"Integrity pacts and their binding nature recent CJEU case law under the light of the new Directives"[1]

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The aim of the paper is to explore the use of integrity pacts and/or legality clauses as a tool in fighting corruption in public procurement. The paper presents concisely the main characteristics and track record of the use of integrity pacts, followed by a brief analysis of the provisions on debarment as a means to fight corruption in public procurement. The paper proceeds to an analysis of the case law of the CJEU regarding the use of integrity pacts and legality protocols. Finally, the paper makes a brief presentation of the notion of conflict of interests and its main features, in relation to the relevant provisions of the Directives 2014/24/EU, 2014/25/EU and 2014/23/EU and comments on the potential use of integrity pacts / legality protocols as a tool used to prevent, identify and remedy conflicts of interests.

I. Introduction

During the 1990s, a number of multilateral negotiations under the initiative of international/regional governmental organizations, such as the Organization of American States, the United Nations, the European Union, the African Union, the Council of Europe, the OECD, the IMF and World Bank led to the adoption of guiding principles and international conventions (hard law) to fight corruption. In the recent years new anti-corruption governmental networks, such as the Council of Europe Group of States Against Corruption (GRECO), and NGOs, such as IT, are being established, introducing new tools, in order to assist the fight against corruption[2]. Corruption is a priority issue and no IGO (International Governmental Organizations) wants to be seen without an action plan against it[3].

Today, anti-corruption activity involves not only public policies, but also companies which have adopted their own **internal anti-corruption policy,** by setting new ethics bodies, strengthening internal audit procedures and forensic inspections, signing **integrity pacts** and becoming members and supporters of a series of anticorruption

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[1] A short version of this article has been presented in the International Conference **Public Procurement: Global Revolution VIII, University of Nottingham, 12 – 13 June 2017**

[2] Luis de Susa, Anti-corruption agencies: between empowerment and irrelevance, in Crime Law Society Change, 2010, σελ. 5 επ

[3] Mény, Y., & De Sousa, L. (1999). Corruption. In Association d'Economie Financière (Ed.), *Rapport Moral sur l' Argent dans le Monde 1999* (pp. 137–144). Paris: Montchrestien.Google Scholar

networks. NGOs play a key role, in mobilizing people's attention and putting pressure on decision-makers to adopt and implement anti-corruption reforms[4].

Framework concepts, such as 'ethics infrastructure', promoted by the OECD or 'national integrity systems', fostered by TI, **bring governmental and non-governmental actors together for a common mission.** More active methods of fighting corruption are being sought after, by states, international and regional organizations[5] and private parties[6]. A broad range of tools and mechanisms, soft law (codes of conduct, **pacts of integrity** and standards of transparency) and hard law (covenants, protocols, and recommendations) is available for this purpose.

II. Integrity pacts and legality protocols

In this context it is of interest to examine the role of the integrity pacts and integrity clauses, as tools for **preventing or limiting corruption in public contracting**. Integrity Pacts first appeared in the 1990s, when proposed by the NGO Transparency International.

An **Integrity pact** is an **agreement** between the contracting authority and the bidders, in relation to **a particular project,** that **all parties** will **abstain from** bribery, collusion, extortion and other **corrupt practices** for the extent of the contract. To ensure accountability, Integrity Pacts also include a **monitoring system** all stages of the procedure and the implementation of the contract, typically led by **civil society** organisations, since they are regarded as being independent, which **signals the eventual unlawful components to the parties,** prepares reports on the transparency and fairness of the process regularly, made publicly available. Whenever possible, the Integrity Pact should cover all the activities related to the contract, from the identification of a need for procurement, the designing of the tender, the pre-selection of bidders, the bidding and contracting proper, through the implementation, to its completion and operation.

[4] Luis de Susa, Anti-corruption agencies: between empowerment and irrelevance, in Crime Law Society Change, 2010, σελ. 5 επ.

