia. In Europe, six EU Member States have had relevant experience with Integrity Pacts, namely Germany, Latvia, Austria, Hungary, Bulgaria, and Italy. Two EU Member States recently started to work with Integrity Pacts, namely Spain and Romania. Eleven EU Member States have no experience with Integrity Pacts (Lithuania, Cyprus, Luxembourg, Poland, Czech Republic, Slovenia, Croatia, Belgium, the Netherlands, France and Portugal). The United Kingdom and Poland explored Integrity Pacts relating the defence sector. In Poland, these efforts did not materialise in a concrete project. Greece acquired knowledge on the Integrity Pact by having supported relevant efforts in 2011<sup>326</sup>. The pilot project initiated by the European Commission in collaboration with Transparency International expands the list of EU Member States that will be in the near future initiating and implementing Integrity Pacts. Pilot Integrity Pacts in eleven EU Member States will cover public procurement processes co-funded by EU funds. This includes projects in Bulgaria, Czech Republic, Greece, Hungary, Italy, Latvia, Lithuania, Portugal, Romania, Slovenia and Poland.

The World Bank Institute denominates the Integrity Pact as a collective action tool. It defines collective action as a “*collaborative and sustained process of cooperation among stakeholders*”<sup>327</sup>. According to the World Bank Institute, collective action can increase the impact and credibility of individual action, bring vulnerable individual players into an alliance of like-minded organisations and level the playing field between competitors. “*Collective action can complement or temporarily substitute for and strengthen weak local laws and anti-corruption practices*”<sup>328</sup>. In particular, small-medium enterprises (SMEs) can

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<sup>326</sup> The tool was not applied but advocacy to authorities resulted in expected forthcoming legislative changes.

<sup>327</sup> WORLD BANK INSTITUTE (2008) Fighting Corruption through Collective Action [WWW]. Available from: <http://www.fcpablog.com/blog/2014/11/6/collective-action-a-new-approach-to-combat-corruption-part-8.html> [Accessed on 12-10-2016]. Slide 4

<sup>328</sup> WORLD BANK INSTITUTE (2008) Fighting Corruption through Collective Action [WWW]. Available from: <http://www.fcpablog.com/blog/2014/11/6/collective-action-a-new-approach-to-combat-corruption-part-8.html> [Accessed on 12-10-2016]. Slide 4

benefit from collective action initiatives, as these businesses risk being disproportionately affected by the effects of corruption due to their size<sup>329</sup>. Also, collective action could ensure that SMEs with less human and financial resources are able to install anti-corruption systems, interact with others and collectively address level playing field challenges in both non- and endemically corrupt business environments. SMEs in endemically corrupt business environments face the challenge that the company most likely to pay a bribe has an unfair advantage over those that do not resort to such practices. A common response by businesses is denying responsibility: “if we do not bribe, someone else would”. In addition, not necessarily only pertaining to endemic corrupt environments, businesses could also argue justification based on higher moral grounds such as bribing is a part of free-market forces of supply and demand. The Integrity Pact embraces the neutralization techniques used by companies to resist tackling the problem of corruption. Michael Wiehen and Cobus de Swardt discuss this in their reflections on the Integrity Pact as a collective action tool<sup>330</sup>. They argue that the prevalence of corruption disheartens individual companies and even whole nations to take the first step against corruption. Companies are facing dilemma scenarios and risk ending up empty-handed when being the one deciding to conduct clean business while their competitors continue bribing. Wiehen and de Swardt acknowledge the problems and note: “*nobody in business or government can operate globally without recognizing their role, their responsibility, and their risk when it comes to corruption*”<sup>331</sup>. Hence, they suggest the Integrity Pact as tool to drive economic operators and contracting authorities to take steps in doing clean business, to enforce this via an independent broker (i.e. civil society organisation) and lay the foundation for an equal level playing field. On first sight the choice of the European Commission to use the Integrity Pact as a tool seems to target various elements of interest for the EU. The tool targets an area vulnerable for corruption, namely EU public procurement which affects a large part of EU expenditure and over which the European Commission has limited control. Secondly, it targets businesses that can be disproportionately affected by corruption such as SMEs, which are specifically targeted through the EU public procurement reforms. Thirdly, the Integrity Pact aims to promote best

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<sup>329</sup> WORLD BANK INSTITUTE (2008) Fighting Corruption through Collective Action [WWW]. Available from: <http://www.fcablog.com/blog/2014/11/6/collective-action-a-new-approach-to-combat-corruption-part-8.html> [Accessed on 12-10-2016]. Slide 13

<sup>330</sup> Pieth, M. P. 87

<sup>331</sup> PIETH, M. (2012). Collective action: Innovative Strategies to Prevent Corruption. Dike Verlag AG. p. 84.

public procurement practices, which could help harmonising the implementation of EU public procurement measures across the EU Member States. Also it aims to ensure an equal level playing field for businesses, which could ensure more cross-border public procurement activity at this way complete the functioning of the Single Market. Finally, the tool can be used on different business sectors, on different governmental levels and across regions.

The main challenge, however, is that the effect or impact of collective action initiatives is difficult to determine and that collective action initiatives according to the World Bank Institute particularly fair well in endemic corrupt environments. Despite that collective action initiatives can also be used in non-endemic corrupt environments, the question does raise which conditions favour the effective use of the Integrity Pact. Without better understanding this, we would not be in a position to simply justify the use of the tool in EU Member States. It is therefore that the next section of this study aims to better understand which conditions favour the use of the Integrity Pact tool and this way aim to determine the effective role of civil society organisations to prevent corruption in public procurement.

## 5 Part II – Integrity Pacts as collective action

The second study area aims to determine the compatibility of the Integrity Pact tool on the basis of the collective action approach to prevent corruption in public procurement. The tool is used to provide multiple-case study evidence on the role of the independent monitor to prevent corruption in public procurement. With this information, areas can be exposed in which civil society monitoring of public procurement plays a preventive role outside the confines of the existing anti-corruption framework to prevent corruption in public procurement.

The main study questions are:

- How is the Integrity Pact tool set up?
- How is the Integrity Pact tool applied in practice?
- What are limitations, strengths and weaknesses of the Integrity tool?

The Integrity Pact initiative was developed by Transparency International in the 1990s and was initially coined as “Islands of Integrity”. The idea originated from the notion that corruption is different in each country and that change does not happen over night. De Swardt and Wiehen note<sup>332</sup> that businesses may not know how to make government change its way of dealing with the private sector and that governments may not be able to keep out corruption because it cannot stop companies from bribing. The latter, they note, is of particular relevance in developing countries where foreign companies bribe the country’s officials. According to the founders of the Integrity Pact, the way to achieve change is to work together transparently on an “island of integrity” which allows both sides to fundamentally change the nature of the game. The idea of the “island of integrity” was first tested on procurement, partially due to its vulnerability for corruption and therefor need for transparency, partially because public procurement is an important driver for development in developing countries and emerging economies. *“Passing new laws alone is not enough to*

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<sup>332</sup> PIETH, M. (2012). Collective action: Innovative Strategies to Prevent Corruption. Dike Verlag AG. p. 84.

*address the problem. The challenge is to change practices that have become deeply rooted over time.*”<sup>333</sup>.

The collective problem described by De Swardt and Wiehen in Pieth (2012) describes the scenario in which corruption is perceived endemic: *“if other people don’t want to tackle it, you can’t expect us to”*<sup>334</sup>. Individual companies are reluctant to take the first step as it risks that their competitors do resort to bribing. In order to tackle this, the experts suggest three actions: pressure on the top; encourage good practices to stakeholders; and support citizens to make change happen from the bottom up. In operational terms this means that voluntary agreements are made between bidders and government to restrict opportunities for corruption in a particular project. Bidders agree not to pay bribes and disclose all commissions paid. The government agrees to ensure measures to avoid corruption in the process, and sanction any official that accepts or demands bribes. With the Integrity Pact, independent experts and civil society organisations are used to increase transparency and accountability as well as compliance with the agreement’s commitments. According to De Swardt and Wiehen the role of the civil society expert is crucial in addressing the collective action problem. After all, with their involvement the companies *“can abstain from bribing in the safe knowledge that their competitors have provided assurance to do the same”*<sup>335</sup>.

The concept of “islands of integrity” also, apart from the Integrity Pact, has been applied on different tools. For example, so-called Development Pacts were used to reconfirm promises made by those governing to those governed. Communities and committed public officials publically negotiate an agreement in which local improvements are outlined. The former would monitor the compliance of the latter in achieving these improvements. The Development Pacts have been used for example in Kenya where the local community group signed a pact with the local water company setting standards for service provision. In India the Development Pacts were used to monitor election promises of politicians. Another tool which builds on the Islands of Integrity is the Integrity Pledge which is used to seal and legitimize commitment of leaders to integrity with public monitoring. Finally, new technologies could break the boundaries of the “islands” by allowing wider social control of integrity beyond the reach of a specific civil society organisation.

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<sup>333</sup> PIETH, M. (2012). Collective action: Innovative Strategies to Prevent Corruption. Dike Verlag AG. p. 86

<sup>334</sup> Ibid. p. 87

<sup>335</sup> Ibid. p. 89

## 5.1 Integrity Pact cases

This following section will present the Integrity Pact case studies. The first sections includes an overview of the reviewed cases on the global level, the second section will present in more detail the European cases.

### 5.1.1 Integrity Pacts across the world

The main body of Integrity Pact cases are documented by Transparency International, which across the globe has operated as a civil society monitor for public procurement. However, also other organisations engage in Integrity Pacts or similar types of initiatives, such as the Construction Sector Transparency Initiative (CoST). The following section will introduce the initiatives that will form the basis this study's analysis to determine the favourable conditions for an effective role of civil society to prevent corruption in public procurement.

Transparency International is a decentralised civil society organisations with a secretariat in Berlin and local chapters in around 100 countries world-wide. The chapters of the organisation enjoy a great degree of independence and therefor vary greatly in size and organisation. Chapters have designed and implemented Integrity Pacts in Latin America, Asia, Africa, and Europe. Although not all cases have been documented, Integrity Pacts in roughly 20 countries have been implemented. Some countries implemented numerous projects while in other countries the tool was used once or twice. Also the shape of each Integrity Pacts differs which complicates taking stock of the cases in a structured manner. In Latin America there have been Integrity Pacts implemented in Argentina, Colombia, Ecuador, El Salvador and Mexico. In Asia there have been Integrity Pacts in China, India, Indonesia, Pakistan and South Korea. In Africa, projects have been documented in Benin, Rwanda, Uganda and Zambia. In Europe, there have been Integrity Pacts in Austria, Bulgaria, Germany, Hungary, Italy and Latvia.

Civil society organisations in some countries are in the initial stages of exploring the use of the Integrity Pact or recently launched projects. For example, in Honduras the chapter of Transparency International is in the process of designing projects for the healthcare sector. In Spain, the national Transparency International chapter is starting the launch of Integrity Pacts as part of the Siemens Integrity Initiative. In Romania, the national Transparency International chapter started a project in 2015. Transparency International United Kingdom

and Poland explored the use of Integrity Pacts for monitoring procurement in the defence sector but did not come to implement.

### *1. Colombia*

One of the most experienced stakeholders on Integrity Pacts is the chapter of Transparency International in Colombia. The first documented projects date back to the early days of the Integrity Pact in the 1990s. The projects covered a range of economic sectors such as health, infrastructure, education, finance, energy, housing, communications and transport, and were implemented on the local, regional and national level. According to the Transparency International chapter, the Integrity Pacts promoted dialogue on ethics and public procurement, improved procurement processes and public contracts, supported in the identification of risks, raised public awareness and strengthened accountability<sup>336</sup>.

The implementation of the Integrity Pact posed challenges to the chapter<sup>337</sup>. For example, in monitoring corruption in public procurement it was a challenge to determine the difference between legal corruption and ethical or moral corruption. In other words, some behaviour by contracting authorities can be within the boundaries of the law but from a moral point of view of the monitors unethical. The second challenge is how to respond to such a scenario. For example, the civil society monitor needs to formulate a response to such unethical but legal behaviour. Towards the public the reasoning behind such a response does not always explain itself. A third challenge for the civil society organisation is the participation of actors in the Integrity Pact using the tool as a form of window-dressing rather than an effort to drive for change. Also the Transparency International Colombia chapter identified a lack of willingness of participants in a procurement process to blow the whistle on identified irregularities as a problem<sup>338</sup>.

### *2. El Salvador*

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<sup>336</sup> Survey feedback global review, September – November 2015.

<sup>337</sup> Survey feedback global review, September – November 2015.

<sup>338</sup> Survey feedback global review, September – November 2015.

In El Salvador the Integrity Pact as a tool was introduced in 2009 after election debates in the country centred around issues such as corruption and transparency. The national chapter of Transparency International entered into dialogue with the Ministry of Public Works to formulate a response to irregularities and corruption in public procurement. In collaboration with the contracting authority and the construction sector, the first Integrity Pact was launched in 2010. By the end of 2015 around 31 Integrity Pact projects were conducted allowing for external monitoring of around USD 62 billion in public procurement.

The Integrity Pact included transparency and anti-bribery commitments for both the contracting authority and the bidder<sup>339</sup>. For example, the stakeholders are not to offer or accept any payment, gift or favour in exchange for advantages, and have to disclose relevant information to the monitor such as personal asset declaration requirements. Also the Integrity Pact ensures that information is published online about progress made in the procurement process. Also stakeholders are asked to come forward about any inappropriate acts.

A challenge in the Integrity Pact used in El Salvador is that monitoring only initiates after the winning bid has been decided and the contract is being implemented<sup>340</sup>. The national procurement law keeps information during the bidding process confidential which limits the transparency overall and limits access to the procurement process by the independent monitor from the civil society organisation. In practice this means that only the winning bidder will be subject to monitoring once this economic operator is fulfilling contractual obligations. A second challenge experienced in the El Salvador Integrity Pact cases has been to identify and provide evidence of corruption<sup>341</sup>. Instead the civil society organisation used transparency and accountability indicators to determine level of compliance. This included rating the quality and amount of information provided by the ministry website and the number of complaints filed against signatory parties to the Integrity Pacts. Another challenge was the response to possible irregularities. The Integrity Pact does not provide for a proper mechanism but instead the independent monitor needs to take the claim to the public prosecutor or directly escalate to the head of the Ministry of Public Works.

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<sup>339</sup> Survey feedback global review, September – November 2015.

<sup>340</sup> Survey feedback global review, September – November 2015.

<sup>341</sup> Survey feedback global review, September – November 2015.

The outcomes of the Integrity Pacts in El Salvador is that no corruption was identified in the project monitored between 2010 and 2015<sup>342</sup>. It is therefore seen more as a tool to deter corruption despite its limitations due to the fact it only monitors one particular phase in the procurement process. In 2013 the Ministry of Public Works joined the Construction Sector Transparency Initiative in order to further build on the experience with the Integrity Pact.

### *3. Honduras*

In 2015 the Transparency International chapter of Honduras entered into dialogue with the Ministry of Health in order to establish an integrity framework to deal with health care procurement<sup>343</sup>. The Integrity Pact was foreseen as part of the agreement in order to deal specifically with the purchase of medicines. This market was identified by the civil society organisation as a vulnerable area due to the frequent use of emergency procurement procedures. Preceding the agreement, the Transparency International chapter drafted a concept and strategy paper on the issue and approached the industry in order to ensure support for the activities relating the integrity framework.

The objective of the Integrity Pact according to the chapter is to counter weaknesses in control mechanisms of the Ministry of Health and strengthen internal control. Longer-term objectives include more structural reform on procurement procedures as well as sector-specific issues such as the dispensing of medicines.

Commitments on behalf of the bidders include commitments for companies not to bribe, collude or commit any other illegal acts. Also the private sector actors will be held liable for fraudulent representation. Contracting authorities will be requested to disclose procurement information to the bidders and public, and ethically commit to the rules of interaction with bidders during the procurement process. Whistle-blowing is promoted by allowing stakeholders to review and comment on bidding documentation and entitling them to make allegations of Integrity Pact violations.

### *4. India*

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<sup>342</sup> Survey feedback global review, September – November 2015.

<sup>343</sup> Interview feedback #43 global review, September – November 2015.

Transparency International India is one of the most experienced chapters using the Integrity Pact<sup>344</sup>. The approach used for the Integrity Pact in India is different from others discussed in this study. In 2006 the chapter launched its first project with the Oil and Natural Gas Corporation Limited, an Indian Public Sector Undertaking. Soon after, the Integrity Pact was recommended as a tool to promote transparency in public procurement through a government report on ethics in government. In 2007 the Central Vigilance Commission officially recommended the adoption of the Integrity Pact by all Public Sector Undertakings. In 2009 the Central Vigilance Commission issued a circular note outlining the Standard Operating Procedure for Integrity Pacts. This includes:

- Promise on the part of the principal not to seek or accept any benefit, which is not legally available;
- Principal to treat all bidders with equity and reason;
- Promise on the part of bidders not to offer any benefit to the employees of the Principal not available legally;
- Bidders not to enter into any undisclosed agreement or understanding with other bidders with respect to prices, specifications, certifications, subsidiary contracts, etc.;
- Bidders not to pass any information provided by principal as part of business relationship to others and not to commit any offence under the law;
- Foreign bidders to disclose the name and address of agents and representatives in India and Indian bidders to disclose their foreign principals or associates;
- Bidders to disclose the payments to be made by them to agents/brokers or any other intermediary;
- Bidders to disclose any transgressions with any other company that may impinge on the anti-corruption principle<sup>345</sup>.

The Standard Operating Procedures further define that the Integrity Pact should cover the entire procurement process. It also provides implementation guidelines, appointment

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<sup>344</sup> Survey feedback global review, September – November 2015.

<sup>345</sup> CENTRAL VIGILANCE COMMISSION (2009). Circular No. 10/5/09 [WWW] Available from: <http://integritypact.in/download/CVC%20Standard%20Operating%20Procedure%2018%20May%202009.pdf> [Accessed on 21-10-2016].

procedures and the role definition for the monitor, and established a periodical review system. Each Integrity Pact is to be prepared by the Public Sector Undertaking and approved by the Central Vigilance Commission. Almost half of the Public Sector Undertakings have signed a memorandum of understanding with Transparency International India to ensure collaboration but this is not mandatory. The Central Vigilance Commission approves the monitor selected by the Public Sector Undertaking and this person needs to be of “high integrity and reputation”. The Integrity Pact has been institutionalised to a certain degree in India. In the defence sector this has become a practice since 2006 with the introduction of an independent monitor in the Defence Procurement Procedures.

The outcomes of the Integrity Pact have been assessed by Transparency International India in 2012. This shows that the Integrity Pact has been effective in enhancing transparency in the procurement process, increasing the level playing field, boosting vendor confidence and improving brand image. The purpose of the Integrity Pact in India is to increase transparency through ethical conduct in public contracting and procurement, provide a mechanism for the detection of risks and red flags, and promote corrective measures. Nonetheless, Transparency International India also noted various difficulties in relation to the implementation of the Integrity Pact<sup>346</sup>. For example, the fact that the Integrity Pact is institutionalised risks that the exercise reduces to ticking off boxes rather than aiming to drive for change in ethical behaviour. Another challenge is allocating sufficient resources to oversee many procurement procedures. In India this is the responsibility of the Public Sector Undertaking and allocating insufficient monitors to a procurement project could result in less scrutiny. The chapter of Transparency International in India is now looking into redefining the role of civil society in monitoring and social auditing.

## 5. *Indonesia*

In 2013 the Indonesian chapter of Transparency International initiated a project that supports businesses based on four different pillars: participation, integrity, transparency, and

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<sup>346</sup> Interview feedback Field Mission India, collected by co-author global review, 17-23 September 2015.

accountability (PITA)<sup>347</sup>. The project as a whole covers a wide array of activities to help private sector players and in particular state-owned companies to harness anti-corruption standards. Part of this includes active engagement of civil society in the monitoring of procurement. According to the chapter, a major risk for state-owned companies is undue influence by political parties, in particular the ruling party. In addition, the companies face corruption on the ground when interacting with citizens. The combination of these two requires a holistic approach and therefore it is considered that a project such as PITA can help shield these companies against this. A major project by the Transparency International chapter focused on the country's second biggest electricity provider, whose director at the time asked them for assistance. In 2013 and 2014, they introduced the project in 47 business units and 10 subsidiaries. The main driver behind the successful implementation is the leadership of the company. This project is considered a flagship given it is the first time such intensive collaboration materialised between civil society and the private sector<sup>348</sup>.

The Integrity Pact function of the PITA project builds on the assumption that procurement is vulnerable to corruption and can only be addressed through systematic monitoring and multi-stakeholder involvement<sup>349</sup>. This includes collaboration between the country's anti-corruption commission, the company itself and civil society. Together they evaluate existing regulations on procurement, identify weaknesses and loopholes and provide policy recommendations. The project includes provisions for bidders and for the contracting authorities. For bidders this includes the provision not to bribe, collude or engage in other illegal activities<sup>350</sup>. The contracting authorities are in addition asked to disclose information on procurement to the public and to bidders. Also, they have to report any attempted or completed breaches of the clauses, ethically commit to rules of engagement between bidders and authorities and disclose financial interests.

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<sup>347</sup>TRANSPARENCY INTERNATIONAL INDONESIA (2013). PITA [WWW]. Available from: <http://www.ti.or.id/index.php/priority/2013/10/07/pita-empat-pilar-program-pln-bersih> [Accessed on 21-10-2016].

<sup>348</sup> Interview feedback #41 global review, September – November 2015.

<sup>349</sup> Interview feedback #41 global review, September – November 2015.

<sup>350</sup> Survey feedback global review, September – November 2015.

The PITA project does not include specific sanctions apart from those foreseen in the law. The chapter highlights that monitoring activities are seen as a way to enhance learning of stakeholders<sup>351</sup>. In case irregularities are identified the stakeholders first try to solve these through collective agreement. If this fails, the decision can be taken to follow judicial procedures. There are no clear criteria for success, however the PITA project is considered a learning exercise. There is an exit strategy in which the chapter aims to finish the project once they consider the company can be self-sustainable in its anti-corruption efforts. At the time of this study, the chapter is looking into new PITA projects dealing with state-owned companies in the mining sector<sup>352</sup>.

## 6. Malaysia

The national chapter of Transparency International in Malaysia introduced Integrity Pacts as tools to address business integrity. For example, one initiative concerned the mining company KSSB (Kumpulan Smesta Sdn Bhd). This included an agreement in which clear codes of behaviour were established including ways to sanction misconduct. Another case concerned an Integrity Pact for the company MRT (Mass Rail Transit). The MRT case concerned the building of a rail network around Kuala Lumpur. Apart from the mining and public works sectors, Transparency International Malaysia also advocates for the use of the tool in other sectors. For example, in 2010 the chapter called for the inclusion of an Integrity Pact in relation to a rehabilitation project of a major river, which included works for RM 50 billion<sup>353</sup>. Spill-over effects identified from the Integrity Pacts have included plans from the public authorities to extend the tool to local councils<sup>354</sup>.

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<sup>351</sup> Interview feedback #41 global review, September – November 2015.

<sup>352</sup> Interview feedback #41 global review, September – November 2015.

<sup>353</sup> TRANSPARENCY INTERNATIONAL MALAYSIA (2010). TI-Malaysia calls for Integrity Pacts in Klang River Rehabilitation Project [WWW]. Available from: <http://transparency.org.my/media-and-publications/ti-malaysia-calls-for-integrity-pacts-ips-in-klang-river-rehabilitation-project/> [Accessed on 21-10-2016].

<sup>354</sup> THE SUN DAILY (2010). Integrity Pacts for local councils in Selangor [WWW]. Available from: <http://www.thesundaily.my/node/140459> [Accessed on 21-10-2016].

Malaysia's anti-corruption agency refers on its website to the use of the Integrity Pact in 2010<sup>355</sup>. According to the agency, the main objectives of the Integrity Pact are to strengthen efforts towards improving integrity and transparency in government procurement while at the same time reduce waste and curb the abuse of power<sup>356</sup>. The Integrity Pact covers government employees involved in public procurement and members of procurement-related committees, such as bidders and appointed consultants. Sanctions in case of violations include termination of contracts and liability of damages resulted from this termination. Further, sanctions include forfeiture of bids or performance bonds, blacklisting and criminal or disciplinary action against employees.

## 7. Mexico

In Mexico, the federal government introduced the Social Witness Program (*Testigo Social*) in 2004 after piloting various civil society public procurement monitoring projects in collaboration with the Mexican Transparency International chapter. Since that time, Transparency International Mexico has monitored over 200 public procurement processes<sup>357</sup>.

The legally adopted formula for monitoring stems from the Integrity Pact model designed by Transparency International but differs in various ways from examples identified across the spectrum<sup>358</sup>. For example, natural and legal persons can register and be accredited in order to be eligible for monitoring federal procurement processes. A government selection committee appoints a monitor from a pool of accredited experts to a specific procurement project. *De facto*, the monitor cannot choose the process it wishes to monitor. The contracting authority will include the monitor in the process, provide access to documentation and meetings, and remunerate the work based on time sheets. The monitor has an observatory role, but can comment on procedures and promote good practices. In case the monitor identifies irregularities, it can take the decision to escalate these to competent authorities. Primarily its

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<sup>355</sup>MACC (n.d.). Integrity Pact Malaysia [WWW]. Available from:

<http://www.sprm.gov.my/index.php/en/korporat/2015-10-29-01-30-59/142-knowledge/774-integrity-pact-malaysia> [Accessed on 21-10-2016].

<sup>356</sup> Interview feedback #42 global review, September – November 2015.

<sup>357</sup> Survey feedback global review, September – November 2015.

<sup>358</sup> Interview feedback Field Mission 21-25 September 2015, global review, September – November 2015.

role is to ensure that the procurement process is done according to the law. In the end, the monitor drafts a monitoring report that will be made public.

The Social Witness Program in Mexico specifically focuses on the bidding process. This however does not mean that the monitors do not ask questions about the activities relating to the pre-bidding or post-bidding stages<sup>359</sup>. Apart from looking at compliance with legal procurement rules, independent monitors from Transparency International Mexico strongly focus on asking authorities and bidders to justify decisions they take. The idea is that this can break information asymmetries within the contracting authority and also between bidders and authorities.

Transparency International Mexico has conducted projects for numerous federal contracting agencies. A frequent authority is the state-owned electricity company CFE (Comisión Federal de Electricidad). Currently CFE is being privatized and once operating on the private market it will not be required to use Social Witness for its procurement. Nonetheless, the company opted for continuing this and is currently developing its own version of the tool<sup>360</sup>. The Mexican Transparency International chapter provides the company with advice on how to set this up. This includes involving other private sector players in discussing with CFE how to best design this.

Transparency International Mexico and contracting authorities subject to their Social Witness programme identified improvements in procurement quality, which had impact on the final public goods, works and services<sup>361</sup>. The method adopted by the independent monitors includes motivating the contracting authority to trace back decisions taken and assess whether these suit the needs of the public or economic means at their disposal. With this, the monitors hope to break the information cycle and move the contracting authority to overturn decisions that might impact public procurement in a negative way. In Mexico, the Transparency International chapter argues that in the future the Integrity Pact as a tool is expected to become part of an interactive ecosystem of tools that aim to reduce corruption<sup>362</sup>. The role of

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<sup>359</sup> Interview feedback Field Mission 21-25 September 2015, global review, September – November 2015.

<sup>360</sup> Interview feedback Field Mission 21-25 September 2015, global review, September – November 2015.

<sup>361</sup> Interview feedback Field Mission 21-25 September 2015, global review, September – November 2015.

<sup>362</sup> Interview feedback Field Mission 21-25 September 2015, global review, September – November 2015.

modern technology, i.e. through open data, in combination with access to information and transparency laws creates new opportunities for citizens to play an active role in monitoring public procurement.

## 8. *Pakistan*

In 2001 Transparency International Pakistan implemented an Integrity Pact for the K-III Greater Karachi Water Supply Scheme (K-III Project). The Integrity Pact was part of a larger initiative aiming to revive Karachi economically. Apart from the Integrity Pact the municipality also used different processes to enhance transparency in contracting<sup>363</sup>. Transparency International Pakistan selected and appointed consultants for the design, supervision and selection of contractors<sup>364</sup>. The pact was signed by all bidders and included clauses in order not to offer or accept bribes and collude with other bidders. Bidders were to disclose all payments and to report breaches of the Integrity Pact. A violation of the Integrity Pact could be sanctioned with liability for damages as well as blacklisting.

Transparency International Pakistan noted that an important factor for its success was the top-down support by the managing directors of the Karachi Water and Sewerage Board<sup>365</sup>. As a result of the Integrity Pact an estimated PKR 1000 million were saved. This was calculated by comparing the actual contract award costs with the initial estimated costs. Savings were based both on difference on the contract design costs and on the contract award costs. Apart from cost savings, the Integrity Pact in Pakistan was also institutionalised with the adoption in 2004 for public procurement above PKR 10 million. With this adoption the approach of the Integrity Pact changed. Now the civil society organisation did not monitor anymore directly but this was done by the contracting authority itself. Transparency International would become a channel through which bidders could file complaints on the procurement process. The chapter could then decide to forward the case to the contracting authorities or any other regulatory bodies involved. While this posed challenges relating the independent monitoring of the Integrity Pact, on the long-run the chapter argued that a healthier investment climate

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<sup>363</sup> SIDDIQUI, S., ASHUTOSH, M., and PRAKASH KAUR, J. (2015). Integrity Pact in India: Glancing Back and Looking forward. Network India and Transparency International India.

<sup>364</sup> Survey feedback global review, September – November 2015.

<sup>365</sup> Interview feedback #19, collected by co-author global review, September – November 2015.

developed since the Integrity Pact was institutionalised. For example, more international bidders have been taking part in procurement in Pakistan.

## 9. *Rwanda*

The Rwandan chapter of Transparency International initiated dialogue with the public authorities after the Government of Rwanda adopted in 2000 a decentralisation policy and strategy for its implementation. On the basis of the strategy new corruption risks for public procurement were identified and Transparency International Rwanda started assessing the relevance of anti-corruption tools in the Rwandan context. Soon after the organisation realized that an Integrity Pact could be the right tool to monitor procurement on the local level, and started mobilizing stakeholders and organising information meetings<sup>366</sup>. It was not until 2011 that this materialised in expression of interest in the Integrity Pact for large-scale infrastructure procurement. The Rwandan chapter organised meetings with stakeholders in order to explain and promote the Integrity Pact. They expected that the tool would help exposing corruption practices and at the same time help reduce such practices<sup>367</sup>. Through the Ministry of Local Government the chapter approached local authorities that due to decentralisation were newly exposed to large-scale procurement. Once an agreement was made, the Chapter started working through the details of the Integrity Pact. Meetings were arranged with business representatives and officials, access was requested to documentation and the organisation prepared initial reports. In 2013, the decision was taken to start monitoring two different projects.

Both the bidders and contracting authorities had commitments to adhere to in the Integrity Pacts. For bidders, provisions included not to bribe, not to collude, to refrain from all other illegal acts, and to accept liability. They were also to disclose information regarding payments to agents and other intermediaries, provide the same undertakings from subcontractors and report any attempted or fulfilled breaches of the Integrity Pact. Contracting authorities were requested not to demand or accept bribes and to refrain from all other illegal acts. They were to disclose relevant and equal information to all bidders, guarantee data protection disclose public information on the contracting process and ethically

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<sup>366</sup> Interview feedback #39, global review, September – November 2015.

<sup>367</sup> Interview feedback #39, global review, September – November 2015.

commit to establishing rules of interaction with bidders during and after tender processes. Also, contracting authorities were to report any attempted or completed breach of the clauses. Concerning sanctioning, the Integrity Pacts in Rwanda provided additional sanctions to the ones foreseen by law. For example, bidders could lose a contract or be denied one upon breaching the pact. In addition, violations could lead to debarment from contracting with the authority. The Rwandan Integrity Pact spans the entirety of the procurement process and contract execution phase. It includes whistle-blower protection and foresees independent monitoring. The pacts do not have a predetermined procedure in place to pursue breach claims because law already foresees this.

In Rwanda, the monitor had procurement expertise in combination with civil engineering knowledge<sup>368</sup>. The monitor was selected through an independent selection committee coming from Transparency International Rwanda's Board, staff, the private sector, and government. The independent monitor is required to identify and prevent irregularities. A key tool of the monitor is the entitlement to allege Integrity Pact violations. Any anomaly identified by the monitor was to be reported to the chapter and the contracting authority. The chapter subsequently exercised discretion whether or not to inform the public on this<sup>369</sup>. The role of the monitor focused on ensuring that laws were followed, and to scrutinise bidding documents and proposals.

Increased confidence and trust by the bidders is considered a positive outcome from the Integrity Pacts<sup>370</sup>. However, the chapter noted that no definite feedback could be given on impact on corruption compared to non-Integrity Pact public procurement projects, cost savings or increased public support for the government. Concerning its preventive impact, the chapter points out that, the mere fact that stakeholders are aware of the presence of an independent monitor affects behaviour. In more concrete terms, the Integrity Pacts resulted in the Rwandan Private Sector Federation to develop a code of conduct that requires signatories to refrain from bribery.

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<sup>368</sup> Interview feedback #39, global review, September – November 2015.

<sup>369</sup> Interview feedback #39, global review, September – November 2015.

<sup>370</sup> Interview feedback #39, global review, September – November 2015.

According to Transparency International Rwanda, the most important elements for a successful Integrity Pact are government support, sufficient budget for monitoring and the close involvement of civil society organisations<sup>371</sup>. However, the chapter confirms that aiming for sustainability is obstructed by the high costs for independent monitoring. This makes the Integrity Pact a one-time anti-corruption tool. Consequently, Transparency International Rwanda opted for using the Civil Society Procurement Monitoring Tool developed by the national chapter of Transparency International in the United States. This allows the chapter to now monitor three procurement processes in real time, using permanent staff members. Special audit activities are combined with online monitoring, creating a form of social audit. Thus, all procurement processes are put online and as a consequence citizens can also become monitors. At the time of this study Transparency International Rwanda was promoting the tool in four different districts in the country. The fact that Transparency International is involved already increases trust in the districts according to the chapter. At the same time, their advocacy is creating awareness among policy-makers. With the support of policy-makers and backing of civil society, the organisation now aims to institutionalise the tool through legislative reform. They foresee the Ombudsman to play a role as independent watchdog.

### *10. Uganda*

The Ugandan chapter of Transparency International started developing the Integrity Pact concept in 2008 and 2009. They initially organised trainings and meetings on Integrity Pacts in order to inform stakeholders and gather support. A model was developed in collaboration with a Swiss organisation. The idea was to target road and water works funded by international donors such as the World Bank and the EU. The reasoning behind this was that these donors could advocate for the incorporation of an Integrity Pact<sup>372</sup>.

The projects eventually did not materialise. The Transparency International chapter was confronted with reluctance on behalf of the contracting authorities<sup>373</sup>. First, the authorities were uncomfortable with the concept of an independent monitor participating in a

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<sup>371</sup> Interview feedback #39, global review, September – November 2015.

<sup>372</sup> Interview feedback #40, global review, September – November 2015.

<sup>373</sup> Interview feedback #39, global review, September – November 2015.

procurement process. Secondly, they considered the legal framework sufficient to allow for a corruption free procurement environment. Finally, the chapter struggled with a lack of funds to complete the Integrity Pact. The private sector had expressed interest in the projects but this was dependent on the willingness of the contracting authority to promote it.

According to the Ugandan chapter, the local context in Uganda is suited for a tool such as the Integrity Pact<sup>374</sup>. There are problems with collusion, bribery and kick-backs, even though the procurement process overall is considered open, by way of public websites, transparent bidding and public awarding of contracts. Despite this openness, according to the chapter, more sophisticated forms of corruption, such as collusion, are not necessarily prevented. In addition, the system does not cover contract implementation, which is considered problematic. The chapter expects that here the Integrity Pact could add value.

### 5.1.2 Integrity Pacts in Europe

#### 1. Latvia

The Transparency International chapter in Latvia (Delna) has been involved in two civil monitoring of public procurement projects. One involved tracking the privatisation of the Latvian Shipping Company, and the second concerned the construction of the National Library of Latvia (NLL). This overview focuses on the latter.

In 2004, the Minister of Culture invited Delna to monitor the construction of the new National Library in Riga. The construction was launched with political and public support. The decision to procure was made in 2002, but it was not until 2004 that a new government declared the construction a national priority. A special state agency was created under the responsibility of the Ministry of Culture, and was called the Three Brothers (*Jaunie Trīs Brāļi*). This agency had to manage the construction of the library and two other projects - a concert hall, and a museum for contemporary arts. The total cost of the library was estimated at roughly EUR 270 million (USD \$300 million). The economic implications of the project can be considered relevant, in light of Latvia's small size (approximately 2 million

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<sup>374</sup> Interview feedback #39, global review, September – November 2015.

inhabitants) and, compared to the EU average, low per capita GDP per capita.<sup>375</sup> Since the start of the project in 2004, economic and political support declined as new governments took office, and economic uncertainty increased in light of the global economic and financial crisis. Construction took place against a backdrop of perceived corruption in the construction sector. All of these factors challenged Delna from the start of the Integrity Pact in September 2005 until the NLL was commissioned in August 2014<sup>376</sup>.

The agreement aimed to stop corruption, unethical behaviour and inefficient procedures during the construction and to promote transparency. The Integrity Pact established terms of participatory monitoring of the NLL construction in order to ensure good governance. Delna was assigned the role of monitor of decisions and activities of the ministry and the agency. In order to do so, Delna was given permission to:<sup>377</sup> monitor decisions of ministerial staff at all levels; participate in internal meetings and with third parties; ask for clarifications in written and orally; explore third party complaints; analyse documentation prepared by project parties from a good governance and anti-corruption perspective; attract external construction, legal and other experts when needed.

Specific objectives set for the Integrity Pact were that<sup>378</sup>: anti-corruption declarations were to be included by the Ministry of Culture for every procurement contract, including for subcontractors; all suppliers that violated or refused to sign the declaration were to be excluded from further participation in tenders, and existing contracts with them were to be terminated; suspicions of corruption were to be communicated to the prosecutor general.

Long-term objectives of Delna included that the Integrity Pact would lead to improvements in the legislation governing public procurement and contracting<sup>379</sup>.

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<sup>375</sup> In 2004 this was 52% below the EU average. This increased over time to 36% below EU average. See: EUROSTAT (2016). GDP per capita in PPS [WWW]. Available from:

<http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=tec00114&plugin=1>

[Accessed on 21-10-2016].

<sup>376</sup> Interview feedback Field Mission Latvia, European review, 23-25 March 2015.

<sup>377</sup> Desk research internal documentation, final report Latvia lp 2011.doc

<sup>378</sup> Interview feedback Field Mission Latvia, European review, 23-25 March 2015.

<sup>379</sup> Interview feedback Field Mission Latvia, European review, 23-25 March 2015.

**Table 2: Integrity Pacts Latvia**

	Case 1
Name Integrity Pact	National Library of Latvia
Role civil society organisation	Independent monitor
Date Integrity Pact	September 2005 – 2016
Sector public procurement	Construction
Agencies involved	Ministry of Culture
Size public procurement	EUR 163,1 million
Level of public procurement	National

## 2. Hungary

From 2011 to 2015, nine Integrity Pacts have been implemented in Hungary, two of which at the national level and seven at the local level. Procurement types varied from public relations and financial management services, to technical controller, planning, construction, taxi services, and computer hardware acquisition.

The 2010 Global Corruption Barometer shows that citizens perceive political parties as the most corrupt institutions. The negative perception of political parties is worsened by apparent links between business and politics. Transparency International Hungary in 2012 warned that an estimated 65-75% of procurement is affected by corruption. An estimated 25% of large-scale procurement works are affected<sup>380</sup>. The EU Anti-Corruption Report also references concern over the link between business and politics. Transparency International's National Integrity System assessment report states that corruption risks arise from the interdependent relationship between the political and business elite, concerns regarding the independence of control institutions, and the lack of transparency in the legislative process. Together these risks raise concerns on state capture<sup>381</sup>. An example is the case of Közgép Incorporated, which has won over EUR 710 million in public procurement. The owner of the company was

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<sup>380</sup> MAGYAR NARANCS (2012). A beletörődés a legrosszabb [WWW]. Available from: <http://magyarnarancs.hu/belpol/a-beletorodes-a-legrosszabb-80853/?orderdir=novekvo> [Accessed on 21-10-2016].

<sup>381</sup> BURAI P. and HACK P. (2012) *Corruption Risks in Hungary 2011*. Budapest: Transparency International Hungary, p. 232

considered a close friend of the Prime Minister, former finance director of the ruling party, and former head of the national tax authority. The company's success in public procurement also has been noted through EU's Operational Programmes<sup>382</sup>.

Against this background, the Government adopted in 2012 a two-year anti-corruption programme. This included important steps in the fight against corruption, such as reviewing laws on public procurement and distribution of funds. Unfortunately, the measures generally failed to address vulnerable sectors such as the business sector, local governments and the legislature<sup>383</sup>. For the development of the anti-corruption strategy, civil society participated in initial consultations through hearings. The impact of the anti-corruption strategy on the state public administration can be considered effective from the perspective that this level is not widely regarded as a corruption risk environment. Nonetheless, concerns are voiced that politicization of the administration can spill over to lower levels of governance. The 2011 and 2012 Integrity Reports by the State Audit Office identified several irregularities in the public institutions<sup>384</sup>.

Integrity Pacts were introduced in Hungary for all procurement procedures relating to the project Development of Ózd town's drinking water supply infrastructure and distribution systems and its sustainable control<sup>385</sup>. In the Integrity Pacts, the municipality signed as contracting authority, together with the bidders, independent monitors, Transparency International Hungary and managing authorities and development agency. The Swiss Contribution Office covered costs for the Integrity Pact. Transparency International Hungary developed a visualization tool for the project allowing visitors to track easily the process of procurement and the project's current phase. Bidders could voluntarily sign the Integrity Pact in the agreement pertaining to the construction investment. Adherence to the Integrity Pact was possible by signing the declaration, which was part of the tender documentation. All bidders signed the declaration.

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<sup>382</sup> MAGYAR NARANCS (2012). Közgép: túl a 200 milliárdon [WWW]. Available from: <http://magyarnarancs.hu/belpol/kozgep-tul-a-200-milliardon-78425> [Accessed on 21-10-2016].

<sup>383</sup> Interview feedback Field Mission Hungary, European review, 18-22 March 2015.

<sup>384</sup> INTEGRITAS (2012). A 2012. Évi integritás felmérés eredményeinek összefoglalója [WWW]. Available from: [http://integritas.asz.hu/uploads/files/2012-es%20eredmenyek\\_osszefoglalo.pdf](http://integritas.asz.hu/uploads/files/2012-es%20eredmenyek_osszefoglalo.pdf) [Accessed on 21-10-2016].

<sup>385</sup> Survey feedback European review, February – April 2015.

The municipality of the XIII-District of Budapest signed an Integrity Pact with Transparency International Hungary as monitor for the public procurement and the implementation of a nursery refurbishment. Bidders joint the Integrity Pact during the procedure. The municipality contracted an independent company in charge of the procurement procedure. Prior to monitoring the public procurement, Transparency International reviewed the procurement regulations of the municipality and called for changes. Costs for the independent monitor were covered by the municipality.

The Hungarian Public Procurement Act (PPA) does not foresee exclusion of bidders. In Hungary experience shows that breaching the contract can result in disclosure to the public, which has a preventive effect. In case the monitor identifies or suspects a violation of the provision of Act LXXVII of 1996 or that of the Treaty of the EU, he/she will notify the contracting authority. On the basis of the PPA, the contracting authority will notify the competition authority. The monitor can also turn to the procurement authority, the police or the public prosecutor.

Transparency International Hungary has prepared e-learning material to inform and brief every single employee/colleague in the institutions signing Integrity Pacts. If an Integrity Pact is not correctly implemented it could become an appearance-measure and an additional administrative burden.

**Table 3: Integrity Pacts Hungary**

	Case 2	Case 3
Name Integrity Pact	Ózd Water Supply Rehabilitation Project	XIII- District Nursery
Role civil society organisation	Advisor	Independent Monitor
Cost Integrity Pact	EUR 40500	1% of EUR 1,3 million
Date Integrity Pact	January 2011 – January 2016	January 2013 – December 2014
Public procurement sector	Water supply construction	Construction (education)
Agencies involved	National Development Agency, Managing Authority, Municipality of Ózd	XIII-District of Budapest
Size public procurement	EUR 5 million	EUR 1,3 million
Level of public procurement	Local and international	Local

### 3. Bulgaria

The European Union's Cooperation and Verification Mechanism (CVM) monitors Bulgaria's progress made since the accession to the EU in 2007. The most recent CVM report from January 2015 highlights the effect of political uncertainty on public opinion concerning corruption<sup>386</sup>. The Special Eurobarometer showed that citizens are concerned about the fight against corruption, judicial reform and tackling organised crime<sup>387</sup>. The CVM reports clearly show progress in the country's efforts to strengthen rule of law however the European Commission finds anti-corruption deficiencies. Two key issues repeatedly addressed are the need to develop and implement a sound evidence-based policy-making strategy, and strengthening the institutional independence and the capacity of anti-corruption units to develop and monitor the execution of anti-corruption policies.

Various key corruption risk areas are identified in Bulgaria, such as impunity of political corruption, influence peddling between members of political parties and members of organised crime, and public procurement. Key vulnerable sectors identified are the health care and energy sectors. The former experienced decentralisation from the state to the regional level, which has not objectively been assessed. The latter requires transparency in market regulation and execution of large public procurement tenders.

Transparency International Bulgaria implemented at the time of this study three Integrity Pacts in light of their involvement in the Siemens Integrity Initiative<sup>388</sup>. Three different kinds of procurement projects were selected covering three different public bodies<sup>389</sup> managing national and EU funds. From February 2012 to December 2013, the chapter implemented the

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<sup>386</sup> EUROPEAN COMMISSION (2015). Report from the Commission to the European Parliament and the Council on progress in Bulgaria under the Co-operation and Verification Mechanism [WWW]. Available from: [http://ec.europa.eu/cvm/docs/com\\_2015\\_36\\_en.pdf](http://ec.europa.eu/cvm/docs/com_2015_36_en.pdf) [Accessed on 21-10-2016].

<sup>387</sup> EUROPEAN COMMISSION (2014). Special Eurobarometer 397 [WWW]. Available from: [http://ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_397\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_397_en.pdf) [Accessed on 21-10-2016].

<sup>388</sup> Interview feedback Field Mission Bulgaria, European review, 31 March – 2 April 2015.

<sup>389</sup> Ministry of Regional Development and Public Works, Ministry of Health, and Ministry of Labour and Social Policy.

Integrity Pacts, which in total covered five public procurement contracts (two public works and three for the provision of goods and services).

**Table 4: Integrity Pacts Bulgaria**

	Case 4	Case 5	Case 6
Name Integrity Pact	Truma Motorway	Renovation Medical Care Homes for Children	E-Data Exchange System for Social Security
Role civil society organisation	Independent monitor	Independent monitor	Independent monitor
Date Integrity Pact	May 2012 – December 2013	July 2012 – July 2013	July 2012 – October 2013
Sector public procurement	Construction	Construction Health Care	Consultancy IT
Agencies involved	Road Infrastructure Agency, Ministry of Regional Development and Public Works	Ministry of Health	Ministry of Labour and Social Policy
Size public procurement	EUR 102 million	EUR 105 million	EUR 46000
Level of public procurement	National	National	National

#### 4. Germany

The German chapter of Transparency International has implemented four Integrity Pacts<sup>390</sup>. In Bremen and Hannover, the chapter implemented Integrity Pacts for the procurement of two health care projects. In Berlin, the organisation implemented Integrity Pacts for a housing project and for the construction of the Berlin-Brandenburg International Airport.

The Bremen hospital procurement ran at a cost of roughly EUR 230 million. Transparency International Germany monitored both the planning and construction of the works. The Integrity Pact (signed June 2009) was seen as a pioneer project warranting transparency and anti-corruption<sup>391</sup>. A monitor was assigned to the Integrity Pact with a legal and construction

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<sup>390</sup> TRANSPARENCY INTERNATIONAL GERMANY (n.d.). Der Integritätspakt [WWW]. Available from: <http://www.transparency.de/Integritaetspakt.80.0.html> [Accessed on 21-10-2016].

<sup>391</sup> Interview feedback #26, European review, February – April 2015.

background. The contracting authority acknowledged the importance of having an independent monitor on their side portraying both such qualifications<sup>392</sup>.

The construction costs of the hospital in Hannover came to EUR 180 million<sup>393</sup>. A construction expert was publically appointed as monitor for the duration of the Integrity Pact (signed June 2010). The contracting authority highlighted in its press release the importance of the Integrity Pact as a tool to signal fair competition, corruption prevention and no collusion.

The Integrity Pact for the Berlin housing project (signed July 2010) included a team of two monitors with technical, economic and legal backgrounds. The monitors were required to scrutinise the entire planning and construction phase for the modernization and repair of 2,300 apartments in Berlin. The rehabilitation of the apartments started in the 1990s and in total cost roughly EUR 1.2 billion.

The first and largest Integrity Pact in Germany was signed in 2005 to monitor the construction of the Berlin-Brandenburg International Airport. Being one of the largest construction projects in Europe, the total cost of the procurement project was initially estimated at EUR 2.4 billion. Due to numerous project changes, delays and technical problems, the final cost will be significantly higher<sup>394</sup>. At the stage of drafting this text, the date of opening of the airport was still uncertain. In 2005, Transparency International Germany and the company Flughafen Berlin-Schönefeld GmbH (FBS) issued a public call for a monitor team lead, resulting in the appointment of an independent external monitor with a strong professional record in public procurement. For ten years the Transparency International chapter engaged in Integrity Pact activities. In March 2015, the chapter chose to

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<sup>392</sup> TRANSPARENCY INTERNATIONAL GERMANY (2009). Klinikum Bremen-Mitte: Korruption soll keine Chance haben Gesundheit Nord und Transparency International vereinbaren Integritätsvertrag [WWW].

Available from:

[http://www.transparency.de/fileadmin/pdfs/Themen/Verwaltung/PM\\_Integritaetspakt\\_Bremen\\_09-09-24.pdf](http://www.transparency.de/fileadmin/pdfs/Themen/Verwaltung/PM_Integritaetspakt_Bremen_09-09-24.pdf)

[Accessed on 21-10-2016].

<sup>393</sup> Survey feedback global review, September – November 2015.

<sup>394</sup> Survey feedback global review, September – November 2015.

end cooperation due to reported corruption incidents. The experience in this Integrity Pact has led the chapter to question the tool's effectiveness<sup>395</sup>.

## 5. *Romania*

Transparency International Romania has provided technical assistance for large procurement processes, engaging in collaboration with a utilities company called Electrica, which led to development of an Integrity Pact.

The Integrity Pact includes a conflict of interest provision, disclosure of anti-corruption policy, monitoring obligations, budget, and quality review<sup>396</sup>. The Integrity Pact legal contract was part of the tender documents. All parties that participated in the bidding were required to sign the Integrity Pact. At the time of data collection for this study, the chapter did not yet start monitoring activities.

In case of breach, the Integrity Pact foresees a complicated scheme of financial corrections. Further, provisions for a dispute resolution mechanism stated that complaints first must be mediated. If not successful, the contractor, bidder and independent monitor have the right to appeal to an arbitration panel of experts. If no solution is foreseen, the contracting authority can impose sanctions and initiate formal legal proceedings.

Romania planned to organise a platform of civil society to discuss the monitoring report before launching the Integrity Pact. The aim of such a platform is to ensure full civil society coverage and, this way, improve the report. At this stage, concrete results from the Integrity Pact have been the successful advocacy to government stakeholders of the Integrity Pact process for Electrica. The European Bank for Reconstruction and Development is also a shareholder together with the government, investment funds and other small shareholders.

## 6. *Italy*

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<sup>395</sup> Interview feedback #26, European review, February – April 2015.

Interview feedback Field Mission Germany, collected by global review co-author, 28 September-1 October 2015.

<sup>396</sup> Focus group feedback Berlin workshop, European review, 23 February 2013

In 2000, Transparency International Italy analysed the Integrity Pact model and its applicability to the Italian system based on Integrity Pact experiences from other countries as well as findings from a workshop in Bogota at the time. The chapter undertook training and education activities and attempted to implement Integrity Pacts<sup>397</sup>.

The research team dealing with the Integrity Pact first carefully analysed the tool and systematically assessed which elements are optional or required for the Italian system<sup>398</sup>. Subsequently, the organisation drafted a model agreement and started approaching municipalities to explore interest. Despite expressions of interest, the Integrity Pacts did not materialize quickly. They were confronted by a “*climate of suspicion and inertia/apathy*” perceived as a general characteristic of public environments<sup>399</sup>. In 2000, six municipalities were contacted (Bergamo, Como, Genoa, Milan, Palermo, and Varese). The municipalities of Milan and Genoa tentatively committed.

Feedback received by the organisation in 2008 provides insight into the workings of Integrity Pacts in Italy. In the sequence of activities associated to the implementation of an Integrity Pact, the organisation first collects information about the entities that have problems with integrity of procurement processes. Key is to identify champions within the public administration to allow for support of the Integrity Pact concept. After this, they establish contact and offer support, for example through the use of an Integrity Pact. Once an agreement has been made at the management level, training is foreseen on Integrity Pacts for procurement staff. Support is given when preparing general purchase conditions in order to introduce the clauses of the Integrity Pact. After this, bidders are informed about the need for integrity and transparency. Contracting authorities are asked to establish clear mechanisms for contract awarding. Bribes are to be excluded and real competition to win a bid should be based on technical-commercial advantages. The chapter recommends offering the authority continued support throughout the project implementation.

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<sup>397</sup> Survey feedback global review, September – November 2015.

<sup>398</sup> Desk research internal documentation, Italy\_Integrity\_Pact 2000.pdf, p. 47

<sup>399</sup> Desk research internal documentation, Italy\_Integrity\_Pact 2000.pdf, p. 47

In Milan, an Integrity Pact materialized<sup>400</sup>. The Integrity Pact included an undertaking of the public authority and the bidders. For the latter, the Integrity Pact includes provisions not to bribe, not to use facilitation payments, not to collude and disclose information regarding payments related to the contracting process. Sub-contractors were excluded. Transparency International Italy highlighted that collusion was the most difficult hurdle. In addition, it was noted that facilitation payments were a common practice and the organisation expressed concerns that could also affect a certain range of projects abroad. In order to dispel misunderstandings, bidders were urged to signal grey areas. Provisions concerning the authorities included: not to demand or accept bribes; not to demand or accept facilitation payments; to disclose relevant and equal information to all bidders; to guarantee protection of restricted information; to report any attempted or completed breaches; and to provide public information on the contracting process. Disciplinary sanctions were included such as: loss or denial of contract, forfeiture of bid and performance bonds; liquidated damages to principal and competitors; and debarment for a period of five years. Breaches would be dealt with through national arbitration.

### 5.1.3 Others

As mentioned about, the concept of “islands of integrity” has been applied on different tools. The following section presents some examples from Transparency International chapters as well as other civil society organisations, all example relating to public procurement.

Feedback from European Transparency International chapters<sup>401</sup> shows that many conduct research and advocacy work relating corruption in public procurement. The Transparency International chapters in Czech Republic and Croatia are involved in other types of monitoring activities. The former monitors public procurement cases once they are red flagged through their Anti-Corruption Legal Advisory Centre (ALAC). The experience gained with monitoring activities is subsequently used to advocate for legislative improvements and training activities. The latter has provided technical assistance to the Ministry of Health on audit procedures and public procurement procedures. This resulted in

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<sup>400</sup> Desk research internal documentation, see IP Italy\_final versión 2008.doc

<sup>401</sup> Bulgaria, Czech Republic, Hungary, Slovenia, Latvia, Lithuania, Italy, Romania, Greece. Feedback from: Survey feedback global review, September – November 2015; Focus group feedback Berlin workshop, European review, 23 February 2013.

the cancellation of four tender procedures estimated worth EUR 2,6 million. Transparency International Italy and Czech Republic note experience with training public officials on corruption in public procurement. Transparency International Greece supported complainants that issued warnings of lack of transparency in public procurement processes relating to staff selection, works and supplies.

Transparency International Slovakia in collaboration with Fair-play Alliance has designed the *Open Contracts Portal* that helps citizens to read, search and assess the profitability of public contracts<sup>402</sup>. Through automated analysis and public involvement in the evaluation of contracts, it draws attention to those contracts that most require review. Since 2011, all contracts relating to management of public resources, state and local property in Slovakia have to be disclosed. Transparency International Czech Republic developed a similar initiative and established *Indicators of transparency in public procurement*. The set of indicators were designed to assess the transparency of the public procurement market in the country. It is based on the assumption that the greater number of open tenders with no limit on bidders, the greater the pressure for efficiency and the lower the likelihood of corruption.

It is important to highlight that both examples allow for better public control but do not necessarily scrutinise directly procurement processes or authorities themselves. An example focusing more on the institutional level is the Transparency International Czech Republic's *Efficiency of control systems in procurement* initiative. The organisation examined the competences and impact of the Supreme Audit Office and the Office for Protection of Competition. Another example looking into procurement from an institutional level is Transparency International Bulgaria's initiative *Monitoring the transparency of public procurement with high public interest in Bulgaria: The case of highway*. Together with the America for Bulgaria Foundation, the chapter initiated the project in order to help reduce the risk of misuse of public funds when awarding and carrying out transactions of substantial public interest in the country. A key element of the project is the development of a methodology for independent civil monitoring of large-scale public works. The methodology is applied to the procedure for selecting a contractor for the construction of the Trakia highway.

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<sup>402</sup> See the Open Contracts Portal: <http://otvorenezmluvy.sk>

Transparency International Bulgaria's initiative shows similarities to Integrity Pacts, however, it does not necessarily provide for a methodology on monitoring procurement contract implementation. It does address key characteristics such as independent monitoring, tailor-made application, and public outreach. The Trakia project is seen by the organisation as a step towards a full Integrity Pact project<sup>403</sup>. Transparency International Romania presents us with a project example that also includes execution of contracts. The *Monitoring structural funds management* project is designed to monitor the management of structural funds by public authorities in the country. The monitoring process aims to evaluate the extent to which integrity standards are respected by both the public institutions and authorities disbursing the funds, as well as by eligible beneficiaries. The project also established a mechanism for monitoring the implementation of structural funds, parallel to the public one<sup>404</sup>.

The civil society organisation Access Info developed a practical guide for civil society, journalists, academics and others to evaluate whether the key information needed to prevent and/or identify corrupt practices within government is in fact readily available. The methodology draws on international anti-corruption treaties such as UNCAC, as well as other international standards and best practices, to propose some core classes of information, which should be published by democratic and accountable governments. These include, for example, copies of public procurement contracts, assets declarations by public officials, and information on decision-making in privatisation processes.

The UNDP developed a methodology for measuring the index of responsibility, transparency and accountability at local level. This tool aims to measure the exposure of a given institution to corruption and/or corruption risks. It covers three areas: public procurement, urban planning and financial management in local government. It can be used as a mechanism for self-evaluation by the local government or for identification and monitoring by independent agencies. It has been applied in Macedonia.

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<sup>403</sup> Interview feedback Field Mission Bulgaria, European review, 31 March – 2 April 2015.

<sup>404</sup> TRANSPARENCY INTERNATIONAL BULGARIA (2007). Raport de Monitorizare a gestiunii fondurilor structural in Romania <http://www.fonduricomunitare.ro/RMonitorizare.pdf> [Accessed on 22-01-2016].

To conclude this section we will take a brief look at the CoST initiative. The tool provides a clear overview on the way the organisation aims to achieve good quality delivery of infrastructure projects<sup>405</sup>. Summarized this translates to services being provided to governments in order to put systems in place that allow for public access to information relating the project. At the same time, the initiative facilitates a multi-stakeholder platform to oversee and validate this information. This results directly in a system in place giving public access, and better-informed stakeholders. Once empowered with information, stakeholders can raise concerns over poor governance, mismanagement or corruption. As a consequence governments will investigate and sanction, build capacity and improve procedures and regulations. The outcome of this is more accountability, corruption prevention, more efficient spending, increased competition and better governance. The wider impact could be cost savings that can subsequently be allocated to different priorities and increased public trust.

The CoST initiative shows similarities to Integrity Pacts. Based on a comparison of projects across the globe, CoST identified potential benefits for the different stakeholders. For governments this includes<sup>406</sup>: greater efficiency of public spending; improved quality of public services; improved business environment; building public confidence; enhanced political reputation; reduction in risks to public safety resulting from poor building practices; increased prospects for investment. For the private sector this includes: greater confidence that a level playing field exists; the potential to invest in new markets based on fair competition; a more predictable business environment and improved levels of trust; reducing reputational risks and improved access to financial markets. For civil society this includes: greater opportunities for public involvement; identify if value for money is being achieved; demand improved service delivery; provides assurances that corruption is being mitigated.

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<sup>405</sup> CoST (n.d.). Objectives [WWW]. Available from: <http://www.constructiontransparency.org/the-initiative/objectives?forumboardid=3&forumtopicid=3> [Accessed on 28-10-2016].

<sup>406</sup> CoST (n.d.). Benefits [WWW]. Available from: <http://www.constructiontransparency.org/the-initiative/benefits?forumboardid=4&forumtopicid=4> [Accessed on 28-10-2016].

## 5.2 Integrity Pact structure

The 2013 Integrity Pact guide developed by Transparency International provides practical guidance to civil society organisations on how to design and implement the tool<sup>407</sup>. The guide is meant to help readers to understand the Integrity Pact as a tool to monitor public procurement projects and as an approach to prevent corruption. The authors lay out a roadmap of seven steps in order to implement the Integrity Pact: 1) consider the use; 2) design; 3) undertake initial activities; 4) prepare the Integrity Pact document; 5) sign the Integrity Pact document; 6) monitor during the bid; 7) monitor after the bid. In other words, the Integrity Pact should according to Transparency International concern two main elements: 1) design; and 2) implementation. The following sections introduce considerations that are of relevance to civil society organisations when designing and implementing Integrity Pacts.

### 5.2.1 Design of the Integrity Pact

Transparency International sums up four steps when considering the use of the tool<sup>408</sup>:

- Learn about the Integrity Pact and issues of corruption in public contracting;
- Select a project to which it can be applied;
- Identify the requirements, resources and capacity needed to implement it;
- Get support and expertise where necessary.

When designing an Integrity Pact it is important to take into account internal and external conditions that determine the tool's functioning. The tool does not stand on its own in the fight against corruption in public procurement. Its effective functioning can depend on the political, social and legal context in which it is being conducted<sup>409</sup>. The external conditions in which it operates are determined by the legal public procurement framework, as well as, the

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<sup>407</sup> TRANSPARENCY INTERNATIONAL (n.d.). *Integrity Pacts* [WWW]. Available from: [http://www.transparency.org/whatwedo/tools/resources\\_about\\_integrity\\_pacts/3/](http://www.transparency.org/whatwedo/tools/resources_about_integrity_pacts/3/) [Accessed on 12-10-2016].

<sup>408</sup> TRANSPARENCY INTERNATIONAL (n.d.). *Integrity Pacts* [WWW]. Available from: [http://www.transparency.org/whatwedo/tools/resources\\_about\\_integrity\\_pacts/3/](http://www.transparency.org/whatwedo/tools/resources_about_integrity_pacts/3/) [Accessed on 12-10-2016]. p.

<sup>409</sup> TRANSPARENCY INTERNATIONAL (n.d.). *Integrity Pacts* [WWW]. Available from: [http://www.transparency.org/whatwedo/tools/resources\\_about\\_integrity\\_pacts/3/](http://www.transparency.org/whatwedo/tools/resources_about_integrity_pacts/3/) [Accessed on 12-10-2016].

involvement of different stakeholders that have different motivations and expectations. The internal conditions relate to the management considerations that determine how an Integrity Pact is efficiently managed to ensure optimal effectiveness.

According to Transparency International, the Integrity Pact is not considered a tool to substitute public procurement legislation<sup>410</sup>. In fact, the tool is considered a supplement to the existing legal framework and a way in which the implementation of the framework can be enhanced. For example, if we look at the corruption in public procurement risks, most risks are to an extent covered by existing procurement regulation. However, this does not mean in practice that the risks are not present in a particular context. After all, the legal framework only produces safeguards against corruption to the extent to which the laws are obeyed and enforced. We have discussed in this study that the level of compliance with laws differs per jurisdiction, per country, etc. and equally so does the level of enforcement. This is the case for each and every EU Member State. Despite that the EU legislative framework for public procurement aims to level the playing field, stakeholders (might) interpret and enforce the rules differently.

Conducting risk identification and establishing mitigation measures allows stakeholders to assess external considerations but also deals with internal considerations for the efficient and effective functioning of the Integrity Pact. For example, a map of which corruption risks could occur during the procurement process (external consideration) allows a civil society monitor to identify which Integrity Pact activities could detect or identify such risks. It allows them at the same time to use their (often) limited Integrity Pact resources (internal considerations) efficiently in order to aim for more effectiveness of their Integrity Pact activities.

The risk assessment also allows for a better understanding of the socio-economic and political context in a country (external considerations). Specific corruption risks or a combination of risks could indicate that the political context in which an Integrity Pact is implemented influences the outcome of the activities. This is particularly crucial in big public works investments and long-term concessions, including privatisations. Once a civil society monitor knows which risks can occur in the procurement process, an assessment can be made

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<sup>410</sup> TRANSPARENCY INTERNATIONAL (n.d.). *Integrity Pacts* [WWW]. Available from: [http://www.transparency.org/whatwedo/tools/resources\\_about\\_integrity\\_pacts/3/](http://www.transparency.org/whatwedo/tools/resources_about_integrity_pacts/3/) [Accessed on 12-10-2016].

on the likelihood of this occurring and the severity. The likelihood of each scenario to occur could be assessed by taking into account the present situation without considering the current controls in place to avoid these risks. On the basis of the reflections in this study, some factors that could be considered are:

- Incidents that occurred in the past relating the specific activity or stakeholder;
- Culture of openness in the public administration or private sector;
- Level of contact between the different stakeholders;
- Complexity of the activity related to the risk;
- Political connections and interests that led to decide the public investment in question (pork barrelling);
- The quality and deepness of the studies that preceded the procurement decision (on public works, concessions and privatisations);
- Etc.

Subsequently, each scenario could be assessed by looking at the potential severity or impact. The impact of the scenarios can vary from financial, legal, operational and reputational damage. Some factors that could be taken into consideration are:

- Impact of past incidents on key stakeholders;
- Severity of penalties / sanctions imposed in past incidences;
- Impact on the procurement process;
- Etc.

Applying values to the rating allows for an assessment table, which then can be used to prioritise the areas in need of specific attention. Again, it is noted that while primarily contextualising external considerations, also this exercise deliberates internally. We could argue that such an exercise could help a civil society organisation with limited resources to narrowing their monitoring target to high-risk scenarios in public procurement. Prioritising which scenarios to focus on could address key concerns for civil society monitors relating the potential reputational damage on the basis of public procurement complexity, which entails the risk of failing to identify irregularities.

Apart from understanding the procurement regulation in a country, the design of the Integrity Pact should also consider other laws that might influence the procurement legal framework when addressing corruption (external considerations). Such related laws are for example the transparency laws, access to information laws, auditing and oversight laws, and anti-corruption laws. As mentioned before, the Integrity Pact does not intend to substitute the procurement rules but rather complement these. If for example the local procurement rules do not provide for access of a third party to specific steps in the procurement process, the design of the Integrity Pact ought to be adapted in order to ensure optimal effectiveness. A law on access to information could perhaps ensure that where the procurement rules fail to provide access to the civil society, at least afterwards the information can be requested to conduct post-monitoring functions. It is therefore that we could advocate that during the design stage of the Integrity Pact a thorough legal feasibility study is conducted<sup>411</sup>. This does not only strengthen the Integrity Pact in terms of transparency but also addresses another relevant element in anti-corruption, namely accountability.

The design stage of the Integrity Pact can be used to consider the way in which transparency in the procurement process is foreseen. One would need to know which type of information should be published during the procurement process and at what stages in the process. At this stage, it is important to consider which information is restricted due to data protection provisions. For example, in case the bids of companies contain business secrets it is likely that only authorities can access this. This might complicate the work of the independent monitor and therefore other means need to be used in order to ensure the Integrity Pact can still be of use. Perhaps the law on access to information foresees ways to get access to these documents or perhaps permission needs to be granted by the companies after which a confidentiality agreement is established with the civil society organisation. The design stage can be used to anticipate such problems, which is relevant from the perspective that without transparency for the independent monitor it will be difficult for an Integrity Pact to function effectively.

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<sup>411</sup> Legal feasibility studies were conducted by chapters of Transparency International in order to prepare for Integrity Pacts, i.e. in the case of Bulgaria and Spain. Interview feedback #20 and #28, European review, February – April 2015.

The design stage of the Integrity Pact can be used to consider the way in which the accountability structure is set up as well as determining how to enforce in case of non-compliance. In order to do so, it is crucial to map the stakeholders that will be involved. In particular, concerning the external considerations it is important to look at the available sanctioning mechanisms. Sanctions as a way to hold stakeholders accountable for corruption but also mismanagement are according to Transparency International a key cornerstone in the Integrity Pact<sup>412</sup>. Two elements are to be clarified in the design, namely the kind of sanctions that can be applied and the process in which this has to be determined. The kind of sanctions can be foreseen by law or can be specifically included in the Integrity Pact. For example, by law a stakeholder is (normally) not allowed to bribe and can be sanctioned. The Integrity Pact can reinforce the detection of bribe (i.e. by external monitoring of public procurement) and help drive for a sanction (i.e. by reporting irregularities to the authorities). At the same time the Integrity Pact can have alternative sanctions such as naming-and-shaming. An important response to irregularities identified in Integrity Pacts is the termination of the agreement. This can be considered a clear signal to the public that the procurement process does not comply with the required level of transparency, accountability and stakeholder participation desired by the Integrity Pact.

A final element concerning the external considerations for the functioning of the Integrity Pact concerns the mapping of stakeholders. Generally there are three stakeholder groups involved in the Integrity Pact: the government including the contracting authorities, the bidders/companies, and civil society organisations as independent monitors. A fourth stakeholder group could be the public as the ultimate beneficiaries of the procured goods, works or services. In particular the motivations of stakeholders to participate have effect on both the efficient and effective implementation of the Integrity Pact.

In the Transparency International document ‘Integrity Pacts: A how-to guide from practitioners’<sup>413</sup> we note that the buy-in from the government is not always very

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<sup>412</sup> Focus group feedback Berlin workshop, European review, 23 February 2013.

<sup>413</sup> TRANSPARENCY INTERNATIONAL (2015). Integrity Pacts: a how-to guide from practitioners [WWW]. Available from:

[http://www.transparency.org/whatwedo/publication/integrity\\_pacts\\_a\\_how\\_to\\_guide\\_from\\_practitioners](http://www.transparency.org/whatwedo/publication/integrity_pacts_a_how_to_guide_from_practitioners)

[Accessed on 21-10-2016]. p. 15

straightforward. For example, the motivation for the contracting authority to participate in an Integrity Pact might be to ensure more transparency and accountability but, from the side of the government, they might not be the only stakeholders able to influence the procurement process and others might have different motivations with regard to the desired level of transparency in the procurement process. The other way around could be a scenario in which the contracting authority is requested from the top, i.e. from the executive or from the legislative branch (parliamentary oversight), to implement an Integrity Pact. The companies can be forced to be subject to oversight through the Integrity Pact when this is required by law or by the contracting authority. Companies can also be motivated to partake in an Integrity Pact if this levels the playing field in which they operate. An Integrity Pact ensures that their competitors are held up to the same accountability and transparency standards, which ensures a level playing field when bidding for public contracts. A third motivation for companies to partake in bidding processes with an Integrity Pact is that it gives them a fairer chance of winning a public contract as it protects them to possible bias decision-making by public authorities.

Internal considerations in order to effectively implement an Integrity Pact include organisations to assess project management and coordination capacity, expertise in public procurement processes, access to human resources and capacity to communicate and disseminate work<sup>414</sup>. Of particular importance is the expertise in public procurement processes. As discussed above in this study, the professionalism in public procurement is considered besides transparency and accountability a key element to fight corruption. The capacity to communicate and disseminate the work is relevant from the perspective of active multi-stakeholder participation. Collective action includes the involvement of the bidders, contracting authorities, civil society organisation, but also the public or citizens directly affected by a public procurement project. From a project management perspective it is important in order to understand which groups are likely to affect or be affected by proposed activities. For preparation of an Integrity Pact one can assess the background and the role of the stakeholders in the procurement process and target activities to these actors. It is relevant

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<sup>414</sup> TRANSPARENCY INTERNATIONAL (2015). Integrity Pacts: a how-to guide from practitioners [WWW].

Available from:

[http://www.transparency.org/whatwedo/publication/integrity\\_pacts\\_a\\_how\\_to\\_guide\\_from\\_practitioners](http://www.transparency.org/whatwedo/publication/integrity_pacts_a_how_to_guide_from_practitioners)

[Accessed on 21-10-2016]. p.11

to understand the stakeholders involved when designing the Integrity Pact. For example, understanding the contracting authorities will strengthen a civil society organisation's position during 'negotiating' an Integrity Pact agreement. Understanding bidders and their interconnections as a 'social group' can help prevent collusion.

Above we discussed internal and external considerations for the initial preparation of the Integrity Pact. The second stage in the design phase is the design of the Integrity Pact process. This builds on the four steps above and includes<sup>415</sup>:

- Deciding when to start the Integrity Pact;
- Deciding who to involve;
- Listing the activities that need to be included in the Integrity Pact and the type of document to have;
- Deciding on the implementation arrangements;
- Determining the monitoring system and selecting a monitor;
- Communicating about the IP and building support;
- Getting ready to provide information about the process;
- The initial phase of the design process.

The third stage includes the undertaking of initial activities (i.e. starting the monitoring agreement and the implementation arrangements, and undertaking activities before the bidding process starts such as public hearings and reviewing bidding documents). The fourth stage in the design phase is the preparation of the Integrity Pact document, which establishes the content of the agreement and also includes informing the stakeholders involved. The design phase is concluded with the signing of the Integrity Pact. The World Bank Institute notes that an Integrity Pact should contain certain mandatory elements such as a formal contract, external monitoring and sanctions. The formal, written contract is ideally signed by the top responsible stakeholders of the participating parties. It should describe the rules and principles in accordance with the law. Third party monitoring should be included in an Integrity Pact considering this is a tool to enhance the level playing field. The independent

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<sup>415</sup> TRANSPARENCY INTERNATIONAL (n.d.). *Integrity Pacts* [WWW]. Available from: [http://www.transparency.org/whatwedo/tools/resources\\_about\\_integrity\\_pacts/3/](http://www.transparency.org/whatwedo/tools/resources_about_integrity_pacts/3/) [Accessed on 12-10-2016]. p.

monitor's role could reduce the risk of non-compliant behaviour but also reduce the risk of non-awarded companies to initiate lawsuits. In addition, the World Bank Institute notes that the external monitor can add value to the companies and contracting authorities by advising them on procurement process related issues. Including sanctions in the Integrity Pact ensures that credibility is increased and non-compliance is met with consequences.

### 5.2.2 Implementation of the Integrity Pact

The second phase is the implementation of the Integrity Pact. This includes two stages, namely the activities during the bidding process and the activities after the bidding once the contract is being implemented. Each participating stakeholder plays a specific role in the Integrity Pact with the contracting authority and the companies focusing their work primarily on the activities relating the tender or procurement process. The civil society organisation plays both a monitoring and communication role in the Integrity Pact.

A key role in the implementation of the Integrity Pact is for the independent external monitor. This person or group of persons have different tasks. For example, the monitor can participate in meetings at all procurement process stages. The monitor could receive the tender documents and all offers for transparency-focused review, participate in communication between the companies and contracting authorities and issue monitoring report on the tender process. The monitor can also have an active role in asking for clarification of decisions, inform on identified irregularities and drive for addressing these. The World Bank Institute highlights that the monitor is more a witness to the procurement process rather than a decision-maker<sup>416</sup>.

Transparency International considers contracting authorities the lead implementers of the Integrity Pact<sup>417</sup>. Ideally, they work closely together with others stakeholders, particularly the civil society organisations. Contracting authorities might also not implement the Integrity

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<sup>416</sup> WORLD BANK INSTITUTE (2008) Fighting Corruption through Collective Action [WWW]. Available from: <http://www.fcpablog.com/blog/2014/11/6/collective-action-a-new-approach-to-combat-corruption-part-8.html> [Accessed on 12-10-2016].

<sup>417</sup> TRANSPARENCY INTERNATIONAL (n.d.). *Integrity Pacts* [WWW]. Available from: [http://www.transparency.org/whatwedo/tools/resources\\_about\\_integrity\\_pacts/3/](http://www.transparency.org/whatwedo/tools/resources_about_integrity_pacts/3/) [Accessed on 12-10-2016]. p.

Pact alone, but do this in coalition with other government agencies, decision-makers or control and oversight agencies.

A key element in the implementation of the Integrity Pact is the communication of the Integrity Pact<sup>418</sup>. Communication can be directed internally to the bidders and contractors on their rights and obligations in the Integrity Pact, but can also be external to the public on the monitoring of the procurement process.

During the bidding process, the Integrity Pact could facilitate the debate on the bidding documents. This enables the participation of all potential bidders to the process, which could enhance levelling the playing field. Once the tender invitation has been issued there is a time frame for questions and answers. The Integrity Pact could ensure that all questions are addressed and openly communicated to all stakeholders. This ensures fair competition. Further, the Integrity Pact could guide the closing of the tender period by ensuring that the received bids are publicly opened. More importantly, the Integrity Pact could play a strong role in the bid evaluation and awarding process. Also in case of reopening of tender procedures, the Integrity Pact can ensure that this is done in a fair manner. Following the contract award, the Integrity Pact can then monitor the contract negotiation up until the signature. After the bidding process finalises, the Integrity Pact shifts its focus from procurement to contract management and could monitor the implementation of the works.

### **5.3 Context of Integrity Pacts**

The analytical framework to analyse the role of the monitor to prevent corruption in public procurement through collective action starts with a contextual analysis or defining of initial conditions. The context includes external factors the group members of the collective action initiative face, as well as, other conditions relating resources and assets, sources of vulnerability, legal structures and power relations. These conditions should allow us to clarify the constraints and opportunities that determine the context in which group members aim to

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<sup>418</sup> TRANSPARENCY INTERNATIONAL (n.d.). *Integrity Pacts* [WWW]. Available from: [http://www.transparency.org/whatwedo/tools/resources\\_about\\_integrity\\_pacts/3/](http://www.transparency.org/whatwedo/tools/resources_about_integrity_pacts/3/) [Accessed on 12-10-2016]. p.

reach collective outcomes. This section discusses findings from the global and European reviews on Integrity Pacts and is structured as follows:

- Governance and economic conditions;
- Public procurement vulnerabilities;
- Legal conditions;
- Implementation arrangements.

### 5.3.1 Governance and economic conditions

For the global review of the Integrity Pacts we attempted to draw lessons from governance characteristics of countries that have introduced Integrity Pacts. We have seen a geographically diverse range of countries that have used the Integrity Pact. By taking a closer look at some of the governance indicators for the countries that have implemented the Integrity Pact, some similarities can be identified.

The figures below are from the World Development Indicators (WDI) and Worldwide Governance Indicators (WGI). Scores for the WGI range from -2,5 (for weak governance) to 2,5 (for good governance). The WDI allows for a distinction between low income (L), lower middle income (LM), upper middle income (UM) and high income (H) countries. Figures for the WGI are given for the year of Integrity Pact implementation. In Europe it is noticeable that with the exception of Germany, most countries that have introduced the Integrity Pact suffer significant levels of corruption. The same can be said about the total picture of countries that have implemented Integrity Pacts, averaging a score of -0.11. If we remove the outlier (Germany) this reaches -0.22.

**Table 5: Governance and economic conditions**

Country	Year of IP Implementation	World Development Indicator	Worldwide Governance Indicator				GDP per capita 2007 (PPP, current USD)	CPI 2015	WDI 2015
			Government Effectiveness	Regulatory Quality	Rule of Law Estimate	Control of Corruption			
Europe									
Italy	1999	H	0.77	0.81	0.80	0.72	33,731.2	44	H
Germany	2005	H	1.54	1.50	1.66	1.86	36,735.8	81	H
Latvia	2006	UM	0.69	1.00	0.64	0.29	19,083.7	55	H
Bulgaria	2012	UM	0.14	0.54	-0.64	-0.24	12,984.9	41	UM
Hungary	2011	H	0.68	1.03	0.74	0.32	19,269.6	51	H
Spain	2015	H	1.15	0.78	0.94	0.53	32,806.7	58	H
Romania	2014	UM	0.00	0.60	0.15	-0.14	13,172.0	46	UM
Latin America									
El Salvador	2012	LM	-0.14	0.32	-0.75	-0.39	7,122.3	39	LM
Colombia	1999	LM	-0.17	0.05	-0.79	-0.43	9,710.9	37	UM
Argentina	2000	UM	0.06	0.29	-0.20	-0.34	*	32	UM
Ecuador	2000	LM	-0.80	-0.527	-0.69	-1.01	8,366.1	32	UM
Mexico	2001	UM	0.23	0.291	-0.45	-0.24	13,717.5	35	UM
Honduras	2014	LM	-0.78	-0.384	-0.97	-0.79	4,074.3	31	LM
Asia									
South Korea	1999	UM	0.33	0.314	0.73	0.34	27,872.1	56	H
Indonesia	2000	L	-0.27	-0.18	-0.75	-0.89	7,040.7	36	LM
Pakistan	2001	L	-0.58	-0.73	-0.95	-0.82	4,054.6	30	LM
China	2004	LM	0.00	-0.28	-0.43	-0.56	6,807.1	37	UM
India	2006	L	-0.05	-0.24	0.19	-0.30	3,523.0	38	LM
Africa									
Rwanda	2012	L	-0.06	-0.10	-0.26	0.65	1,072.1	54	L

Source: own elaboration

From the countries that have introduced the Integrity Pact, half belong to upper middle income and high-income countries and half to lower middle income and low-income countries. This gives reason to believe that the decision to introduce the Integrity Pact is not determined by the economic classification of a country. If we look at most of the countries that have implemented the Integrity Pact it also becomes clear that, from the perspective of the Transparency International's CPI, many countries suffer endemic levels of corruption. According to the CPI, countries suffer from systemic corruption when scoring at or below 50 on a scale from 0 (highly corrupt) to 100 (highly clean).

If we narrow down on European countries, it is clear that the outlier is again Germany. Nonetheless, most countries that have implemented Integrity Pacts, experience high levels of corruption perception. Some of these countries fall under the 50 points labelling threshold. From this perspective, it could be argued that, despite being considered upper middle or high-level income, the CPI scores underscore concerns about whether normative constraints of the law suffice to fight the problem. After all, these countries all apply EU procurement directives, which hold provisions to enhance transparency and fight corruption, but still consider the use of the Integrity Pact as relevant. On the other hand, European Union Member States in the higher percentiles of the CPI have not used the Integrity Pact to address corruption in public procurement. On the global level, although we have not analysed the different procurement systems in each country, we do see that the same can be said about those countries scoring worst in the CPI. The Integrity Pact has not been introduced in those countries scoring the worst, which could imply that some level of public sector integrity is a pre-requisite before introducing the collective action initiative. The public procurement systems possibly are weak in those countries, as is the rule of law, which reduces trust of private sector stakeholders in an Integrity Pact given that enforcement cannot be guaranteed. This can for example be supported by looking at the government effectiveness indicator. This examines the perceptions of the quality of public services, civil service, and the degree of its independence from political pressures. As discussed in the chapters above on public procurement, these elements can be relevant to the procurement process and the application of the Integrity Pact. Looking at the ranking above, most countries score between -0.5 and 0.5, which demonstrates a fairly even distribution of scores. This suggests that Integrity Pacts have been introduced in countries that, while not performing by governance standards, do not necessarily belong to the worst performers. Finally, if we look at the GDP per capita figures we see that most countries that have implemented the Integrity Pact can be classified as middle-income with the exception of the European countries and South Korea. In the European Countries this differs from the global picture. Within the European Union countries, the countries with the lower per capita figures (PPP) are those that have implemented Integrity Pacts.

Overall what the figures above tell us is that the governance and economic indicators can provide insight into the operating environment of Integrity Pacts. From these figures it is not certain which governance and economic prerequisites might influence whether countries decide to initiate the Integrity Pact, neither the success of the Integrity Pact. In this section

some commonalities were identified but above all differences in how countries score comparatively.

Data for government effectiveness and voice and accountability, vis-à-vis a country's per capita GDP show that the governance score is positively correlated with per capita GDP. Analysis of other governance indicators such as regulatory quality, control of corruption, political stability, and rule of law and their correlation with per capita GDP, also confirms this positive relationship. The relationship between governance and economic development varies across the various dimensions of governance. Government effectiveness is more closely correlated with per capita GDP than voice and accountability. In fact, government effectiveness has the highest correlation with per capita GDP among the six World Bank Governance Indicators, and voice and accountability has the lowest<sup>419</sup>. On this basis it would be relevant to look at those countries that on the basis of the indicators above do not fit the profile of low governance and/or low GDP. For example, in Europe the Integrity Pacts in Germany stand out. The same can be said for South Korea compared to the other Asian countries that have implemented the Integrity Pact. The question could be asked why these countries initiated an Integrity Pact given the economic and governance indicators in the respective countries. The answer probably lies in the chain of events leading up to the initiation of the Integrity Pact.

Initiation refers to the putting forward of the proposal for collective action in an Integrity Pact. The support of the government and the respective contracting authority is essential in order to be able to get an Integrity Pact of the ground. However, other stakeholders, such as civil society organisations or even companies themselves, can also drive initiation. Also donor organisations could play an important role. This is for example seen in the project in Bulgaria and Spain, both driving by the Siemens Integrity Initiative. Most often, the initiation of an Integrity Pact is a combination of champions advocating for the use of the tool. This study found various factors contributing to the decision to initiate an Integrity Pact:

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<sup>419</sup> IMF (2014). Governance unbundled [WWW]. Available from: <http://www.imf.org/external/pubs/ft/fandd/2014/06/jha.htm> [Accessed on 12-10-2016].

- The emergence of an acute concern for transparency and anti-corruption, for example the postponement of a tender process or the use of an emergency procedure without understanding why;
- A change in government priorities to fight corruption or improve governance, for example after a scandal or when the leadership changes;
- A similar event or situation that brought the Integrity Pacts as a potential solution.