[5] The principal international legal instruments in the fight against corruption are: United Nations Convention Against Corruption, adopted by the United Nations General Assembly by Resolution 58/4 of 31 October 2003; OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions, signed on 17 December 1997; African Union Convention on Preventing and Combating Corruption, adopted 11 July 2003; Inter-American Convention Against Corruption, adopted on 29 March 1996; Criminal Law Convention on Corruption of the Council of Europe, adopted on 27 January 1999; Civil Law Convention on Corruption of the Council of Europe, adopted on 4 November 1999.

[6] Teresa Medina Arnaiz, Exclusion of tenderers in public procurement as an anti-corruption means

In the preparatory phase of the procedure (from the identification of a need for procurement up to the moment of publishing a call for tenders) the **contracting authority** and the **monitor** constitute the parties of the Integrity Pact. In the bidding phase, the Integrity Pact is joined by the **bidders**, the persons making an offer for carrying out the task that the procurement is aimed at. In the third, closing phase, which is the implementation of the contract signed by the winner of the public procurement procedure, only the **successful bidder**, the **contracting authority** and the **monitor** take part. **Donors** and **investors** as well as **sub-contractors** of the bidders can also join the Integrity Pact[7].

The major elements are:

(a) regarding the contracting authority, an undertaking that its officials **will not demand or accept any bribes,** gifts or payments of any kind and maintain appropriate disciplinary, civil or criminal sanctions in case of violation.

(b) regarding each bidder, (i) a statement that it has **not paid, and will not pay, any bribes** in order to obtain or retain the contract, (ii) an undertaking to **disclose all payments** made in connection with the contract in question to anybody, (iii) the explicit acceptance that the commitments and obligations remain in force for the winning bidder **until the contract has been fully executed,** (iv) an obligation to have a company **code of conduct** and a **compliance programme** for the implementation of the code of conduct.

(c) a **set of sanctions** for any violation by a bidder of its statements or undertakings, such as: - Denial or loss of contract - Forfeiture of the bid or performance bond or other security - Liability for damages to the contracting authority and the competing bidders - Debarment of the violator by the contracting authority for an appropriate period of time

(d) an **independent external expert monitor**

With this content, Integrity Pacts **increase transparency and accountability, enhance trust in authorities and government contracting, contribute to a good reputation of government agencies, bring cost savings and improve competition through better procurement.** Overall, integrity pacts are **a simple and flexible tool: they are essentially contracts establishing the rights and obligations of all the parties to a public contracting process,** they can be implemented within the regular

[7] The **cost** of implementing an Integrity Pact may vary depending on the implementation arrangements, the activities included in the process and the complexity of bidding procedures. Whatever the case, experience has shown that they remain a very small percentage of the project costs and can be covered by different sources, such as the contracting authority's own resources, bidders' fee, contributions from donors or project financiers or a combination of the above.

authority of contracting officials and bodies, they do not entail additional legal reform in order to be implemented and they can be applied to a wide variety and size of public contracts. Being **simple, flexible and adaptable,** they have a positive track record, having been applied in more than 15 countries and 300 separate situations.

However, in certain European countries, among which Greece, they have received negative criticism, mainly due to the lack of defining a specific procedure to monitor any breach of the Pact, the lack to specify the acceptable evidence of such a breach and the sanction of debarment of the violator[8], for a longer period of time, having been considered as a severe restriction of the right to economic freedom[9].

III. The EU environment – debarment as one of the means to safeguard the general principles of EU law and fight corruption

Aware that the problem of corruption also affects Member States, the EU has developed **a comprehensive anticorruption strategy** in those sectors that are more prone to corrupt practices, intensifying its efforts in those areas that, because they jeopardize greater amounts of public resources, might endanger the community objective of ensuring the effective operation of the Internal Market, since corruption **violates the general founding principles of EU law.**

The economic value of public procurement in the EU and the public origin of its funding make it imperative to achieve the double aim to reduce spending and to increase quality[10]. For the very same reasons public procurement is **vulnerable to corruption. The primary objective of EU Public Procurement Law is the acquisition of goods and services, under the best possible terms.** This aim is at risk in situations where the personal, economic or other interest of members of a contracting authority or public officials prevails. **The qualities of the people involved in the public procurement system,** either politicians or agents from the public sector and officials serving at the contracting authorities, as well as economic operators from the private sector, **are the cornerstone of establishing integrity.**

These are the reasons why EU legislation on Public Procurement also pursues secondary / non-commercial goals – such as the **fight against corruption.** In the private sphere, the compliance systems and the audit and remedy/protest system

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[8] Opinion 2/2016 of the Hellenic Single Procurement Authority on the draft L. 4413/2016 "Transposition, in the greek legal order, of the Directive 2014/23/EU on Concessions" (p. 10 et seq., remarks on art. 36).

[9] M. – E. Tsipis, Integrity Pact: Will it exterminate corruption in public contracts?, in Journal of Administrative Law (ΕφΔΔ), 3/2013, p. 394 - 405

[10] Prof. Daniel Gordon – Prof. Gabriella Racca, Integrity challenges in the EU and the US procurement systems, in Ius Publicum Network Review (www.ius-publicum.com)

for the public sphere seem to be the main instruments for pursuing integrity and efficiency[11]. The EU procurement Directives (aim to) create a quite detailed, clear and comprehensive framework[12] of procurement law. The previous Directives[13] were the outcome of a remarkable institutional effort to ensure the conditions for real competition between European firms in the award of tenders by the contracting authorities, so that these **acquire goods and services under the best possible terms – the primary objective of EU PP law**, as mentioned above[14].

The EU Procurement Directives require transparency in procurement procedures and contain provisions on the exclusion grounds, which "deter" or "punish" corrupt behavior. They establish obligations referring to the preparation and the award of public contracts, all based upon and serving effectively the EU fundamental principles. These obligations are interlinked between each other in such a way, that the "obligation of transparency which is imposed on the public authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the public contracts market to be opened up to competition and the impartiality of procurement procedures to be reviewed."[15] EU law provides, as well, for the qualitative selection (eligibility criteria) of participants in a public procurement procedure, by contracting authorities, within the context of which contracting authorities **are required to or possibly may** exclude those who do not achieve the required standards (professional qualifications, reliability, suitability) for the proper execution of the contract[16]. **Observance of the principles of transparency and of equal treatment require clear and explicit reference of the relevant criteria in the tender document[17].**

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[11] Luis de Susa, as cited, p. 44

[12] Teresa Medina Arnaiz, as cited; such a regulatory framework, which provides for objective criteria in decision making, the establishment of the principles of transparency and competition and sets up subsequent supervisory mechanisms over the awards through the incorporation of effective review procedures, contributes to the restriction of corrupt practices. Such a framework for the conduct of public procurement is a fundamental prerequisite for curbing corruption in public contracting (ADB/OECD, 2006 and art. 9 of the United Nations Convention against Corruption) and ensuring the spending of public funds for legitimate purposes.

[13] Directives 2004/17/EC and 2004/18/EC

[14] EU Directives can contribute to the European Union's overall policy in the fight against corruption through two sets of measures: the first are of a general nature and refer to the **legal framework**; and, the second, which is of a specific nature, is aimed at **promoting probity** among those economic operators that wish to become contractors (Bovis, 2006).

[15] Teresa Medina Arnaiz, as cited

[16] S. Arrowsmith, EU public procurement law: An introduction, 2011, p. 140 et seq., M. Gabriel, The establishment and participation of bidding consortia in award and review procedures in Germany and Austria, 2007, 16 Public Procurement Law Review, 174, D. Mardas, Criteria for qualitative selection in public procurement: A legal and economic analysis, 1995, 4 Public Procurement Law Review 145.