To illustrate, in Germany when plans were made for the construction of the Berlin airport in 1995, Transparency International Germany approached the airport authorities with the suggestion of using the Integrity Pact. The offer was initially rejected by the authorities with the argument that this would be an admission of corruption in the project. Shortly thereafter several corruption allegations reached the media, culminating in stopping of construction in 2001. As further allegations arose three years later, the airport authority returned to Transparency International Germany and its recommendation of the Integrity Pact, which was then signed in January 2005. Transparency International Germany ultimately ended its relationship with the contracting authorities in March 2015, following a series of corruption incidents since early 2013.<sup>420</sup> This example shows that not necessarily the economic and governance conditions in the country predetermined the relevance of using the Integrity Pact but instead an isolated factor, namely a corruption scandal<sup>421</sup>.

In Spain, the Integrity Pact initiative was promoted under the Siemens Integrity Initiative. While this can be considered a driving force behind the use of the tool, the conditions arguably are favourable in the country for such an initiative. As discussed before in this study, Spain, according to the EU anti-corruption report has a strong legal framework against corruption. Also, Spain's meritocratic civil service at the central government levels allow for

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<sup>420</sup> TRANSPARENCY INTERNATIONAL GERMANY (2015), Korruption nicht ernst genommen – Transparency Deutschland beendet Kooperation mit BER [WWW]. Available from: <https://www.transparency.de/2015-03-24-Integritaetspakt-BE.2603.0.html?&contUid=6031> [Accessed on 21-10-2016].

<sup>421</sup> Interview feedback Field Mission Germany, collected by global review co-author, 28 September-1 October 2015.

an acceptable degree of impartiality in the implementation<sup>422</sup>. Nonetheless, the country is experiencing increased public perception of corruption<sup>423</sup>. This can be partially attributed to the increase efforts of law enforcement to investigate corruption and of the Judiciary to prosecute also important politicians<sup>424</sup>. Data from the Public Prosecutor Office shows an increase of 20% of corruption cases under investigation<sup>425</sup>. Another reason identified is the relation between perception of corruption and the state of the national economy<sup>426</sup>.

Since the economic crisis in 2009, also the WGI on voice and accountability decreased indicating that social accountability mechanisms to enhance control of the government are not fully exploited.

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<sup>422</sup> VILLORIA (ed) (2012). El marco de integridad institucional en España. Situación actual y recomendaciones. Valencia: Tirant lo Blanch, 2012. Chapter 4

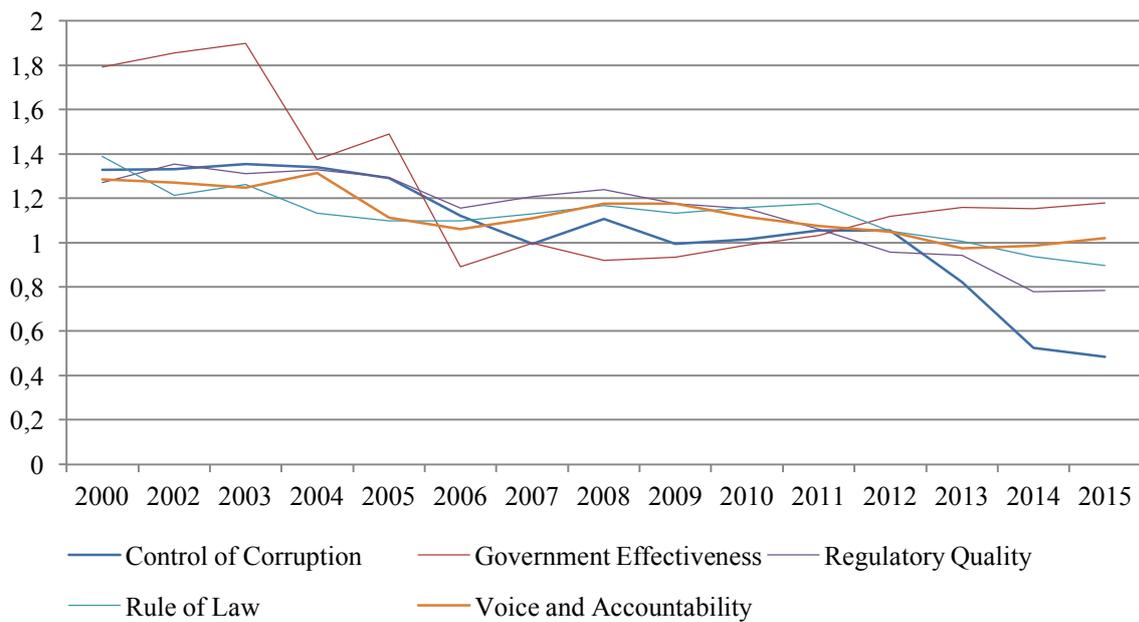
<sup>423</sup> DE LANCER, P., and VILLORIA, M. (2014). *Understanding and addressing citizens' perceptions of corruption: the case of Spain*. *International Review of Public Administration*, 19, No. 1 (January, 2014): 23–43.

<sup>424</sup> Ibid.

<sup>425</sup> FISCALÍA GENERAL DEL ESTADO (2015). *Memorias 2013-2015* [WWW]. Available from: <https://www.fiscal.es/memorias/memoria2015/Inicio.html> [Accessed on 12-09-2016].

<sup>426</sup> Natalia Melgar, Maximo Rossi, & Tom W. Smith, “The Perception of Corruption”. *International Journal of Public Opinion Research*, 22(1) (January 2010): 120-131; Stephen D. Morris “Disaggregating Corruption: A Comparison of Participation and Perceptions in Latin America with a Focus on Mexico”. *Bulletin Of Latin American Research*, 27(3) (July 2008): 388-409.

Figure 3: World Governance Indicators Spain



Source: WGI Spain 2000-2015

The WGI data show on the one hand that control of corruption is a problem, which justifies an anti-corruption initiative such as the Integrity Pact. On the other hand, the government effectiveness sees after a steep drop (up until 2006) a steady recovery indicating that quality of civil servants and the independency from political pressure is warranted. However, the nuance in Spain lays in the different procurement challenges facing the country, in which compared to the state level more problems are identified on the regional and local level. The local and regional governments do not have such a strong integrity system in place resulting in politicization<sup>427</sup>. This in combination with decreasing voice and accountability, indicates that the conditions for initiating an Integrity Pact would be suitable. In fact, arguably, Spain has faced collective action problems in the past on the local and regional level. For example, during the years of economic growth in the country, the citizens continued to support corrupt regional and local governments despite the scandals<sup>428</sup>. Currently, this perception has

<sup>427</sup> VILLORIA (ed) (2012). El marco de integridad institucional en España. Situación actual y recomendaciones. Valencia: Tirant lo Blanch, 2012. Chapter 4

<sup>428</sup> JIMENEZ, F. (2008). Un balance la lucha contra la corrupción política”, in *Informe sobre la democracia en España/2008*. Ed. Joaquin Estefanía (Madrid: Fundación Alternativas, 2008): 185-238

COSTAS-PÉREZ, E., SOLÉ-OLLÉ, A., and SORRIBAS-NAVARRO, P. (2011). Corruption Scandals, Press Reporting, And Accountability. Evidence From Spanish Mayors”, Institut d’Economia de Barcelona Working

changed which provides for a scenario in which the collective approach to prevent corruption in public procurement could provide effective.

Whether the economic and governance conditions could determine the success of the Integrity Pact is difficult to say. In the view of Transparency International Germany, the Integrity Pact for the Berlin airport was not a success<sup>429</sup>. In other words, the favourable economic and governance conditions in Germany have not necessarily contributed to a successful Integrity Pact.

### 5.3.2 Public procurement conditions

#### 1. *Corruption in procurement risks*

Above we noted that the Integrity Pact is not considered a tool to substitute public procurement legislation. In fact, the tool is considered a supplement to the existing legal framework and a way in which the implementation of the framework can be enhanced. The limits of the EU procurement rules come to light when we ask procurement officials, civil society actors and anti-corruption experts in the EU about the different corruption risks and mitigation measures in public procurement. The 2015 survey for the European review collected information on corruption risks and measures in European procurement systems. From the survey results it is shown that, regardless EU procurement rules, there are differences in views on the weaknesses in procurement, the likelihood of irregularities throughout the process and the severity of these irregularities both depending the country and depending the type of respondent.

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Paper, 2011. Available from: <http://www.ieb.ub.edu/aplicacio/fitxers/2011/4/Doc2011-9.pdf> (Accessed on 10-12-2015)

GÓMEZ, B., CABEZA, L., and PALACIOS, I. (2008) Las elecciones autonómicas de 2008 en Andalucía: los costes de la corrupción urbanística. In *Elecciones generales 2008*, ed. José Ramón Montero and Ignacio Lago (Madrid: CIS, 2011), 409-438.

<sup>429</sup> Interview feedback Field Mission Germany, collected by global review co-author, 28 September-1 October 2015.

The survey targeting civil society experts (mainly Transparency International<sup>430</sup>) and other anti-corruption experts<sup>431</sup> across the EU measured their views on the likelihood<sup>432</sup> of risk scenarios to occur as well as the severity of such a risk<sup>433</sup>. The respondents indicated that in their respective country during the pre-bidding phase, a lack of adequate needs assessment, planning, and budgeting of public procurement is most likely to occur and has moderate to very severe consequences. Broken down per risk, the respondents rated the following:

- The lack of adequate needs assessment, deficient business cases, poor procurement planning (3,3/2,4)
- Failure to budget realistically, deficiency in the budget (3/2,2)
- Procurement is not aligned with the overall investment decision-making process in departments (2,4/1,8)
- Interference of high-level officials in the decision to procure (3,2/2,4)
- Informal agreement on contract (2,9/2,4)

Concerning the second stage of bidding preparation, namely the contracting preparation, common risks relate to selection requirements that are not adequately or objectively defined, inadequate or irregular choice of the procurement procedure, or a timeframe for the preparation of the bid that is insufficient or not consistently applied across bidders. Broken down per element, the respondents rated the following:

- Technical specification are vague or not based on performance requirements (3/1,8)
- Technical specifications are tailored for one bidder (3,1/2,4)
- Selection and award criteria are not clearly and objectively defined (2,8/2,0)
- Selection and award criteria are not established and announced in advance of the closing of the bid (1,6/1,6)
- Lack of procurement strategy for the use of non-competitive procedures based on the value and complexity of the procurement which creates administrative costs (2,3/1,5)

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<sup>430</sup> Data was collected from Bulgaria, Czech Republic, Hungary, Croatia, Lithuania, Latvia, Portugal, Romania and Slovenia.

<sup>431</sup> Data was collected from Austria, Spain, Estonia, Hungary, Croatia, Poland and Slovakia.

<sup>432</sup> Likert-scale 1-4 (very unlikely, unlikely, likely, very likely).

<sup>433</sup> Likert-scale 1-3 (slightly severe, moderately severe, very severe).

- Contract splitting in order to remain below monetary thresholds from which public competition is mandatory (3,2/2,4)
- Abuse of the “extreme urgency” clause to avoid competitive tendering (2,7/2,0)
- Abuse of other exceptions to competition based on a technicality or exclusive rights (2,8/2,2)
- Untested continuation of existing contracts (2,6/1,7)
- A time frame that is not sufficient for ensuring a level playing field (2,0/1,8)

Although the transition between the pre-bidding phase and bidding phase is not always very evident, generally the bidding process includes the invitation to bid and the awarding of the contract. Broken down per element, the respondents rated the following:

- Information on the procurement opportunity not provided in a consistent manner (1,9/1,7)
- Absence of public notice for the invitation to bid (2,0/1,8)
- Sensitive or non-public information disclose (1,4/1,1)
- Lack of competition or in some cases collusive bidding that leads to inadequate process or even illegal price fixing (2,9/2,6)

The awarding of the contract is more conflictive with especially risk of conflict of interest. Broken down per element, the respondents rated the following:

- Obligation to include a sub-contractor pre-defined by the contracting authority (2,0/1,4)
- Inadequate, discriminative modification of the call for tenders (1,9/1,4)
- Conflict of interest and corruption in the evaluation process such as familiarity with bidders over the years (2,8/2,3)
- Conflict of interest and corruption in the evaluation process such as personal interests such as gifts or additional/secondary employment (2,8/2,3)
- Conflict of interest and corruption in the evaluation process such as no effective implementation of the four-eyes principle (1,9/1,6)
- Conflict of interest and corruption in the approval process such as no effective separation of financial, contractual and project authorities in delegation of authority structure (2,0/1,8)

- Lack of access to records on the procedure in the award that discourages unsuccessful bidders to challenge a procurement decision (1,9/1,5)

The post-bidding phase starts with the signing of the contract and includes contract management and order and payment. Broken down per element, the respondents rated the following:

- Failure to monitor the performance of the contractor, in particular lack of supervision over the quality and timing of the process, that results in substantial change in contract conditions to allow more time and higher prices for the bidder (3,0/2,5)
- Failure to monitor the performance of the contractor, in particular lack of supervision over the quality and timing of the process, that results in product substitution or sub-standard work or service not meeting contract specifications (3,2/2,4)
- Failure to monitor the performance of the contractor, in particular lack of supervision over the quality and timing of the process, that results in theft of new assets before delivery to end-user or before being recorded in the asset register (2,0/1,4)
- Failure to monitor the performance of the contractor, in particular lack of supervision over the quality and timing of the process, that results in that subcontractors and partners are chosen in a non-transparent way, or not kept accountable (3,1/2,4)
- Deficient separation of duties and/or lack of supervision by public officials that results in false accounting and cost misallocation or cost migration between contracts (2,2/1,9)
- Deficient separation of duties and/or lack of supervision by public officials that results in late payments of invoices, postponement of payments to have prices reviewed to increase the economic value of the contract (2,2/1,8)
- Deficient separation of duties and/or lack of supervision by public officials that results in false or duplicate invoicing for goods and services not supplied and for interim payments in advance of entitlement (1,9/1,8).

Feedback collected from procurement officials 2013 for a study for the European Parliament<sup>434</sup> on anti-corruption measures showed that at the pre-bidding phase, officials

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<sup>434</sup> BEKE, M., CARDONA, F., BLOMEYER, R. (2013). *Political and other forms of corruption in the attribution of public procurement contracts and allocation of EU funds: Extent of the phenomenon and overview*

viewed as relevant the public consultation of stakeholders when drafting tender specifications. Involving different parties in this process could avoid undue political influence during the needs assessment stage as long as a representative sample of stakeholders participate. The fact that all stakeholders are involved from the start in the decision-making process allows for stopping unnecessary public works but also ensures that when approved, the project carries sufficient public support. The study further showed that officials found the inclusion of post-bidding guidelines in the procurement plans moderately important when addressing corruption. The formal commitment of stakeholders not to commit misconduct and corruption on the other hand was highly valued. However, it was raised that this measure is seen as a soft tool creating awareness rather than having serious consequences. At the bidding phase, the e-procurement system was valued as very important to avoid corruption. Also the use of clear evaluation criteria, including the weightings, ranked high in importance. This is essential to avoid bias decision-making. Also, setting up strong criteria protects procurement authorities from strategic bidding practices. Such practices are not uncommon and in general permitted. The bidders can strategically use the scoring method applied for the evaluation of bids in order to reach the highest possible scoring. For example, bidders can shift the budget between line items and this way take advantage of the set scoring criteria. Such practices are perceived as unwanted and perhaps manipulative. However, this is not necessarily negative. After all, bidders are allowed to present the most financially attractive offers and could even decide to carry losses, for example, in case their objective is increasing their market share. Rather than prohibiting strategic bidding, procurement authorities should ensure a solid scoring system. Measures concerning equality, transparency and timeliness of communication with the bidders are considered very important to the procurement officials. Special emphasis is placed on communicating the contract award, which should include information on the successful bidders, nature of goods and services procured, award criteria, etc. Regarding the rejected bids, the respondents agree that grounds for rejection should be communicated upon request. Using a council to monitor the bidding process was valued moderately important by the consulted stakeholders. On measures against corruption in the post-bidding stage, the surveyed officials responded with mixed views on the importance of e-procurement in contract management. The principle reason for this could be the lack of use

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*of practices* [WWW]. European Parliament. Available at:

[http://www.europarl.europa.eu/thinktank/es/document.html?reference=IPOL-JOIN\\_ET\(2013\)490676](http://www.europarl.europa.eu/thinktank/es/document.html?reference=IPOL-JOIN_ET(2013)490676) [Accessed on 12-11-2013].

of e-contract management as opposed to e-bidding procedures. Restrictions and controls over changes in the terms of the contracts are overall seen as very important. The public access to procurement documents and records received support. However, it is important to highlight that this carries administrative costs as the documentation needs to be collected and a level of discretion is needed when disclosing business sensitive information.

The use of risk assessment to determine the condition in which an Integrity Pact operates can be illustrated by the Integrity Pacts implemented by the Transparency International chapter in Bulgaria. The chapter showed took a proactive approach by identifying for each step in the procurement process specific risks (labelled by the organisations as deficits) and linking Integrity Pact activities (labelled as transparency and integrity indicators) to these risks<sup>435</sup>. For example, the organisation identified a potential deficit concerning the contract implementation, namely “failure to take prompt actions due under the contract, indifference and / or slowness in carrying out actions by the contracting authority”<sup>436</sup>. An activity in order to mitigate this risk is according to the organisation the scheduling of working meetings concerning the progress, on-the-spot checks, and inspection of documentation and assessment of proofs related to contract execution.

## *2. Procurement cycle*

On the basis of the corruption risk assessment an important follow-up question needs to be posed, namely, to which phases of the procurement process the Integrity should apply. Integrity Pacts can cover the entire or parts of the procurement process cycle. As we have seen in this study, corruption risks occur in all phases of the process. Also, we have discussed how corrupt activities can take place in one phase and only come to light during another. Stakeholders’ feedback from the European and global review confirmed the added value of the Integrity Pact as a tool that potentially covers an entire process, from start to finish. This, in combination with the multi-stakeholder approach, provides for a strong basis to prevent corruption at all levels. In practice, however, civil society organisations implement Integrity Pacts at different phases of the procurement cycle. The Transparency International chapters

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<sup>435</sup> Interview feedback Field Mission Bulgaria, European review, 31 March – 2 April 2015.

<sup>436</sup> Desk research internal documents, document Indicators for transparency and integrity under public procurement procedures, p. 78.

that have implemented Integrity Pacts have not always been able to start monitoring activities in the pre-bidding phase and only started after the decision to procure had been taken, often at the start of the bidding-phase. In addition, chapters have not always included Integrity Pact activities for the post-bidding phase. The need for increased financial and technical capacity in order to monitor contract execution can pose challenges for civil society organisations before reaching post-bidding activities. As a consequence, most Integrity Pacts focus specifically on the bidding phase.

To illustrate, the Social Witness Program in Mexico specifically focuses on the bidding process. This however does not mean that the monitors do not ask questions about the activities relating to the pre-bidding or post-bidding. Feedback from the interviews conducted with stakeholders in Mexico shows that monitors, apart from looking at compliance with legal procurement rules, strongly focus on asking authorities and bidders to justify decisions they take<sup>437</sup>. An interesting angle provided by authorities during an interview was that the questions raised by monitors could break information asymmetries, both within the institution, but also between bidders and authorities<sup>438</sup>. For example, the contracting authority had always relied on the uncontested expertise of their senior engineers when taking decisions. Not until the Social Witness asked the senior engineers to justify their input did the authorities realise that perhaps they had more options. The Transparency International chapter highlighted that despite the fact that they were not monitoring contract execution, their involvement in the bidding phase could prevent problems afterwards<sup>439</sup>.

### 5.3.3 Legal conditions

The legal condition in which the Integrity Pact operates is considered one of the most distinctive features of the tool. All Integrity Pacts operate alongside procurement laws, but how, when and why an Integrity Pact is implemented is influenced by its status within the country's laws and regulations. Overall, the case analysis exposed two different types of relations: those that are a legal requirement; and those that receive direct promotion and recommendation from the government through directives or similar means. In practice, most

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<sup>437</sup> Feedback interview # 31, #32, #34, global review, September-November 2015.

<sup>438</sup> Feedback interview # 35, global review, September-November 2015.

<sup>439</sup> Feedback interview # 35, global review, September-November 2015.

Integrity Pacts have been applied in isolated instances for select public procurement processes. This has been the case for example in Argentina, Colombia, and Germany, among others. Elsewhere however, the Integrity Pact has become a legal requirement in public procurement processes under certain pre-defined conditions at various levels of government, as seen in Mexico, India, Italy, Pakistan and South Korea. This distinction in approach is an important dividing line in how the Integrity Pact has been applied. It is significant with regard to the number of Integrity Pact projects implemented in a country. It also touches upon the question whether from a collective action point of view the Integrity Pact is the right approach to deal with corruption problems. As we have discussed earlier in this study, too many Integrity Pacts could lead to monitoring over-stretch for civil society organisations in which case alternative efforts to combat corruption in a sector should be considered (i.e. business certification). For example, Transparency International India began promoting the Integrity Pact in 2001. It was first adopted in 2006 by one public company. In 2007 the Integrity Pact was recommended for all major procurements undertaken by central public companies<sup>440</sup>. As a consequence, nearly 100 contracting authorities have now adopted Integrity Pacts as a requirement for their procurement processes, institutionalizing the tool and seeing it repeated on a large scale. In Mexico, the federal government introduced the Social Witness Program (*Testigo Social*) in 2004 after piloting various civil society public procurement monitoring projects in collaboration with the Mexican Transparency International chapter. Since that time, the chapter has monitored over 200 public procurement processes. The legally adopted formula for monitoring stems from the Integrity Pact model designed by Transparency International but differs in various ways from examples identified across the spectrum. For example, natural and legal persons can register and be accredited in order to be eligible for monitoring federal procurement processes. A government selection committee appoints a monitor from a pool of accredited experts to a specific procurement project. *De facto*, the monitor cannot choose the process it wishes to monitor. The contracting authority will include the monitor in the process, provide access to documentation and meetings, and remunerate the work based on time sheets. The monitor has an observatory role, but can comment on procedures and promote good practices. In case the monitor

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<sup>440</sup> CENTRAL VIGILANCE COMMISSION (2009). Circular No. 10/5/09 [WWW] Available from: <http://integritypact.in/download/CVC%20Standard%20Operating%20Procedure%2018%20May%202009.pdf>  
<http://integritypact.in/download/CVC Standard Operating Procedure 18 May 2009.pdf>  
[Accessed on 21-10-2016].

identifies irregularities, it can take the decision to escalate these to competent authorities. Primarily its role is to ensure that the procurement process is done according to the law. In the end, the monitor drafts a monitoring report that will be made public. Contrary to the Indian and Mexican cases, in other countries, such as in most EU countries, Integrity Pacts are case-based. Transparency International Germany has been promoting Integrity Pacts since 1995, but it has in fact only conducted four. The Latvian chapter of Transparency International started an Integrity Pact in 2006 and only concluded this in 2015.

Either approach of promoting the Integrity Pact as a requirement or promoting it in isolated procurement tenders can presents strengths and weaknesses. The former ensures that more procurement processes are monitored, which, if well-implemented and successful in achieving their stated objectives, will have a better chance for sustainability of positive outcomes beyond a single tender. More stakeholders will be exposed to the Integrity Pact, reducing the learning curve for participants. More case examples within a specific national context will also provide greater opportunities to fine-tune and improve the approach, developing a repository of knowledge, lessons learned and best practices. This is seen particularly in Mexico and India where the both academia and the civil society organisations have produced research, conducted trainings and events. The negative side of institutionalised Integrity Pacts is that it risks becoming a check-box exercise and potentially worse, a form of window-dressing. This would have potentially long-term negative consequences for the credibility of the civil society organisations involved and the tool more generally. Even with the political support of the government, the inclusion of the Integrity Pact within a broader reform programme, or commitment of resources in support of the Integrity Pact, the tool risks becoming a formality in the procurement process, without actual intention of implementing the commitments. The Integrity Pact as a project-based tool, applied to a small number of tenders can allow for more selective monitoring of corruption risks. This way civil society organisations can be more selective in the choice of projects, commit resources and attention to those that could potentially experience the greatest benefits from increased transparency and accountability that an Integrity Pact can provide. This in turn can help promote the further use of the tool and reduce the future risk of abuse of the Integrity Pact as window-dressing. The negative side from the single-project Integrity Pacts is that learnings risk to get lost post-project once no follow-up action is foreseen. Also, the longer-term impact on anti-corruption for public procurement will be difficult to determine. More intangible elements of

anti-corruption such as awareness-raising becomes more difficult if civil society organisations occasionally enter into monitoring of procurement projects.

#### 5.3.4 Implementation arrangements

The implementation arrangement contains many different elements that could determine the success of the Integrity Pact. At the foundation of the Integrity Pact lies the multi-stakeholder participation. Implementation arrangements depend on the involvement of multiple stakeholders. This is one of the characteristics of the Integrity Pact that is most important to stakeholders when defending its adoption.

##### *1. Multi-stakeholder participation*

The multi-stakeholder participation manifests itself not only through the way in which signatory parties come together to sign shared commitments of integrity on a project, but also through sharing of information with the beneficiaries of the projects in question (the public) and their contributions. Transparency International in its guide points to methods to achieve such as targeted public hearings or town hall meetings, facilitating discussion with the community on project impacts, a proactive media presence, and active civil society involvement, by either channelling information to or serving as a representative of the public<sup>441</sup>.

We have seen in the section above that stakeholder participation is also an important element in the theory of change that the Integrity Pacts seeks to support. The idea is that through effective participation of and outreach towards the public, the Integrity Pact can support empowered citizens, who through increased attention on and information about the procurement process, may submit legitimate concerns, generating a response from the public authorities towards improvement of the process. From what we have seen through the governance indicators, countries differ in the degree to which civil society and citizens in general enjoy freedom of expression and active participation of the media in policy discourse. If this feedback loop is limited due to a minimal role or tradition of civil society activity

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<sup>441</sup> TRANSPARENCY INTERNATIONAL (n.d.). *Integrity Pacts* [WWW]. Available from: [http://www.transparency.org/whatwedo/tools/resources\\_about\\_integrity\\_pacts/3/](http://www.transparency.org/whatwedo/tools/resources_about_integrity_pacts/3/) [Accessed on 12-10-2016].

within a country, this may influence the design, success and impact of the Integrity Pact. This, however, cannot be fully supported by the feedback received from Transparency International chapters. For example, for the global review survey only one of six respondents confirmed that it implements some form of town hall/targeted public hearings as part of the Integrity Pact. The use of Internet and other electronic disclosure mechanisms for Integrity Pacts results were slightly higher, with three of six respondents having used this for the Integrity Pact. The European review showed that Integrity Pact activities focused mainly on publicity or public education, but less on the exchange of information between the authorities, bidders and citizenry. The global review did point to the use of public hearings in past Integrity Pacts in Argentina, Colombia, Ecuador, Indonesia, Pakistan and South Korea. In South Korea, the public hearings were used at all phases of the procurement process (pre-bidding, bidding and contract implementation)<sup>442</sup>.

## *2. Mandatory or voluntary participation*

One of the first issues is to consider whether an Integrity Pact is to be mandatorily or voluntarily signed by bidders. Transparency International prefers the mandatory signature of the Integrity Pact in order for bidders to participate in a tender process<sup>443</sup>. However, this is not always possible given that procurement rules do not always permit such conditionality. Mandatory signature was identified for Integrity Pacts in Argentina, China, Ecuador, Germany, India, Indonesia, Italy, Latvia, Mexico, Pakistan and South Korea. In Colombia, El Salvador, Paraguay and Peru the signature was voluntary. The main argument in favour of mandatory signature is that this is considered an effective method to ensure that all actors acknowledge and express intention to play by the same rules. In other words, the mandatory signature is considered a condition for ensuring the level playing field. Also, stakeholders argue that the signature ensures ownership of the Integrity Pact. Voluntary signature risks partial ownership of the Integrity Pact, which according to interview feedback could result in unequal participation in the collective action, which could have effect on the success of the initiative. Those advocating in favour of the voluntary signature argue that it keeps the Integrity Pact from becoming another requirement for participating in a tender<sup>444</sup>. The

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<sup>442</sup> Ibid.

<sup>443</sup> Ibid.

<sup>444</sup> Ibid.

argument was also noted in those examples where Integrity Pacts were institutionalised such as in India and in Mexico. Another reason for voluntary signature could be that mandatory signature would be considered confrontational and risking this way sufficient buy-in from bidders.

### 3. *Content Integrity Pact*

The content of the Integrity Pact in some instances can be subject to negotiation. The document or contract of the Integrity Pact sets out the different elements. It can include the activities to be undertaken by the civil society organisation, rights and obligations and procedures in case of cancelation of the Integrity Pact<sup>445</sup>. Also the procedure for selection of the external monitor could be part of the contract. In addition, the document could also include the rights and obligation of the other participating parties such as the commitment of the contracting authority to disclose all tender documentation. An important element of the contract is the procedure in case corruption is detected. Another question arises concerning the need to make the Integrity Pact provisions mandatory for bidders. The feedback from the interviews shows different views on whether bidders should be obliged to participate in the Integrity Pact. Overall, a mandatory approach is preferred. The main argument is that if agreements are watered down after negotiating with companies it could create an unequal level playing field. Another argument against negotiating is that in some cases the large number of parties potentially involved in the process would make such negotiations impractical. This risks undermining other procurement objectives such as value for money. A drawback to mandatory content in an Integrity Pact may be the effect on bidder participation in a tender process. This would undermine market principles for procurement that should allow all actors to bid, regardless of their negotiation capacity. The example we identified was in India where some companies perceived the Integrity Pact as one-sided, to the detriment of bidders<sup>446</sup>. In other instances, such as in Latvia, it was noted that the bidders were willing to adhere to Integrity Pact obligations as long as that was requested by the contracting authority<sup>447</sup>. They perceived the mandatory participation in the Integrity Pact as

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<sup>445</sup> Ibid. p. 54

<sup>446</sup> SIDDIQI, S., ASHUTOSH, M., and PRAKASH KAUR, J. (2015). Integrity Pact in India: Glancing Back and Looking forward. Network India and Transparency International India.

<sup>447</sup> Interview feedback Field Mission Latvia, European review, 23-25 March 2015.

part of business costs for participating in the tender process. Overall, the study into the Integrity Pact shows that in most cases the companies are not participating in the design of the content. Some stakeholders do recommend including bidders in the process as this can create buy-in and encourage the signing of the Integrity Pact. While the need for participation in the design of the Integrity Pact by the bidders is questionable, the requirement to have all parties (including bidders) to sign the Integrity Pact is considered a key requirement. Without all parties recognizing the shared obligations for the procurement process under an Integrity Pact, the process can become a unilateral pledge. This would strip the collective action initiative from its multi-stakeholders approach.

The content of Integrity Pacts varies; however, in the view of Transparency International various elements are obligatory to include for all signatories such as<sup>448</sup>:

- Undertaking by the authority that officials won't demand or accept bribes, kickbacks, gifts, facilitation payments, etc., with appropriate administrative, disciplinary, civil or criminal sanctions in case of violation.
- Undertaking by each bidder that it has not paid and will not offer or pay any bribes, kickbacks, facilitation payments, gifts, etc., in order to obtain or retain a contract; along with the appropriate contractual, administrative civil or criminal sanctions in case of violation.
- An undertaking by each bidder that it has not colluded and will not collude with other bidders in order to rig or influence the tender process in any way.
- An undertaking by each bidder to disclose to the authority and the monitor all payments made, or promised, in connection with contract in question to anybody (including agents and other middlemen). This refers to payments made directly as well as indirectly through family members, etc.
- The explicit acceptance by each bidder that the no-bribery commitment and the disclosure obligation as well as the corresponding sanctions, remain in force for the winning bidder until the contract has been fully executed.

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<sup>448</sup> TRANSPARENCY INTERNATIONAL (n.d.). *Integrity Pacts* [WWW]. Available from: [http://www.transparency.org/whatwedo/tools/resources\\_about\\_integrity\\_pacts/3/](http://www.transparency.org/whatwedo/tools/resources_about_integrity_pacts/3/) [Accessed on 12-10-2016].

- The explicit acceptance by each bidder that it will have to provide the same Integrity Pact undertakings from all its subcontractors and joint-venture partners.

Additional obligations that are suggested by Transparency International are<sup>449</sup>:

*For bidders*

- Requirements or requests to have a code of conduct and compliance programme, including a whistle-blowing mechanism.
- Commitment that documents provided are truthful and the acceptance of strict liability for misrepresentation, fraudulent representation or false declarations.
- Statement of lack of involvement in conduct forbidden by the IP or any other corruption-related behaviour in a period prior to the bid.
- Cap on payments to agents.
- Extension of the bidders' undertakings to other obligations, i.e. taxes and social security payments connected to the bidding.

*For contracting authorities*

- An ethical commitment similar to the Integrity Pact for all officials directly or indirectly involved with the contracting process.
- A requirement for the authority to make public any contracting information of relevance.
- Regular disclosure by authorities involved in the process of their personal assets and family assets.

*For bidders and contracting authorities*

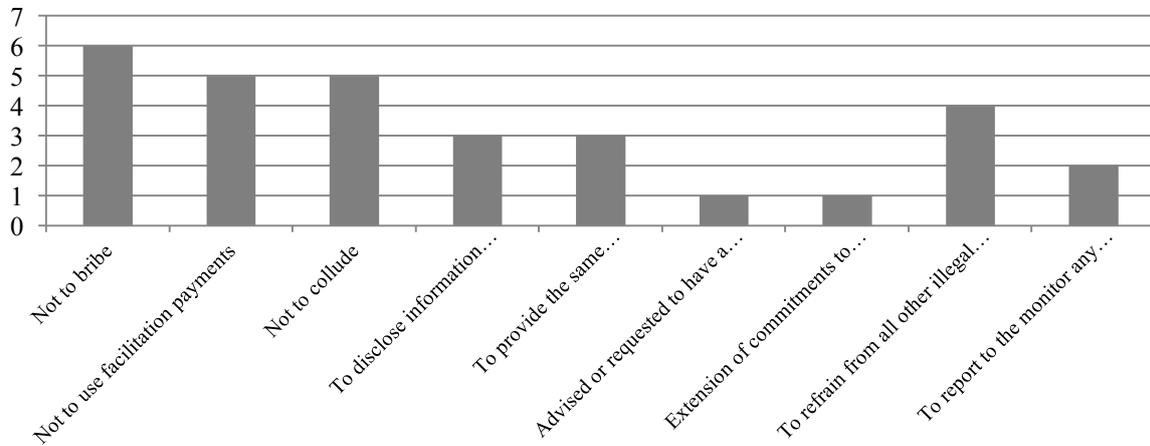
- Extension of undertakings to include that they “refrain from all other illegal acts”.
- Requirement to report to the monitor all attempts or failed breaches of the Integrity Pact.

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<sup>449</sup> Ibid. p. 40-41

Feedback received from the different Transparency International chapters for the global review showed that Integrity Pacts use different clauses for bidders:

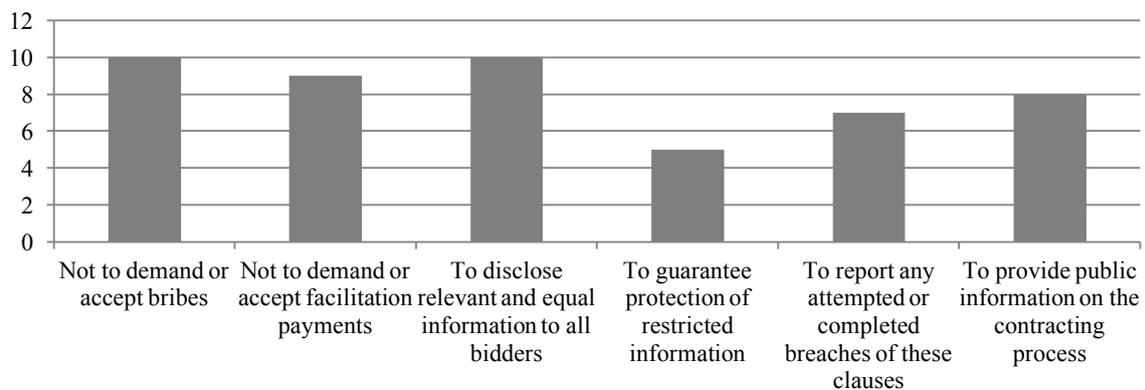
**Figure 4: Integrity Pact clauses for civil society organisations**



Source: Global review survey

The global review survey shows that the main requirements for bidders has been the commitment not to offer or accept bribes, not to use facilitation payments, not to collude, and the requirement to disclose information regarding payments relating to the contracting process. A similar pattern of core clauses emerges when looking at requirements of the contracting authorities, which include: not to demand or accept bribes and facilitation payments, and a requirement to disclose relevant and equal information to all bidders.

**Figure 5: Integrity Pact clauses for contracting authorities**



Source: Global review survey

One particular clause raises discussion, which is the extension of obligations to sub-contractors. The main challenge the bidder face with this is that further down the chain it becomes more difficult for them to control compliance. Sub-contractors might not be aware of compliance and anti-corruption which risks breaches for the hiring company in the Integrity Pact. This issue was flagged both in the Indian Integrity Pact experience as well as the Latvian case<sup>450</sup>. The former included the extension in the Standard Operating Procedures of the Central Vigilance Commission, the government anti-corruption oversight body that published recommendation for Integrity Pact implementation. The main challenge faced by bidders in India was that often for public works large numbers of contractors were sub-contracted. Applying the extension of Integrity Pact obligations to these companies proved difficult, let alone easy to control. On the other hand, the corruption risk was identified for this area, which legitimises the inclusion of the provision in the Integrity Pact. This was the case in Latvia where the hiring company was to ensure whistle blower channels for sub-contracted parties. If the Integrity Pact would not include this clause, the risk of success for the tool decreases. The inclusion of all parties to the Integrity Pact is argued essential to the effect and impact of the collective action initiative.

Overall, determining whether certain clauses are conditional for success of the Integrity Pact is challenging. Mainly due to the fact that Integrity Pact stakeholders perceive success of the tool different from each other. Transparency International, for example, suggests that success of Integrity Pact means<sup>451</sup>:

- That everything (in the procurement process) went as planned.
- Visibility, accountability and transparency, with information shared and communicated with the public as well as active involvement of stakeholders.
- Lack of scandals or conflicts and complaints were minimised and effectively managed, when arising.
- Observed reduction in costs or prices compared to the original procurement budget.

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<sup>450</sup> Interview feedback Field Mission Latvia, European review, 23-25 March 2015.

Interview feedback Field Mission India, collected by co-author global review, 17-23 September 2015.

<sup>451</sup> TRANSPARENCY INTERNATIONAL (n.d.). *Integrity Pacts* [WWW]. Available from: [http://www.transparency.org/whatwedo/tools/resources\\_about\\_integrity\\_pacts/3/](http://www.transparency.org/whatwedo/tools/resources_about_integrity_pacts/3/) [Accessed on 12-10-2016]. p. 85.

- Process improvements and reforms benefiting future projects at organisational and institutional (legal) levels.
- Successful detection and handling of any forms of corruption, with direct savings and prevention of damages.

The attribution of a specific clause as a condition for the tool's success cannot be supported by the data collected for this study. However, it is possible to argue that absence of clauses, which relate to identified corruption risks does undermine the potential effect of the tool. If corruption in public procurement manifests itself in the relationship between awarded contractor and sub-contractor, the absence of Integrity Pact clauses on these stakeholders means that the collective action tool cannot be optimally effective.

### *3. Role of civil society*

From the collective action point of view, the role of the civil society organisation is of particular importance in order to deal with collective action problems with which the contracting authority and the bidders are dealing. Above we already discussed the relevance of having strong support from public authorities and the need for a buy-in from the bidders. Civil society organisations play and have played a major role. After all, the tool has been developed and pioneered by Transparency International chapters all across the globe. The civil society organisation can play an important part not only in guaranteeing the Integrity Pact's multi-stakeholder credentials and connections to the public but also in a leading and active role. From the data collected, we note that historically chapters have served a number of roles in the process. They have served as: initiators, facilitators; lead implementers, monitors; investigators, etc.

As initiators, civil society organisations started conducting their own research and risk analysis and using its network to raise awareness for the Integrity Pact and then gathering relevant stakeholders. It can also refer to the government contracting authority inviting the chapter to act as initiator in order to conduct the necessary research and risk analysis to support the buy-in by stakeholders in the early phase of the Integrity Pact. This will also frequently involve advocacy work. For example, when Transparency International Italy initiated an Integrity Pact in 2000, this involved an analysis of the Integrity Pact model and its compatibility with the Italian legal system, coupled with training and education activities

of the signatories to the Integrity Pact. A model agreement was drafted and brought to several municipalities to explore interest, following a positive response several regions and communes now require potential bidders to sign the Integrity Pact as a standard requirement for public procurement<sup>452</sup>. However, the chapter does not get involved in monitoring of the bidding process.

As facilitator, the civil society organisations took on the role of mediator between the various parties that have signed the Integrity Pact. This can involve serving as a go-between, or entail a more pro-active role particularly as part of the oversight responsibilities regarding adherence to the procurement regulations. As facilitator, the civil society organisation could be required to be the neutral spokesperson acting on behalf of the various stakeholders, either for the signatories themselves, or towards the public, the monitor, donors or other stakeholders. Communication of the outcome of the Integrity Pact, as well as advisory and training to stakeholders could also be among the tasks.

As lead implementer the civil society organisation takes up the implementation of the agreement that constitutes the Integrity Pact. Normally, this is a combined undertaking with the contracting authority, however, when the civil society organisation takes the role of lead implementer, this will entail a majority of responsibilities falling under its remit. This can entail preparing the Integrity Pact plan of implementation, logistical preparations for meetings between stakeholders, drafting and/or signing the monitor agreement, implementing the signature of the Integrity Pact document itself, and project management tasks.

As monitor, the civil society organisation is primarily involved in ensuring Integrity Pact implementation and ensuring that there is no violation of the Integrity Pact and that bidders and contracting authority have fulfilled all obligations. In concrete terms this could include examination of all documents during the bidding process, providing commentary on tender documents prior to their issuance, providing feedback to bidders' questions, facilitating public hearings or meetings of bidders, site visits, clarifying Integrity Pact-related complaints, regular communication with the authority, suggestions for improvements to the process. Several examples of Transparency International chapters that have served as monitor for an

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<sup>452</sup> Desk research internal documents, European review, TI Internal Review 2010.doc.

Integrity Pact can be found in Bulgaria, Hungary and Latvia. In El Salvador, the chapter started as initiator to later also include monitoring of Integrity Pacts in 2012 together with a local civil society organisation responsible for monitoring other Integrity Pacts in the country. As investigator, the civil society organisation will take up a more pro-active role beyond monitoring activities and also investigate to ensure sanctioning of corruption. It is important to establish the process, steps and escalation measures, as well as grounds for passing information to legal authorities.

In some countries, the civil society organisations are playing more of an advisory and advocacy role in the Integrity Pact process. This has partially to do with the issue of capacity restrictions to play the same role in all Integrity Pacts being implemented. For example in India, should a contracting authority commit to the Integrity Pact, it then has the option of entering into a Memorandum of Understanding with the Transparency International chapter. This Memorandum of Understanding does not entail monitoring of the procurement process by the chapter itself. Instead, they assist the contracting authority by providing a draft structure of an Integrity Pact, conduct training of stakeholders (i.e. independent external monitors, public procurement staff, etc.) on implementation and red flags, and explaining the process overall. The actual monitoring is undertaken by independent external monitors selected by the contracting authority, and vetted by the Central Vigilance Commission. The monitors are hence not affiliated with Transparency International India. The Indian case shows that for a civil society organisation it is important to consider the capacity available to perform certain functions for the Integrity Pact. For example, the Indian case is very country-specific on account of the level to which it has been institutionalised and made mandatory for many tenders. This has resulted in nearly 100 contracting authorities adopting Integrity Pacts for 90-95% of an individual contracting authority's procurement. The sheer number of Integrity Pact in a particular country may affect the ability of one civil society organisation to engage in the Integrity Pact monitoring or monitor selection process, thus an advisory and facilitation role is more realistic, though even here resources may be stretched because these roles may also be demanding in practice. In Latvia, where Integrity Pacts have been conducted for single-procurement projects, the civil society organisation did engage in monitoring. Yet, it was found that challenges were faced in ensuring that monitoring always received the requisite time and expertise necessary from in-house staff, thus a few years into

the Integrity Pact, the chapter engaged external experts for procurement monitoring as well, in order to provide a stronger technical component to the process<sup>453</sup>. The chapter provided backstopping for the external monitor, and concentrated instead on communication of the Integrity Pact to the public.