[17] The same criteria may be applied in order to limit the number of candidates, in restricted and negotiated procedures with publication of a contract notice and in the competitive dialogue.

Fair competition and equal treatment of bidders, two major goals of the Directives, are important in the fight against corruption as measures of a general nature. As a response to this, measures of a more specific nature are needed, in order to fight corruption by promoting the probity of the stakeholders involved in public procurement procedures[18]. Such measures may include **codes of conduct, conflict of interest regulations, incompatibility laws, rules on abstention designed for public officials and politicians, as well others that refer to the integrity of the candidates or tenderers.** Among the measures of this type is the **obligatory exclusion** from tendering procedures of those tenderers who have been **convicted of corruption** in a final sentence against which no further appeal is possible. The principle of proportionality has to be observed at all times, since exclusion of tenderers by public procurement procedures restricts their economic freedom, which is protected by the Treaty, a manifestation of which is **the right to participate freely in the public procurement procedure.** From this view point, disqualification of a candidate or tenderer in such a way that they can be defined as an **administrative remedy, i.e. an administrative measure and not an administrative penalty[19].**

IV. The rule that the grounds for exclusion are exclusive and the derogations from the rule[20]

A. The rule

The grounds for exclusion provide, depending on the gravity of the conduct and the seriousness of the situation, for the mandatory or for the discretionary exclusion of participants. The previous Directives introduced the rule that **the grounds for exclusion listed are exclusive. Ratio** had been the necessity to establish undistorted competition and the uniform application of public procurement EU law, objectives which would be in jeopardy if Member States enjoyed discretion in establishing**, unilaterally, grounds for exclusion.**

Despite exclusion being **mandatory** in nature, Member States may decide on a derogation due to "*overriding requirements in the general interest*" (Article 45 (1) Directive 2004/18/EC); however, this article does not offer a definition of what is to

[18] Teresa Medina Arnaiz, as cited

[19] ERLING HJELMENG AND TINA SØREIDE, DEBARMENT IN PUBLIC PROCUREMENT: RATIONALES AND REALIZATION, Chapter in G. M. Racca and C. Yukins. 2014. Integrity and Efficiency in Sustainable Public Contracts. Bruylant.

[20] Ch. Detsaridis, The power of the national legislator, in relation to EU law, to provide for additional criteria for the qualitative selection of tenderers, regarding serious professional misconduct, CJEU C-465/11, decision of 13-12-2012, Forposta SA, article published in Theory and Action of Administrative Law, issue 3/2015

be understood as “the general interest”, which complicates its practical application. The contracting authorities enjoy a great deal of discretion when assessing the grounds for exception due to the inexistence of any list of cases. Nevertheless, such cases must be **limited to those that are justified and proportionate** to the pursued objectives, since, like all exceptions, they are subject to a **restrictive interpretation** so that exceptions do not arise so frequently **as to render this debarment ineffective at fighting corruption.** Based on this restrictive interpretation, among the cases that give rise to exclusion it would appear that those referring to the protection of public health are highlighted.[21]

The exclusion criteria according to the Directives can be grouped into 2 categories, on the basis of their severity: article 45 (1) contains the exclusion criteria for offences considered as grave, i.e. certain sorts of criminal conduct for example conviction for corruption, which lead to the obligatory exclusion of the participants, however, Member States remain free to decide the conditions under which these criteria are applied, while article 45 (2) provides for the discretionary power of the Member States, depending on their **legal, economic or social considerations,** and, subsequently, of the contracting authorities, to exclude participants on certain grounds; in this context, the Member States have the power to make the grounds of exclusion less onerous or more flexible. **The only limits placed on their freedom of choice are that they cannot include grounds for exclusion that are not foreseen in the Directives or that violate the general principles of transparency and equal treatment and proportionality.**

B. The derogation

Art. 45 para. 1 of the 2004/18 Directive establishes, in a binding manner, the conditions for the obligatory exclusion of tenderers in relation to their personal situation[22] : the existence, at the expense of the operator of a final conviction, for specific and restrictively defined criminal offenses.