Determining the role of a civil society organisation, as well as other stakeholders in an Integrity Pact implementation process, is generally arranged through a Memorandum of Understanding. This establishes information such as responsibilities of the civil society organisation and the contracting authority, monitor selection procedure, information disclosure clauses, necessary steps to be undertaken in case of corruption being detected, level of collaboration, and any involved fees<sup>454</sup>. To determine which role for a civil society organisation is favourable in order to effectively prevent corruption in public procurement, it is arguably dependent on the capacity of the organisation to comply with the Integrity Pact obligation in terms of monitoring the procurement process. This means that the main condition is to selection, appoint and support the monitor in conducting monitoring activities.

#### *4. Monitoring*

Both the World Bank Institute and the Transparency International guidance stress the importance of the monitor and monitoring system to the Integrity Pact.

##### *Monitor*

From the interview feedback, it is suggested that a monitor should be independent from the project that is under procurement and the companies bidding as well as not having any conflicts of interest with the contracting authority. The monitor should also be knowledgeable about the procurement process both legally and technically, and where necessary be able to call on technical advice in relation to the subject matter of the procurement. The monitor should: be of good reputation; be accountable for its role; have the capacity to fulfil its role

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<sup>453</sup> Interview feedback Field Mission Latvia, European review, 23-25 March 2015.

<sup>454</sup> TRANSPARENCY INTERNATIONAL (n.d.). *Integrity Pacts* [WWW]. Available from: [http://www.transparency.org/whatwedo/tools/resources\\_about\\_integrity\\_pacts/3/](http://www.transparency.org/whatwedo/tools/resources_about_integrity_pacts/3/) [Accessed on 12-10-2016]. p. 85.

properly and in a timely manner and have the commitment to act in what can be a challenging environment. The objective of the monitor is to add credibility to the entire process by ensuring that all parties fulfil their obligations. In essence the monitor in the Integrity Pact is a key spill in dealing with the collective action problems facing public expenditure through public procurement. In addition, the monitoring function can directly bring the public into the procurement process, enhancing the Integrity Pact's multi-stakeholder credentials and reinforces the public accountability elements of the Integrity Pact. In the end, the main task of the monitor is to see that there is no violation of the Integrity Pact by ensuring bidders and the authority uphold their obligations.

The independent role of the monitor is to a degree determined upon various elements: selection, funding and the applicable monitoring scheme. The selection and funding of the monitor has varied across the cases we looked at for this study. In some instances the role of monitor was played by the civil society organisations themselves. In other instances, the monitoring of procurement was conducted by an independent expert(s), selected and/or approved by the civil society organisation, the contracting authority, or a joint effort. In most cases of external monitoring, financing has been the responsibility of the contracting authority. In Latvia and Bulgaria there was donor funding available for monitoring. In India, monitors are expected to perform their duties without monetary recompense and with approval from the authorities. In Mexico, the contracting authorities remunerate the expenses of the independent monitors.

Feedback from stakeholders from Transparency International chapters and contracting authorities across the globe were nearly unanimous in emphasising the effect of a good monitor on the successful functioning of an Integrity Pact. In particular a monitor that takes an empowered approach to their engagement is considered relevant. The Integrity Pact cases reviewed in Bulgaria and Germany note a proactive approach in monitoring that expanded beyond the formal requirements focusing on anti-corruption as positive drivers towards successful Integrity Pacts. The same was noted in Mexico and India where the role of Transparency International chapter are different. In Mexico, the chapter engaged in monitoring but they did not exclusively provide monitoring service in the country. The Mexican Social Witness programme allows contracting authorities to select monitors from a pool of pre-approved monitors. A selection committee assigns, from this pool of experts, a monitor to a specific procurement process. The monitor partakes in meetings and has access

to a list of documents predefined by law. Its principal role is to ensure that the process is conducted according to the law and to flag those practices that are or can be problematic. The chapter highlighted that quality of monitoring this way could differ<sup>455</sup>. In India, some representatives from contracting authorities noted that the monitor only operate upon receiving complaints<sup>456</sup>. Those proactively engaged would further distinguish themselves.

### *Monitoring arrangement*

The effect of skills and qualities of a monitor is influenced by the nature of the monitoring agreement. Such an agreement establishes explicitly the rights, obligations, terms of engagement and (where relevant) fees of the monitor(s). It can be applied in several different methods, depending on how the monitoring, accountability channels and division of labour is constructed<sup>457</sup>. For example, when a civil society organisation takes lead implementation roles, a monitoring contract or Memorandum of Understanding is signed between the monitor and the civil society organisation. The same can be seen when the contracting authority is the principle implementer of the Integrity Pact. From experiences in Germany and Latvia with Integrity Pacts, critical in this agreement is the process for potential withdrawal from the Integrity Pact, of either the monitor (including the chapter, when playing this role) or of the chapter in general. Withdrawal from the Integrity Pact by the monitor and/or chapter makes a strong statement to the public and other stakeholders as to the overall integrity of the procurement process. Clearly outlining the circumstances under which this process takes place and the escalation procedures can help to avoid any limitation as to civil society's capability to make use of this tactic. This was the case in Latvia, where governance concerns surrounding the rewarding of a tender elicited discussion in the Transparency International chapter as to potentially withdrawing from the Integrity Pact<sup>458</sup>. This course of action however was not undertaken due to lack of this clause as reasoning for withdrawal from an Integrity Pact. Transparency International Germany's experience before carrying out

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<sup>455</sup> Interview feedback #36, global review, September-November 2015.

<sup>456</sup> Interview feedback Field Mission India, collected by co-author global review, 17-23 September 2015.

<sup>457</sup> TRANSPARENCY INTERNATIONAL (n.d.). *Integrity Pacts* [WWW]. Available from: [http://www.transparency.org/whatwedo/tools/resources\\_about\\_integrity\\_pacts/3/](http://www.transparency.org/whatwedo/tools/resources_about_integrity_pacts/3/) [Accessed on 12-10-2016].

p. 85.

<sup>458</sup> Interview feedback Field Mission Latvia, European review, 23-25 March 2015.

withdrawal from the Berlin Airport Integrity Pact exposed similar challenges. The chapter did not have a contract with the contracting authority that outlined rights and obligations, with the monitor reporting directly to the contracting authority. Following several corruption allegations and dissatisfaction in the manner in which these allegations were handled by the contracting authority, the chapter withdrew from the Integrity Pact, learning from the experience that clearly defined information rights, obligations, and grounds for withdrawal are necessary elements for future Integrity Pact implementation<sup>459</sup>. The fact that the monitor reported directly to the contracting authority also meant that monitoring continued despite that the civil society organisation withdrew from the initiative.

Despite the primacy of the monitor's role in the experience and recommendations of many chapters, independent monitoring does not always feature in Integrity Pacts practiced to date. In Italy there is no independent monitoring, as it was anticipated that costs would prove too high for its inclusion. Transparency International Italy would occasionally serve in an independent consulting role (at the request of a contracting authority), providing the chapter with an opportunity to analyse compliance with rules and laws of the Integrity Pact and informing the contracting authority in cases of irregularity. It cannot however stop the bidding process<sup>460</sup>. Now in Italy, following a Protocol signed in 2009,<sup>461</sup> the Court of Auditors is seen as acting as a monitor to the Integrity Pact process by being assigned the duty of checking all expenditures made and the bidding process linked to the Integrity Pact. With no extra costs being incurred for this work, the model was seen as a more feasible form of monitoring in the Italian Integrity Pact experience. The Court of Auditors, however, plays an important, but entirely different role to that of a monitor. The review is usually retroactive and based on criteria that may not necessarily be the same as the functions exercised by a monitor; its reports may also be confidential and not accessible to the public. Where a monitor is able to engage proactively in the Integrity Pact implementation and is otherwise empowered to investigate and take remedial action as may be necessary, it can have a decisive effect on the success of the Integrity Pact. After all, for a collective action initiative to reach suboptimal outcomes, there is need for frequent communication as well as some

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<sup>459</sup> Draft report from TI-S (2015), "Practitioners' Advice on Implementing Integrity Pacts."

<sup>460</sup> Desk research internal documents, European review, Case Study Italy (draft) 2010.doc

<sup>461</sup> Ibid.

form of trust building. Arguably the post-procurement process involvement of the Court of Auditors defeats the purpose of the Integrity Pact from being a real-time collective effort.

The global review of the Integrity Pact highlighted also the case of Pakistan where since 2004, Integrity Pacts were implemented without the use of a monitor. The fact that Integrity Pacts were from 2004 without a monitor is a shift away from earlier Integrity Pact experiences in the country. In 2001 the Pakistan Transparency International chapter served as the monitor in the completion of the Greater Karachi Water Supply Project (K-III) and had a robust role. In addition to observing compliance with Integrity Pact obligations, the monitor prepared evaluation criteria for the short-listed selection of consultants, was involved in the project's design and supervision, assisted in developing evaluation criteria, and provided advice on the selection procedure. Following institutionalisation of the Integrity Pact the monitor function was not included. Some stakeholders have praised the institutionalisation of Integrity Pacts and learning from it. Within the context of this study as a reflection on which conditions favour effective corruption prevention, this can be considered a valuable lesson. An Integrity Pact can cause longer-term institutional and professional change. This, however, must be contingent upon outcomes and implementation mechanisms that have a positive impact such as the independent monitoring. The feedback collected during the global review indicates that concerns were raised that the lack of a monitor in the current institutionalised version of the Integrity Pact in Pakistan has limited the extent of the tool's effectiveness in uncovering instances of corruption or plain procurement irregularities. In other words, from the stakeholder feedback it is possible to determine that the use of an independent monitor is a required condition for the Integrity Pact to effectively prevent corruption in public procurement.

To conclude, most stakeholders interviewed for this study highlight the importance of independent monitors that hold a specific skill set (e.g. constructive, independent, respectful) and have sufficient professional experience (e.g. in procurement and/or technical issues). The monitoring can either be conducted by one person or a team of monitors. Some Transparency International chapters however identified challenges when deploying monitors, due to limited resources. There is only so much one or multiple monitors can do over the course of a procurement process. In addition, procurement can be very specialized, further limiting the pool of experts from which to choose. As a consequence, various Transparency International chapters highlighted different tools that can be deployed in order to more extensively monitor

public procurement. A driving factor behind this has been legislative developments in countries concerning transparency and access to information, but also technological developments have opened up new avenues for monitoring procurement, i.e. through the use of open data. Chapters with Integrity Pact experience have changed the Integrity Pact model (i.e. Indonesia, Rwanda) from a “closed” monitoring exercise, meaning only using designated monitors, to an “open” exercise, meaning allowing the wider public to perform monitoring activities. It is argued that the latter allows for wider stakeholder participation. Other chapters consider this (i.e. Mexico) or have always opted for the open monitoring function (i.e. Slovakia). The chapters aim to have an open participation of any citizen to the procurement process. Transparency legislation in countries ensures a degree of openness of procurement. In combination with open data, anyone could function as a monitor to scrutinise processes. It is clear that there are differences between the degree of access to procurement processes between an “open-monitoring approach” and the “closed-monitoring approach” as adopted by Integrity Pacts (such as access to meetings). It is argued that the essence of both approaches is to hold parties accountable. The premise is that this is best facilitated by allowing a wide range of participants, and not only a handful of monitors, to ask questions. The question that can be raised is whether open monitoring facilitates trust building between the stakeholders. Also, face-to-face communication, an important element in collective action, is limited when focus is placed on “open” monitoring arrangements.

## 5. *Sanctions*

In case of breaches in the Integrity Pact, Transparency International recommends in the implementation guide the inclusion of sanctions<sup>462</sup>. These special Integrity Pact sanctions are complementary and do not supersede those criminal, civil, disciplinary or administrative sanctions already established by law. It is recommended by Transparency International that Integrity Pact sanctions should be proportionate to the actual breach itself, and should provide a swift mechanism for the monitor to ensure that the appropriate authorities are informed in cases of misconduct. Sanctions cannot result from suspicion alone, however suspicion of

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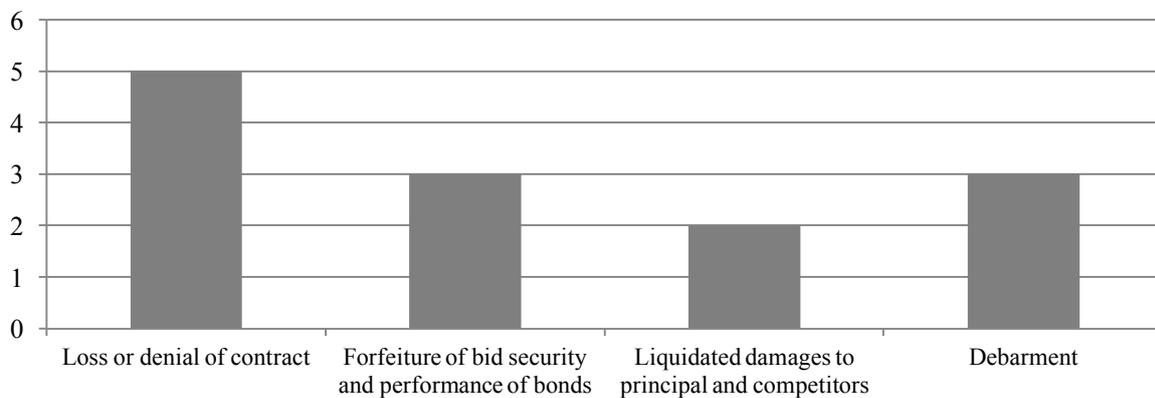
<sup>462</sup> TRANSPARENCY INTERNATIONAL (n.d.). *Integrity Pacts* [WWW]. Available from: [http://www.transparency.org/whatwedo/tools/resources\\_about\\_integrity\\_pacts/3/](http://www.transparency.org/whatwedo/tools/resources_about_integrity_pacts/3/) [Accessed on 12-10-2016].

impropriety is sufficient to start an investigation or request for clarifications from a monitor or the authorities. The main sanction noted for the use of the Integrity Pact are<sup>463</sup>:

- Denial or loss of contract;
- Forfeiture of security and performance bonds;
- Liability for damages to competing bidders;
- Debarment.

Feedback received from the different Transparency International chapters for global review showed that Integrity Pacts use different types of sanctions:

Figure 6: Integrity Pact use of sanctions



Source: Global review survey

The fact that Integrity Pacts include sanctions could imply that this has a preventive effect on stakeholders. Especially given that, from the reviews of the Integrity Pacts, the use of sanctions has been limited. This is explained partially due to the fact that a majority of survey responses indicates that Integrity Pacts lack a specific process for the activation of sanctions. The Berlin Airport Integrity Pact did not include additional mechanisms for conflict resolution or for sanctions. In this case, existing mechanisms were already established under German law and applicable to the contracting authority. On the other hand, it did include sanctions that the contracting authority itself could apply. The process went as follows: upon

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<sup>463</sup> TRANSPARENCY INTERNATIONAL (n.d.). *Integrity Pacts* [WWW]. Available from: [http://www.transparency.org/whatwedo/tools/resources\\_about\\_integrity\\_pacts/3/](http://www.transparency.org/whatwedo/tools/resources_about_integrity_pacts/3/) [Accessed on 12-10-2016].

suspicion of a breach of the Integrity Pact, the monitor (who does not impose sanctions) would notify management of the contracting authority, who is then responsible for addressing the issue. Should there be no response from the contracting authority or should there be no timely response, the monitor would then have to pass the issue on to the prosecuting authorities<sup>464</sup>. One could argue that the lack of applied sanctions is indicative of the preventative power of the Integrity Pact. Under this hypothesis, due to the threat of sanctions in case of a breach, the Integrity Pact has fostered compliance with the clauses and ensured a procurement process free of corruption. This argument however is unpersuasive without further feedback from stakeholders and actual perceptions of sanctions specifically in the context of Integrity Pacts. The opposite could in fact be the case, whereby a poorly applied Integrity Pact never has instances of sanctions due to the Integrity Pact being co-opted and no longer fit for purpose.

Similar experiences were noted in other Integrity Pacts. Most Transparency International chapters focus on the detection and follow-up of ‘red flags’ indicating poor governance. Sanctioning is a last resort, whereas instead, a constructive approach is commonly adopted to find solutions to problems. This was seen during Integrity Pacts in Latvia, Hungary, and Bulgaria. In Bulgaria, the Transparency International chapter even opted for a “white list” as a positive incentive rather than a more punitive blacklisting for bidders. The main reason why Transparency International chapters opt for a constructive approach is that parties to the Integrity Pact prioritise long-term goals such as a successful procurement project. Second, in the case of many identified ‘red flags’ that could lead to the application of sanctions it is difficult to prove illegalities. Oftentimes the monitor lacks the means to investigate effectively. Hence, cases are flagged to the Integrity Pact stakeholders or in serious cases referred to the relevant authorities. A third reason identified is that monitors and civil society organisations struggle with judging the seriousness of the situation. Implementing an Integrity Pact involves significant collaboration with authorities and bidders, which could cloud judgements as to the right approach in a grey zone situation. This was the case of Germany and the decision of the chapter to withdraw from the Berlin Airport Integrity Pact only after years of corruption allegations. The late decision of the chapter prompted many

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<sup>464</sup> TRANSPARENCY INTERNATIONAL (n.d.). *Integrity Pacts* [WWW]. Available from: [http://www.transparency.org/whatwedo/tools/resources\\_about\\_integrity\\_pacts/3/](http://www.transparency.org/whatwedo/tools/resources_about_integrity_pacts/3/) [Accessed on 12-10-2016].

questions from journalists. Finally, the sanctions mentioned above are very definite. Debarment or loss of contract is a final decision that cannot be taken lightly. It is unclear from the interview feedback which criteria are used by stakeholders to come to such a decision. There are differences between Integrity Pacts on how stakeholders define a serious breach and at the same time implementation of sanctions can vary. As a consequence various risks are identified. For example, when in one Integrity Pact actors apply different criteria for sanctioning than in another Integrity Pact, it might create an uneven playing field. Also, inconsistent application of sanctioning might fail to address problems arising from repeat offenders.

One occasion has been identified where through the Integrity Pact sanctions were imposed on a bidder<sup>465</sup>. In 2004 an Integrity Pact for the defense sector in India resulted in a cancellation of a helicopter deal worth USD 753 million. The Government of India cancelled the deal in the wake of corruption allegations<sup>466</sup>. As a consequence also six more companies were blacklisted following allegations of bribery<sup>467</sup>. These examples show that the consequences for companies can be far-reaching with according to commentaries significant financial and reputational damage<sup>468</sup>. The example in India strengthens the argument that Integrity Pact sanctions can have serious consequences. From the perspective of collective action this is important to ensure that all stakeholders remain alert on the risks of non-compliant behaviour. From this we could argue that rather than the sanction itself, the sanctioning mechanism possibly is even more important. Sanctions should be effective, proportionate and dissuasive but in practice we see that there is little sanctioning going on through the Integrity Pact. In order to be able to get the most out of the preventative power of sanctions, we would instead have to look at the sanctioning mechanisms in place. Such mechanisms should have clear red flag lists, dialogue and escalation procedures for the criteria under which investigations are

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<sup>465</sup> Interview feedback Field Mission India, collected by co-author global review, 17-23 September 2015.

<sup>466</sup> BBC (2014). India scraps \$753m Finmeccanica helicopter deal [WWW]. Available from: <http://www.bbc.com/news/world-asia-india-25568464> [Accessed on 12-10-2016].

<sup>467</sup> PRES INFORMATION BUREAU INDIA (2012). MoD Debars Six Firms from Business Dealings for Ten Years [WWW]. Available from: <http://pib.nic.in/newsite/erelease.aspx?relid=80699> [Accessed on 12-10-2016].

<sup>468</sup> DEFENSE NEWS (2015). What Finmeccanica stands to gain and lose with new name [WWW]. Available from: <http://www.defensenews.com/story/defense/policy-budget/industry/2015/10/31/what-finmeccanica-stands-gain-and-lose-new-name/74813152/> [Accessed on 12-10-2016].

triggered and subsequently the use of sanctions, in order to give increased credibility and effectiveness if and when they must be applied.

## 6. *Dispute resolution*

At the basis of the identified lack of examples of imposed Integrity Pact sanctions lies the fact that monitoring does not always expose corruption, nor provides sufficient evidence for sanctions. Another important factor identified is that stakeholders in the Integrity Pact adhere to various objectives, one of which is anti-corruption, and therefore take decisions based on multiple interests such as the need to complete a procurement process. As a consequence, stakeholders emphasise that trust needs to be built and that they rather adopt a constructive approach to problems rather than a punitive approach which could jeopardise the project as a whole. These considerations were identified both among civil society organisations, that tend to prioritise the anti-corruption objectives, and contracting authorities. As a result the emphasis is placed on dispute resolution rather than sanctioning. When conflicts arise during an Integrity Pact, differences are observed between signatory parties surrounding the interpretation or implementation of an Integrity Pact. In Ecuador, Colombia, Indonesia and Pakistan Integrity Pacts included specific dispute resolution mechanisms that included national arbitration<sup>469</sup>.

Transparency International notes that dispute resolution mechanisms and sanctions have rarely been activated by chapters globally, on the grounds that the Integrity Pact, having already created conditions for greater integrity in the procurement process, has effectively limited breaches of the Integrity Pact. This statement is exceedingly difficult to prove empirically. For example, two of the six survey responses from global review highlighted “fear of sanctions” as the principle reason behind the absence of corruption in public procurements conducted with an Integrity Pact. Experiences with the tool in Latvia show that lack of sanctioning is not because there are no breaches against the Integrity Pact. In fact, the chapter identified breaches but decided after internal deliberation to continue working on the project. In Bulgaria, the Transparency International chapter adopted a totally different

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<sup>469</sup> TRANSPARENCY INTERNATIONAL (n.d.). *Integrity Pacts* [WWW]. Available from: [http://www.transparency.org/whatwedo/tools/resources\\_about\\_integrity\\_pacts/3/](http://www.transparency.org/whatwedo/tools/resources_about_integrity_pacts/3/) [Accessed on 12-10-2016].

approach and favoured positive reinforcement, rewarding good behaviour. Sanctioning can thus be seen by civil society organisations as counterproductive.

### 5.3.5 Global and European overview of conditions

When bringing together the different elements discussed in this section, various common threads can be identified that show how the Integrity Pact is shaped. In the global review we denominated these models as the classic model, institutionalised model, open-monitor model and no-monitor model.

The classic model of the Integrity Pact includes most common clauses, sanctions and requirements as set out in the guidance documentation by Transparency International. This model is applied to a selection of procurement projects on an on-and-off basis. The Transparency International chapters with experience in such a model include for example Argentina, Colombia, and El Salvador in Latin America. In Europe this model is identified in Latvia, Bulgaria, Hungary, Germany, Romania and Spain.

The institutionalised model refers to an Integrity Pact that has become a requirement for certain procurement processes. The tool has therefor received significant support from governments on different governmental levels through legislation or specific policy recommendations. Such examples include India, Mexico, Pakistan and South Korea.

The open-monitor approach Integrity Pacts take into account a wider number of stakeholders to participate in procurement monitoring. It is a newer approach, which makes use of technological developments such as the use of open data. Examples are seen in Indonesia, Rwanda, Mexico and Slovakia. This approach opens new ways of ensuring accountability and enhancing transparency. The no-monitor Integrity Pact means that no monitoring is foreseen by the civil society organisation or an independent expert. Such examples are seen in China, Italy and Pakistan.

**Table 6: Monitoring conditions**

<b>Country</b>	<b>Monitor</b>	<b>Open-Monitoring</b>	<b>Mandatory Signature</b>	<b>Legal Basis</b>
Mexico	✓	✓	✓	✓
Pakistan	✗		✓	✓
Colombia	✓		✗	
South Korea	✓		✓	✓
El Salvador	✓		✗	
India	✓		✓	✓
Indonesia	✓	✓	✓	
Hungary	✓		✓	
Germany	✓		✓	
Bulgaria	✓		✓	
Italy	✗		✓	✓
Latvia	✓		✓	

Source: Global review

## 5.4 Collective action of Integrity Pacts

The context presented in the previous section should affect the collective action arena. This arena is where the collective action experiences take place, where decisions are made and corruption is prevented. The Integrity Pact as a collective action model on first account seems to cover elements essential to dealing with collective action problems. The collective problem scenario is clear, as described by De Swardt and Wiehen, in which corruption is perceived endemic and individual companies are reluctant to take the first step as it risks that their competitors do resort to bribing<sup>470</sup>. Also, from the cases discussed above we can relate to Olson's view that it is in the best interest of individuals in the group to act collectively towards shared objectives, which lies at the core of the Integrity Pact multi-stakeholder approach. Ostrom's elements to overcome the temptations of short-run self-interest through reciprocity, reputation and trust, in order to build conditions to allow individuals to achieve results that are better than rational, also comes forward in the Integrity Pact. The sanctions available in the Integrity Pact give impetus to groups to achieve suboptimal results and function as deterrence through the commitment to punish those that do not adhere to the Integrity Pact. The question is to what extent the Integrity Pact performs in those elements. Marquette and Peiffer recall that from the perspective of collective action, "*corruption is the manifestation of free-riding itself, as the motivation for engaging in corrupt behaviour is usually depicted as coming from putting personal interest ahead of the larger group's collective interest*"<sup>471</sup>. The benefit of collective action can be a corruption-free environment or a good quality government. This can be associated with some tangible economic and social outcomes and a governance environment that citizens and companies/investors trust to be fair and reliable. The benefit of collective action can also be "no depletion of resources", which reflects in effective and efficient public service delivery. Corruption would mean that free riding depletes the capacity of the contracting authority to spend money. Marquette and Peiffer recall that the Integrity Pact, by "*bringing all actors together to make a formal agreement, acknowledges that the most precarious risks for corruption often lie in collective dynamics*"<sup>472</sup>. Also, the authors note that the successes of Integrity Pacts are built on trust

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<sup>470</sup> PIETH, M. (2012). Collective action: Innovative Strategies to Prevent Corruption. Dike Verlag AG. p. 87

<sup>471</sup> MARQUETTE, H., PEIFFER, C. (2015). Collective action and systemic corruption. Paper presented at the ECPR Joint Sessions of Workshops, University of Warsaw 29 March-2 April 2015. p. 7

<sup>472</sup> Ibid. p. 9

within the group of stakeholders involved. Transparency International adds various other considerations that determine success of an Integrity Pact such as<sup>473</sup>:

- Transparent, accountable contracting, free of corruption;
- No delays to the process as a result of confusion, lack of transparency;
- Social, economic and development goals have been achieved or not impaired by corruption;
- Trust in government and government officials has improved and reputations of all participants have improved;
- Corruption has been detected, and where occurring, and eliminated.

However, we have noted in this study that success of an Integrity Pact can be challenged, or in other words, collective action can be influenced, when determinant factors are not in place. Transparency International notes for example the following factors<sup>474</sup>:

- Political will of the authorities;
- Transparency and professionalism throughout the contracting process;
- External independent monitoring;
- And a participatory/multi-stakeholder involvement.

These challenges legitimise the need for a reflection on the limits of the collective theory approach to anti-corruption. This way we can attempt to test the hypothesis that an independent monitor, in form of a civil society organisation through the Integrity Pact, can play an effective role in the prevention of corruption and enhancing of transparency in public procurement. In order to do so, the European Integrity Pact cases will be analysed on the basis of a set of variables briefly introduced earlier in this study, namely: group size; repeated interaction; trust and good reputation; group interdependence; heuristic norms; monitoring and transparency; long-term horizons; and salience of the collective good. The following section will further reflect on these variables, illustrated with examples identified through the

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<sup>473</sup> TRANSPARENCY INTERNATIONAL (n.d.). *Integrity Pacts* [WWW]. Available from: [http://www.transparency.org/whatwedo/tools/resources\\_about\\_integrity\\_pacts/3/](http://www.transparency.org/whatwedo/tools/resources_about_integrity_pacts/3/) [Accessed on 12-10-2016].

<sup>474</sup> Ibid. p. 25.

review of Integrity Pacts in Europe. However, we need to be aware that the different variables overlap and cannot be fully detached. Therefore some findings discussed below cover various variables that may affect collective action.

#### 5.4.1 Group size

Larger groups may affect collective action given that group members can get away easier with free riding. In addition, in larger groups, members can feel that their potential contribution will not make much of a difference in the effort to reach a collective benefit. Also, with more members it may be difficult to come to an internal agreement on how to coordinate the collective activity. Important is also that smaller groups may be challenged by difficulties in mobilizing resources to engage in effective collective action.

The adaptability of the Integrity Pact model, first and foremost, generates debate within the Transparency International movement<sup>475</sup>. There are different views as to what defines an Integrity Pact. Transparency International's Implementation Guide highlights that Integrity Pacts are both a document (a legal contract) and a process (a series of activities)<sup>476</sup>. Within this framework, there is room for debate as to which elements should or should not be included. When we take stock of activities of Transparency International chapters across the EU relating corruption in public procurement, we see that various initiatives have a systemic approach by addressing public procurement in general. It could be argued that such an approach primarily aims at reforming procurement systems in a specific region or sector. This is shared by Integrity Pacts, which in theory could aim for long-term impact through reform<sup>477</sup>. However, Integrity Pacts do not primarily focus on system process review, but more so look into specific procurement projects. Its activities not only enhance transparency based on existing public information, but also create transparency by entering into informal decision-making structures. Integrity Pacts thus require a different degree of professionalism.

Overall we find that Integrity Pacts require a degree of flexibility in order to be effective, to be manageable, and to be sustainable. Although the debate on the definition of the Integrity

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<sup>475</sup> Interview feedback European and global review.

<sup>476</sup> TRANSPARENCY INTERNATIONAL (n.d.). *Integrity Pacts* [WWW]. Available from: [http://www.transparency.org/whatwedo/tools/resources\\_about\\_integrity\\_pacts/3/](http://www.transparency.org/whatwedo/tools/resources_about_integrity_pacts/3/) [Accessed on 12-10-2016].

<sup>477</sup> Ibid. p. 85

Pact tool within the Transparency International movement is relevant from an institutional perspective, from an operational perspective it might limit its capacity. Rather than pre-defining Integrity Pacts, it is more important to provide the stakeholders involved with the adequate criteria for action and subsequently tools to design and implement an Integrity Pact project resting on the foundations of integrity.

#### 5.4.2 Repeated interaction

Through repeated interaction, group members can facilitate learning and this way affect collective action. Careful preparation of an Integrity Pact project allows for its adaptation to different procurement projects, different sectors, types of procurement, and legal, cultural and economic contexts. Regardless of the situation, designing Integrity Pacts is each time over again a learning process. One expert stressed that: “*each Integrity Pact makes you smarter, not necessarily faster*”<sup>478</sup>. With this, the expert highlights that the monitor can learn from each Integrity Pact, but that this does not avoid careful planning. Monitors need to understand the legal, political and economic conditions at hand before and during the Integrity Pact. Secondly, monitors should study the other stakeholders involved in the Integrity Pact, as well as the corruption risks involved in the procurement. This allows them to effectively focus their activities in order to maximise the impact of the tool. At the same time, understanding the other parties and their problems strengthens their position when negotiating an Integrity Pact. Thirdly, monitors should carefully plan their activities based on the objectives they want to achieve for the Integrity Pact. The project plan should allow the organisation to monitor their achievements and ensure that during the Integrity Pact they do not lose track of their goals. Finally, monitors should adapt the communication and monitoring activities planned for the Integrity Pact to the available capacity. In case the monitor has limited resources for a large procurement project, it should prioritise what will be monitored.

Further, several considerations have been identified in relation to the monitor requirements, monitoring arrangements/activities, and the selection of the monitor.

##### 1. Monitor requirements

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<sup>478</sup> Feedback interview #24, European Review, February-March 2015.

According to the Transparency International, a monitor requires: independence; knowledge; reputation; accountability; capacity and commitment<sup>479</sup>. Independence is important for the monitor to do his/her job objectively. The work needs to be performed independently but should also be perceived as such by all stakeholders. Knowledge, or expertise, is required both from a legal perspective, when looking at the contracting process, but also from a technical perspective, when looking at the specific procurement sector. Such expertise can be found in one monitor or ensured through a team of monitors. Monitors in the eyes of Integrity Pact practitioners need to have a spotless reputation in order to ensure that their activities are credible<sup>480</sup>. Monitoring activities require time and resources, including a high level of commitment. Sufficient capacity should be assigned to effectively conduct monitoring. The monitor should be accountable to the civil society organisations as well as to the bidders, contracting authorities and to the public. Ensuring this “fourfold” accountability to stakeholders, with different and sometimes opposite interests, is according to this study difficult to operationalize.

Based on the experience of the stakeholders consulted for this study, additional requirements are identified. In Hungary and Latvia, the stakeholders stressed that monitors needed to have a practical and constructive mind-set<sup>481</sup>. Construction projects are characterised by interactions between expertise from architects, financial controllers, lawyers, and engineers, etc. In general terms, construction phases into design and build. The design lays out construction processes, which subsequently are followed during the building phase. It is task for the constructor to build according to these plans. Within this framework, constructors have a degree of manoeuvrability in order to cope with any (unforeseen) challenges they might face. This manoeuvrability is in itself a risk area for irregularities and therefore subject to monitoring. A practical monitor understands these processes and thinks with the contractors. The constructor in the Hungarian XIII-District case spoke highly of the selected

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<sup>479</sup> TRANSPARENCY INTERNATIONAL HUNGARY (n.d.). [WWW]. Available from: [http://transparency.hu/Local\\_government\\_of\\_the\\_13th\\_district](http://transparency.hu/Local_government_of_the_13th_district) [Accessed on 05-05-2015].

<sup>480</sup> TRANSPARENCY INTERNATIONAL (2015). Integrity Pacts: a how-to guide from practitioners [WWW]. Available from: [http://www.transparency.org/whatwedo/publication/integrity\\_pacts\\_a\\_how\\_to\\_guide\\_from\\_practitioners](http://www.transparency.org/whatwedo/publication/integrity_pacts_a_how_to_guide_from_practitioners) [Accessed on 21-10-2016].

<sup>481</sup> Interview feedback #1, #8, European review, February-April 2015.

technical monitor as a person thinking with the project manager and coming to constructive solutions to challenges<sup>482</sup>.

The constructive and practical nature of monitors was also mentioned in Germany, Latvia and Bulgaria. The role of the monitor in effect was also meant to build bridges between stakeholders, especially in case of conflict. In Germany and Bulgaria, the role of the monitors went beyond anti-corruption and transparency to ensuring the procurement complied with good governance. In Germany, monitors for the Hannover and Bremen Integrity Pacts were perceived to have gone beyond their task to monitor corruption and provided broader management advice. This was attributed to commitment to the project, but also good personal relations between the monitor and the stakeholders involved<sup>483</sup>.

The second requirement concerns communication skills given that outreach to the public is a key Integrity Pact activity. In general, outreach activities are conducted by the civil society organisation. However, the monitor can play a key role especially when drafting and presenting the periodical monitoring reports.

## 2. *Monitor's activities*

The case study analysis shows that monitors conduct a wide variety of activities. In principal, they could include: review of documentation; participation in meetings/inspection; communication activities. The activities of the monitors in the Integrity Pact analysed for this study were either conducted on-site or off-site. On-site activities included attending meetings and visiting building sites. Off-site activities primarily concern documentation review. The arrangements between the monitoring organisations in the cases differed. The monitor teams consisted of in-house and external experts. In Hungary, a mixed team was monitoring from the start until the end of the project. In Latvia, the organisation relied primarily on in-house expertise in combination with *ad hoc* external expertise. In Bulgaria, monitoring activities primarily relied on external experts with strong support of the civil society organisation, especially with relation to communication activities. The degree of direct contact with the procurement stakeholders varied. In Bulgaria, most contact with the contracting authority and

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<sup>482</sup> Interview feedback #1, European review, February-April 2015.

<sup>483</sup> Personal communications, interview 9 April 2015.

the bidders first went through the monitoring organisation. In Hungary, the in-house expert focused primarily on the contracting phase given her legal background. Technical monitoring during the contract implementation phase was externalised.

One external monitor involved in the Bulgarian Integrity Pacts had a legal background and specialised in public procurement. The second expert interviewed in Bulgaria was an engineer, specialised in road infrastructure. Both took a proactive approach in monitoring the Integrity Pacts. This approach expanded beyond the formal requirements focussing on anti-corruption. Transparency International Bulgaria played an important role by ensuring that the scope of their activities did not lose track of the anti-corruption objectives set for the Integrity Pact. Together the team managed to effectively monitor anti-corruption, transparency, but also value-for-money aspects relating to public procurement.

Transparency International Latvia relied primarily on in-house staff but insisted to have a stronger technical involvement in the project<sup>484</sup>. In 2010 this matured when the civil society organisation was able to direct resources to this purpose and attract external expertise. The organization prior to this depended on public relations, good governance rhetoric, and suggestions and recommendations based on international experience. With more technical expertise, the chapter was able to analyse in more detail the particular construction project. Consequently their interactions carried more weight with project stakeholders. Also their confidence increased when communicating with the public.

Independent monitoring was not foreseen in Italy. According to documentation, costs would have been too high. However, the law foresees access of civil society to monitor the award process and the project execution. Nonetheless the Integrity Pact in Milan allowed for the contracting authority to appoint a monitor. This could be a civil society organisation if requested by the authorities. The monitor is to review drafts of bidding documents, comment on evaluation and award processes, observe the implementation of the contract, and attend internal meetings. The monitor has access to relevant documentation at any moment. This information is generally not public and therefore the Integrity Pact can be considered an effective tool to increase transparency. It is mentioned in the case documentation that in a

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<sup>484</sup> Desk research internal documents, European review, final report Latvia IP 2011.doc

specific case the municipality appointed an officer to deal with data requests concerning the project. In case a breach is detected it will be disclosed to the public authority. Independence of the monitor was not guaranteed in the case of Milan given that this person was accountable to the mayor. Transparency International Italy was available for consultation but had no direct role in monitoring activities.

The case study analysis suggests that the role of a civil society organisation as Integrity Pact monitor could be threefold: communication; project management; public procurement monitoring. The strength of the civil society organisation is to communicate the activities and findings of the monitors to the public. The main added value of the organisation is the capacity to translate technical information to more accessible language. In addition, civil society organisations can have good access to the public. A second role for the civil society organisation is the management of the Integrity Pact as a project. This included monitoring the project (meaning Integrity Pact) implementation and documenting activities. In addition, the civil society organisation should manage the external monitors. This primarily ensures managing their resources in order to allow for sufficient capacity. If needed, the organisation can also protect the external monitors from possible pressure or obstacles they might face. The third role civil society can play is monitoring itself. Civil society organisations such as Transparency International has in-house staff that hold expertise in anti-corruption and transparency. Such expertise can be used to monitor the contracting phase but also to ensure that external experts remain focussed on the core objectives of Integrity Pacts, namely detecting and preventing corruption, increasing transparency, etc.

### *3. Selection of the monitor*

The selection method of the monitor largely depends on the context of the Integrity Pact. Regardless of whether this selection takes place through an open call or another more restricted procedure, key requirements described above are recommended always be taken into account.

In the selection of the monitor, the case study analysis suggests that on the basis of the economic and governance conditions in a country it could prove difficult to identify a suitable monitor with the requirements needed. For example, interview feedback indicates that finding a monitor with the right reputation in countries with weak governance can be challenging.

Also, the procurement project might be of such a nature (i.e. size or sector-specific) that in a country only few people have the capability to monitor a specific procurement project. As a solution to such a problem, interviewed experts indicate that a monitor could be engaged coming from outside the country. This has also happened in Integrity Pact cases, such as in the case of the *ad hoc* monitoring support in Latvia. However, experts also point to a downside to this practice<sup>485</sup>. The collective action initiative could benefit from an international angle in some contexts, i.e. countries with very weak governance, but should ensure local ownership in order for the initiative to be successful. It is therefore recommended to ensure a balance in monitoring capacity both including local and non-local experts.

Civil society organisations struggle primarily with defining the workload for monitors. It is difficult to estimate the amount of time and effort that should go into the work of the monitor. It exposes the organisations to the risk of under-budgeting with the consequence of not being able to effectively conduct activities up until the project closure. A possible safety mechanism applied by civil society monitors is relying partially on in-house staff. Above all, this concern highlights the importance of engagement of the external monitor as well as effective management throughout the project to ensure that the monitor has sufficient resources. Initially the civil society organisation should adapt the level of monitoring to the resources available. A possible way to avoid the risk of missing out on important moments in the procurement process is to assess *ex-ante* where to direct monitoring efforts. During interviews, monitors were asked how they would divide efforts in case of limited resources. The main approach was through a risk assessment. This could identify the key areas for concern. It was stressed that this would allow monitoring to be most effective, however, as long as activities would be able to span the entire procurement process. In other words, monitors recommended not applying monitoring only to one specific procurement phase.

Securing funding for the monitor is a challenging task for a civil society organisation. Various methods have been used. In Latvia and Bulgaria, the Transparency International chapters relied on external funding. In the case of Latvia, this funding was *ad hoc* and did not cover the entire project cycle. The external donor was the Partnership for Transparency Fund. In Bulgaria the Integrity Pacts were financed through the Siemens Integrity Initiative. This

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<sup>485</sup> Interview feedback #23, #25, European review, February-April 2015.

covered almost the entire project cycle and ensured the full coverage of all activities, including the funding for external experts. The contracting authority financially covered the monitoring activities in Hungary.

In Italy there was no direct correlation between the funding of the project and Transparency International Italy. Any activities undertaken by the project fell within the wider activities of the organisation and were therefore automatically covered. Transparency International Italy chose this approach in order to ensure full independence at all times. In the case of the Milan Integrity Pact there was no indication that the organisation examined expenses made. As for human resources, the organisation needed project managers and legal experts. These were attracted from a pool of Transparency International members and volunteers. The chapter points out that for future references it would be useful to intern staff at the premises of the public authority<sup>486</sup>.

### 5.4.3 Trust and good reputation

Trust and good reputation can help making group members more willing to contribute to the common good. Group members can base trust on good reputation, past collective action or other reasons. Together these would contribute to more willingness to reach objectives.