Para. 2 of art. 45 provides **a fairly wide discretion to the Member States and, subsequently, to the contracting authorities** in relation to the grounds for exclusion of the candidate (financial standing, professional conduct, fulfillment of tax and insurance obligations, conduct during the tendering procedure). Exclusion on these grounds lies in the discretion of the Member States on the basis of the national legislation[23].

[21] Teresa Medina Arnaiz, as cited

[22] El. Trova / P. Skouris, The EU law of public procurement, 2009, p. 370 et seq. J.H. Priess, HandBbuch des Europaischen Verbaberechts, 2005, p. 253 et seq.

[23] CJEU case C-226, 228/2004, La Cascina, decision of 9.2.2006.

Limits to the discretion attributed to Member States are (a) that the list of grounds for exclusion provided for in art. 45 is exhaustive and (b) that the general principles of transparency and equal treatment are being observed at all times[24].

The CJEU recognised, early enough, the need that Member States provide in national legislations, for additional grounds for exclusion (decision of 16 December 2008 of **Michaniki v. Greece)**. In this ruling, the CJEU at first acknowledged that **the intention of the EU's legislator** was to provide for grounds for exclusion **based solely on objective circumstances or behaviours which question the professional integrity or the economic or financial ability of a certain economic entity to complete the contract for the award of which it submits offer**.

Furthermore, according to the CJEU, this **does not exclude the possibility for Member States to maintain or adopt rules aiming, inter alia, to ensure, in the field of public procurement, compliance with the principle of equal treatment, as well as the principle of transparency,** because **each Member State is responsible and the most appropriate, to identify, on the basis of its own historical, legal, economic or social conditions situations that favor the appearance of behaviors that may cause violations of the principles of equal treatment and transparency[25].**

However, these reasons should be **consistent with the principle of proportionality, which is violated,** if **national provisions establish an irrebutable presumption, without providing to the concerned tenderer the chance to demonstrate, to rebut any proof, that, in their case, there is no real risk of corruption or of breach of the principles of the Treaty in the particular public procurement procedure[26].**

In other words, Member States may provide for additional grounds of exclusion of the tenderers, on top of the ones provided for in the Directives, conditionally this is justified for the protection of the public interest. However, **the automatic exclusion**

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[24] CJEU case C-470/99, Universale-Bau et al., decision of 12.12.2002 and case C-421/01, Traunfellner, decision of 16.10.2003, El. Trova / P. Skouris, as cited, p. 369 et seq.

[25] D. Raikos, The Law of Public Procurement, 2014, p. 414 et seq., A. Gerontas, The Law of Public Works, 2009, p. 393 et seq.

[26] See also case Fabricom, in which the Court ruled that even if it serves the principles of equal treatment and fair competition, the a priori exclusion of a tenderer, on the grounds of its previous participation in the preparatory phase of the contract (for example by drafting the technical qualifications of the tender document), violates the principle of proportionality since the observance of the principle of equal treatment could be achieved with **less onerous measures,** such as by reserving the exclusion only to the tenderers who did not prove **that, in the particular case, there is no real risk danger for competition** (see also the case Assitur Srl in relation to the infringement of the principle of proportionality, in so far as national legislation does not provide the concerned tenderers the opportunity to demonstrate that in their case there is no real risk of a practice that may threaten the transparency and to distort competition between tenderers.

of a tenderer, without attributing discretionary power to the contracting authority in order to assess the seriousness of the alleged conduct and without offering the concerned participant the possibility to counter-argue and provide for proof, is not consistent with para. 2 of article 45 of the Directive. The contracting authority should be able to decide, quoting a detailed reasoning, if a conviction affects the solvency or professional reliability of the tenderer and to assess, citing a detailed reasoning, the severity and gravity of the offences relating to its professional activity[27]. Each case should be considered, by the contracting authority, individually[28], after having granted the possibility, to the tenderer concerned, to provide evidence that no distortion of competition took place nor violation of the fundamental principles of EU law[29].

V. The (recent) CJEU case – law: the particular case of IMPRESA EDILUX[30] on legality protocols

The CJEU, in applying and interpreting the previous EU Directives, **consistent to its settled case – law** which we presented above in section II, **repeated its position** that **(a) the intention of the EU's legislator** was to provide for grounds for exclusion **based solely on objective circumstances or behaviours which question the professional integrity or the economic or financial ability of a certain economic entity to complete the contract for the award of which it submits offer, (b)** this **does not exclude the possibility for Member States to maintain or adopt rules aiming, inter alia, to ensure, in the field of public procurement, compliance with the principle of equal treatment, as well as the principle of transparency, and to fight against corruption**, because each Member State is responsible and the most appropriate, to identify, on the basis of its own historical, legal, economic or social conditions situations that favor the appearance of behaviors that may cause violations of the said principles, **(c)** however, any additional grounds of exclusion

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[27] Greek Council of State (GCoS) 1278/2008 (interim measures), 260/2008 (interim measures).

[28] CJEU C-21/03 and C-34/03ΔΕΚ Fabricom, decision of 3.3.2005, C-376/08 Serrantoni decision of 23.12.2009, C-147/06 and C-148/06 SECAP and Santorso, decisions of 15.5.2008.

[29] The CJEU in the Forposta decision ruled that contracting authorities may define **additional grounds for exclusion, on the basis of the principles or other rules of EU public procurement law, however, these may be compatible with art. 45 of the Directive conditionally that the grounds for exclusion do not relate to the professional qualities of the tenderer and, therefore, do not fall into the exhaustive list of art. 45 (1). Moreover, it is imperative that** the additional grounds for exclusion and their compatibility with EU law, **to be proportionate to the purpose pursued, i.e. the protection of the public interest, which consists in excluding really unreliable economic operators (CJEU, C-210/03, Swedish Match, decision of** 14.12.2004, C-147/06 και C-148/06, SECAP and Santorso, decisions of 15.5.2008) **while, at the same time, not providing for the automatic exclusion from the tendering process and the automatic rejection of the offer submitted.**

[30] C-425/14, judgment of 22 October 2015

should be **consistent with the principle of proportionality, which is violated by the establishment of irrebutable presumptions, which deprive the concerned tenderer of the chance to demonstrate, to rebut, any proof, that, in its case, there is no real risk of corruption or of breach of the principles of the Treaty in the particular public procurement procedure [31].**

The CJEU further developed its reasoning in the case of **IMPRESA EDILUX,** which is of particular interest for this presentation. The case concerns a public procurement in Italy for the award of a public works contract. The adhoc association of construction companies (JV), represented by Impresa Edilux, submitted an **incomplete bid,** since it failed to lodge, in its offer, **the declaration of acceptance of the clauses included in the legality protocol which had to be produced according to the scheme established in an Annex to the tendering specifications, which was, under the invitation to tender, an essential document, to be produced on pain of exclusion from the tendering procedure, and the bidder had been excluded from the tendering process. The legality protocol was required by the contracting authority in order to assure compliance with the various Italian rules and protocols on 'legality' – measures designed to combat organised crime.**

More specifically, **the purpose of introducing legality protocols into Italian law, on pain of exclusion, is to prevent and combat the phenomenon of the infiltration of organised crime into the public procurement sector.** Italian legislation against corruption in the public administration"[32] provides for the **discretion** of contracting authorities to include, in public procurement notices, invitations to tender or letters of invitation, **a provision giving them the power to exclude from the tendering procedures participants who fail to comply with clauses of legality protocols or integrity agreements[33]. At the same time, the clauses included clauses intended to**