From the European Integrity Pact cases, stakeholders clearly stressed the relevance of trust and good reputation in collective action. The main concern for civil society organisations is reputational damage given that Integrity Pacts cannot fully exclude corruption and the possibility that contracting authorities and companies use the Integrity Pact for window-dressing. Civil society organisations also expressed awareness of potential negative effects for other stakeholders involved in the Integrity Pact. This was expressed by the fact that cases were identified in which they attempted to solve problems during the procurement process beyond those that relate specifically to corruption. Primarily the civil society organisations were concerned with problems that could delay procurement. It was argued that delays could undermine popular perception of a good procurement process, jeopardising the success of the Integrity Pact, and subsequently damaging the reputation of the stakeholders involved. Regardless of whether delays were attributed to the Integrity Pact, civil society organisations

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<sup>486</sup> Survey feedback global review, September – November 2015.

and monitors systematically felt the responsibility to solve this. This study finds that this responsibility was not always shared equally among the stakeholders. In fact, overall Transparency International chapters struggled with detaching what constitutes a success for an Integrity Pact, from what constitutes a success for a procurement project. In other words, the success of the Integrity Pact and the procurement project are perceived as interdependent. Given the complexity of an Integrity Pact this is understandable, however the tool is primarily about preventing corruption while a procurement project, as discussed in this study, covers a wider array of objectives, such as value for money and/or social and environmental objectives. Arguably, civil society organisations should not be required to carry the larger share of the burden to succeed. Success of the Integrity Pact, and with that the procurement project, can be considered a shared responsibility which requires a degree of collaboration and trust between stakeholders. For example, In Bulgaria the civil society organisation responsible for monitoring clearly pursued ways to avoid delays in the procurement project. It could be argued that the organisation took full responsibility regardless of whether delays were the result of external factors beyond the Integrity Pact itself. The main reason identified why the organisation feared delays, was the effect these might have on public perception and in result their image<sup>487</sup>.

Trust between the contracting authority and the civil society organisation/monitor repeatedly played a role in order to mitigate risks. By building strong relations with stakeholders, monitors attempted to mitigate that Integrity Pacts were abused to keep up the appearance of a clean procurement process. Repeatedly, monitors and contracting authorities stressed the importance of good relations in order to effectively implement Integrity Pact activities<sup>488</sup>. However, civil society organisations also highlight the risk that close relations could jeopardise the monitor's independence. The ways in which chapters mitigated this varied.

In Hungary, the contractor in the XIII-District case commented that some decisions in the contract execution phase suffered minor delays due to the required approval of the Integrity Pact monitor<sup>489</sup>. The contractor did confirm that the benefits from additional technical expertise through the independent monitoring outweighed this problem. Concerning

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<sup>487</sup> Interview feedback #20, European review, February-April 2015.

<sup>488</sup> Interview feedback #2, #5, #14, #17, #18 European review, February-April 2015.

<sup>489</sup> Interview feedback #1, European review, February-April 2015.

duplication of monitoring activities, the contractor confirmed that the project benefitted from ‘two’ sets of eyes monitoring the activities. The contracting authority in the Hungarian case acknowledged that the external monitoring activities could overlap with internal control<sup>490</sup>. However, the former was perceived as a more holistic form of control throughout the entire procurement process while internal control is more sporadic and limited to audit.

#### 5.4.4 Group interdependence

When group members are aware that group resources are dependent on the contributions of others, they will be more inclined to contribute to collective action. Group interdependence may affect collective action. From the cases analysed in Europe, concerns were raised by stakeholders in relation to negative effects of Integrity Pacts such as window-dressing. Risks of window-dressing and duplications of monitoring activities were tested but not confirmed. Various lessons can be drawn from the cases we have reviewed. Monitors are aware of the potential negative effects of Integrity Pacts. They are first and foremost aware of their own exposure when engaging in an Integrity Pact (this was confirmed mostly when civil society organisations themselves did the monitoring). On the other hand, interviewed stakeholders also expressed awareness in relation to the negative effects for other parties to the Integrity Pact. This suggests that stakeholders through the Integrity Pact indeed raise awareness of the interdependency of a successful Integrity Pact.

Companies expressed concerns in relation to the timeliness of procurement projects<sup>491</sup>. Economic operators are under financial and time pressure to comply with contract requirements. Some concerns were raised as to possible delays resulting from the additional scrutiny from the Integrity Pact. Companies expressed particularly concerns with costs relating anti-corruption measures that need to be adopted in relation to the Integrity Pact. These concerns seem to have some relation to the exposure of the companies to the European Single Market. Those primarily operating locally do not seem to weigh in the potential financial damage of not complying with anti-corruption standards. This could relate to impunity on the local level. Those operating on the international market stress the importance of compliance due to international enforcement of anti-bribery legislation. In addition, these

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<sup>490</sup> Interview feedback #2, European review, February-April 2015.

<sup>491</sup> Interview feedback #1, #15, European review, February-April 2015.

companies also seem to factor in the social value of complying with anti-corruption and good governance standards. This suggests that those stakeholders indeed acknowledge the interdependence of the group members in terms of contribution to the collective goods.

For example, in the Latvian NLL-case, the contracted construction company highlighted that the measures they took to comply with the Integrity Pact were only included due to the collective action initiative<sup>492</sup>. The interviewed representatives expressed reluctance as to whether they would repeat such efforts in future projects if this was not forced upon them. A different position was adopted by a contractor responsible for construction oversight. The company stressed their dedication to compliance with international anti-corruption standards, partially based on the fact that they are listed on the New York Stock Exchange and operate across Europe<sup>493</sup>. However, the company ensured efforts to actively engage the Integrity Pact monitor. This resulted in a close cooperation in which effective control was exercised over the construction company.

#### 5.4.5 Heuristics/norms

Group members learn heuristic strategies through personal experiences and from other people on how to get certain outcomes. The norms learned attach a certain value to a given strategy or outcome. The norms and heuristics can affect collective action when an individual's willingness is enhanced to side-line immediate personal goals in the interest of the collective good.

The Integrity Pacts reviewed for in Europe shows that activities contributed to changes concerning the key stakeholders involved. An important driver behind the change is the visibility of the procurement project. This was primarily achieved through media outreach. Limited evidence was found of visible procurement through direct citizen's participation in the European cases, more so on the global level.

The Integrity Pact requires civil society organisations/monitors to acquire a high degree of technical expertise in order to effectively monitor procurement. Given the fact that some of

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<sup>492</sup> Interview feedback #15, European review, February-April 2015.

<sup>493</sup> Interview feedback #8, European review, February-April 2015.

the civil society organisations that have implemented the Integrity Pacts in Europe have limited staff and procurement knowledge capacity, external expertise was attracted in order to undertake the Integrity Pact activities. This had impact on the professionalization of the civil society organisations, especially on knowledge capacity on corruption in public procurement. To a degree, the Transparency International chapters normally cover a wide array of anti-corruption campaigns. The Integrity Pact forced them to target one specific area and abstain from general anti-corruption rhetoric. The main challenge identified was the risk that the civil society organisations do not capitalise on the capacity development resulting from the Integrity Pact. A second area of influence of the Integrity Pact on civil society organisations was the need to adapt or adjust the approach to fighting corruption to the requirements of Integrity Pact. Integrity Pacts as collective action tools require a constructive and proactive approach vis-a-vis other stakeholders. Civil society organisations therefore needed to adopt a long-term vision to achieve change rather than reactive short-term approach to fighting corruption.

The Integrity Pacts have also influenced contracting authorities. This primarily relates to operational aspects of the procurement process, meaning that Integrity Pacts have impact on the way procurement is being done. However, more importantly the Integrity Pacts have impact on visibility of public procurement, which could translate to increased legitimacy and credibility of the contracting authority. The main driver behind visibility of the procurement project is the outreach activity of the civil society organisation. As a consequence of this outreach, contracting authorities were incentivised to participate in this. Despite the fact that contracting authorities are spending public money, they do not always engage in outreach to the public. Integrity Pacts drive contracting authorities to engage either in proactive outreach or force them to react to public debate instigated by the civil society organisation. Feedback from the contracting authorities confirm that public exposure ultimately increases legitimacy and credibility of the public authority and expenditure<sup>494</sup>.

In the global review, contract authorities also confirmed that Integrity Pacts gave them the opportunity to reflect on why certain decisions were taken. For example, in Mexico the monitor would ask why the contracting authority would decided to procure certain products

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<sup>494</sup> Interview feedback #2, #14, European review, February-April 2015.

with certain specifications. This would then motivate the contracting authority to trace back decisions taken and assess whether these suited the needs of the public or economic means at their disposal. A contracting authority interviewed in Mexico confirmed that this way they decided to overturn decisions taken by their in-house experts<sup>495</sup>. The case did not relate specifically to corruption but involved engineers that took a decision based on out-dated technical knowledge. The questions of the monitor broke the information cycle within the contracting authority and opened up avenues for modernization. Another example given in Mexico related to the monitor asking bidders why they would propose to use one construction method over another. According to the monitor, the answers received from bidders allowed the contracting authority to take a more informed decision on the contract award<sup>496</sup>. It helped the contracting authority to compare answers and compensate for their own lack of technical knowledge.

Finally, Integrity Pacts also influenced heuristic strategies by companies/bidders. The main impact of the Integrity Pact on the companies is that they participated in a presumably clean procurement process. Based on the feedback received from the companies, the business sectors they operate in are not free of corruption<sup>497</sup>. A main concern voiced by the companies is unfair competition due to low price offers of contractors working partially in the shadow-economy. Their participation in the Integrity Pact provides companies with the opportunity to show dedication to fair competition and at the same time limit access to companies working according to unfair practices.

The Latvian NLL-case had a significant impact on the Latvian Transparency International chapter, especially due to the need to attract external expertise<sup>498</sup>. In addition, the Integrity Pact forced the organisation to adjust a more short-term, reactive approach to fighting corruption, to a more long-term approach in order to achieve change. Part of this has to do with the nature of Integrity Pacts. In the Latvian case, the Integrity Pact took multiple years covering different governments. This had effect, especially when the government changed and attempted to change governance practices of the predecessors. Another external factor

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<sup>495</sup> Interview feedback #35, global review, September-November 2015.

<sup>496</sup> Interview feedback #34, global review, September-November 2015.

<sup>497</sup> Interview feedback #1, #15, #16, #34, European and global review, February-April 2015.

<sup>498</sup> Interview feedback #6-14, European review, February-April 2015.

that contributed to different conditions was the economic situation. This made the contracted construction company slightly more prone to reach compromises.

The Latvian case did not only affect the Transparency International chapter. Also the contracting authority benefitted from the Integrity Pact. During the first stage, the chapter concentrated efforts on assisting the contracting authority in setting up anti-corruption procedures inside the organisation as well as in relation to outside interactions. In addition, they prepared a code of ethics for the Ministry of Culture<sup>499</sup>. Feedback during the stakeholder interviews highlighted the added value of the public presentation of monitoring reports<sup>500</sup>. The public discussion between the civil society organisation and the contracting authority on the conclusions of the monitoring report increased visibility. The contracting authority confirmed that the public comments they received, including criticism, opened up the procurement project to the public and eventually benefitted credibility.

The Latvia Transparency International chapter acknowledged wider impact of the project as a result of making findings known to the public. This raised awareness in this specific construction project but also impacted general understanding of corruption risks in public procurement. It has facilitated public inquiry and has initiated official investigations more easily<sup>501</sup>. A wider change of strategy identified is the perceived increased pressure that monitoring has placed on other institutions apart from the contracting authority, such as audit and supervision institutions.

In Bulgaria, the Transparency International chapter conducted an assessment of the achieved results. Overall, they perceived increased transparency and publicity. Especially the pre-bidding phase of the procurement process benefitted from this as in normal circumstances this phase remains behind closed doors<sup>502</sup>. The Integrity Pact opened this to the media and the general public. In concrete terms, transparency was ensured by disclosing information on the website of the monitoring organisation and on the website of the contracting authorities.

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<sup>499</sup> Desk research internal documents, PTF book Chapter 9, p. 124

<sup>500</sup> Interview feedback #13, #14, European review, February-April 2015.

<sup>501</sup> Desk research internal documents, European reviews, final report latvia lp 2011.doc

<sup>502</sup> Interview feedback #16, #20, European review, February-April 2015.

In Hungary, the contracting authority in the XIII-District case highlighted the importance of the involvement of the monitor in order to increase the visibility of the procurement project<sup>503</sup>. While in normal circumstance the media attention would be limited to the local level, the Integrity Pact raised nation-wide visibility.

#### 5.4.6 Monitoring and transparency

Monitoring can affect the collective action when activities can be easily monitored. This will reduce the risk of free riding out of fear that this will be detected. Monitoring can also expose certain levels of free riding in which case group members will be less inclined to contribute to the collective good.

##### *1. Detection and follow-up of irregularities*

Various lessons can be drawn from the case study analysis of European Integrity Pacts. Firstly, the Integrity Pacts provide civil society organisations with the means to detect corruption. The degree of access to information together with presence during key decision-making moments in the procurement process allow monitors to identify forms of corruption such as bribery and collusion. However, the possibility to detect corruption through an Integrity Pact is not straightforward. Monitors as a consequence have directed their attention to wider governance of the procurement process, and in particular the detection of irregularities in the process. Such irregularities are identified as “red flags” of corruption but do not necessarily have to be corruption. The main reason why monitors focus on wider governance of public procurement is that they struggle with collecting evidence to prove corruption, and especially with answering the question whether irregularities are intentional or unintentional.

The second lesson from the case study analysis suggests that once the monitor feels that sufficient evidence is gathered of a suspected corruption case, they tend to inform the signatories to the Integrity Pact agreement and subsequently inform the relevant authorities. Procedures are generally clear-cut given that the national legal systems have mechanisms in place to investigate and prosecute corruption. However, we have established that Integrity

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<sup>503</sup> Interview feedback #2, European review, February-April 2015.

Pacts focus more on bad governance of public procurement, rather than only on one of its symptoms, namely corruption. This motivates monitors to raise concerns of corruption (and other bad practices) and allow for intervention through the Integrity Pact. In case this intervention is not satisfactory to the monitors, they can decide to step out of the Integrity Pact. As we have seen in the previous sections, clear sanctions could be in place once one of the parties violates an Integrity Pact clause.

In other words, while mechanisms for following-up a corruption case are rather straight forward, dealing with detected irregularities requires a different approach. This requires a constructive approach in which the monitor aims to find a mutual solution to the problem of the irregularity together with the other parties to the Integrity Pact. Once no solution is found, the monitor's strongest message is the decision to step out of the Integrity Pact. In case of a clear violation of the Integrity Pact clauses, the agreement can provide also for other sanctions. Such sanctions only apply to the signatories of the Integrity Pact and are secondary to sanctions foreseen by law. However, the analysis suggests that overall the Integrity Pact stakeholders prefer a constructive approach to dealing with irregularities rather than a punitive approach. One reason is the difficulty to prove intention as mentioned above. Yet, we find that the main reason is the fact that monitors have long-term interest in successfully completing an Integrity Pact project.

The third lesson from the analysis concerns the finding that follow-up and sanctioning of irregularities seems more ambiguous. Monitors are successfully undertaking their activities resulting in concrete detection of irregularities. Once detected, the civil society organisation is confronted with the need to take decisions as to how to proceed. While clear sanctions can be foreseen by law or through the Integrity Pact agreement, Integrity Pacts in practice seem to be more constructive or collaborative rather than punitive. Clear procedures defined through the Integrity Pact agreement can assist monitors and civil society organisations in how to follow-up. However, detailed procedures cannot fully provide answers to all possible scenarios. For example, the civil society organisation can be confronted with the need to take a strategic decision based on a subjective assessment, such as whether the clarification received by the contracting authority after a suspected breach is deemed sufficient to continue the Integrity Pact. Such a clarification can also include promises to change, which require trust from the monitor.

To illustrate these lessons learned we refer to the Latvian Integrity Pact case for the construction of the National Library of Latvia. The Transparency International chapter in Latvia, as monitor to the Integrity Pact, managed to detect and follow-up on possible irregularities. In order to do so, the organisation planned various activities<sup>504</sup>. These activities resulted in cases of suspected irregularities. For example, the review of contracts signed prior to the Integrity Pact exposed concerns as to dealings involving civil servants. The case led to an investigation by the prosecutor general. A second case identified by the monitor concerned the possible circumvention of public procurement laws by several cabinet ministers. The Transparency International chapter in Latvia successfully submitted an application to the Constitutional Court to investigate this case.

Apart from the concrete detected cases, the chapter throughout the Integrity Pact primarily exposed risks of corruption. The majority of risks were adequately addressed by the authorities, however one particular case stood out. In this case, the monitor raised concerns regarding the decision of the contracting authority to impose an emergency situation for a procurement procedure. This meant that a contract was awarded through a negotiated procedure without announcing a public procurement tender. After receiving explanation, the monitor decided to continue the Integrity Pact and not raise this issue to law enforcement authorities<sup>505</sup>. This case challenged the team because internally there were opposing views on how to respond to this particular situation<sup>506</sup>. Through external mediation a decision was taken to continue the Integrity Pact despite the detected concerns. This decision was based on the fact that an irregularity was detected and this was communicated to the contracting authority. Subsequently the contracting authority provided clarification on their decision. In concrete terms, by providing transparency, the contracting authority fulfilled the Integrity Pact agreement's requirements.

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<sup>504</sup> The Latvian Transparency International chapter provided training on the principles and practices of integrity pacts; attended weekly planning meetings in the Ministry of Culture; attended meetings of the Procurement Committee; visited the building site; liaised with the Library Support Foundation and State Advisory Council; analysed procurement requirements and the signed contracts, including those from before the Integrity Pact; monitored public data from the previous three years on the bidders.

<sup>505</sup> Desk research internal documentation, European review, IP summary\_EN.doc

<sup>506</sup> Interview feedback #9, #11, European review, February-April 2015.

In the case of the Latvian Transparency International chapter, the decision to continue was taken by the organisation in a transparent manner. However, there are indications that the decision was not fully a result of an internal compromise<sup>507</sup>. This is not always required as each organisation has its own decision-making procedures and mechanisms. However, in this case the decision had effect on key persons involved in the implementation of the Integrity Pact. The leading monitoring staff at the time left the organisation. Whether this was as a direct or indirect consequence of the internal dissent that emerged cannot be determined from the interview feedback. However, it is clear from this example that several group members to the collective action initiative had different views on the prevalence of objectives of the Integrity Pact. In the end, the civil society organisation decided to set aside individual interests of members of the team in order to make room for the achievement of longer-term objectives in terms of ensuring procurement objectives shared by all stakeholders. This touches upon the collective action variable concerning long-term horizons. In addition, this case illustrates also raises questions as to the group size of the Integrity Pact.

## *2. Transparency*

The review of European Integrity Pacts suggests that prevention of corruption through Integrity Pact is perceived more effective than detection of corruption. The interviewed stakeholders argue that Integrity Pacts cannot rule out corruption, and therefor primarily is meant as a preventive tool. Transparency is seen together with accountability as the main factor to ensure integrity in public procurement. Across the analysis, stakeholders confirmed that Integrity Pact prioritised transparency as the key objective.

Various ways have been identified to fill in the transparency objective. First of all, transparency is directed inwards from the contracting authority to the monitor/civil society organisation and outwards from the contracting authority and monitor/civil society organisation to the public. Outward transparency is primarily linked to media outreach. Inward transparency is primarily linked to access to documents and information. When we break this further down, we could argue that a key strength of the Integrity Pact is to enhance transparency towards the public. Outreach to the public is either directly done by the contracting authority and/or directly via the monitor/civil society organisation. The main

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<sup>507</sup> Interview feedback #9, European review, February-April 2015.

activity identified is the publication of the (periodical) monitoring reports. These translate the findings of the technical independent monitors and communicate these to the public. The quality of these reports is intrinsically linked to the degree of transparency provided by the contracting authority to the monitor. Confidentiality is the only possible restriction.

A more problematic factor in the Integrity Pact implementation is inward transparency, in particular the information exchange arrangement between the contracting authority and the monitor. The arrangement is primarily pre-defined through the Integrity Pact agreement, stipulating which documents are made available, and in which meetings monitors can participate. However, within this arrangement challenges are identified. The main issue is whether information streams are 'pull' or 'push' based. Arrangements on pull information mean that the monitor requests and receives information. A push system is based on the contracting authority anticipating the needs of the monitor and automatically informing without specific requests. This study finds that an arrangement that largely depends on information delivered by the contracting authority on request of the monitor risks that the former adopts a reactive approach in the Integrity Pact. This could result in the contracting authority alienating from the Integrity Pact and failing to engage in the project. This is problematic given that successful implementation of an Integrity Pact is a collective effort and dependent on the engagement of all stakeholders. It is therefore important to enforce, promote and expect a degree of proactive behaviour regarding information disclosure from the contracting authority. In other words, push information arrangements can be considered enhancing transparency as well as the engagement from the contracting authority. At the same time, it prevents the contracting authority from responding to information requests in a reactive manner and avoids the possibility of late detection of irregularities.

The European cases also show that Integrity Pacts can increase access to information beyond the foreseen access by law. In addition, Integrity Pacts can expose or close gaps that have been identified in many EU countries relating the implementation of access to information laws<sup>508</sup>. Integrity Pacts could allow monitors access to information that under normal circumstances would be confidential. As mentioned before, the confidentiality could be

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<sup>508</sup> TRANSPARENCY INTERNATIONAL (2014). *Money, Politics, Power: Corruption risks in Europe* [WWW]. Available from: <http://www.transparency.org/enis> [Accessed on 14-04-2015].

considered a restriction to the transparency of the procurement procedures and consequently the effectiveness of the Integrity Pact. However, from the cases we found no concrete examples where confidentiality clauses restricted the role of the monitor. In case monitors due to confidentiality restrictions cannot use public outreach as a pressure tool to call for change, other tools are available to internally exercise pressure such as meetings with the stakeholders.

The case studies suggest the potential comprehensive preventive effect of Integrity Pacts, meaning potentially covering all stakeholders. Stakeholders confirmed that Integrity Pacts have a disciplinary effect on those involved. This, very importantly, also applies to bidders/contractors and therefor has effect on the private sector. The Integrity Pact promotes a solution to corruption in the private sector following best practices promoted by Transparency International which includes: private companies taking internal preventive measures; authorities enforcing measures and; stakeholders engaging to transparency.<sup>509</sup>

The Hungarian XIII District-case provides a good insight into which documentation the monitor (in this case Transparency International Hungary) consulted. On the website of the chapter an introduction is given of the Integrity Pact, including contact details in case of complaints<sup>510</sup>. Four monitoring reports are published outlining the information accessed by the monitors and conclusions drawn. Monitoring reports are published after concluding a specific phase in the procurement process. Overall, conclusions from the monitoring are positive. Whenever needed, the information disclosed is complemented with additional documentation on request of the monitor. The contracting authority took a proactive stance by automatically consulting the monitor before taking decisions. The team would receive via email documentation after which they were given two days to respond. Loosely speaking the working arrangement between the monitor and the contracting authority was largely based on information push<sup>511</sup> with information pull<sup>512</sup> whenever needed.

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<sup>509</sup> TRANSPARENCY INTERNATIONAL (n.d.). Private sector [WWW]. Available from: [http://www.transparency.org/topic/detail/private\\_sector](http://www.transparency.org/topic/detail/private_sector) [Accessed on 12-09-2016].

<sup>510</sup> TRANSPARENCY INTERNATIONAL HUNGARY (n.d.). [WWW]. Available from: [http://transparency.hu/Local\\_government\\_of\\_the\\_13th\\_district](http://transparency.hu/Local_government_of_the_13th_district) [Accessed on 05-05-2015].

<sup>511</sup> The agent anticipates the needs of the user and sends information without a specific request.

<sup>512</sup> The user requests and receives information.

**Table 7: Access to information Integrity Pact Hungary**

Procurement phase	Documents disclosed
<ul style="list-style-type: none"> <li>- Preparation of contract award procedure</li> <li>- Contract notice</li> <li>- Tender documentation</li> </ul>	<ul style="list-style-type: none"> <li>- Investment programme and target plan regarding the investment</li> <li>- Draft of preparatory documents of the procedure including inspection of the possibility to divide the contract into lots, the inspection of the process determining the estimated project value, and the inspection of the issue of one-off payment and green procurement</li> <li>- Draft notice launching the contract award procedure</li> <li>- Draft of documentation process</li> </ul>
<ul style="list-style-type: none"> <li>- Monitoring the process starting from the dispatch of the notice launching the contract award procedure</li> <li>- The rectification concerning previously submitted recommendations</li> <li>- The provision of additionally necessary information</li> </ul>	<ul style="list-style-type: none"> <li>- Request for supply of missing information concerning the notice launching the contract award procedure sent by the Notice Control Department of the Public Procurement Authority and the accordingly completed notice</li> <li>- Records of on-the-site inspections</li> <li>- Extension of the time limit for submission of tenders in case supply of additional information is required</li> <li>- Amendment notice</li> <li>- Amended schedule</li> <li>- Provided information to the requests for additional information and their dispatch</li> <li>- Demolition records</li> <li>- Request for supply of missing information and for provision of information and their dispatch</li> <li>- Request of justification</li> </ul>
<ul style="list-style-type: none"> <li>- Monitoring the process starting with the evaluation of tenders and finishing with the conclusion of the contract</li> </ul>	<ul style="list-style-type: none"> <li>- Proposal for decision and written expertise opinion of the Evaluation committee</li> <li>- Evaluation sheets</li> <li>- Resolution of the Council closing the public procurement procedure</li> <li>- Summary of the evaluation of the tenders and documents verifying the dispatch of the summary</li> <li>- Draft contract</li> <li>- Signed contracts and their annexes</li> <li>- Information notice about the result of the procedure</li> <li>- Request regarding the dispatch of the information notice about the result of the procedure</li> </ul>

<ul style="list-style-type: none"> <li>- Monitoring the process starting with the conclusion of the contract conducted as a result of the public procurement procedure and finishing with the completion of public works</li> </ul>	<ul style="list-style-type: none"> <li>- Draft of the contract amendment</li> <li>- Contract amendment</li> <li>- Minutes from the meeting on cooperation</li> <li>- Notice and request of contract amendment</li> <li>- Partial invoices</li> <li>- Documents regarding the implementation of the contract</li> <li>- Draft instructions of the CEO of XIII District Public Service Ltd, based on experiences collected during the renovation works of the nursery school.</li> </ul>
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Source: Transparency International Hungary

While throughout the Integrity Pact, the monitor in Hungary closely interacted with the contracting authority; the bidders only were actively involved during the contract implementation. Most Integrity Pact activities were directed towards the contracting authority and only once the contract was executed the bidder interacted with the monitors of the Hungarian Transparency International chapter. During the interview with the bidder it was confirmed that the Integrity Pact adds value to their work<sup>513</sup>. First of all because of the perceived corruption in the construction sector. Secondly, the bidder was supportive of the Integrity Pact given the importance to the client, meaning the contracting authority. Thirdly, the bidder added that the Integrity Pact strengthened the fact that the contract was fairly awarded.

In the Latvian NLL-case, a different working arrangement materialised between the contracting authority and the monitors from the Latvian Transparency International chapter. The team was granted access to all relevant documentation relating the construction, including financial documentation<sup>514</sup>. In addition, the contracting authority supported the monitors to obtain information through the State Audit Office. This included information that normally would not be accessible to the public. However, in the Latvian case also restrictions on access to information were incorporated. These presumably resulted from negotiation between the parties at the stage of Integrity Pact design<sup>515</sup>. These restrictions primarily had an effect on the freedom to communicate with the public. The Latvian Transparency International chapter did not perceive this as a problem because they felt that the overall

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<sup>513</sup> Interview feedback #1, European review, February-April 2015.

<sup>514</sup> Desk research internal documentation, European review, PTF book Chapter 9, p. 124

<sup>515</sup> Desk research internal documentation, European review, comments on Delna's 03.03.11 report.doc

access to information through the Integrity Pact was more important than the few confidentiality restrictions on that information<sup>516</sup>.

The working arrangement between the monitor and the contracting authority in Latvia was largely based on a pull system. Team members involved in the implementation of the Integrity Pact confirmed that the contracting authority always delivered information once requested. According to the chapter, the arrangement did not impede them from conducting effective control. It is important that in addition, the team was able to attend meetings and this way actively participated in the debates. However, in practice, the limitations of the pull system were acknowledged<sup>517</sup>. Especially given that the monitor at times suffered limited capacity, which affected the degree of monitoring. Not being able to exert continuous pressure on the contracting authority exposed the team to the risk of missing out on important decision-making moments. Various examples have been identified in which the monitor was forced to respond retroactively to potential concerns. With full capacity, this could have been avoided. Alternatively, push information could have also limited the risk of not being present at all times.

While the bidder in Hungary only got involved during the contract execution, in Latvia the bidder was engaged from the start of the procurement procedure. The bidder included in the proposal a code of conduct and established a whistle-blowers policy. This can be directly attributed to the Integrity Pact given that the bidder used templates from Transparency International in order to develop the proposals. During the contract execution, the bidder/contractor disseminated the code through information panels at the building site and enacted channels for staff to submit complaints. Direct staff and sub-contractors were able to anonymously file complaints or directly contact the director of the building company. These systems were complemented by hotlines to the monitor and the contracting authority.

### *3. Competitiveness*

The global review pointed to examples of companies in Italy being excluded from tenders due to a refusal to sign the Integrity Pact. The tracking and reporting on the numbers of firms

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<sup>516</sup> Interview feedback #6, #9, European review, February-April 2015.

<sup>517</sup> Interview feedback #6, #9, European review, February-April 2015.

that have been denied participation in procurement processes due to a refusal to sign or a violation of the Integrity Pact could provide further evidence for Integrity Pact success in increasing competitiveness in the bidding process, by either removing non-compliant firms from the market and/or pressuring them to reform. Isolated efforts have been made by some contracting authorities in this regard. For example, between 2012 and 2013 the Commune of Milan excluded 453 bidders, primarily for violations of the Integrity Pact.

While overall, the potential of the Integrity Pact to increase the level playing field was confirmed, little evidence has been collected from the European review that Integrity Pacts indeed increased competition. In the case of Latvia, it was confirmed that one foreign company was excluded from bidding due to domestic corruption charges pending<sup>518</sup>. In the case of Hungary, the contractor confirmed that competition in the construction sector is challenged due to dominance of some players<sup>519</sup>. While the Integrity Pact in the view of the contractor could provide access to procurement, this could not be proven in terms of more eligible bids received for the specific procurement assignment.

#### 5.4.7 Long-term horizons

Group members with long-term horizons are more likely to contribute to the collective good. These members should be willing to set aside immediate personal interests for the sake of long-term interests of the group.

The Integrity Pact experiences show how some learned heuristic strategies are influenced through the repeated interaction of group members in the Integrity Pact. The tool has contributed to changes concerning the civil society organisations/monitors, contracting authorities, and companies. An important driver behind the change is the visibility of the procurement project. This driver remains important also after project activities end, especially with a view on the contracting authorities and the companies. The visibility created during the Integrity Pact can be used for monitors to maintain a certain degree of pressure on the contracting authorities and companies/bidders also after the Integrity Pact finishes. For the civil society organisations, the most important factor for sustainability through follow-up

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<sup>518</sup> Interview feedback #14, European review, February-April 2015.

<sup>519</sup> Interview feedback #1, European review, February-April 2015.

activities is funding. Important factors that contribute to achieving sustainable change are technical expertise, presence during decision-making moments and good relations with stakeholders.

Securing sufficient funds for the Integrity Pact is the main problem civil society organisations/monitors face. Funds for post-project activities seem to be covered by general budget lines within the organisations. As a consequence, concrete monitoring activities are either suspended or limited to the minimum. Monitors do include activities to follow-up on Integrity Pact results, such as outreach activities in the form of presentations to academia. This study found limited indications of active pursuing for funding specifically for Integrity Pacts. The main reasons identified are the low capacity of some organisations, high staff turnover, and the role of external monitors post-project. Concerning the latter, the monitors enjoy a degree of independence and are normally contracted specifically for the Integrity Pact. This means that the monitor risks not always being able to capitalise on the knowledge and network this person acquires during the course of the Integrity Pact.

For example, the Integrity Pact in Latvia continuously suffered from budget restraints. Some of these restraints were lifted when an external donor (Partnership for Transparency Fund) stepped up. The civil society organisation/monitor confirmed that without the intervention of the donor, successful monitoring would have been challenged and consequently jeopardising the possibility to further secure funding<sup>520</sup>. Communication between the donor and the monitoring organisation provides indications of activities directed to post-project interests. Based on the field visit, it is not clear whether these interests will materialise given that the project manager at the time maintained contacts with the donor and currently has left the organisation. This is a clear example in which continuity of the Integrity Pact is jeopardised due to staff turnover.

Regardless of the funding challenges, we found some indications of change post-project. It has to be noted that the cases analysed in Europe were in some instances recently concluded or are still on going. Nevertheless, Integrity Pacts have contributed to changes in the contracting process, such as internal changes with relation to control of public procurement.

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<sup>520</sup> Interview feedback #9, European review, February-April 2015.

It could be argued that such policy changes are easier to achieve given that public authorities can do so within existing legal frameworks. A particular strength we identified of the Integrity Pact is the real-time control that is being exercised through the tool. This is perceived as more complete compared to internal control mechanisms of public authorities that are more reactive and audit oriented.

Stakeholders perceived increased legitimacy of procurement processes due to Integrity Pacts. One possible way to measure this, as well as determining sustainability, is by looking at the perception of corruption. The question whether the Integrity Pact changed the perception of corruption in public procurement was posed to stakeholders during interviews. Respondents highlighted that this was difficult to determine. The main problem with identifying change is connected with the fact that most Integrity Pacts did not measure perception before or after the application of the tool. This touches upon a more general problem identified during this study, namely the fact that objectives for the Integrity Pact were not always clearly set out at the start, let alone monitored.

In Hungary, the contracting authority explained that at the time they were revising their regulations for internal control of public procurement<sup>521</sup>. They aimed to implement a control system that is more aligned with practices used by the external monitors during the Integrity Pact. The underlying thought is that control becomes a real-time rather than a reactive activity. In addition, the contracting authority clearly expressed their interest into follow-up Integrity Pact projects<sup>522</sup>. The municipality argued that good governance had been a priority of the mayor at the time and therefore lessons-learned from the tool could be beneficial for future procurement. With strong political will of the mayor, the likelihood for more Integrity Pacts was acknowledged. However, sustainability would possibly be jeopardised in case of political change. It was confirmed by Transparency International Hungary that this could be a possible obstacle<sup>523</sup>. Therefore the organisation actively promotes the Integrity Pact also with opposition parties. According to the contracting authority, the opposition party in the municipality generally supported the Integrity Pact during its implementation. This expressed itself primarily by no public objection against the procurement process. An interesting added

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<sup>521</sup> Interview feedback #2, European review, February-April 2015.

<sup>522</sup> Interview feedback #2, European review, February-April 2015.

<sup>523</sup> Interview feedback #5, European review, February-April 2015.

value of the tool in this case was that the municipality perceived high pressure to comply with procurement rules. This pressure allegedly is exerted due to the fact the ruling party in the municipality is on the central level in the opposition. This arguably could make them a target for state institutions dealing with control. The Integrity Pact functioned in a way as a tool to protect from political persecution.

In Latvia, the Integrity Pact identified a potential risk in procurement based on the lack of a Public Works Department. This questions the model upon which authorities design and procure without in-house staff capable of undertaking pre-feasibility studies or preparing design briefs. The monitor identified the opportunity to raise this issue with the contracting authority project manager due to good working relations during the Integrity Pact<sup>524</sup>. The expression of these concerns could lead to reforms in Latvian public procurement. According to the organisation, factors that have contributed to this, *inter alia*, are:<sup>525</sup>

- A developed understanding of major construction projects;
- Having a seat at the table;
- Developing good relations with involved actors;
- Acting as a silent observer.

The monitor in Latvia also managed to change procurement practices. For example, the organisation argued that government agencies should not charge bidders a fee for procurement documentation. As a consequence, agencies agreed to put all procurement documentation online. Also, the agencies accepted the procedure of public discussion with potential competitors before each competition. Although it is not certain that this practice will be sustained for future operations, the monitor perceives that it has contributed to the final establishment of a project management structure at the contracting authority that is equipped to withstand pressure from companies<sup>526</sup>.

#### 5.4.8 Salience of the collective good

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<sup>524</sup> Interview feedback #9, European review, February-April 2015.

<sup>525</sup> Desk research internal documents, European review, comments on Delna's 03.03.11 report.doc

<sup>526</sup> Desk research internal documents, European review, final report latvia lp 2011.doc

If the collective action is of importance to the livelihood or survival of group members, than these members are incentivised to act collectively. The objectives of the Integrity Pacts differed depending on the stakeholders interviewed. Some defined the objective in terms of a corruption-free procurement project, other adopted a wider positions aiming for better governance of procurement.

### *1. Costs and time savings*

Attributing efficiency in the procurement process to the Integrity Pact is challenging. We looked at various indicators to assess whether Integrity Pacts make procurement more efficient. This looked at whether observable reductions in costs compared to the original budget could be attributed to Integrity Pacts. In addition, the study looked at whether the use of an independent monitor had effect on the resources allocated by the contracting authorities to the procurement process. Also, timeliness was addressed and the question whether the Integrity Pact reduced time needed to resolve conflicts.

The case study analysis did not find evidence of Integrity Pacts relating to specific delays suffered in the procurement activities. Various procurement projects with Integrity Pacts suffered overall delays. However, these delays were primarily attributed to external factors such as political changes and the economic crisis. Establishing whether Integrity Pacts make procurement activities more cost efficient is difficult to determine. One possibility is by looking at the cost of corruption in public procurement and allocating a figure to potential savings in case corruption is prevented. However, such an approach exposes us to various methodological challenges given we cannot determine the degree of corruption prevented. After all, not all procurement processes are by definition corrupt. If we expand the scope of Integrity Pacts from an anti-corruption tool to a good governance tool, we see a wider array of cost savings that could be attributed to the Integrity Pact. Good procurement processes can save costs. However, also here we ask the question what economic value can be attributed to the Integrity Pact.

This leaves us to conclude that costs savings through Integrity Pacts are case specific and cannot be generalised. For example, concrete cost savings can be made by carefully supervising construction activities and quality of materials. This activity might go beyond the technical expertise or capacity of the monitoring civil society organisation. The focus of the

Integrity Pact's value perhaps should be sought in the area of social value. For example, one might be able to convince contracting authorities that the monitor's services provided through the tool are efficient from an internal management perspective, i.e. through the independent monitor, rather than efficient from a procurement corruption cost savings perspective. After all, a donor or public authority is willing to pay/cover costs of a service that is affordable and implementable.

The Latvian NLL-case showed clear cost savings compared to the estimated budget. The Latvian Transparency International chapter and the contracting authority highlighted that the involvement of an external construction supervisor had strong impact on expenditure<sup>527</sup>. The company supervised the construction site, which included over 40,000 different items. The company would scrutinise these by applying a price-quality check in order to ensure best value for money. Despite delays in the project, the construction of the National Library of Latvia cost significantly less than planned. The cost savings cannot directly be attributed to the Integrity Pact, however both the contracting authority and the construction supervisor stressed that the successful monitoring during the construction was a team effort including that of the Integrity Pact's monitor.

The delays in Latvia are primarily attributed to changes in the political landscape and the economic crisis. Despite the delays, the monitoring civil society organisation took initiatives whenever possible to reduce further delays. For example, they took the initiative to organise a mediation meeting after an unhappy bidder appealed a decision taken by the procurement committee. This meeting brought the different stakeholders around the table and allowed for discussion. The appeal was not withdrawn. However, it is important that the monitor undertook activities to ensure increased efficiency in dispute resolution. The contracting authority confirmed that this was a valuable contribution<sup>528</sup>. By discussing directly the concerns of the bidder, similar situations can be avoided for future procurement processes.

In Italy, Integrity Pacts allowed according to public authorities for 30% savings on the procurement budget. The Italian Transparency International chapter confirmed reduced costs

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<sup>527</sup> Interview feedback #6-15, European review, February-April 2015.

<sup>528</sup> Interview feedback #14, European review, February-April 2015.

in various major construction projects<sup>529</sup>. According to the organisation, the main impact of their activities was an increased quality of bidders as well as more transparency in the process. Also, the organisation deemed it important that awareness was raised on the importance of integrity.

In Bulgaria, the Transparency International chapter took efforts to avoid delays by using the Integrity Pact as a tool to bridge communication gaps between stakeholders. They argue that the mere role as independent observer already influences interaction between the contracting authority and the contractor<sup>530</sup>. The organisation positioned itself as an independent third party ready to mediate in case of conflict and this way avoiding cost increase or delays<sup>531</sup>.

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<sup>529</sup> Desk research internal documents, Italy (draft 3) 2010.doc

<sup>530</sup> Interview feedback #20, European review, February-April 2015.

<sup>531</sup> Desk research internal documents, global review, Integrity Initiative report, p. 42.



## **6 Part III Integrity Pact as an approach to prevent corruption in public procurement**

The third area is where the tool to prevent corruption is translated into an approach to prevent corruption. By providing the conditions required for civil society organisations to monitor public procurement, an integrated approach is presented to prevent corruption in public procurement on the EU level.

The main study question is:

- Which conditions are required for an integrated approach for civil society organisations to effectively monitor public procurement?

This study has looked at the Integrity Pact experiences in terms of effectiveness. As a consequence, the study looked at multiple units of observation and analysis. Translating this into a corruption prevention approach is challenging due to various reasons. First of all, collective action is a dynamic process that deals with social relationships. Establishing indicators that allow for measuring effectiveness should take into account that Integrity Pacts differ over time, across cultures, between government levels, etc. Another difficulty concerns the different methodological approaches used by social science disciplines. This study attempted to include different disciplines by looking at more traditional economic analyses that focus on incentives of individuals to participate in collective action within institutional settings, as well as sociological approaches which look more at behaviour of groups and how action is motivated through social networks and organisations.

We have seen from the cases discussed in Part II of this study that Integrity Pact projects have been designed and implemented by different civil society organisations, contracting authorities, companies, involving different donor organisations, procurement projects, market sectors, etc. Today, a key question posed is how to inform policy-makers on the best ways to scale-up the use of the tool on the basis of past learning. The data collection from the two reviews we conducted of the Integrity Pact in 2015/2016 highlighted that many projects were implemented throughout the world by Transparency International chapters and others, but that these were scarcely documented which complicated learning from the different

experiences. It was therefore that we recommended an additional step to the roadmap for Integrity Pact, namely evaluation. In other words, the Integrity Pact should concern three elements: 1) design; 2) implementation; and 3) evaluation. The following sections will present the evaluation element in order to shape an approach that would support the implementation of the Integrity Pact tool on the EU level in order to prevent public procurement corruption. While the development of this approach in this study is based primarily on findings from looking back at the experiences of the Integrity Pact, the objective is that by using this approach data will be better collected in the future and help civil society organisations, donors, and academia to better assess the effectiveness of the Integrity Pact as a collective action tool in the future.

## **6.1 Integrity Pact evaluation**

Transparency International, nor the World Bank Institute, provides detailed information on evaluating the effectiveness and impact of the Integrity Pact. In fact, as we have seen in this study, assessing the effectiveness of collective action initiatives is overall an underexposed area. The learning review recommended adding evaluation as an additional phase to the Integrity Pact roadmap. The main driver behind this recommendation was the difficulty of defining the effectiveness and impact of the Integrity Pact on the merit of limited availability of data. But also, the collected evidence on its effectiveness as shown by this study does make a case for stronger evaluation methodologies in order to better assess effectiveness and impact in the future. The experiences with the Integrity Pact differ greatly, which complicates drawing comparative answers from the different cases. Another driver behind this approach is the fact that collective action in the fight against corruption is in the first stages of implementation and that to date there is very little knowledge on the effectiveness and impact of initiatives. This study aims to modestly contribute to this.

### *1. Developing a monitoring and assessment framework*

Developing a monitoring and assessment framework could support the implementation of the Integrity Pacts and strengthens also the evaluability in order to be able to measure results and impact more accurately. Monitoring is primarily a management tool, which helps those that implement Integrity Pacts to regularly check progress against plans. It allows the implementers to follow project activities at all times and ensure that these are implemented in line with available resources. Monitoring can help the stakeholders to detect, in an early

stage, problems relating the implementation of the project and mitigate these. Above all, monitoring can support the achievement of expected output, results and impact.