[31] See also case Fabricom, in which the Court ruled that even if it serves the principles of equal treatment and fair competition, the a priori exclusion of a tenderer, on the grounds of its previous participation in the preparatory phase of the contract (for example by drafting the technical qualifications of the tender document), violates the principle of proportionality since the observance of the principle of equal treatment could be achieved with **less onerous measures,** such as by reserving the exclusion only to the tenderers who did not prove **that, in the particular case, there is no real risk danger for competition** (see also C-21/03 and C-34/03, Fabricom, decision of 3.3.2005 and the case Assitur Srl in relation to the infringement of the principle of proportionality, in so far as national legislation does not provide the concerned tenderers the opportunity to demonstrate that in their case there is no real risk of a practice that may threaten the transparency and to distort competition between tenderers, C-538/07, decision 19.5.2009).

[32] Law No 190, art. 1(17) [legge n. 190, disposizioni per la prevenzione e la repressione della corruzione e dell'illegalità nella pubblica amministrazione) of 6 November 2012 (GURI No 265 of 13 November 2012, 'Law No 190/2012')]

[33] 'Contracting authorities may state in public procurement notices, invitations to tender or letters of invitation that failure to comply with the clauses of legality protocols or integrity agreements is to constitute a ground for exclusion from the tendering procedure.'

protect the fundamental principles of competition and transparency underlying Italian and EU public procurement legislation. The **prior acceptance** of such protocols, by participants, **on pain of exclusion, was necessary in order for the terms of these protocols to be binding, otherwise** the desired and declared effect of providing for a maximum level of protection and deterrence would be reduced to nothing.

The Council of the Region of Sicily, dealing with the appeal of the JV, which had already lost in the first degree, decided to submit the request to the CJEU for a **preliminary ruling,** questioning **whether the Italian 'legality' measures were compatible with the EU's public procurement legislation and the exhaustive reference of the grounds for the disqualification** of a tenderer in art. 45 of the Directive 2004/18/EC[34], or the derogation from the said rule, provided in the same article, according to which **Member States may provide for additional grounds for exclusion for 'overriding requirements in the general interest', could render the exclusion of EDILUX justifiable, on the basis that the Italian measures were designed to prevent organised crime from infiltrating public procedures.**

The declaration concerned various commitments undertaken by the participants, **during the tendering procedure and / or the execution of the contract,** in the event of being awarded the contract; of particular interest, in the context of the present paper, are the following commitments:

(a) to inform the contracting authority of any attempted disturbance, irregularity or distortion observed during the tendering procedure and/or execution of the contract by any interested person, any agent or any person capable of influencing the decisions relating to any possible award of the contract;

(b) to cooperate with the police, by reporting any attempt at extortion, intimidation or influence of a criminal nature;

(c) if awarded the contract, it undertakes to communicate to the contracting authority any attempted disturbance, irregularity or distortion observed during the tendering procedure and/or execution of the contract by any interested person, any agent or any person capable of influencing the decisions relating to any possible award of the contract;

(d) to include the same clauses in subcontracts otherwise, any authorisations will not be granted;

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[34] being its conviction for either participation in a criminal organisation or corruption or fraud or money laundering

In addition, each participant had to "expressly and solemnly declare", that, apart from having not participated in any way in the distortion of competition:

(e) the tender is consistent with the principles of seriousness, integrity, independence and confidentiality, and that it undertakes to observe the principles of fairness, transparency and integrity;

(f) … the declarations and the obligations mentioned above are prerequisites for participating in the tender, so that if the contracting authority establishes, during the tendering procedure and on the basis of serious, precise and consistent evidence, the existence of a de facto association, the undertaking shall be excluded.'