The relevance of monitoring becomes clear when looking at the Integrity Pact project. As we have seen from the case study analysis in this study, Integrity Pacts are frequently considered complex projects with many different activities and involving different stakeholders with different interests but collective goals, sometimes covering an extended period of time. Without systematic monitoring, a project manager from a civil society organisation might lose track of activities and could face multiple problems. For example, when the use of funds is not monitored during the project, one could run into overspending which would be considered unfavourable, none the least in the eyes of donors, but also in order to achieve objectives such as effectively preventing corruption in public procurement. This in turn could lead to need for additional resources or cancelling project activities all together. The former might result in donor organisations pulling out of funding Integrity Pacts, the latter could result in insufficient supervision over a procurement process with the consequence of increasing the risk for corruption.

While monitoring provides insight about what is happening during a project, evaluation aims to answer the question of why things happened as they did. Once an Integrity Pact project is completed, it is relevant to reflect on whether the objectives that were established at the beginning were, at the end, met. This is relevant for civil society organisations but also for the other stakeholders involved in the Integrity Pact (as well as donor organisations that have to justify value for money when funding civil society organisations). Learnings from such assessments can help further determining the conditions that favour effective corruption prevention in public procurement by civil society. As this study discussed in the sections above, civil society organisations are recommended to deal with internal and external considerations when designing an Integrity Pact. This for example includes determining which resources are put into a project. The Integrity Pact implementer needs to make sure to monitor whether these resources (such as funding and time) are used according to plan. Perhaps a civil society organisation could run into a situation in which fewer resources are put into the project than expected. If this is the case one could still re-allocate resources to other activities or even extend the scope of the project. As a consequence, a more favourable climate can be created to prevent corruption. Monitoring capacity input can ensure that no overspending occurs. With the resources put into the Integrity Pact project, the implementer

aims to deliver specific services or products, such as press conferences, press notes, monitoring reports etc. On the basis of the input, Integrity Pacts can have different forms of output. As an implementer it could be relevant to monitor whether the output is produced according to plan and within a specific timeframe. But while the input and output are important to consider when looking at Integrity Pacts, more important is whether these are coherent with the desired objectives. We would need to look at what the Integrity Pact aims to achieve, determine the activities that are coherent with these objectives and determine its effect. After that, practitioners might be able to filter out the different elements that favour effective prevention of public procurement corruption by civil society within their specific environment. For example, with organizing a press conference, one might aim to ensure that stakeholders are better informed on the procurement project that is being monitored. As an Integrity Pact implementer one could try to monitor during the project whether the press conference led to the desired result of better informing citizens on the Integrity Pact. If one then realizes that instead, the press only reported on possible delays of the procurement project due to whatever reason, the implementer could consider to review the way it designed the press conference in order for it to better support the objective. In other words, it allows a civil society organisation to adjust favourably the conditions to be more effective in preventing corruption in public procurement. A distinction can be made between intermediate, long-term and/or indirect change as a consequence of the activities civil society organisations undertake in an Integrity Pact. This is where it becomes rather tricky, especially when we want to attribute the intervention to desired impact. For example, on the long-term one might aim for better quality public procurement by organizing training activities of procurement officials. The impact of the training activities might not be immediately visible during the project but could become visible some time after they have been completed. At the same time, improvements of quality in public procurement could depend on multiple factors, not only the intervention by the civil society organisation through the Integrity Pact. In other words, group members to a collective action initiative might not have direct control or influence over this. As a project manager, one is not expected to be able to monitor the impact during the project, given that this often only becomes visible after a period of time<sup>532</sup>.

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<sup>532</sup> Due to the challenges in monitoring impact during the project, this element primarily is something that should be addressed through evaluation.

Nonetheless, it may be possible to identify aspects of the impact during the project, especially when a project covers multiple years.

## 2. *Integrity Pact theory of Change*

To illustrate the context in which a civil society organisation is operating an Integrity Pact this study will reconstruct a sample logic model that outlines the activities deployed in order to achieve operational, specific and wider objectives of the Integrity Pact. Developing a theory of change is a useful tool to help defining what a project aims to change. The stakeholders involved in an Integrity Pact can use the model to reflect on why they are collectively working on preventing corruption in public procurement. The process of developing a theory of change is critical for initiatives that involve multiple actors. It strengthens the need for actors to come together and discuss the monitoring and evaluation framework for impact monitoring. Going together through such a process is a way to help stakeholders to align systems and practices. On the basis of the learning reviews conducted in 2015 a model has been developed. If adapted to the EU framework for public procurement relating EU funds, the change outlines that the Integrity Pact by design bolsters objectives (such as ensuring a level playing field in order to increase quality procurement and trust in public expenditure) that address the needs of relevant beneficiaries (citizens, governments and business). On the basis of the information available on the European Commission's website, the following objectives for the Integrity Pacts could be identified<sup>533</sup>:

### **Wider objectives**

- Increase trust in public authorities and contribute to better reputation
- Increase transparency, accountability and good governance in procurement

### **Specific objectives**

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<sup>533</sup> EUROPEAN COMMISSION (n.d.). *Integrity Pacts* [WWW]. Available from: [http://ec.europa.eu/regional\\_policy/es/policy/how/improving-investment/integrity-pacts/](http://ec.europa.eu/regional_policy/es/policy/how/improving-investment/integrity-pacts/) [Accessed on 12-10-2016].

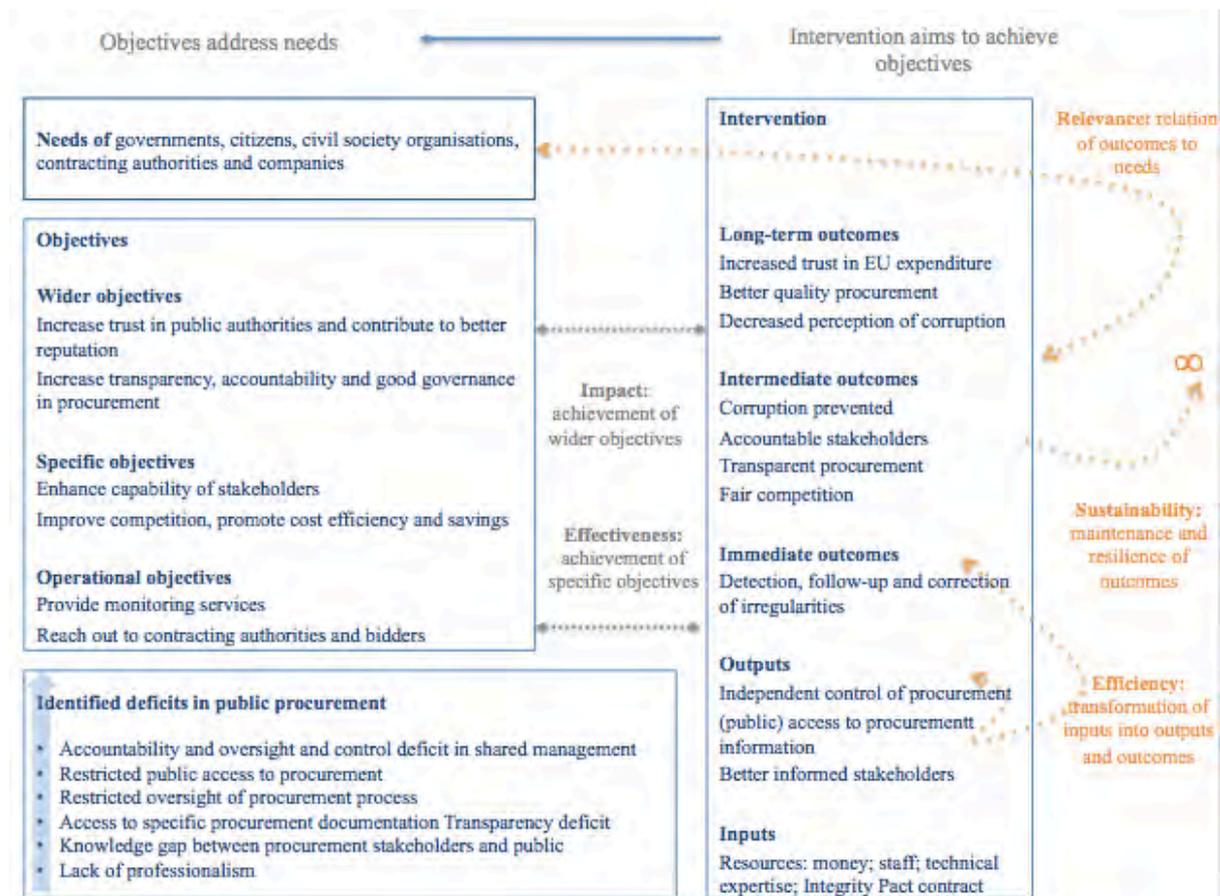
- Enhance capability of stakeholders
- Improve competition, promote cost efficiency and savings

### **Operational objectives**

- Provide monitoring services
- Reach out to contracting authorities and bidders

The objectives are to be achieved through specific interventions requiring resource mobilization (such as financial resources, technical expertise, capacity building activities) to operate an Integrity Pact. In the image below this is denoted as “inputs”. Once these resources are available, they can be used to accomplish planned activities. Generally, for an Integrity Pact this translates to monitoring, communication and project management activities. For example, for the EU project the European Commission clearly notes as activity the periodic sharing and capturing of impact, lessons learned and best practices for project partners and the broader public. Accomplishment of these planned activities should thus deliver the intended services in public procurement, providing a level of independent control, a system for public access to information and better-informed stakeholders. This in the image below is denoted as “outputs”. Once these outputs have been achieved, this can result in collective benefits to the beneficiaries. For example, effective outreach can support empowered citizens, who through increased attention to and information on the procurement process may submit legitimate concerns, generating a response from the public authorities. Such a response can result in mitigation measures in case of irregularities or concrete sanctions in case of corruption. This is denoted in the image below as “outcomes”. In the medium term, the outputs could prevent corruption, hold stakeholders accountable and make procurement more transparent. This is denoted in the image below as “intermediate outcomes”. In the long-term such outcomes could generate expected change, such as increased public trust in EU funding and less perception of corruption, or even institutionalisation of lessons learned from Integrity Pacts and overall improvement in the public procurement system. This is denoted in the image below as “long-term outcomes”.

Figure 7: Theory of change Integrity Pact

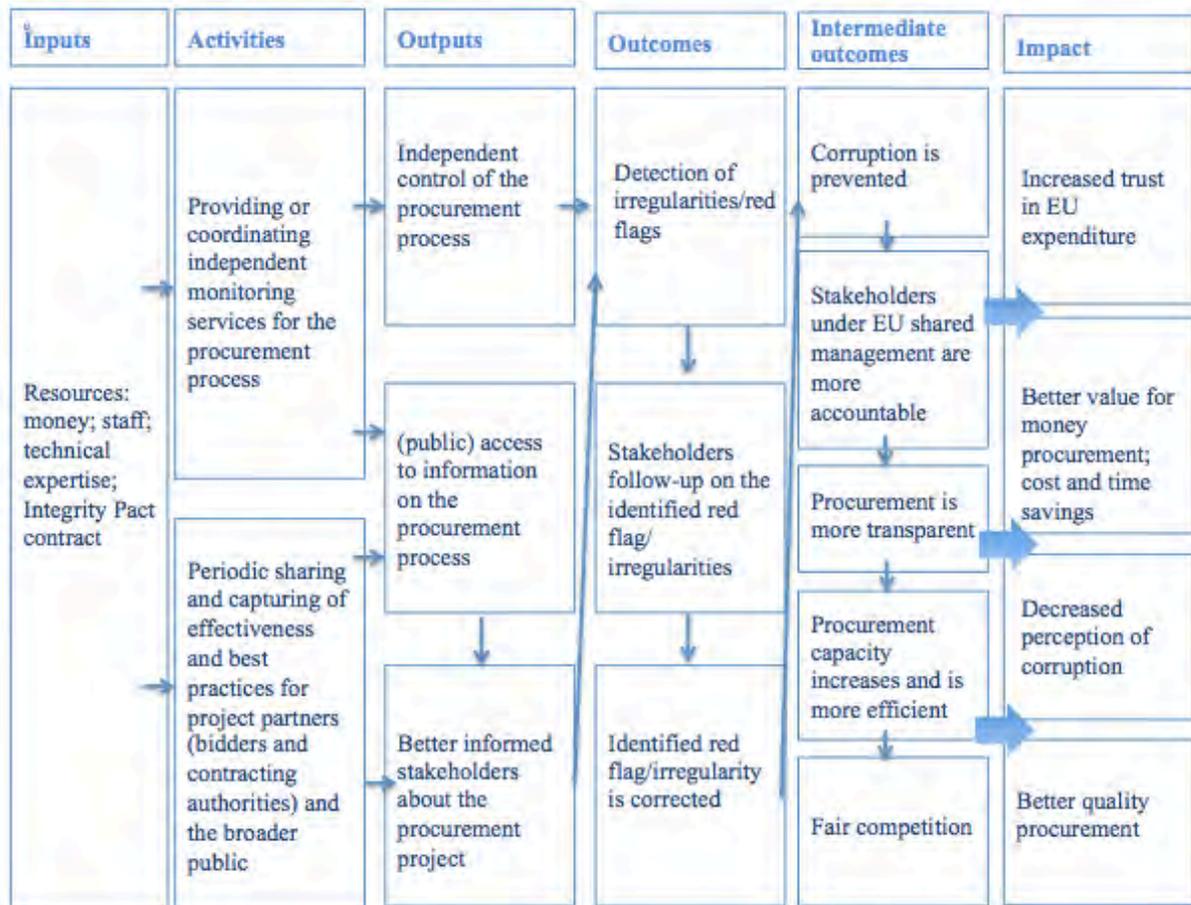


Source: own elaboration

Determining the long-term change stakeholders achieve is to an extent a bolt leap into the unknown. Long-term objectives can be challenging and ambitious but should be reachable. Civil society organisations need to consider who will need to benefit from the change, i.e. individuals, organisations, etc. Also they need to think about what will have changed such as attitudes, policies or norms. In a statement, a desired change could read: “EU citizens have more confidence in EU fund public expenditure because governments prevent corruption in public procurement through the implementation of an appropriate legal or policy framework”. The next step is to think about and map the current situation to understand in which context the civil society organisation is supposed to facilitate the desired change. What social, political, economic and cultural factors influence the change process? Which key stakeholders are involved and what are their stakes? And based on this, which opportunities for change can be identified. For example, a climate of public distrust against governments means that in order to change perception, an anti-corruption initiative should not only focus on improving procurement practices with contracting authorities but also target media. At this

stage, determining the domains of change will help a civil society organisation to organise the complexity of the ambitious goals and determine where to best intervene. The main question asked is what/who needs to change and in which way in order to make the desired change possible. For example, policy and legislative change (targeting authorities) for Integrity Pacts can include: strengthening implementation and enforcement of existing public procurement rules; developing new procurement rules; and improving processes concerning transparency, accountability and participation. In order to change public perception (targeting citizens) Integrity Pacts can focus on: better inform the public on public procurement; mobilize the public to participate (e.g. raise concerns or monitor the process) in public procurement. The following step in the thought process concerns setting boundaries and focusing on how the civil society organisation can intervene in the different domains. In other words, we can start mapping the pathways of change. A way to do this is to start with the desired long-term change and ask the question what needs to be done in order for the change to occur. In order to do so it is important to first consider outcomes. These, as opposed to long-term objectives, have a shorter time-span, which makes them reachable within the duration of the Integrity Pact. The pathways between the different outcomes are visualised below in a linear way. However, in real life this will not always be the case. This means that one has to keep in mind that the model can change and needs to be adapted in response to the situation at hand. This is particularly relevant when thinking about dynamic networks characteristic to collective action initiatives such as the Integrity Pacts. For example, to increase public trust in procurement there is need for fair competition, transparency and accountability in procurement. In order to achieve this, there is need for detection of irregularities, follow-up by those who detected it and correction of the detected irregularity.

Figure 8: Results chain Integrity Pact



Source: own elaboration

At this stage it is possible to zoom in on the Integrity Pact project contribution to achieving these different levels of change. Now the question is asked what a civil society organisation can do to contribute to these outcomes. In other words, where can one have control and/or influence to drive for change? For example, as an independent monitor of a procurement process one might have control over detection and follow-up of identified irregularities. On the correction of the detected irregularities one might have less control but influence. This arguably falls more in the influence sphere of the contracting authority. Based on this an implementer can adapt action in order to increase the likelihood of change.

## 6.2 Integrity Pact indicators of change

After determining the change process, it is key to consider which information or indicators can be collected to explain the changes at the outcome levels. Indicators could allow for monitoring systematically whether Integrity Pact implementers achieve the desired change. Deciding on indicators allows for an instrumental way to measure progress. It is not easy to define indicators, especially for a complex project such as the Integrity Pact. In fact, the wide variety of Integrity Pact projects across the globe does not lend itself to a fixed list of indicators. Instead, these can differ for each Integrity Pact project. In practical terms, when objectives are defined, one can start filling in the blanks and consider which indicators can be used to measure change. Indicators ideally should possess four qualities, they need to be: specific, measurable, available, relevant and time-bound. For each defined indicator, a project manager should ask the questions:

- Does the indicator provide a measurement that describes progress as closely as possible?
- Can the indicator be quantified?
- Is the information for the indicator available?
- Is the indicator relevant for us and/or the stakeholders?
- Can we specify at what moment the indicator target has been met?

The most common indicators can be divided in the following categories: input indicators; output indicators; result indicators; and impact indicators. Input indicators provide a measurement of progress in the use of input and are normally measures in monetary units (e.g. EUR) or units of staff time (e.g. working days). Output indicators are normally directly related to a specific activity. Result indicators are often more qualitative of nature and aim to quantify the realisation of immediate objectives. The impact indicators measure progress in achieving wider objectives and normally quantify socio-economic development. Once an Integrity Pact project finishes, one could assess whether the changes were reached. The main focus is at this stage on the longer-term and or wider objectives. As mentioned above, an evaluation looks beyond what has happened during the project, which to a large degree can be seen through monitoring. Evaluation assessments ask why activities have or have not progressed and why some were more successful in reaching objectives. Such findings will help civil society organisations to decide on future projects but also could help us to determine better in the future which conditions favour effective prevention of corruption.

Evaluations look at different aspects of the project. In general they address five different aspects: relevance, efficiency, effectiveness, impact and sustainability.

The reason to look at all the evaluation criteria is that this provides a comprehensive overview of the outcomes of Integrity Pacts. This can form the basis of the evidence needed to determine for a collective action initiative the favourable conditions that effectively allow civil society organizations to prevent corruption in public procurement.

Relevance of a project refers to the relationship between needs that were identified during project identification and the actual project results and impact. In other words, an evaluation seeks to find out to what extent the results and impact have contributed to improvements in relation to the needs of the group members to the collective action initiative. For example, one would have to assess whether an Integrity Pact has contributed to better following-up on detected irregularities. An indicator would be the extent to which Integrity Pacts have detected irregularities as defined in the Integrity Pact agreement such as bribes, kickbacks, gifts, facilitation payments, collusion, bid rigging etc. Another indicator could be the extent to which Integrity Pacts detected risks of corruption in public procurement. The challenge with determining this as an indicator is determining by the judgement criteria. After all, an Integrity Pact that has not detected any irregularities could mean that corruption was prevented and therefore it was a success. On the other hand, not detecting any irregularities does not mean corruption has not taken place considering that corrupt acts often go unnoticed. Also the success of detection of irregularities depends largely on the ability of the integrity monitor to detect irregularities.

Efficiency relates to the relationship between input against output, results and impact. The main efficiency question is whether the same output could have been reached with less input. For example, is it possible to organise more press conferences with less resources. Effectiveness looks at how output was translated into results and impact. The first questions that should be raised is whether the set result and impact targets were achieved and if not, why? At the same time, one should ask the question whether with the same output more results and impact could have been achieved. For example, the question here is whether the press conference resulted in better-informed stakeholders on the procurement process? In addition one could ask the question whether a different format could have been more

effective in informing stakeholders. Subsequently, one could look at the wider impact of the Integrity Pact project as well as any unforeseen positive or negative consequences. In the case of an Integrity Pact one could for example look at whether the better-informed stakeholders have changed the perception of corruption in public procurement. This is a tricky exercise given that such impact is often not immediately visible, perhaps only after a period of time. At the same time, as mentioned above, such data can most likely not be collected from the monitoring data. In other words, we need to establish impact on the basis of additional research.

The following sections present objectives, indicators and judgement criteria that could support the measurement of effect of an Integrity Pact on the basis of the approach presented in this study.

### 6.2.1 Value for money

With objectives to achieve high value for money in a procurement process through efficient public services, a civil society organisation could determine various different indicators. For example, measurement of value for money could be done in percentage of cost savings between the estimated project budget and the final expenditure. Or one could measure the percentage of acceptable over-expenditure. Respectively, the judgement criteria would then be that cost efficiency has been met when there is an observable reduction in incurred costs relating the procured work, good, or service, compared to the original costs foreseen. Or, cost efficiency has been met if over-expenditure does not exceed a certain percentage of the planned budget. Both are difficult indicators to use because the attribution of the Integrity Pact to the cost savings is difficult to establish. Various reasons could be given for cost differences between planned and actual expenditure. If cost saving are identified, the question is raised whether they could relate to other factors such as greater competition brought about by a certain change in government policy. If over-expenditure is identified, this could reflect on the perceived success of the Integrity Pact while this instead could be the result of poor planning prior to the project.

From the global and European reviews it showed that monitors had difficulty capturing all potential contributions mainly due to lack of setting baseline information. It was therefore recommended that civil society organisations could select those budget lines that have deviated in past procurement projects. Such information could be identified in past audit

reports or support could be requested from audit authorities. One approach could be to select specific budget lines and monitor those expenses. Standard unit costs exist for specific goods and works, i.e. the price of 1km of highway or standard costs for providing training. This could form the basis of the validation of this indicator.

Another indicator to measure value for money could be to look at the difference between the number of weeks intended and actual duration of a procurement process. Efficiency could be met when the expected duration does not exceed a certain number of months. When looking at whether the judgement criteria have been met, civil society organisations might be confronted with situations in which delays are the result of a number of different reasons. For example, this could be affected by political instability or conflict during the procurement process, or simply just due to poor planning. While the Integrity Pact may reduce delays due to conflicts between stakeholders in the procurement process, it may not have the capacity to influence more external conditions such as political instability. Civil society organisations should be aware of this and try to capture all potential contributors, internal and external. For example, a civil society organisation could select a specific phase of the procurement process, for example the bidding phase. External factors which are difficult to influence are of less importance here considering that time periods are often established by law. One could set specific indicators for the decision speed, i.e., timeliness is achieved if a decision on the award has been taken within 120 days.

Two other possible indicators to achieve value for money could be the use of e-procurement as well as the use by contracting authorities of cost estimation models. In operational terms, a criteria could be met when the contracting authority processed a cost estimation before the tender was issued, when the contracting authority used forecasting methodologies to estimate costs, and when the contracting authority uses electronic integrated procurement and finance systems to forecast the budget. The mere fact that the contracting authority processed, following the official channels (i.e., procurement regulation or guidelines) and used a cost estimation could be an indicator for efficient procurement. The same for using forecast methodologies.

### 6.2.2 Trust

The objective to increase trust in public procurement processes is arguably a very important element of the Integrity Pact. A possible indicator to measure this would be to assess the

change in the public view on the level of cleanliness of the procurement process. This could be achieved when the perception of cleanliness improves between the start and finish of the procurement process. The contracting authority clearly could benefit from this and use the civil society organisation as a tool to improve the perception. Participating in an Integrity Pact already demonstrates commitment to making change, which could influence perception. Measurement could look at the public statements made by the authorities in support of the Integrity Pact efforts by contracting authorities and civil society organisations. Another way to measure this could be by looking at trust levels. Obviously this is less straight forward but if an Integrity Pact implementer sets clear baselines at the start of the project by asking how citizens feel about the contracting authority and on what basis, this information can be assessed after the project and compared. One way to do this is by surveying citizens directly affected by the public procurement or consulting a membership database of worker unions.

Trust from the private sector can be measured by looking at the appeals in procurement processes. This would translate in trust being achieved among bidders when no appeals are issued during the procurement process. Additionally, the indicator can be used of satisfactory resolution of disputes between the parties to the Integrity Pact. This is achieved when disputes are handled in a satisfactory manner.

### 6.2.3 Social accountability

A key interest of the European Commission is to enhance social accountability in the use of EU funds through procurement. The way to measure whether this is achieved could be by looking at changes in which stakeholders challenge procurement practices (such as irregularities and corruption). The judgement criteria would be that stakeholders challenge the procurement process in relation to transparency, accountability and integrity related issues. With stakeholders, the emphasis should be placed on those that normally are not directly part of the Integrity Pact, such as citizens. After all, the idea of the Integrity Pact is that procurement is held accountable beyond the small group of procurement officials and bidders. In a way, this objective aims for raising awareness among “principles” to become “principled” about the way the authorities are spending EU funds.

Another measurement indicator that could be used to determine enhanced social accountability is by looking at the existence and use of complaint mechanisms. Enhanced social accountability is achieved by the presence of a complaint mechanism or when

complaints have been received and handled. The existence of a complaint mechanism allows for civic engagement. The effective use of the complaint mechanism allows for changing the public perception but can also lead to systemic changes in public procurement.

Social accountability can also be achieved by the establishment of civic coalitions as a response to procurement activities. Integrity Pacts could facilitate the forming of civic coalitions, such as neighbours united to scrutinize the procurement project to build a new highway. Finally, social accountability can be achieved when official data requests are made by journalists and citizens concerning the procurement project. The way in which civil society organisation could operate is by increasing visibility of the procurement project which generates more media attention which could result in journalists requesting data from the authorities on public expenditure, i.e. list of contract awards, etc.

#### 6.2.4 Monitoring and transparency

As put forward by the European Commission, part of the EU project's activities will include training and enhancement of knowledge of the relevant stakeholders, such as, contracting authorities, managing authorities, economic operators, on anti-corruption and transparency measures in the context of the Integrity Pact approach. Increased awareness as an objective for the Integrity Pact could be measured by coverage of transparency, accountability and integrity related issues in procurement regulations and guidelines. The judgement criteria for the coverage of these elements could be that corruption risks are less due to existence of a code of conduct that informs officials and businesses on corruption risk scenarios. Another indicator could be the awareness of risks, which could be achieved when awareness of risks is high due to training of procurement officials and businesses on corruption risks. More straightforward could be the judgement criteria that awareness of risks is ensured when a certain number of officials or businesses are trained per year.

Another objective highlighted in this study is the aim to decrease incidence of corruption and mismanagement risks. The indicator to measure this could be the number of detected irregularities, such as: bribers; kickbacks; gifts; facilitation payments; collusion; bid rigging, etc.. This can be confirmed when corruption risks are decreased due to absence of irregularities or when corruption risks are decreased due to the fact that scandals/irregularities have been detected, investigated and sanctioned through the Integrity Pact.

In terms of transparency, the objective to increase this for public procurement processes can be measured by looking at improvements in terms of the volume and type of information proactively made available on the public procurement project. This is achieved when more information is provided than by law required.

### 6.2.5 Level playing field

A key objective in relation to the EU Single Market could be the increased competition between bidders. An indicator to measure this could be the average number of bidders participating in each procurement process. Increased competition would be achieved when more than a certain number of bids are submitted or when (a certain number of) foreign bidders participate. The competition in procurement can be measured by looking at the number bidders participating in a bid. If more bidders participate in a tender process the competition increases and a level playing field is enhanced. This could result in increased trust in fair competition. More bidders also could lead to lower public expenses, which will improve value for money.

Another indicator for to measure increased competition could be by looking at whether the bid evaluation committee is independent and professional. This implies that:

- Competition is increased when the evaluation committee is selected based on criteria established in advance;
- Competition increased when controls are in place to exclude the involvement of bidders in the evaluation of the bids;
- Competition increased when bids are evaluated based on guidelines containing evaluation criteria;
- Competition is increased when external evaluators are used to evaluate technical offers.

A range of rather simple indicators are possible when looking at objectivity of the bid evaluation. The idea is that this objectivity ensures that fair competition takes place. It also leave less room for corruption.

### 6.2.6 Heuristics and norms

Changes in standards, policy and legislation could indicate that the Integrity Pact achieved better procurement standards, processes and practices. This can be determined:

- When Integrity Pact activities are included in the internal oversight mechanisms of contracting authorities;
- When codes of conduct are established including corruption risk scenarios;
- When whistleblowing channels are included, including protection of whistle-blowers.

The Integrity Pact project might focus on one specific procurement process but here the stakeholders could aim for change in the way officials and companies participate in a process. Within the existing regulatory framework, the Integrity Pact could aim for the promotion of best practices. Also, the Integrity Pact can break through information asymmetries that might exist in relation to the participating stakeholders.

Another indicator in relation to the objective to better procurement standards, processes and practices is the improvement in the adherence to and enforcement of laws and policies. This could be achieved when:

- Corruption practices identified through the Integrity Pact are criminalised;
- Detected irregularities through the Integrity Pact are investigated and prosecuted by the relevant authorities;
- Suspected corruption through Integrity Pact results in the cancelation or suspension of the procurement process;
- Detected irregularities are sanctioned by the administration.

Also changes in institutional capacities could be an indicator of better procurement standards. Such changes directed at the promotion of transparency, accountability and integrity could be achieved:

- When additional resources are allocated to procurement processes;
- When audit activities are expanded to more process assessment activities.

The objective to better procurement standards, processes and practices does not limit itself to contracting authorities. The alignment of interests to better results of public expenditure also touches upon companies. Changing standards, processes and practices in businesses deals with better corporate governance. This can be achieved:

- When whistle-blower mechanisms are adopted, promoted and used (internal or external mechanisms);
- When compliance systems are installed.

Both the changes in the contracting authority and in business can in the medium-long term improve the quality of public procurement.

## 7 Conclusions

This chapter presents the main findings of this study. The first section reflects on collective action for corruption and EU public procurement. The second and third sections present the main findings from the Integrity Pact multi-case study analysis, followed by the reflections on the integrated approach for the Integrity Pact to prevent corruption in public procurement. The final section presents steps forward for the Integrity Pact for EU procurement.

### 7.1 Reflections on collective action for corruption and EU public procurement

Corruption scandals often point to bribed-elected officials or embezzling civil servants. However, the reciprocity that characterises corrupt transactions also implies that someone paid or offered the bribe in exchange for a favour. It is therefore also important to look at the supply-side of corruption, often embodied in the form of corporations and its workers. In line with the definitional problems when describing corruption, or measuring the scale and determining the methods of corruption, also different research perspectives aim to explain the causes of the phenomenon.

This study discussed first social processes leading to corrupt behaviour. In particular it highlights the individual, organisation, and network, but also reflected on the social actor's structure or location such as its occupation (e.g. businessman or public official) and institutional environment (e.g. company or public authority). Secondly, this study discussed the dominant principle-agent approach to studying corruption, and how research suggests that strategies based on the principle-agent theory failed to address serious forms of corruption. Instead, the debate shifted pointing to corruption as a collective action problem. Subsequently, the study reflected on the related collective action theories that refer to systemic corruption scenarios in which “principles”, that should supposedly control the agent do not and can share in the proceeds of corruption or are simply indifferent about the issue. This lack of normative constraints, which normally should endorse ethical universalism and monitor and prevent deviation from the norms, implies that existing societal norms do not work. Instead, with the lack of “principled principles”, particularism creates a scenario in which allocation of public resources is based on a connection between the one in power and the one receiving the public goods.

While the shift from principle-agent to collective action theories to explain the causes of corruption focuses on elements of incompatibility of the approaches, this study argued that in a EU context the two approaches are not incompatible, especially when aiming to address corruption as a cross-border problem. It is safe to say that the diversity in the EU makes that there is no one-size-fits-all solution to corruption. However, anti-corruption measures based on principle-agent might work for some countries or sectors suffering less political corruption, while collective action initiatives are more adequate for others suffering more systemic forms of corruption.

This study supports the hypothesis that the structure for EU funding poses corruption challenges in public procurement for EU Member States that can more effectively be addressed through collective action. This study identified various elements pertaining to the EU context.

1. First of all, political and economic integration of the EU increased competitive pressure, both for companies and political parties. The economic (general) strain theory discussed in this study shows how corporations resort to criminal behaviour under economic pressure in a climate of competition. Apart from the need to economically perform to survive, strain theory also explains more emotional decisions that drive criminal behaviour, for example when companies resort to crime due to stress they experience from competitors. This study supports that such a scenario is present when looking at the integration of the EU single market and economic differences between Member States. In line with the market integration, the EU developed an extensive procurement legislative framework, providing for provisions to prevent corruption and enhance transparency. This study argues that the comprehensiveness of the EU legislative framework generated competitive pressure on the procurement market in Member States, particularly affecting local businesses that can face competition from foreign companies. Increased competitiveness is suggested to motivate local politicians stop seeking (predatory) bribes from local companies, in order to allow them to remain in competition and employ voters and pay tax. However, this study discussed that weaknesses in the EU's accountability structure as well as the different attitudes towards corruption in Member States have a counter-effect on the normative constraints.
2. Secondly, the theory of anomie discussed in this study supports in understanding why attitudes towards corruption differ between EU Member States. EU political and

economic integration increases competition and associated societal situations in which material success is promoted but means to achieve this are not equally accessible for all. As a consequence, some pursue material success through criminal behaviour. For example, this has been observed for former Soviet states in Eastern Europe that made the transition from communism to free-market based economies. More recent history can be the enlargement of the EU with 13 more Member States since 2004. The adoption of the European *acquis communautaire* and the associated societal and political change in new Member States resulted in a EU with significant differences in terms of economic and governance levels between the countries. Arguably, while corruption in the original 15 Member States could be conceptualised on the basis of the principle-agent theories, in the newer Member States the problem would be more of a collective action nature. Hence, in the EU the problem of corruption is still significant, despite decades of anti-corruption measures. This can be supported by the fact that cross-border procurement as part of the EU single market has not materialised in practice.

3. Thirdly, concerning the accountability structures of the EU, this study argued firstly that the effectiveness of the EU's procurement legislative framework primarily depends on the implementation on the Member State level. This can be particularly illustrated by looking at the European Structural and Investment Funds. The Member States have delegated to themselves management of the funds. In the words of the principal-agent theory, the principles (the Member State) are for a large portion also the agents. At the same time, the Member States also manage the regulatory structure. At the foundation of this arrangement lies the debate on the difficulty for Member States to sign away sovereignty to European institutions and procedures that should have the power and resources to address corruption. On the national level one could add a political establishment that might be concerned about international competition and not necessarily willing to strengthen their own institutions to fight corruption. The EU has a governance structure that is different from normal, includes many different attitudes towards corruption, and does not necessarily promote free-market principles in all sectors. From a rational-choice point of view, Member States would rely on the EU institutions if by doing so they can promote their own interests. However, this is provided that there are rules to punish non-cooperative behaviour. From the perspective of the collective action theories, countries would in principle never agree to cooperate and delegate sovereignty if there was no way of detecting and punishing non-cooperative behaviour. In such a scenario, it would only be rational for states to agree to a European regime if the benefits of organisation would

outweigh the risks of others cheating or if the state sees benefits in cheating others. In other words, Member States could see fraud and corruption as a marginal cost compared to the benefits from participating. However, at the same time one must keep in mind that the benefit could actually be the corruption itself. This scenario combines principal-agent dilemmas but also collective action problems. The EU can be described as an organisation playing to host various principal-agent relations, for example when assuming the Member State as principles and the European Commission as agent. However, the EU funds show that Member States have largely delegated management to themselves, making them the principals and agent. This in itself generates opportunity for corruption. Member States, in other words can free ride on the EU because the damage is dispersed across all members, while gains are country-specific.

4. Finally, this study concluded that while challenges to ascertain the scale and impact of corruption in EU procurement remain an obstacle to determine the effectiveness of any anti-corruption measure, its potential damage does legitimise looking into the role civil society could play in preventing corruption in public procurement. From the outset of the transparency provisions for EU fund shared management, it is clear that the European Commission has limited control over spending of the funds in the different Member States. This supports the relevance to explore the role of civil society in the control of public procurement of European Structural and Investment Funds through the Integrity Pact. The Integrity Pacts include key criteria for anti-corruption in public procurement, such as transparency, professionalism and accountability. The aims of the Integrity Pacts fall in line with public procurement objectives applied in the EU, namely ensuring a level playing field for all actors, and ensuring value for money by avoiding corruption.

To conclude, businesses in endemically corrupt business environments face the challenge that the company most likely to pay a bribe has an unfair advantage over those that do not resort to such practices. A common response by businesses is denying responsibility by claiming that: “if we do not bribe, someone else would”. The Integrity Pact embraces the neutralization techniques used by companies to resist tackling the problem of corruption. Companies are facing dilemma scenarios and risk ending up empty-handed when being the one deciding to conduct clean business while their competitors continue bribing. On first sight, the choice of the European Commission to use the Integrity Pact as a tool seems to target various elements of interest for the EU:

- The tool targets an area vulnerable for corruption, namely EU public procurement which affects a large part of EU expenditure and over which the European Commission has limited control.
- It targets businesses that can be disproportionately affected by corruption such as small and medium enterprises, which are specifically targeted through the EU public procurement legislative framework.
- The Integrity Pact aims to promote best public procurement practices, which could help harmonising the implementation of EU public procurement measures across the EU Member States.
- It aims to ensure an equal level playing field for businesses, which could ensure more cross-border public procurement activity and this way complete the functioning of the Single Market.
- The tool can be used on different business sectors, on different governmental levels and across regions.

The main challenge, however, is that the effect or impact of collective action initiatives is difficult to determine and that collective action initiatives particularly fair well in endemic corrupt environments. Despite that collective action initiatives can also be used in non-endemic corrupt environments; the question asked is which conditions favour the effective use of the Integrity Pact.

## **7.2 Reflections on the Integrity Pact main take-away**

From the multiple-case study analysis various lessons can be drawn. The following section will sum up the main take away from the review of the Integrity Pacts, both on the global and European level.

The analytical framework to analyse the role of the monitor to prevent corruption in public procurement through collective action started with a contextual analysis or defining of initial conditions. On the basis of the context in which Integrity Pacts operate, this study subsequently looked at the collective action arena of the tool. This is where the collective action experiences take place, where decisions are made and corruption is prevented. The Integrity Pact as a collective action model on first account seems to cover elements essential to dealing with collective action problems. The contextual analysis supports collective action

views that it is in the best interest of individuals in the group to act collectively towards shared objectives, which lies at the core of the Integrity Pact multi-stakeholder approach. The study also pointed out that elements of the Integrity Pact aim to overcome the temptations of short-run self-interest through reciprocity, reputation and trust, in order to build conditions to allow individuals to achieve results that are better than rational. The sanctions available in the Integrity Pact give impetus to groups to achieve suboptimal results and function as deterrence through the commitment to punish those that do not adhere to the Integrity Pact. The question is to what extent the Integrity Pact performs in those elements. By looking at a set of variables, such as trust and reputation, heuristics and monitoring and transparency, the study aimed to test on the basis of the case studies the hypothesis that an independent monitor, in form of a civil society organisation in the Integrity Pact, can play an effective role in the prevention of corruption and enhancing of transparency in public procurement.

### 7.2.1 Governance and economic context

The study discussed how the context includes external factors that the group members of the collective action initiative face, as well as, other conditions relating resources and assets, sources of vulnerability, legal structures and power relations. On the basis of the multi-case study analysis, this study showed that the decision to introduce an Integrity Pact is not determined by the economic classification of a country. Instead, this study showed that governance indicators play a more important role with most countries that have implemented Integrity Pacts, also experiencing weak governance. The outliers identified in this study, meaning those countries that have implemented Integrity Pacts within a context of high governance indicators, can be explained by external factors such as corruption scandals that drove the introduction of the Integrity Pact. This study also finds that some level of governance effectiveness is needed in a country in order to implement the tool. This is supported by the fact that Integrity Pacts have been introduced in countries that, while not performing by governance standards, do not necessarily belong to the worst performers. This study found overall that the governance and economic indicators could provide insight into the operating environment of the Integrity Pact. However, from the economic and governance context it is not certain which prerequisites might influence success of the Integrity Pact.

### 7.2.2 Prevention of corruption

The case studies have shown that implementers of Integrity Pacts determined success in prevention and detection of corruption by either the absence of irregularities and/or the fast identification and resolution of irregularities. However, taking stock of both these elements has been difficult due to limited monitoring and analysis of Integrity Pact activities and outputs by the different stakeholders implementing the tool. Instead, the analysis of the cases suggests that stakeholder rather rely on subjective information on the prevention of corruption. For example, contracting authorities argue prevention of corruption due to intermittent feedback from companies/suppliers, or the fact that no major problems had emerged during the procurement process. This study cannot with certainty claim that due to lack of irregularities or scandal, corruption did not occur. This is also supported by the civil society organisations/monitors consulted for this study, whom admit it is possible that corruption did take place outside their view. On the basis of this, Integrity Pacts shift their focus on the improvement of procurement governance as a whole. This translates into:

- Integrity Pacts ensuring that procurement is done according to the law;
- Integrity Pacts promoting best practices for procurement.

As a result, in practice, Integrity Pacts focus on finding a solution to identified irregularities or risks in procurement practices. Once these are mitigated, Integrity Pacts can ensure that these do not recur in the future. In practice this translates into monitoring activities focused on tangible elements of the procurement project, such as vulnerabilities discussed in this study. These do not necessarily point to corruption but do present a framework in which corruption risks are prevented and if detected, addressed. It functions as a sort of “early warning system”. While this allows contracting authorities to address issues before they manifest themselves, at the same time it fosters a culture of compliance and in time creates a “culture of integrity”.

### 7.2.3 Integrity Pact monitor

This study finds that an independent monitor, in the form of a civil society organisation through the Integrity Pact, can play an effective role in the prevention of corruption and enhancing of transparency in public procurement. Three conditions are predominantly important for this: the monitor requirements, monitoring arrangements/activities, and the selection of the monitor.

Concerning the monitoring requirements, this study has found:

1. That independence of the monitor is important to deliver objective and quality work. The work needs to be performed independently but should also be perceived as such by all stakeholders. Monitors in the eyes of Integrity Pact practitioners need to have a spotless reputation in order to ensure that their activities are credible.
2. That legal procurement knowledge, or expertise, is needed for monitors to understand and anticipate weaknesses in contracting processes. Technical knowledge is needed when monitoring a project in a specific procurement sector.
3. That monitoring activities require time and resources, including a high level of commitment. Sufficient capacity should be assigned to effectively conduct monitoring especially given that procurement rules can set specific timelines.
4. That the monitor should be accountable to the civil society organisations as well as to the bidders, contracting authorities and to the public. Ensuring this “fourfold” accountability to stakeholders, with different and sometimes opposite interests, is difficult to operationalize. Such difficulties need to be emphasised when designing the Integrity Pact. This is why this study finds that monitors need to be practical and have a constructive mind-set.
5. That the repeated interaction between stakeholders are set in formal legislative processes, i.e. the bidding phases, or less formalised processes such as contract implementation phases. Within the formal procurement framework and the less formal contract implementation framework, parties to the Integrity Pact have a degree of manoeuvrability. This study finds that this manoeuvrability is in itself a risk area for irregularities and therefore subject to monitoring. A practical monitor understands these processes and thinks with the parties to the Integrity Pact.
6. That outreach to the public is a key Integrity Pact activity and that therefor the monitor should have communication skills. In general, outreach activities are conducted by the civil society organisation. However, the monitor can play a key role especially when drafting and presenting the periodical monitoring reports.

Concerning the implementation arrangements and monitor activities, this study has found that:

1. Monitors conduct a wide variety of activities from review of documentation and participation in meetings/inspection to internal and external communication activities. The activities of monitors in the Integrity Pact are either on-site (e.g. attending

meetings and visiting building sites) or off-site (e.g. documentation review). Information reaches the monitor either through push (e.g. copied in all correspondence between the bidders and contracting authority) or pull (e.g. correspondence on the basis of request to the contracting authority) arrangements. This study finds that pull arrangements do not necessarily enhance trust of the monitor in the procurement process. Push arrangements allows for complete transparency and suggests to enhances trust between parties to the Integrity Pact. However, this study suggests that a combination between the two arrangements is preferred because it enables monitors to selectively monitor in light of the limited resources available to civil society organisations.

2. That monitoring teams consist of in-house and external experts, depending on whether civil society organisations can meet the required skills discussed earlier in combination with the financial capacity. An important approach identified in this study is that combined teams of monitors can play a proactive approach in monitoring the Integrity Pact. This approach suggests that activities of mixed teams expand beyond the formal anti-corruption objectives of procurement and also include transparency and value-for-money objectives.
3. That in terms of frequency and intensity of interaction, the degree of direct contact with the procurement stakeholders varied. The study suggests that the relations between the contracting authority and monitors are most frequent and intense due to the fact that the civil society monitors predominantly focus activities on the bidding process. Frequency and intensity of interaction with companies increases primarily during the contract implementation.
4. That the strength of the civil society organisation is to communicate the activities and findings of the monitors to the public. The main added value of the organisation is the capacity to translate technical information to more accessible language, and the access to the public.
5. That civil society organisations take up large part of the management of the Integrity Pact. This sometimes includes monitoring the project (meaning Integrity Pact) implementation and documenting activities. Mostly this concerns the management of the external monitors. If needed, it has shown that civil society organisation can also protect the external monitors from possible pressure or obstacles they might face.

Concerning the selection of the monitor, this study finds:

1. That on the basis of the economic and governance conditions in a country it can prove difficult to identify a suitable monitor with the requirements needed. Ensuring good reputation is difficult in a country with weak governance. Also, the procurement project can be of such a nature (i.e. size or sector-specific) that in a country only few people have the capability to monitor a specific procurement project.
2. That national or foreign monitors can be selected. The collective action initiative can benefit from an international angle in some contexts, i.e. countries with very weak governance, but should ensure local ownership in order for the initiative to be successful.
3. That civil society organisations struggle with defining the workload for monitors. This exposes civil society organisations to the risk of under-budgeting with the consequence of not being able to effectively conduct activities up until the project closure. A safety mechanism applied by civil society monitors is relying partially on in-house staff. In addition, civil society organisation adapt the level of monitoring to the resources available.
4. A possible way to avoid the risk of missing out on important moments in the procurement process is to assess *ex-ante* where to direct monitoring efforts. This study finds that monitoring intensity can be determined on the basis of a risk assessment. This can identify the key areas for concern and allow monitoring to be most effective, as long as activities span the entire procurement process.

### **7.3 Reflections on an approach for the Integrity Pact**

The case study analysis shows that the Integrity Pact is not considered a one-size-fits-all approach. The tool has shown results in different context from an economic, legal and governance perspective. This study in particular highlighted the importance of the monitor in allowing the tool to be used under different conditions. It has to be noted that the flexibility of the tool arguably has its limits. For example, the effective functioning of an Integrity Pact can be influenced by the complexity of the procurement process, number of contracts, number of companies involved, sectorial specifications and monetary size of the procurement.

This study has looked at the Integrity Pact experiences in terms of effectiveness. As a consequence, the study looked at multiple units of observation and analysis. It was noted in this study that translating this into a corruption prevention approach is challenging due to various reasons. Firstly, collective action is a dynamic process that deals with social relationships. Establishing indicators that allow for measuring effectiveness should take into account that Integrity Pacts differ over time, across cultures, between government levels, etc. Secondly, the different methodological approaches used by social science disciplines complicates designing an integrated approach. This study attempted to include different disciplines by looking at more traditional economic analyses that focus on incentives of individuals to participate in collective action within institutional settings, as well as sociological approaches which look more at behaviour of groups and how action is motivated through social networks and organisations.

The multi-case study analysis has shown that Integrity Pacts have been designed and implemented by different civil society organisations, contracting authorities, companies, involving different donor organisations, procurement projects, market sectors, etc. Today, a key question posed is how to inform policy-makers on the best ways to scale-up the use of the tool on the basis of past learnings. This study therefor presented an evaluation framework in order to shape an approach that would support the implementation of the Integrity Pact tool on the EU level in order to prevent public procurement corruption. The choice for an evaluation framework as an approach to prevent corruption in public procurement is primarily based on the need for a flexible tool that can be adapted to the contextual conditions in which an Integrity Pact can be designed. While the development of this approach in this study is based primarily on findings from looking back at the experiences of the Integrity

Pact, the objective is that by using this approach data will be more systematically collected in the future and help civil society organisations, donors, and academia to better assess in the future the effectiveness of the Integrity Pact as a collective action tool. This report presented a sample theory of change, as well as a reflection on various indicators in order to measure effectiveness and impact. Developing a monitoring and assessment framework could support the implementation of the Integrity Pacts and strengthens also the evaluability in order to be able to measure results and impact more accurately. Monitoring is primarily a management tool, which helps those that implement Integrity Pacts to regularly check progress against plans. It allows the implementers to follow project activities at all times and ensure that these are implemented in line with available resources. Monitoring can help the stakeholders to detect, in an early stage, problems relating the implementation of the project and mitigate these. Above all, monitoring can support the achievement of expected output, results and impact.

#### **7.4 Reflections on the Integrity Pact for EU procurement**

To conclude this study, this section will take a first look at the EU pilot Integrity Pact project that initiated in 2015. This section will also include reflections for future research and concrete recommendations.

The project includes eleven EU Member States of which only Romania and Bulgaria are considered upper middle-income countries and the rest high-income countries. This shows that also for the selection of these countries, the economic classification does not determine whether an Integrity Pact would be relevant. This is different when looking at the governance indicators. The colour coding used reflects that of the percentile ranking<sup>534</sup>. This indicates the country's ranking among all countries covered by the aggregate indicator with 0 corresponding to the lowest score and 100 to the highest score. From the table below it is clear that those countries participating with Integrity Pacts in the European Commission's pilot project also experience most governance problems.

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<sup>534</sup> Note that the colours used in line with those used by the World Bank. Dark colours imply better scoring on WGI and light colours indicate lower governance scores.

**Table 8: European Union Member States governance indicators**

Country Name	Rule of Law	Voice and Accountability	Regulatory Quality	Government Effectiveness	Control of Corruption
Participating countries in the EU project “Integrity Pacts Civil Control Mechanism for safeguarding EU funds”					
Hungary	66,8	66,0	74,0	71,2	61,1
Greece	63,9	68,5	65,9	63,9	53,8
Italy	64,4	77,3	73,6	69,2	57,2
Czech Republic	82,7	78,3	81,3	81,7	67,3
Portugal	83,7	83,7	79,3	86,1	79,8
Slovak Republic	69,7	75,4	75,5	75,0	62,0
Romania	61,1	61,6	72,1	51,9	57,7
Poland	76,4	80,3	80,3	74,5	70,7
Lithuania	81,3	75,9	88,0	85,6	70,2
Latvia	76,0	72,9	81,7	84,1	68,3
Slovenia	80,3	74,4	72,6	77,4	76,4
Bulgaria	52,9	61,1	71,2	62,0	48,6
Non-participating countries					
Belgium	88,9	94,1	87,5	88,9	90,9
Cyprus	81,7	79,8	80,8	81,3	80,3
Denmark	99,0	97,5	94,7	97,6	98,1
Finland	100,0	97,0	98,1	96,6	99,5
Ireland	93,3	92,6	97,6	91,3	91,8
Germany	92,8	95,6	93,3	94,2	93,3
France	88,5	86,2	83,7	89,4	88,0
Estonia	86,5	85,2	92,8	83,2	87,0
Croatia	62,5	64,5	64,9	71,6	63,5
Austria	95,7	94,6	91,3	90,4	90,4
Luxembourg	96,2	96,6	93,8	93,3	96,6
Netherlands	97,1	98,0	96,2	97,1	94,7
Spain	78,4	78,8	75,0	85,1	69,2

United Kingdom	93,8	92,1	98,6	93,8	94,2
Sweden	99,5	99,5	97,1	96,2	98,6
Malta	84.1	85.7	84.6	76	79.3

Source: own elaboration with data from WGI

Also when looking at the CPI scores, clearly countries ranking poorly in the EU participate in the pilot project. From the CPI viewpoint, four out of eleven participating countries rank below 50 indicating levels of systemic corruption. The other seven countries also show concerning levels of corruption according to the CPI.

**Table 9: European Union Member States corruption perception**

EU Member State	Corruption Perception Index Transparency International (2015)
Participating countries in the EU project “Integrity Pacts Civil Control Mechanism for safeguarding EU funds”	
Portugal	63
Poland	62
Lithuania	61
Slovenia	60
Czech Republic	56
Latvia	55
Hungary	51
Greece	46
Romania	46
Italy	44
Bulgaria	41
Non-participating countries	
Denmark	91
Finland	90
Sweden	89
Netherlands	87
Germany	81
Luxembourg	81
United Kingdom	81
Belgium	77
Austria	76
Ireland	75
Estonia	70

France	70
Cyprus	61
Spain	58
Malta	56
Slovakia	51
Croatia	51

The combination of weak governance scores with high levels of corruption perception for the countries selected for the EU project suggests to support the contextual conditions discussed earlier in this report on the basis of Integrity Pacts conducted in Europe as well as in the rest of the world. The one country that has implemented Integrity Pacts in the past and was identified as an outlier in relation to governance indicators, Germany, in this occasion is not part of the project. This study found that the reason for the Transparency International chapter not to engage in the EU project has not to do with the governance or economic indicators in the country, but due to the bad experience with the Integrity Pact for the Berlin airport<sup>535</sup>.

As highlighted in this study, all EU Member States are subject to EU procurement rules that already foresee anti-corruption and transparency provisions, thus providing in theory normative constraints for engaging in corrupt behaviour. However, the governance indicator on the rule of law questions the effectiveness in the selected countries. This raises doubts as to whether in these countries the law can provide sufficient safeguards for companies in case of conflicts in the procurement process. Weaker rule of law in countries could make a case for the use of the Integrity Pact given the tool can include sanctions and dispute resolution mechanisms. This could generate private sector trust in public procurement. Considering the EU project deals with EU funding, it would be interesting to assess in the future whether this will generate more cross-border procurement activity and hence supports a level playing field on the EU Single Market.

When looking at government effectiveness it is possible to contextualise the perceptions of the quality of public services, civil service, and the degree of its independence from political pressures. These elements can be relevant to the procurement process and the application of

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<sup>535</sup> Interview feedback #16, collected by the co-author of the global review, September-November 2015.

the Integrity Pact. In particular, because this touches upon the different governmental levels that expose weaknesses in terms of procurement as we have seen for example in the case of Spain.

To conclude, the case study analysis in this study did not address specifically the contextual conditions concerning the EU funding challenges due to the fact that the analysed Integrity Pacts did not specifically include ESI Funds. In the case of the Integrity Pact projects that will be launched in light of the EU project, it would be useful to take a first look at this issue. The table below presents information in relation to the Integrity Pact experience of Transparency International chapters, ESI funds, and general economic and governance indicators. Five out of eleven countries that will be participating in the project already have past experience with Integrity Pacts. It shows that at least four of those countries have also participated in Integrity Pacts that focused on procurement sectors in alignment with ESI thematic priorities. Arguably, this should provide the implementers with an added value given this experience can support in designing the Integrity Pacts foreseen in the EU project.

From the perspective of the ESI funds, all major receivers of EU funding will be involved in the project with the exception of Spain. Also in this case, not the economic and governance indicator seem to have influenced this. As for the Transparency International chapter, the decision was based on the fact that initiatives were already launched under the Siemens Integrity Pact<sup>536</sup>. All the countries involved in the EU project count for roughly three-fourth of the ESI Funds foreseen for the period 2014-2020. Relevant is also that these countries all have major projects<sup>537</sup> foreseen under the EU funding structures. The money involved in these highly complex projects suggests that Integrity Pacts can be a complementary tool to deal with corruption challenges. Major projects regularly involve substantial procurement activity.

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<sup>536</sup> Interview feedback #28, European review, February-April 2015.

<sup>537</sup> Article 100 of the 'Common Provisions Regulation' (i.e. the main legal text governing the European Structural and Investment (ESI) Funds in 2014-2020) defines major projects as “*operation comprising a series of works, activities or services intended in itself to accomplish an indivisible task of a precise economic or technical nature which has clearly identified goals and for which the total eligible cost exceeds EUR 50 000 000 and in the case of operations contributing to the thematic objective under point (7) of the first paragraph of Article 9 where the total eligible cost exceeds EUR 75 000 000*”.

Finally, from the data in the table it also shows that in the past, irregularities and breaches were reported in the respective member states.

**Table 10: ESI funds and Integrity Pacts in the European Union**

Countries	Integrity Pact experience <sup>538</sup>	ESI alignment <sup>539</sup>	ESI Funds in 2014-2020 <sup>540</sup>	Major Projects in 2014-2020	Reported breaches ESI Funds in 2013 <sup>541</sup>	Number of irregularities reported in 2013 <sup>542</sup>	WDI	Control of Corruption	Government Effectiveness	Regulatory Quality	Rule of Law	Voice and Accountability
Bulgaria	✓	✓ <sup>543</sup>	7,59	✓	✓	5	UM	-0,31	0,22	0,55	-0,12	0,39
Czech Republic	✗	Na	21,98	✓	✓	20	H	0,39	1,05	1,08	1,12	1,02
Greece	✗	Na	15,52	✓	✗	30	H	-0,13	0,25	0,40	0,24	0,59
Hungary	✓	✗	21,91	✓	✗	2	H	0,10	0,49	0,77	0,40	0,52
Italy	✓	✓ <sup>544</sup>	32,82	✓	✓	72	H	-0,05	0,45	0,73	0,25	1,01
Latvia	✓	✓ <sup>545</sup>	4,51	✓	✗	27	H	0,40	1,10	1,09	0,79	0,82
Lithuania	✗	Na	6,82	✓	✗	2	H	0,56	1,20	1,28	0,98	0,97
Poland	✗	Na	77,57	✓	✓	48	H	0,58	0,80	1,00	0,80	1,04
Portugal	✗	Na	21,47	✓	✗	4	H	0,92	1,23	0,94	1,14	1,12
Romania	✓	✓ <sup>546</sup>	22,99	✓	✓	23	UM	-0,05	-0,04	0,59	0,15	0,43
Slovenia	✗	Na	3,07	✓	✗	4	H	0,73	0,97	0,62	0,95	0,95

<sup>538</sup> Transparency International chapter experience with Integrity Pact

<sup>539</sup> Integrity Pact Sector (alignment with ESI Thematic Priorities)

<sup>540</sup> ESI Funds in 2014-2020 (EUR billion)

<sup>541</sup> European Court of Audit reporting on breach of public procurement rules in relation to Structural Funds in 2013. European Court of Auditors, Annual Report 2013, 2014.

<sup>542</sup> European Commission reporting on number of 'irregularities reported as fraudulent' in relation to Cohesion Policy in 2013. European Commission, Protection of the European Union's financial interests — Fight against fraud, 2013 Annual Report, 2014.

<sup>543</sup> Infrastructure (works)

<sup>544</sup> Metro, Rail, Airport (works)

<sup>545</sup> Cultural Heritage (works)

<sup>546</sup> Road, Rail, Drinking Water, Waste Water, Communication, Energy

At the stage of finalizing this study, some information is available on the individual selected projects by the European Commission. The European Commission selected seventeen projects in eleven Member States (Italy will include four Integrity Pact projects, Hungary two, and Romania three projects). The projects cover a range of sectors (transport, institutional building, culture, monitoring, environment, energy, education, research and development, integrated territorial investment, administrative capacity and health care) representing roughly EUR 1 billion. Fifteen civil society organisations will be involved in the EU projects and will perform the role of monitor, quality assurance of project implementation, promotion and dissemination of the project results. If needed, the civil society organisations will be involved in training and capacity building activities. From the list available on the European Commission's website it suggests that the projects include mostly national level contracting authorities (eleven out of seventeen national contracting authorities, three local and three regional)<sup>547</sup>. The Italian experiences would be interesting from a comparative angle given that regional, local and national Integrity Pact projects will be implemented. Thirteen Integrity projects will be done by chapters of Transparency International, the rest by different civil society organisations. This should provide for an interesting learning opportunity to consider different implementation arrangements used for Integrity Pacts.

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<sup>547</sup> EUROPEAN COMMISSION (n.d.). Integrity Pacts [WWW]. Available from: [http://ec.europa.eu/regional\\_policy/es/policy/how/improving-investment/integrity-pacts/](http://ec.europa.eu/regional_policy/es/policy/how/improving-investment/integrity-pacts/) [Accessed on 12-10-2016].

## 7.5 Concluding remarks

This study combines both theoretical considerations as well as practical considerations on the use of the Integrity Pact as a tool to prevent corruption in public procurement. Collective action initiatives for the fight against corruption are increasingly used by a multitude of stakeholders around the world. With emphasising the relevance of monitoring and evaluating these initiatives, this study hopes to contribute to further the understanding of the effectiveness on prevention of corruption. With this in mind, this study ends with some practical recommendations for contracting authorities, companies and civil society organisations working jointly to fight corruption through the Integrity Pact.

### **Ensure multi-stakeholder engagement.**

- Actively involve all parties to the Integrity Pact from the design phase up until the end of the collective action initiative.
- Identify and match a champion within the contracting authority/government to the monitor, and identify government policy priorities that align with transparency and integrity measures.
- Consider the use of incentives to encourage participation, such as White Lists or other forms of recognition for firms that champion and take part in Integrity Pacts.
- Impose a ‘pay-to-play’ methodology whereby all stakeholders contribute to the remuneration of the independent monitor and in part to the overall architecture of the Integrity Pact so as to promote greater ownership from all stakeholders.

### **Incorporate greater social control mechanisms whenever possible.**

- Consider the inclusion of the Integrity Pact as a project-based initiative into a wider array of collective action initiatives aiming for long-term change.

### **Ensure strong design of the collective action initiative**

- Understand the legal, political and economic conditions at hand before and during the Integrity Pact, and adjust accordingly.
- Study the other stakeholders involved in the project, as well as the corruption risks involved in the procurement. A risk-based approach is essential.

- Ensure that procurement processes which feature Integrity Pacts have been subject to a needs assessment, thorough analysis of the corruption risk profile as well as the legal, political and economic conditions surrounding the proposed Integrity Pact. This can serve as a baseline to further measure impact of Integrity Pacts.
- Establish rigorous methodology and evaluation framework in order to capture baseline assumptions and the change - positive or negative - that the intervention created. In light of difficulties in evidencing corruption and corruption prevention, focus instead on prevention and management of irregularities, ensuring that the procurement process has minimal disruptions, and mediation capabilities that are quick and effective.
- If feasible and after taking potential limitations into account, promote IPs in the context of legislative change or recommendations from ministries within the government.

### **Consider the implementation arrangements**

- Adopt an internal decision-making mechanism that is adjusted to the needs of the Integrity Pact. This could be done by establishing an advisory committee with a degree of decision-making power.
- Establish a clear set of procedures for the imposition of sanctions. This should include a process for screening the complaints (and delineation of who can submit them), assessment criteria for the complaint, a resolution approach, escalation criteria and procedures in cases where the involvement of legal authorities is required, and recourse procedures in cases of disputes. The procedures should be transparent and disseminated to all stakeholders.
- For Integrity Pacts that are suspected of not being fit to purpose, the civil society organisation should have and make use of the option to exit the Integrity Pact. Establish a clear escalation protocol for these eventualities and make public the reporting on these decisions.
- Establish a clear communication strategy using media adapted to the local context that will have the best outreach capabilities, particularly digital communications strategies, regularly updating on Integrity Pact activities, progress; provide fora for feedback.

### **Optimise the role of the monitor**

- Involve the monitor from the earliest possible stage of the procurement process,

preferably during the design stage of the tender, the monitor should field appropriate experts at this stage to ensure credibility and to have a strong position from the start of the process.

- Professionalize the monitor:
  - Use monitors that have procurement process knowledge and technical knowledge of the industry involved in the procurement.
  - Ensure capacity to assemble a monitoring team that can draw on expertise when necessary.
  - Provide training to the monitor on Integrity Pact implementation issues, procurement red flags.



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## 9 Annex I surveys

### Surveys European review – civil society organisations

#### Introduction

Dear Sir/Madam,

Transparency International Secretariat has commissioned [Blomeyer & Sanz](#) to conduct a learning review on the use of civil monitoring mechanisms for public procurement, such as TI's [Integrity Pact](#) tool. With this survey we would like to ask for your feedback.

The survey should not take more than 20-30 minutes of your time and is primarily meant to gather basic data from your organization on experience with **civil monitoring tools for public procurement**. This allows for a better understanding of experience and expertise within the movement and for better targeting of the learning review activities.

In addition, this survey aims to map risks in public procurement across the European Union. This will be an optional exercise and invites you to assess risks in public procurement on the basis of your expert judgement. With this exercise we aim to map risks in public procurement and reflect on whether the Integrity Pact as an anti-corruption tool can provide added-value by addressing these risks.

All data gathered will be kept confidential and in the event of any publication or presentation resulting from the survey, no personally identifiable information will be divulged. Completing this survey implies that you have read the above information and hereby provide us your consent to make use of the data collected through this survey for the final learning review report.

In case you have any questions, please do not hesitate to contact us at [mbeke@blomeyer.eu](mailto:mbeke@blomeyer.eu). Should you wish to contact someone at TI-S, please write to Claire Martin at [cmartin@transparency.org](mailto:cmartin@transparency.org). The deadline for submission of the survey is 15 April 2015.

We look forward to your feedback.

Sincerely,

Mike Beke

e. [mbeke@blomeyer.eu](mailto:mbeke@blomeyer.eu)  
w. [www.blomeyer.eu](http://www.blomeyer.eu)  
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t. +34 949 492 505

## National experience

\* 1. Please select the types of activities relating to corruption in public procurement conducted by your organization:

- Research activities
- Advocacy activities
- Monitoring activities
- Other (please specify)

\* 2. Please briefly describe the main activities of your organization relating to corruption in public procurement:

\* 3. Has your organisation used Integrity Pacts, or similar civil monitoring mechanisms, to monitor public procurement?

If not, please explain why:

## National experience with Integrity Pacts (1/2)

**This section aims to collect data on the overall use of Integrity pacts, or similar civil monitoring mechanisms, on public procurement.**

**With these questions we aim to collect an estimation of the number of contracts that were subject to Integrity Pacts. For example, one Integrity Pact can include multiple contracts delivering either goods and/or services.**

**In case you do not have access to specific data, please make an estimation or insert 'do not know'.**

4. Please specify the number of Integrity Pacts your organisation has been involved in, and specify the total number of contracts included for monitoring within the Integrity Pacts:

Total number of Integrity Pacts

Total number of contracts

5. Please specify for each procurement type the number of contracts where Integrity Pacts have been applied:

Provision of goods and services

Public works

Privatisation

Concession / licences / permits awards

Other

6. Please specify for each level the number of contracts where Integrity Pacts have been applied:

At the national level / federal level

At the provincial (state) level

At the local / municipal level

7. Please specify the total value of contracts where Integrity Pacts have been applied (in EUR):

8. Please list the sectors covered (e.g. health care, defence, construction, etc.):

## National experience with Integrity Pacts (2/2)

**This section aims to collect specific data on recent Integrity pacts, or similar civil monitoring mechanisms, on public procurement.**

### IP characteristics

Please complete the following tables with specific details about the most recent Integrity Pacts conducted by your organization. You can list up to three such projects.

#### 9. Project 1:

Title of the IP project

Brief description of the IP project

Description role TI in the IP project (e.g. independent monitor)

Size of the IP project (e.g. in EUR and/or working days)

Start and end date of the IP project

Sector(s) covered (e.g. health care, defence, etc.)

Governmental level (e.g. local, regional, national, international)

List of governmental agencies involved

Size overall procurement project (in EUR)

Any additional comments (e.g. success IP, impact IP, lessons learned, link to project documentation, etc.)

**10. Project 2:**

Title of the IP project

Brief description of the IP project

Description role TI in the IP project (e.g. independent monitor)

Size of the IP project (e.g. in EUR and/or working days)

Start and end date of the IP project

Sector(s) covered (e.g. health care, defence, etc.)

Governmental level (e.g. local, regional, national, international)

List of governmental agencies involved

Size overall procurement project (in EUR)

Any additional comments (e.g. success IP, impact IP, lessons learned, link to project documentation, etc.)

**11. Project 3:**

Title of the IP project

Brief description of the IP project

Description role TI in the IP project (e.g. independent monitor)

Size of the IP project (e.g. in EUR and/or working days)

Start and end date of the IP project

Sector(s) covered (e.g. health care, defence, etc.)

Governmental level (e.g. local, regional, national, international)

List of governmental agencies involved

Size overall procurement project (in EUR)

Any additional comments (e.g. success IP, impact IP, lessons learned, link to project documentation, etc.)

## Corruption risk mapping exercise (1/3)

This is an optional exercise and invites you to assess risks in public procurement on the basis of your expert judgement. With this exercise we aim to map risks in public procurement and reflect on whether the Integrity Pact as an anti-corruption tool can provide added-value by addressing these risks.

The following section lists common corruption risk scenarios. The list has been compiled by selecting common examples identified by the OECD and Transparency International.

Based on your understanding of public procurement in your country, please assess how likely and severe the risk scenario is per item.

### Definitions for likelihood of risk

The likelihood of each scenario to occur should be assessed taking into account present situation. In other words, how likely is it that this risk occurs? Try to assess the risk without considering current controls in place to avoid such risks. Some factors that could be taken into consideration are:

- Incidents that occurred in the past relating the specific activity
- Culture of openness in the public administration or private sector
- Level of contact between the different stakeholders
- Complexity of the activity related to the risk
- Etc.

### Definitions for severity of risk

Each scenario should be assessed by looking at the potential severity or impact. The impact of the scenarios can vary from financial, legal, operational and reputational damage. Some factors that could be taken into consideration are:

- Impact of past incidents on key stakeholders
- Severity of penalties / sanctions imposed in past incidences
- Impact on the procurement process
- Etc.

## Pre-bidding phase scenarios

**12. Lack of adequate needs assessment, planning, and budgeting of public procurement**

	Likelihood of risk	Severity of risk
The lack of adequate needs assessment, deficient business cases, poor procurement planning	<input type="text"/>	<input type="text"/>
Failure to budget realistically, deficiency in the budget	<input type="text"/>	<input type="text"/>
Procurement is not aligned with the overall investment decision-making process in departments	<input type="text"/>	<input type="text"/>
Interference of high-level officials in the decision to procure	<input type="text"/>	<input type="text"/>
Informal agreement on contract	<input type="text"/>	<input type="text"/>

**13. Requirements that are not adequately or objectively defined**

	Likelihood of risk	Severity of risk
Technical specifications are tailored for one bidder	<input type="text"/>	<input type="text"/>
Technical specification are vague to not based on performance requirements	<input type="text"/>	<input type="text"/>
Selection and award criteria are not clearly and objectively defined	<input type="text"/>	<input type="text"/>
Selection and award criteria are not established and announced in advance of the closing of the bid	<input type="text"/>	<input type="text"/>

**14. Inadequate or irregular choice of the procedure**

	Likelihood of risk	Severity of risk
Lack of procurement strategy for the use of non-competitive procedures based on the value and complexity of the procurement which creates administrative costs	<input type="text"/>	<input type="text"/>
Contract splitting in order to remain below monetary thresholds from which public competition is mandatory	<input type="text"/>	<input type="text"/>
Abuse of the "extreme urgency" clause to avoid competitive tendering	<input type="text"/>	<input type="text"/>
Abuse of other exceptions to competition based on a technicality or exclusive rights	<input type="text"/>	<input type="text"/>
Untested continuation of existing contracts	<input type="text"/>	<input type="text"/>
Timeframe not consistently applied to all bidders, or insufficient to ensure a level playing field	<input type="text"/>	<input type="text"/>

### Bidding phase scenarios

#### 15. Invitation to bid

	Likelihood of risk	Severity of risk
Information on the procurement opportunity not provided in a consistent manner	<input type="text"/>	<input type="text"/>
Absence of public notice for the invitation to bid	<input type="text"/>	<input type="text"/>
Sensitive or non-public information disclose	<input type="text"/>	<input type="text"/>
Lack of competition or in some cases collusive bidding that leads to inadequate process or even illegal price fixing	<input type="text"/>	<input type="text"/>
Obligation to include a sub-contractor pre-defined by the contracting authority	<input type="text"/>	<input type="text"/>
Inadequate, discriminative modification of the call for tenders	<input type="text"/>	<input type="text"/>

#### 16. Awarding of contract

	Likelihood of risk	Severity of risk
Conflict of interest and corruption in the evaluation process such as familiarity with bidders over the years	<input type="text"/>	<input type="text"/>
Conflict of interest and corruption in the evaluation process such as personal interests such as gifts or additional/secondary employment	<input type="text"/>	<input type="text"/>
Conflict of interest and corruption in the evaluation process such as no effective implementation of the four-eyes principle	<input type="text"/>	<input type="text"/>
Conflict of interest and corruption in the approval process such as no effective separation of financial, contractual and project authorities in delegation of authority structure	<input type="text"/>	<input type="text"/>
Lack of access to records on the procedure in the award that discourages unsuccessful bidders to challenge a procurement decision	<input type="text"/>	<input type="text"/>

## Post-bidding phase scenarios

### 17. Contract management

	Likelihood of risk	Severity of risk
Failure to monitor performance of contractor, in particular lack of supervision over the quality and timing of the process, that results in substantial change in contract conditions to allow more time and higher prices for the bidder	<input type="text"/>	<input type="text"/>
Failure to monitor performance of contractor, in particular lack of supervision over the quality and timing of the process, that results in product substitution or sub-standard work or service not meeting contract specifications	<input type="text"/>	<input type="text"/>
Failure to monitor performance of contractor, in particular lack of supervision over the quality and timing of the process, that results in theft of new assets before delivery to end-user or before being recorded in the asset register	<input type="text"/>	<input type="text"/>
Failure to monitor performance of contractor, in particular lack of supervision over the quality and timing of the process, that results in subcontractors and partners are chosen in a non-transparent way, or not kept accountable	<input type="text"/>	<input type="text"/>

### 18. Order and payment

	Likelihood of risk	Severity of risk
Deficient separation of duties and/or lack of supervision of public officials that results in false accounting and cost misallocation or cost migration between contracts	<input type="text"/>	<input type="text"/>
Deficient separation of duties and/or lack of supervision of public officials that results in late payments of invoices, postponement of payments to have prices reviewed to increase the economic value of the contract	<input type="text"/>	<input type="text"/>
Deficient separation of duties and/or lack of supervision of public officials that results in false or duplicate invoicing for goods and services not supplied and for interim payments in advance of entitlement	<input type="text"/>	<input type="text"/>

## Thank you

Thank you very much for completing this survey.

The final learning review report will be made available to all stakeholders by the end of April.

## Survey European review – shadow experts

### Introduction

Dear Corruption Expert,

Blomeyer & Sanz is conducting a learning review on anti-corruption civil monitoring mechanisms for public procurement. With this short survey we would like to ask for your feedback.

The survey should not take more than 15 minutes of your time and aims to assess risks in public procurement on the basis of **your expert judgement**. With this exercise we aim to map risks in public procurement and reflect on whether anti-corruption civil monitoring tools can provide added-value by addressing these risks.

All data gathered will be kept confidential and in the event of any publication or presentation resulting from the survey, no personally identifiable information will be divulged. Completing this survey implies that you have read the above information and hereby provide us your consent to make use of the data collected through this survey for the final learning review report.

In case you have any questions, please do not hesitate to contact us at [mbeke@blomeyer.eu](mailto:mbeke@blomeyer.eu). The deadline for submission of the survey is 10 April 2015.

Thank you very much for your support and we look forward to your feedback.

Sincerely,

Mike Beke

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## Background information

\* 1. Please select the type of organisation you work for currently (if working for more than one, please select the primary organisation you for work):

- Government
- Academic (university)
- Research organization/institute (affiliated with university)
- Research organization/institute (unaffiliated with university)
- Think tank (research as well as advocacy)
- Practitioner NGO
- International organisation
- Other business
- Independent / consultant
- Other (please specify):

\* 2. Please select the position you hold in the current institution:

- Professor
- Associate professor
- Researcher
- Co-Investigator
- Consultant
- Other (please specify):

\* 3. Please select the types of activities relating to corruption in public procurement conducted by your organization:

- Research activities
- Advocacy activities
- Monitoring activities
- Other (please specify)

\* 4. Please briefly describe the main activities of your organization relating to corruption in public procurement:

\* 5. Has your organisation used civil monitoring mechanisms to monitor public procurement?

Please provide relevant details:

## Corruption risk mapping exercise (1/3)

This is a common risk mapping exercise and invites you to assess risk scenarios in public procurement on the basis of your expert judgement. With this exercise we aim to map risks in public procurement and reflect on whether anti-corruption civil monitoring tools can provide added-value by addressing these risks.

The following section lists common corruption risk scenarios. The list has been compiled by selecting common examples identified by the OECD and Transparency International.

Based on your understanding of public procurement in your country, please assess how likely and severe the risk scenario is per item.

### Definitions for likelihood of risk

The likelihood of each scenario to occur should be assessed taking into account present situation. In other words, how likely is it that this risk occurs? Try to assess the risk without considering current controls in place to avoid such risks. Some factors that could be taken into consideration are:

- Incidents that occurred in the past relating the specific activity
- Culture of openness in the public administration or private sector
- Level of contact between the different stakeholders
- Complexity of the activity related to the risk
- Etc.

### Definitions for severity of risk

Each scenario should be assessed by looking at the potential severity or impact. The impact of the scenarios can vary from financial, legal, operational and reputational damage. Some factors that could be taken into consideration are:

- Impact of past incidents on key stakeholders
- Severity of penalties / sanctions imposed in past incidences
- Impact on the procurement process
- Etc.

6. Please specify the country you will focus on:

## Pre-bidding phase scenarios

**7. Lack of adequate needs assessment, planning, and budgeting of public procurement**

	Likelihood of risk	Severity of risk
The lack of adequate needs assessment, deficient business cases, poor procurement planning	<input type="text"/>	<input type="text"/>
Failure to budget realistically, deficiency in the budget	<input type="text"/>	<input type="text"/>
Procurement is not aligned with the overall investment decision-making process in departments	<input type="text"/>	<input type="text"/>
Interference of high-level officials in the decision to procure	<input type="text"/>	<input type="text"/>
Informal agreement on contract	<input type="text"/>	<input type="text"/>

**8. Requirements that are not adequately or objectively defined**

	Likelihood of risk	Severity of risk
Technical specifications are tailored for one bidder	<input type="text"/>	<input type="text"/>
Technical specification are vague to not based on performance requirements	<input type="text"/>	<input type="text"/>
Selection and award criteria are not clearly and objectively defined	<input type="text"/>	<input type="text"/>
Selection and award criteria are not established and announced in advance of the closing of the bid	<input type="text"/>	<input type="text"/>

**9. Inadequate or irregular choice of the procedure**

	Likelihood of risk	Severity of risk
Lack of procurement strategy for the use of non-competitive procedures based on the value and complexity of the procurement which creates administrative costs	<input type="text"/>	<input type="text"/>
Contract splitting in order to remain below monetary thresholds from which public competition is mandatory	<input type="text"/>	<input type="text"/>
Abuse of the "extreme urgency" clause to avoid competitive tendering	<input type="text"/>	<input type="text"/>
Abuse of other exceptions to competition based on a technicality or exclusive rights	<input type="text"/>	<input type="text"/>
Untested continuation of existing contracts	<input type="text"/>	<input type="text"/>
Timeframe not consistently applied to all bidders, or insufficient to ensure a level playing field	<input type="text"/>	<input type="text"/>

### Bidding phase scenarios

#### 10. Invitation to bid

	Likelihood of risk	Severity of risk
Information on the procurement opportunity not provided in a consistent manner	<input type="text"/>	<input type="text"/>
Absence of public notice for the invitation to bid	<input type="text"/>	<input type="text"/>
Sensitive or non-public information disclose	<input type="text"/>	<input type="text"/>
Lack of competition or in some cases collusive bidding that leads to inadequate process or even illegal price fixing	<input type="text"/>	<input type="text"/>
Obligation to include a sub-contractor pre-defined by the contracting authority	<input type="text"/>	<input type="text"/>
Inadequate, discriminative modification of the call for tenders	<input type="text"/>	<input type="text"/>

#### 11. Awarding of contract

	Likelihood of risk	Severity of risk
Conflict of interest and corruption in the evaluation process such as familiarity with bidders over the years	<input type="text"/>	<input type="text"/>
Conflict of interest and corruption in the evaluation process such as personal interests such as gifts or additional/secondary employment	<input type="text"/>	<input type="text"/>
Conflict of interest and corruption in the evaluation process such as no effective implementation of the four-eyes principle	<input type="text"/>	<input type="text"/>
Conflict of interest and corruption in the approval process such as no effective separation of financial, contractual and project authorities in delegation of authority structure	<input type="text"/>	<input type="text"/>
Lack of access to records on the procedure in the award that discourages unsuccessful bidders to challenge a procurement decision	<input type="text"/>	<input type="text"/>

## Post-bidding phase scenarios

### 12. Contract management

	Likelihood of risk	Severity of risk
Failure to monitor performance of contractor, in particular lack of supervision over the quality and timing of the process, that results in substantial change in contract conditions to allow more time and higher prices for the bidder	<input type="text"/>	<input type="text"/>
Failure to monitor performance of contractor, in particular lack of supervision over the quality and timing of the process, that results in product substitution or sub-standard work or service not meeting contract specifications	<input type="text"/>	<input type="text"/>
Failure to monitor performance of contractor, in particular lack of supervision over the quality and timing of the process, that results in theft of new assets before delivery to end-user or before being recorded in the asset register	<input type="text"/>	<input type="text"/>
Failure to monitor performance of contractor, in particular lack of supervision over the quality and timing of the process, that results in subcontractors and partners are chosen in a non-transparent way, or not kept accountable	<input type="text"/>	<input type="text"/>

### 13. Order and payment

	Likelihood of risk	Severity of risk
Deficient separation of duties and/or lack of supervision of public officials that results in false accounting and cost misallocation or cost migration between contracts	<input type="text"/>	<input type="text"/>
Deficient separation of duties and/or lack of supervision of public officials that results in late payments of invoices, postponement of payments to have prices reviewed to increase the economic value of the contract	<input type="text"/>	<input type="text"/>
Deficient separation of duties and/or lack of supervision of public officials that results in false or duplicate invoicing for goods and services not supplied and for interim payments in advance of entitlement	<input type="text"/>	<input type="text"/>

## Thank you

Thank you very much for completing this survey.

The final learning review report will be made available to all stakeholders by the end of April.

## Survey global review – civil society organisations

- **Introduction – IP typological elements**
- Country:
- Respondent:
- Personal Experience and Involvement in IPs:
- Year that IPs were introduced in the Chapter’s work:

Can you describe briefly the sequence of activities from the moment the National Chapter decides to intervene until the end of this intervention?

*(Further interview Introduction questions divided by Integrity Pact (IP) Content and Implementation questions from the survey. The question is as to whether or not to go over them during the interviews, or instead to provide the survey directly after the interview per Claire’s suggestion.)*

### I. IP Content Questions

#### a. Undertaking of the Bidders

- i. Does the IP Include a commitment of the Bidders? (Y/N)
  - 1. If YES, does it include these provisions?
    - a. Not to bribe (Y/N)
    - b. Not to use facilitation payments (Y/N)
    - c. Not to collude (Y/N)
    - d. To disclose information regarding payments related to the contracting process, including to agents and other middlemen (Y/N)
    - e. To provide the same undertaking from all sub- contractors and joint venture partners (Y/N)
    - f. Advised or requested to have a company code of conduct (clearly rejecting bribery) and a compliance programme (Y/N)
    - g. Commitment by each bidder that documents are truthful, and acceptance of strict liability for misrepresentation, fraudulent representation or false declaration (Y/N)
    - h. Statement of non-involvement in conduct forbidden by the IP or related corrupt behavior in period 3-5 years prior to bid (Y/N)
    - i. Cap on payments to agents (Y/N)
    - j. Extension of undertakings to other obligations (Y/N)
    - k. To refrain from all other illegal acts (Y/N)
    - l. To report to monitor any attempted or fulfilled breaches of IP (Y/N)
    - m. Other – please specify and explain importance and reasons for inclusion of such provisions

#### b. Commitment of the public authority

- i. Does the IP include a commitment of the Public Authority? (Y/N)
  - 1. If YES, does it include the following provisions?
    - a. Not to demand or accept bribes (Y/N)
    - b. Not to demand or accept facilitation payments (Y/N)
    - c. To disclose relevant and equal information to all bidders (Y/N)
    - d. To guarantee protection of restricted information (Y/N)
    - e. To report any attempted or completed breaches of these clauses (Y/N)
    - f. To provide public information on the contracting process (Y/N)
    - g. Ethical commitment establishing rules of interaction with bidders during and after tender process (Y/N)
    - h. To refrain from all other illegal acts (Y/N)
    - i. To disclose on a regular basis their own and their family’s assets (Y/N)
    - j. Other – please specify and explain importance and reasons for inclusion of such provisions

#### c. Sanctions

- i. Does the IP provide sanctions different to the ones provided by the national legal system? (Y/N)
  - 1. If NO, because:
    - a. Sanctions are already covered by national law. If so, please specify which sanctions already covered by national law apply to the IP violation \_\_\_\_\_
    - b. Other reason, please specify: \_\_\_\_\_

2. If YES, are they applicable to bidders? (Y/N) and do they include:
    - a. Loss or denial of contract (Y/N)
    - b. Forfeiture of bid security and performance bonds (Y/N)
    - c. Liquidated damages to principal and competitors (Y/N)
    - d. Debarment of violator from contracting with government/authority (Y/N)
    - e. Other, please specify and explain importance and reasons for inclusion of such provisions
  3. If YES, are they applicable to government officials? (Y/N)
    - a. Criminal sanctions? (Y/N)
    - b. Disciplinary sanctions? (Y/N)
    - c. Civil sanctions? (Y/N)
    - d. Other, please specify \_\_\_\_\_
- d. Monitoring**
- i. Does the IP include independent monitoring during the bidding process? (Y/N)
  - ii. Does the IP include independent monitoring during the execution phase? (Y/N)
  - iii. Does the IP include whistleblower protection? (Y/N)
- e. Stakeholder Participation and Information Disclosure**
- i. Does the IP include town hall / targeted public hearings? (Y/N)
  - ii. Does the IP include internet/electronic information disclosure mechanisms? (Y/N)
  - iii. Other, please specify and explain \_\_\_\_\_
- f. Dispute Resolution**
- i. Does the IP include a predetermined procedure to pursue IP breach claims? (Y/N)
    1. If NO, because:
      - a. Procedure already provided in national law to pursue breaches of IP requirements
      - b. Other reason, please specify \_\_\_\_\_
    2. If YES, is the procedure:
      - a. Arbitration (National or International, please specify)
      - b. Judicial review
      - c. Other, please specify \_\_\_\_\_
  - ii. How is the arbitration mechanism selected? Please specify \_\_\_\_\_
  - iii. Are decisions to enter procedures public? (Y/N)
- g. Please include any further information on the content of the IP**
- 

## II. IMPLEMENTATION

- a. Characteristics of IP Implementation**
- i. In which stages of the contracting cycle can an IP project be run**
1. PRE-BIDDING STAGE (including: Needs assessment; Feasibility Studies; Market Research Studies; Planning and Budgeting; Definition of Requirements; Choice of procedures).
  - Please specify in which ones \_\_\_\_\_
  2. BIDDING STAGE (including: Invitation to Bid; Evaluation of Bids; Bid Award, Signing of Contract).
  - Please specify in which ones \_\_\_\_\_
  3. POST-BIDDING STAGE (including: Contract Management, Internal Supervision or Control of Activities, External Audit, External Technical Supervision of Implementation; Payment Orders).
  - Please specify in which ones \_\_\_\_\_
- ii. In which moment of the bidding process have IPs been signed? Select all that apply:**
1. At the beginning of the pre-bidding stage
  2. At the beginning of the selection process before the bidders pre-qualification (if pre-qualification is applied)
  3. At the time of the submission of the tender by the bidders
  4. For the contract implementation, please specify the exact moment of signing of the IPs 
    - a. At contract signing
    - b. Other moment, please specify
  5. Other moment during the bidding process, please specify
- iii. Is the IP applied:**
1. On an individual basis (for selected contracts)
  2. On a general basis (law or policy provision establishes the IP as a requirement) 
    - a. for a sector

- b. for a government agency or group of government agencies
  - c. for a provincial (state) / local government
  - d. for all government contracts
  - e. for procurement above a certain monetary value
  - f. other, please specify \_\_\_\_\_
- iv. Does the general public have an opportunity to comment on drafts of the bidding documents before official invitation to tender is published? (Y/N)**
1. If YES, is this done via:
    - a. Internet
    - b. Public hearings
    - c. Other, please specify \_\_\_\_\_
  2. If YES, does this opportunity exist for:
    - a. Only for contracting processes with IPs
    - b. For any public contracting process
- v. Are bidders involved in discussion regarding IP content? (Y/N)**
1. If YES
    - a. With negotiation powers?
    - b. Without negotiation powers?
    - c. Other, please specify \_\_\_\_\_
  2. If NO, why not?
- vi. The initiative to promote the IP comes from:**
1. Government
  2. Firms/ Professional associations/ Chambers of Commerce
  3. Individuals / Civil Society (NGOs, CSOs)
  4. TI
  5. Donors / International Financial Institutions (IFIs)
  6. Other, please specify \_\_\_\_\_
- vii. How has the IP been advocated in the country?**
1. Through direct contacts with high level government officials (e.g. President, Ministers, etc.)
  2. Seminars and international workshops
  3. Training public officials, companies and/or civil society
  4. Publicizing results and evaluation of IP implementation processes
  5. Other, please specify \_\_\_\_\_
  6. Which has been most effective and why? \_\_\_\_\_
- viii. How has government commitment to the IP been achieved?**
1. Through an agreement/MOU
  - Please specify the parties involved \_\_\_\_\_
  2. Other, please specify \_\_\_\_\_
- ix. Did the document signed with the government include a withdrawal clause for the chapter or the monitor? (Y/N)**
- x. What type of evidence /proof is required to allege IP Violations? \_\_\_\_\_ And who is entitled to make allegations?**
1. Monitor
  2. Chapter
  3. Bidders
  4. Citizens/Whistle-blowers
  5. Contracting authority
  6. Other, please specify \_\_\_\_\_
- b. Monitoring**
- i. Who monitors the procurement processes involving IPs?**
1. TI Chapter
  2. Independent civil society external monitor
  3. Other NGO, please specify \_\_\_\_\_
  4. Independent private sector inspector general
  5. Independent government official

6. Other, please specify \_\_\_\_\_
- ii. **Who selects the monitor? Please explain the process** \_\_\_\_\_
- iii. **When does monitoring begin and end?** \_\_\_\_\_
- iv. **What are the functions of the monitor? Please select all that apply:**
1. Monitor the compliance with IP
  2. Review / comment on drafts of bidding documents
  3. Review / comment on official bidding documents
  4. Discuss / negotiate the IP with participants
  5. Observe / comment on evaluation and award process
  6. Deal with complaints
  7. Observe implementation, supervision and variations of contract
  8. Inform the public opinion on the process. If NOT, why not? Please explain \_\_\_\_\_
  9. Attending meetings with responsible teams within the Public Authority along the contracting process
  10. Other, please specify and explain importance \_\_\_\_\_
- v. **Does the monitor have access to the following documents? Please select all that apply and when in the process that they have access:**
1. Procurement Plan
  2. Drafts of bidding documents
  3. Official bidding documents
  4. Amendments to bidding documents
  5. Bidders' pre-qualification documents
  6. Pre-qualification evaluation report
  7. Official bid invitation
  8. Bidders' proposals
  9. Bid evaluation report
  10. Award decision (including the reasons that substantiate it)
  11. Text of the contract signed by the parties
  12. Variations of contract
  13. Progress reports
  14. Audit / supervision reports
- vi. **What type of analysis does the monitor carry out on the documents? Please select all that apply:**
1. whether laws / rules are followed
  2. whether the bidders have submitted the full documentation required
  3. identify possible indicators or corruption / lack of competitive conditions in the bidding documents (e.g. tailored technical specifications, etc.)
  4. identify possible indicators of corruption in the bidders proposals (e.g. artificially low prices, identical prices, same addresses, etc.)
  5. other analysis, please describe \_\_\_\_\_
- vii. **What interaction does the monitor have with contract beneficiaries – local communities?**
- viii. **What is the process that the monitor undertakes when detecting or being alerted to a problem/compliant? Please select all that apply:**
1. Report to the contracting authority
  2. Report to other control bodies
  3. Alert the judiciary
  4. Inform the media
  5. Other, please specify \_\_\_\_\_
  6. Can the monitor influence or affect the bidding process in these situations? Please explain \_\_\_\_\_
- ix. **How is the independence of the monitor guaranteed vis-à-vis the funding source?** \_\_\_\_\_
- x. **If not undertaken directly by the TI-NC, what is the role of the chapter in the monitoring process and in other IP implementation activities? Please explain** \_\_\_\_\_
- xi. **What contributed to the success of the monitoring?** \_\_\_\_\_
- xii. **What made monitoring difficult?** \_\_\_\_\_
- c. **Other tools**
- i. **Please specify other tools frequently used in the implementation of the IP, their methodology and their importance in the process**

**d. Additional implementation information**

- i. Are there significant differences in IP Implementation according to sector, level of government, and other factors? Please explain \_\_\_\_\_**



## 10 Annex II Interviews

### 10.1 List of interviews

Interviews conducted for the European review by the author of this study, Mike Beke		
#	Category	Organisation
<b>Field mission Hungary (18-22 March 2015)</b>		
1.	Private Sector	Nimród-Bau
2.	Contracting Authority	13 <sup>th</sup> District Budapest
3.	Civil society	K-Monitor
4.	Civil society	K-Monitor
5.	Civil society	Transparency International Hungary
<b>Field mission Latvia (23-25 March 2015)</b>		
6.	Civil society	Delna
7.	Private Sector	Zverinats Advocats
8.	Private Sector	Hill International
9.	Civil society	European Institute for Gender Equality (former Delna)
10.	Civil society	Delna
11.	Civil society	Delna
12.	Civil society	Lawyer (former Delna)
13.	Contracting Authority	National Latvian Library
14.	Contracting Authority	Ministry of Culture
15.	Private Sector	National Builders Association
<b>Field mission Bulgaria (31 March – 02 April 2015)</b>		
16.	Donor organisation	Siemens Bulgaria
17.	Contracting Authority	Ministry of Regional Development and Public Works (Bulgaria)

18.	Integrity Pact Monitor	Peterkap Partners
19.	Private Sector	PMI Bulgaria Chapter
20.	Civil society	Transparency International Bulgaria
21.	Civil society	Transparency International Bulgaria
22.	Integrity Pact Monitor	Independent consultant
<b>Others (February – April 2015)</b>		
23.	Other	Independent consultant (Transparency International)
24.	Other	Independent consultant (former Transparency International)
25.	Other	UNDP (former Transparency International)
26.	Civil society	Transparency International Germany
27.	Civil society	Transparency International EU office
28.	Civil society	Transparency International Spain
29. <sup>548</sup>	Civil society	Transparency International India
<b>Workshop Berlin (23 February 2015)</b>		
30. <sup>549</sup>	Civil society	Transparency International Lithuania
	Civil society	Transparency International Lithuania
	Civil society	Transparency International Greece
	Civil society	Transparency International Cyprus
	Civil society	Transparency International Hungary
	Civil society	Transparency International Luxembourg
	Civil society	Transparency International Latvia
	Civil society	Transparency International Italy

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<sup>548</sup> Workshop in Berlin, 26 April 2015

<sup>549</sup> Focus group meeting in Berlin, 23 February 2015

	Civil society	Transparency International Poland
	Civil society	Transparency International Czech Republic
	Civil society	Transparency International Czech Republic
	Civil society	Transparency International Bulgaria
	Civil society	Transparency International Slovenia
	Civil society	Transparency International Croatia
	Civil society	Transparency International Romania
	Donor organisations	European Commission DG Regio
	Civil society	Transparency International Secretariat
	Civil society	Transparency International Secretariat
	Civil society	Transparency International Secretariat
	Civil society	Transparency International Secretariat
	Civil society	Transparency International Secretariat
	Civil society	Transparency International Secretariat
	Civil society	Transparency International EU Office
<b>Interviews conducted for the global review by the author of this study, Mike Beke</b>		
<b>Field Mission Mexico: 21-25 September 2015</b>		
31.	Civil Society	TI Mexico
32.	Integrity Pact Monitor	Lawyer (independent)
33.	Other	Member of Parliament
34.	Integrity Pact Monitor	University of Mexico
35.	Contracting Authority	Energy sector
36.	Civil Society	Transparency International Mexico
37.	Civil Society	Transparency International Mexico

<b>Others: September - November 2015</b>		
38.	Civil Society	Transparency International Slovakia
39.	Civil Society	Transparency International Rwanda
40.	Civil Society	Transparency International Uganda
41.	Civil Society	Transparency International Indonesia
42.	Civil Society	Transparency International Malaysia
43.	Civil Society	Transparency International Honduras
44.	Civil Society	Independent consultant energy sector
45.	Private Sector	Hill International

<b>Interviews conducted by co-author Global Review, William Nero</b>		
<b>Field Mission India: 17-23 September 2015</b>		
1.	Civil Society	Interviews conducted face-to-face and in focus group setting.
2.	Civil Society	
3.	Civil Society	
4.	External Monitor	
5.	Private Sector	
6.	External Monitor	
7.	External Monitor	
8.	Contracting Authority	
9.	Contracting Authority	
10.	Contracting Authority	
11.	Contracting Authority	
12.	Contracting Authority	
13.	Civil Society	
<b>Mission Germany: 28 September - 1 October 2015</b>		
14.	External Monitor	Independent
15.	Contracting Authority	Hannover
16.	Civil Society	Transparency International

		Germany
17.	Civil Society	Transparency International Germany
<b>Others: September - November 2015</b>		
18.	Civil Society	Transparency International Thailand
19.	Civil Society	Transparency International Pakistan
20.	Private sector	Siemens
21.	Civil Society	CoST

## 10.2 Interview questions European review

### European review guiding questions

1. Have Integrity Pacts achieved their stated outcomes (e.g. prevention, detection and follow-up of irregularities)? Which factors contributed to the achievement or non-achievement of the stated outcomes?
2. What changes have Integrity Pacts contributed to (e.g. visibility procurement project, credibility and legitimacy procurement project)? Which factors contributed to these changes?
3. Did Integrity Pacts make procurement more efficient (e.g. costs procurement project, resources allocated, duration)?
4. Did Integrity Pacts have any negative effects (e.g. duplication of activities, red tape, additional costs)? How can this be addressed?
5. What are the best approaches for the independent monitoring component of the Pacts (e.g. selection process, accountability, funding, activities monitor)?
6. To what extent did the benefits of Integrity Pacts continue or lead to other follow-up activities after the project ended (e.g. reform of contracting process, engagement decision-makers, engagement economic operators, corruption perception)?
7. What were the major factors that influenced the achievement or non-achievement of sustainability of Integrity Pacts (e.g. political will, transparency and professionalism, independent monitoring, participatory stakeholder involvement)?
8. How can the model be adapted to small procurement projects and to diverse sectors, types of procurement, and legal, cultural and economic contexts?
9. Is there any ideal size and type of procurement for the implementation of Integrity Pacts? Conversely, are their types/sizes of procurement for which an Integrity Pact is not an appropriate tool?
10. Are there any elements in the Integrity Pact model that are useful only under certain circumstances? Can any element be added in some (or all) contexts?
11. How can Integrity Pacts be used to monitor EU-funded procurement projects? How should they be adapted?

### Interview questions – civil society organisations

- **Introductory Information**
- Name of Interviewee:
- Civil society organization:
- Number of Integrity Pacts involved in (as a company and as an individual):

### Effectiveness and impact

1. Can you describe briefly the sequence of activities from the moment you decide to intervene until the end of this intervention?
2. Which activities are undertaken to advocate for the use of Integrity Pacts in the country?

3. Which activities do you reckon most effective to advocate for the use of Integrity Pacts?
4. Where did the initiative come from to initiate an Integrity Pact?
5. How was the Integrity Pact content established?
6. Which parties were involved in designing Integrity Pact?
7. Was the content discussed with any other stakeholders? Should it be discussed with the bidders?
8. How was commitment of the public authority secured?
  - a. Through an agreement?
  - b. Through a Memorandum of Understanding?
9. Did the possibility exist for civil society organisations to withdraw from the process?
10. Which role did the civil society organisations play in the Integrity Pact?
11. How was the Integrity Pact financed?
12. How is the independence of the civil society organisations foreseen vis-à-vis the funding source?
13. Have there been concerns as to the independence of the civil society organisations or monitor?
14. What kind of human resources did the civil society organisations need to implement the Integrity Pacts?
15. What kind of financial resources did the civil society organisation need?

### **Integrity Pact agreement**

1. Does the Integrity Pact include provisions with relation to bidders?
2. Which provisions?
  - a. Not to bribe?
  - b. Not to use facilitation payments?
  - c. Not to collude?
  - d. To disclose information regarding payments?
  - e. Including subcontractors?
  - f. Others?
3. Does the Integrity Pact include provisions with relation to public authority?
4. Which provisions?
  - a. Not to demand or accept bribes
  - b. Not to demand or accept facilitation payments
  - c. To disclose relevant and equal information to all bidders
  - d. To guarantee protection of restricted information
  - e. To report any attempted or completed breaches of these clauses
  - f. To provide public information on the contracting process
  - g. Other
5. Have Integrity Pacts been applied on an individual basis (for selected contracts) or on a general basis (through policy)?
  - a. If on a general basis, was this for a specific sector or governmental agency?

### **Transparency**

6. Does the Integrity Pact foreseen specific provisions that increase transparency beyond legislative requirements?
  - a. Use of Internet?
  - b. Use of public hearings?
  - c. Opportunity for public to comment on tender documentation?
7. What means are used to make documents accessible to the public?
8. In which way does the Integrity Pact foresee additional transparency to the public?
  - d. Monitoring reports?
  - e. Additional documentation?
9. Were transactions from economic operators relating the project disclosed?

### **Monitoring provision**

10. Has independent monitoring been foreseen during:
  - a. The bidding process?
  - b. The contract execution?

11. Who monitored the procurement process where Integrity Pacts are used?
12. Who selects the monitor?
13. Which characteristics are essential?
14. How is the monitor financed?
15. When does the monitoring start and end?
16. To whom is the monitor accountable?
17. Did the possibility exist for the monitor to withdraw from the process?
18. How is independence of the monitor foreseen?
19. What are the functions of the monitor?
  - c. Monitor compliance with the Integrity Pact
  - d. Review / comment on documents
  - e. Discuss with participants
  - f. Observe and comment on the evaluation and award process
  - g. Deal with complaints
  - h. Observe implementation of the contract
  - i. Inform public opinion
  - j. Attend meetings with the responsible teams
20. In which way does the monitor duplicate work that has already been foreseen through formal arrangements? (red tape)
21. Did the monitor have access to all relevant documentation?
22. Did the monitor enjoy easier or more access to documentation than foreseen by relevant legislation?
23. What type of analysis does the monitor carry out on documents?
  - k. Whether laws are followed?
    - l. Identify corruption risks in bidders proposals / bidding documents?
24. What type of activities does the monitor undertake during the contract execution phase?
25. What steps does the monitor take when breaches of the Integrity Pact are identified?
26. Have breaches been identified during Integrity Pacts?
27. If yes, how many?
28. If yes, what type of breaches?

#### **Dispute resolution mechanism**

29. Is there a predetermined procedure to pursue violations of the Integrity Pact?
30. If no, why not?
31. If yes, please specify
  - a. National arbitration?
  - b. International arbitration?
  - c. Judicial review?
32. Who is entitled to allege the Integrity Pact violations?
33. What type of evidence is required to allege violations?
34. Have all violations been notified to authorities?
35. Is there a predetermined procedure to pursue complaints?
36. Were complaints made in relation to the procurement process?
37. In how many Integrity Pact cases have complaints been made to the monitor?
38. Does the dispute resolution system differ in any way from the formal mechanisms in place?
39. Does the system foreseen through the Integrity Pact, increase efficiency?

#### **Sanctions**

40. What kinds of sanctions are included in the Integrity Pacts?
  - a. Loss or denial of contract?
  - b. Forfeiture of bid and performance bonds?
  - c. Liquidated damages to principal and competitors?
  - d. Blacklisting?
  - e. Other?
41. Do these differ from those provided by the national legal system?
42. Which sanctions you reckon are most effective to include in an Integrity Pact?

43. Are sanctions also applicable to government officials?
  - f. Criminal sanctions?
  - g. Disciplinary sanctions?
  - h. Civil sanctions?
  - i. Other?
44. Have breaches or irregularities lead to sanctions?
45. How likely will an irregularity result in a sanction?

#### **Communication**

46. Was there a strategy in place to communicate the Integrity Pact to the media?
47. Who executed the communication strategy?
48. Did you perceive a difference between stakeholders' outreach (window-dressing risk)?
49. Which activities were conducted to reach out to the media?
50. Has there been media coverage of the Integrity Pact during and after the project?
51. Has there been response on outreach activities to the public?
52. How did this response materialize?
53. Have there been public scandals relating the procurement process or the contractors/contracted?
54. How would you rate the level of interaction with stakeholders such as the public and the media?
55. What impact does an Integrity Pact have on the perception of the public on public procurement?

#### **Public procurement costs**

56. Has there been over-expenditure during the bidding process / during the contract implementation (Difference between the estimated project's budget and the final expenditure)? Which factors contributed to this?
57. Are there indications that costs were saved on the procurement process?
58. Did the use of an independent monitor have effect on the resources allocated by the contracting authority to the process?

#### **Public procurement time**

59. Has there been a delay in the procurement process? In which way did this relate to the Integrity Pact?

#### **Sustainability**

60. Did the Integrity Pact result in any reform of contracting processes on an organizational or institutional level?
61. Have any activities been undertaken to ensure that Integrity Pacts become a permanent tool in public procurement?
62. Have activities been undertaken to ensure that anti-corruption measures have been included in a reform of the procurement process?
63. In which way has the application of an Integrity Pact contributed to broader recommendations against corruption in public procurement / incited reforms in procurement processes?
64. Has funding been ensured for follow-up activities relating corruption in public procurement?
65. Have activities been undertaken to secure funding for follow-up activities such as training on IPs, promotion material, research on public procurement?
66. Has funding been ensured for follow-up Integrity Pact?
67. Which activities have been undertaken to secure funding for follow-up Integrity Pact projects?
68. Which activities have been undertaken to ensure stakeholder commitment beyond the Integrity Pact agreement?
69. Which activities have been undertaken to ensure engagement of politicians after the Integrity Pact?
70. Has there been an observed change in corruption cases relating public procurement? To which extent does this change relate to the Integrity Pact?
71. Has there been an observed change in perception of corruption in public procurement?
72. To which extent does this change relate to the Integrity Pact?
73. Overall, do you believe that sustainability of the IP has been achieved?

#### **Adaptability**

74. Was there need to adapt the content of the Pacts to:

- a. Local conditions?
  - b. The size of the Integrity Pact?
  - c. The sector of the Integrity Pact?
75. What are the main differences of applying Integrity Pacts to different sectors and governmental levels?
  76. Are there any elements in the Integrity Pact model that are useful only under certain circumstances? Can any element be added in some (or all) contexts?
  77. How can the model be adapted to small procurement projects and to diverse sectors, types of procurement, and legal, cultural and economic contexts?
  78. How can Integrity Pacts be used to monitor EU-funded procurement projects? How should they be adapted?
  79. In which way can the Integrity Pact be used as a tool to call for reform of the procurement process

### **Interview questions – contracting authorities**

- **Introductory information**
- Name of Interviewee:
- Contracting authority:
- Governmental level:
- Number of procurements with Integrity Pacts conducted:

### **Effectiveness and impact**

1. Could you briefly describe your role in the Integrity Pact project?
2. Can you describe briefly how and when the decision was made to initiate an Integrity Pact?
3. Did you undertake activities to advocate the use of Integrity Pacts within your organization?
4. How was the Integrity Pact content established?
  - a. Which parties were involved in designing the Integrity Pact?
  - b. Was the content discussed with any other stakeholders? Should it be discussed with the bidders?
5. How did you secure commitment of your organization to initiate and Integrity Pact and during the Integrity Pact?
6. How was the Integrity Pact financed?
7. What kind of human and financial resources did you need for the Integrity Pact?

### **Integrity Pact agreement**

8. What kind of provisions did the Integrity Pact contain with relation to your organization?
  - a. Not to demand or accept bribes
  - b. Not to demand or accept facilitation payments
  - c. To disclose relevant and equal information to all bidders
  - d. To guarantee protection of restricted information
  - e. To report any attempted or completed breaches of these clauses
  - f. To provide public information on the contracting process
  - g. Other
9. Do these provisions go beyond those required by law?
10. Have Integrity Pacts been applied on an individual bases (for selected contracts) or on a general basis (through policy)?
  - h. If on a general basis, was this for a specific sector or governmental agency?

### **Transparency**

11. Does the Integrity Pact foresee specific provisions that increase transparency beyond legislative requirements?
  - a. Use of Internet?
  - b. Use of public hearings?
  - c. Opportunity for public to comment on tender documentation?
12. What means are used to make documents accessible to the public?
13. In which way does the Integrity Pact foresee additional transparency to the public?
  - d. Monitoring reports?

- e. Additional documentation?
- 14. Were transactions from economic operators relating the project disclosed?

#### **Monitoring provision**

- 15. Has independent monitoring been foreseen during:
  - a. The bidding process?
  - b. The contract execution?
- 16. Who monitored the procurement process where Integrity Pact are used?
- 17. Which characteristics are essential for the monitor?
- 18. To whom is the monitor accountable?
- 19. How is independence of the monitor foreseen?
- 20. What are the functions of the monitor?
  - c. Monitor compliance with the Integrity Pact
  - d. Review / comment on documents
  - e. Discuss with participants
  - f. Observe and comment on the evaluation and award process
  - g. Deal with complaints
  - h. Observe implementation of the contract
  - i. Inform public opinion
  - j. Attend meetings with the responsible teams
- 21. In which way does the monitor duplicate work that has already been foreseen through formal arrangements?  
(duplication work contracting authority / red tape)
- 22. What steps does the monitor take when breaches of the Integrity Pact are identified?
- 23. Have breaches been identified during Integrity Pacts?
- 24. If yes, how many and what types?

#### **Dispute resolution mechanism**

- 25. Is there a predetermined procedure to pursue violations of the Integrity Pact? If no, why not? If yes, please specify:
  - a. National arbitration
  - b. International arbitration
  - c. Judicial review
- 26. Who is entitled to allege the Integrity Pact violations?
- 27. What type of evidence is required to allege violations?
- 28. Have all violations been notified to authorities?
- 29. Is there a predetermined procedure to pursue complaints?
- 30. Were complaints made in relation to the procurement process?
- 31. In how many Integrity Pact cases have complaints been made to the monitor?
- 32. Does the dispute resolution system differ in any way from the formal mechanisms in place?
- 33. Does the system foreseen through the Integrity Pact increase efficiency?

#### **Sanctions**

- 34. What kinds of sanctions are included in the Integrity Pacts?
  - a. Loss or denial of contract?
  - b. Forfeiture of bid and performance bonds?
  - c. Liquidated damages to principal and competitors?
  - d. Blacklisting?
  - e. Other?
- 35. Do these differ from those provided by the national legal system?
- 36. Which sanctions you reckon are most effective to include in an Integrity Pact?
- 37. Are sanctions also applicable to government officials?
  - a. Criminal sanctions?
  - b. Disciplinary sanctions?
  - c. Civil sanctions?
  - d. Other?
- 38. Have breaches or irregularities lead to sanctions?

39. How likely will an irregularity result in a sanction?

### **Communication**

40. Was there a strategy in place to communicate the Integrity Pact to the media?
41. Who executed the communication strategy?
42. Did you perceive a difference between stakeholders outreach (window-dressing risk)?
43. Which activities were conducted to reach out to the media?
44. Has there been media coverage of the Integrity Pact during and after the project?
45. Has there been response on outreach activities to the public?
46. How did this response materialize?
47. Have there been public scandals relating the procurement process or the contractors/contracted?
48. How would you rate the level of interaction with stakeholders such as the public and the media?
49. What impact does an Integrity Pact have on the perception of the public on public procurement?

### **Public procurement costs**

50. Has there been over-expenditure during the bidding process / during the contract implementation? Difference between the estimated project's budget and the final expenditure
51. Which factors contributed to this?
52. Are there indications that costs were saved on the procurement process?
53. Did the use of an independent monitor have effect on the resources allocated by the contracting authority to the process?

### **Public procurement time**

54. Has there been a delay in the procurement process?
55. In which way did this relate to the Integrity Pact?

### **Sustainability**

56. Did the Integrity Pact result in any reform of contracting processes on an organizational or institutional level?
57. Which activities have been undertaken to ensure stakeholder commitment beyond the Integrity Pact agreement?
58. Which activities have been undertaken to ensure engagement of politicians after the Integrity Pacts?
59. Has there been an observed change in corruption cases relating public procurement?
60. To which extent does this change relate to the Integrity Pact?
61. Has there been an observed change in perception of corruption in public procurement?
62. To which extent does this change relate to the Integrity Pact?
63. Overall, do you believe that sustainability of the Integrity Pact has been achieved?

### **Adaptability**

64. Was there need to adapt the content of the Pacts to:
65. Local conditions?
66. The size of the Integrity Pact?
67. The sector of the Integrity Pact?
68. What are the main differences of applying Integrity Pact s to different sectors and governmental levels?
69. Are there any elements in the Integrity Pact model that are useful only under certain circumstances? Can any element be added in some (or all) contexts?

70. How can the model be adapted to small procurement projects and to diverse sectors, types of procurement, and legal, cultural and economic contexts?
71. How can Integrity Pacts be used to monitor EU-funded procurement projects? How should they be adapted?
72. In which way can the Integrity Pact be used as a tool to call for reform of the procurement process?

### **Interview questions – companies/bidders**

#### **- Introductory Information**

- Name of Interviewee:
- Company:
- Sector:
- Number of Integrity Pacts involved in (as a company and as an individual):

### **Effectiveness and impact**

1. Could you briefly describe your role in the procurement project?
2. At what stage did your company get involved in the Integrity Pact?
3. Was your company familiar with the tool?
4. Does your company have a compliance programme in place?
5. Does your company have anti-corruption policies in place?
6. Do you have a code of conduct in place?
7. Did you undertake activities to advocate the use of Integrity Pacts within your organization?
8. How did you secure commitment of your organization during the Integrity Pact?
9. Did you require additional resources to implement the Integrity Pact?
10. What kind of human and financial resources did you need for the Integrity Pact?
11. Did you undertake any additional activities apart from those required to comply with procurement law?
12. What were your expectations of the Integrity Pact? Were the expectations met?
13. From the perspective of your business sector what are the main challenges you face in public procurement? What effect does the Integrity Pact have on this?
14. Do Integrity Pacts have a negative/ positive impact on public procurement?

### **Transparency**

15. Does the Integrity Pact foresee specific provisions that increase transparency for your company beyond legislative requirements?
16. Were transactions relating the project disclosed?

### **Communication**

17. Was there a strategy in place to communicate the Integrity Pact to the media?
18. Who executed the communication strategy?
19. Which activities were conducted to reach out to the media?
20. Has there been media coverage of the Integrity Pact during and after the project?
21. Has there been response on outreach activities to the public?
22. How did this response materialize?
23. How would you rate the level of interaction with stakeholders such as the public and the media?
24. What impact does an Integrity Pact have on the perception of the public on public procurement?
25. How did you perceive collaboration with the other stakeholders involved?

### **Public procurement costs**

26. Has there been over-expenditure during the bidding process / during the contract implementation? Difference between the estimated project's budget and the final expenditure
27. Which factors contributed to this?

28. Are there indications that costs were saved on the procurement process?

#### **Public procurement time**

29. Has there been a delay in the procurement process?

30. In which way did this relate to the Integrity Pact?

#### **Sustainability**

31. Did the Integrity Pact result in any reform of contracting processes on an organizational or institutional level?

32. Which activities have been undertaken to ensure your companies commitment beyond the Integrity Pact agreement?

33. Overall, do you believe that sustainability of the Integrity Pact has been achieved?

#### **Adaptability**

34. Was there need to adapt the content of the Pacts to:

- a. Local conditions?
- b. The size of the Integrity Pact?
- c. The sector of the Integrity Pact?

35. What are the main differences of applying IPs to different sectors and governmental levels?

36. Are there any elements in the Integrity Pact model that are useful only under certain circumstances? Can any element be added in some (or all) contexts?

37. How can the model be adapted to small procurement projects and to diverse sectors, types of procurement, and legal, cultural and economic contexts?

## 10.3 Interview questions global review

### Global review guiding questions

1. Have Integrity Pacts been effective in preventing and detecting corruption? And if so, which forms of corruption? Which factors contributed to the achievement or non-achievement of the stated outcomes?
2. What changes/benefits (including economic and social) and impact have Integrity Pacts contributed to? And why did these changes happen?
3. Did Integrity Pacts make procurement more efficient? And if yes, are there differences in efficiency gains between the parties to an Integrity Pact? Have there been cost or time savings associated with their application? Has there been evidence of increased competitiveness in the procurement process and/or competitive advantages/disadvantages for specific groups, i.e. SMEs?
4. To what extent did the benefits of Integrity Pacts continue or lead to other follow-up activities after the project ended?
5. What were the major factors that influenced the achievement or non-achievement of sustainability of Integrity Pact results?
6. Are there certain legal, political, cultural or economic contexts in which the Integrity Pact is best suited?
7. Are there certain elements of the Integrity Pact and/or specific tender that are necessary or sufficient in order to increase chances of success?
8. One of the most important and defining elements of the Integrity Pact is the use of external independent monitoring. Let's focus further on this piece of the Integrity Pact.
9. Did Integrity Pacts have any negative effects? Major weaknesses and critiques? How can this be addressed?
10. What is the business case for the Integrity Pact?

### Interview questions global review - civil society organisations

- **Introductory Information**
- Name of Interviewee:
- Civil society organization:
- Number of Integrity Pacts involved in (as a company and as an individual):

### Efficiency, effectiveness and impact

1. How does your chapter define success of Integrity Pact implementation and outcomes?
2. Has use of the Integrity Pact discouraged corruption during the contracting process? If so, please explain how and what types of corruption.
  - a. Which elements of and arguments for the Integrity Pact were most important in the discouragement of bribery? I.e., fear of loss of reputation, level playing field, fear of sanctions, etc.
3. How has the effectiveness of the Integrity Pact varied in comparison to procurement processes without Integrity Pacts applied?
4. What have been the main short and long-term impacts of the Integrity Pact and what are your metrics for identifying these?
4. How has support for the Integrity Pact and its outcomes been communicated to the general public? Has this played a role in support for the Integrity Pact from the public, private sector and/or other stakeholders?
5. Has the Integrity Pact contributed to increased transparency and accountability in the public procurement process? If so why or why not, how has this been measured and what were the principle elements of the Integrity Pact and conditions of its application that contributed to this?
6. Has there been an observed change in public/private sector/other stakeholder perceptions of corruption in procurement?

7. Has there been an observed increase/decrease in public procurement **time** due to the Integrity Pact? If so, what were the factors of the Integrity Pact or the circumstances of its implementation behind this development?
8. Has there been an observed increase/decrease in public procurement **costs** due to the Integrity Pact? If so, what were the factors of the Integrity Pact or the circumstances of its implementation behind this development?
9. Has there been evidence of increased competitiveness in the procurement process?

### **Sustainability**

10. Have there been any organisational or institutional changes among both public sector and private sector participants stemming from the application of Integrity Pacts?
11. To what extent have Integrity Pacts, elements of them and lessons learned from their **outcomes** been institutionalized in your country's public procurement processes and/or agencies?
12. Has there been a recognized spread of or interest in the application of Integrity Pacts locally, nationally or regionally since their initial use by the chapter?
13. What activities have been undertaken to build stakeholder capacity and interest in future engagement in Integrity Pacts?
14. Who has been the primary 'champion' of the Integrity Pact among the various stakeholders involved, i.e. the national chapter? Contracting authorities? Private sector? NGOs? Public? Government?
15. What factors of the Integrity Pact or its implementation help or hinder sustainability of results?
16. How has the sustainability of Integrity Pact outcomes varied in comparison to procurement without Integrity Pacts and what reasons would you give for these differences?

### **Flexibility**

17. Please share your views on differences in application of the Integrity Pact according to government level, sectors, monetary value of the Integrity Pact, etc., including where it works best and where there are more challenges.
18. Is the signing of the Integrity Pact mandatory or voluntary? Which in your view is the best option and why?
19. Has there been a need to adapt the Integrity Pact content to local conditions – legal, cultural, political, economic etc.? If so, how, why, and what effects do you think that this has had on the Integrity Pact outcomes?
20. When in the procurement process do you think that the Integrity Pact should be signed?
21. How much flexibility do you believe should be permitted in the application of Integrity Pacts? In your opinion, should bidders be involved in negotiations on Integrity Pact content? Why or why not?
22. What are in your view the most important **elements within the Integrity Pact itself** that are necessary for it to achieve successful outcomes, and why?
23. What are in your view the most important conditions of **Integrity Pact implementation** that are necessary for it to achieve success, and why?
24. What other tools have you used and promoted in preference to or in complement with the Integrity Pact and why? What role do you believe that this has on the outcomes of the Integrity Pact?
25. Please share our experiences with the independent external monitoring, for example in selection, independence, and financing, etc.
  - a. What role does the monitor and the allowance for dispute resolution mechanisms play in the effectiveness and general success of an Integrity Pact?
  - b. What role do the characteristics of the monitor – selection process, guarantees of independence, financing, operative capabilities – play in the successful completion of its duties? Which are the most important?

### **Cross-cutting**

26. What have been some of the greatest challenges in promoting and implementing Integrity Pacts in the country among various stakeholders?
27. In your view as well as those received from other stakeholders (i.e. bidders/private sector companies, contracting authorities, government, NGOs, the public), what are some of the weaknesses and criticisms of IPs? What are the strengths and benefits?

28. How do the sanctioning, dispute resolution mechanism, and public disclosure elements of Integrity Pact implementation differ and align with established legislative practice in the country?
29. How does the civil society organisation address concerns regarding the business case for the Integrity Pact?
30. Would you like to share any further information on Integrity Pacts?

### **Interview questions global review – contracting authorities**

- **Introductory information**
- Name of Interviewee:
- Contracting authority:
- Governmental level:
- Number of procurements with Integrity Pacts conducted:

### **Efficiency, effectiveness and impact**

1. How does your organisation define success of Integrity Pacts implementation and outcomes?
2. Has use of the Integrity Pact discouraged corruption during the contracting process? If so, please explain how and what types of corruption.
  - a. Which elements of and arguments for the Integrity Pact were most important in the discouragement of bribery? I.e., fear of loss of reputation, level playing field, fear of sanctions, etc.
3. How has the effectiveness of the Integrity Pact varied in comparison to procurement processes without Integrity Pacts applied?
4. Where do you see the greatest corruption risks in procurement and how do you see the Integrity Pact as contributing in mitigating them?
5. What have been the main short and long-term impacts of the Integrity Pact and what are your metrics for identifying these?
6. How has support for the Integrity Pact and its outcomes been communicated to the general public? Has this played a role in support for the Integrity Pact from the public, private sector and/or other stakeholders?
7. Has the Integrity Pact contributed to increased transparency and accountability in the public procurement process? If so why or why not, how has this been measured and what were the principle elements of the IP and conditions of its application that contributed to this?
8. Has there been an observed change in public/private sector/other stakeholder perceptions of corruption in procurement?
9. Has there been an observed increase/decrease in public procurement **time** due to the Integrity Pacts? If so, what were the factors of the Integrity Pact or the circumstances of its implementation behind this development?
10. Has there been an observed increase/decrease in public procurement **costs** due to the Integrity Pact? If so, what were the factors of the Integrity Pact or the circumstances of its implementation behind this development?
11. Has there been evidence of increased competitiveness in the procurement process? Change in the share of international companies in procurement, the share of SMEs or the share of open vs closed tenders?

### **Sustainability**

12. Have there been any organisational or institutional changes among both public sector and private sector participants stemming from the application of Integrity Pacts?
13. To what extent have Integrity Pacts, elements of them and lessons learned from their **outcomes** been institutionalized in your organizational and/or national public procurement processes?
14. Has there been a recognized spread of or interest in the application of Integrity Pacts locally, nationally or regionally since their initial use by the chapter?
15. What activities have been undertaken to build stakeholder capacity and interest in future engagement in Integrity Pacts?
16. Who has been the primary ‘champion’ of the Integrity Pact among the various stakeholders involved, i.e. the Transparency International national chapter? Contracting authorities? Private sector? NGOs? Public? Government?
17. What factors of the Integrity Pact or its implementation help or hinder sustainability of results?

18. How has the sustainability of Integrity Pact outcomes varied in comparison to procurement without IPs and what reasons would you give for these differences?

### **Flexibility**

19. Is the signing of the Integrity Pact mandatory or voluntary? Which in your view is the best option and why?
20. Has there been a need to adapt the Integrity Pact content to local conditions – legal, cultural, political, economic etc.? If so, how, why, and what effects do you think that this has had on the Integrity Pact outcomes?
21. When in the procurement process do you think that the Integrity Pact should be signed? When is it signed in your processes?
22. How much flexibility do you believe should be permitted in the application of Integrity Pacts? In your opinion, should bidders be involved in negotiations on Integrity Pact content? Why or why not?
23. What are in your view the most important **elements of the Integrity Pact** that are necessary for it to achieve successful outcomes, and why?
24. What are in your view the most important conditions of **Integrity Pact implementation** that are necessary for it to achieve success, and why?
25. What other tools have you used and promoted in preference to or in complement with the Integrity Pact and why? What role do you believe that this has on the outcomes of the Integrity Pact?
26. Please share our experiences with the independent external monitoring, for example in selection, independence, and financing, etc.
  - a. What role does the monitor and the allowance for dispute resolution mechanisms play in the effectiveness and general success of an Integrity Pact?
  - b. What role do the characteristics of the monitor – selection process, guarantees of independence, financing, operative capabilities – play in the successful completion of its duties? Which are the most important?

### **Cross-cutting**

27. What have been some of the greatest challenges in promoting and implementing Integrity Pacts in the country among various stakeholders?
28. In your view as well as those received from other stakeholders (i.e. bidders/private sector companies, contracting authorities, government, NGOs, the public), what are some of the weaknesses and criticisms of Integrity Pacts? What are the strengths and benefits?
29. How do the sanctioning, dispute resolution mechanism, and public disclosure elements of Integrity Pacts implementation differ and align with established legislative practice in the country?
30. How do you address concerns regarding the business case for the Integrity Pact in interactions with the private sector/bidding companies?
31. Would you like to share any further information on Integrity Pacts?

### **Interview questions global review – companies/bidders**

- **Introductory Information**
- Name of Interviewee:
- Company:
- Sector:
- Number of Integrity Pacts involved in (as a company and as an individual):

### **Efficiency, effectiveness and impact**

1. Where do you see or experience the greatest risks in public procurement in this country?
2. In your view and experience, is the Integrity Pact effective in mitigating these risks?

3. Has IP use discouraged bribery during the contracting process? If so, please explain how as well as what the most important element of the process was that discouraged bribery (i.e. knowledge that competitors are bound by the same rules, fear of sanctions, fear of loss of reputation, knowledge that government agencies will undertake measures to prevent corruption, other)
4. How has anti-bribery and corruption been perceived and experienced by your company in procurement processes with Integrity Pacts compared to those procurement processes conducted without Integrity Pacts?
5. Were there experiences of violations raised by your company or competitors during the bidding process? If yes, to who were these issues brought to and what was your satisfaction with the response and the process as a whole? How did this experience compare to similar experiences in contracting procedures without Integrity Pacts?
6. Do you perceive an increased commitment on the part of the contracting authorities to effective and efficient procurement, and a commitment to anti-corruption, since the introduction of the Integrity Pact?
7. Have you seen an effect - positive, negative or neutral - on your company's reputation or image since engaging in Integrity Pacts?
8. How has interaction with customers and other stakeholders changed, if at all, since your engagement in Integrity Pacts?
9. How has the inclusion of an Integrity Pact affected the speed with which the contracting process has taken place?
10. Have you seen a reduction in legal proceedings/arbitration in contracting procedures with IPs compare to procedures without Integrity Pacts?
11. How has the inclusion of an Integrity Pact affected your company's costs? Financial and human resource requirements?
12. What affect did the Integrity Pact have on the final price of the winning bid in the contracting processes in which you have been involved?

### **Sustainability**

13. Did engagement in Integrity Pacts influence your internal anti-corruption policies, over the short or long term, in contracting procedures that you have undertaken since first taking part in Integrity Pacts?
14. Do you require your subcontractors to adhere to the terms of the Integrity Pact? To your anti-corruption and compliance policies in general?
15. What role did your company's CEO/top management play in decision to engage in and the implementation of the Integrity Pact?
16. How did the company communicate its engagement in the IP internally/externally, as well as during and after the conclusion of the Integrity Pact?

### **Flexibility**

17. Did your company have a Code of Conduct and/or an anti-corruption compliance programme prior to engaging in Integrity Pacts?
18. Were there any clauses in the Integrity Pacts in which you have been involved that you found to be particularly useful/onerous/unnecessary for the success of the Integrity Pact? If so, why?
19. Were there any clauses in the Integrity Pacts in which you have been involved that you found burdensome/beneficial to you as a company? If so, why?
20. Did bidding companies have a voice in deciding the content of the Integrity Pact? Please share your thoughts on this.
21. Please share your views on the contribution of the independent external monitor(s) in the Integrity Pact and your interactions with them.
22. What other tools have you used in contracting procedures, in preference to or in complement with the Integrity Pact, and why? What effect do you believe that this has, if any, on the outcomes of the Integrity Pact?

### **Cross-cutting**

23. What in your opinion and experience are the strengths and weaknesses of the Integrity Pact system?
24. Where do you see that the Integrity Pact can be improved, particularly from the private sector standpoint?
25. What in your view can governments, contracting authorities, civil society and other stakeholders do to increase private sector participation in Integrity Pacts?