In those circumstances, account being taken of the Member States' discretion (para. 26 of the judgment), the obligation of participants to declare acceptance of the commitments contained in a legality protocol **from the start of a tendering procedure for the award of a contract does not go beyond what is necessary to achieve the desired objectives; therefore, it is compatible with the principle of proportionality.**

CJEU declared, in the first place, that the questions referred concern the interpretation of the fundamental rules and general principles of the Treaty, in particular the principles of equal treatment and of non-discrimination and the consequent obligation of transparency. Member States must be recognised to have **a certain discretion** for the purpose of adopting measures intended **to ensure observance of those principles,** which are binding on contracting authorities in any procedure for the award of a public contract, since each Member State is best placed to identify, **in the light of historical, legal, economic or social considerations specific to it,** situations which may endanger the application of those principles (see, to that effect, judgment in *Serrantoni and Consorzio stabile edili*, C-376/08, EU:C:2009:808, paragraphs 31 and 32 and the case-law cited, judgement in *Michaniki v. Greece,* C-213/07, Rec. 2008, p. I-9999).

According to the CJEU, by preventing criminal activity and distortions of competition in the public contracts sector, **a measure such as the obligation to declare acceptance of that type of legality protocol** appears to be such, as **to strengthen equal treatment and transparency** in procurement procedures; in addition, inasmuch as that obligation is incumbent upon every candidate without distinction, **it does not conflict with the principle of non-discrimination[35].** In assessing the

[35] In this context, the CJEU rejected the argument that such a declaration is an ineffective means since observance of those commitments can be determined only after the contract concerned has been awarded.

compatibility of such a measure to **the principle of proportionality,** a general principle of EU law, **the CJEU declared that such a measure must not go beyond what is necessary to achieve the intended objective**[36]**.**

In this context, as regards the content of the legality protocol at issue:

(a) the commitment which must be given by tenderers regarding, among others, to report to the contracting authority and / or the police any attempted disturbance, interference, irregularity or distortion in the conduct of the tendering procedure and during performance of the contract by any person or agent capable of influencing the decisions relating to the award of the contract or its execution, to cooperate with the police by reporting any attempt at extortion, intimidation or influence of a criminal nature and to include the same clauses in subcontracts;

(b) the declaration that the tender is consistent with the principles of seriousness, integrity, independence and confidentiality, and the undertaking to observe the principles of fairness, transparency and integrity

(c) the commitment to communicate to the contracting authority or even to the police any possible influence exerted on the successful tenderer by another undertaking participating in the tender with a view to having the performance of that contract subcontracted to the latter, given the objective of preventing and combating the phenomenon of the infiltration of organised crime,

Such commitments and declarations <u>concern the honest conduct of the candidate or tenderer towards the contracting authority at issue in the main proceedings and cooperation with law enforcement</u>. They do not, therefore, go beyond what is necessary in order to prevent organised crime infiltrating the public contract awards sector.

However, the declaration of the legality protocol that the participant is not in a relationship of control or of association with other competitors (a situation which may cause distortion of competition, as well as the declaration that the participant has not concluded and will not conclude any agreement with other participants in the tendering procedure (which excludes any agreements between the participants, regardless them being capable or not of restricting competition) goes beyond what is necessary to safeguard the principle of competition in the public procurement sector and is, therefore, in breach of the principle of proportionality.

VI. The new Directives and the case - law of the CJEU on legality protocols

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[36] see, to that effect, judgment in *Serrantoni and Consorzio stabile edili*, C-376/08, EU:C:2009:808, paragraph 33 and the case-law cited

The new EU public procurement Directives provide for certain tools to use in the fight against corruption. The motivation and involvement of private parties in the fight against corruption that had become part of the regulative framework of public procurement, has become **more visible in the new Directives.**

The relevant provisions of the new Directives **(2014/24/EU and 2014/25/EU)** are similar, yet somewhat different, **alternative,** since they adapt the provisions of the previous Directives to the well - established relevant case – law of the CJEU. More specifically, **article 57** of the new public sector Directive provides for **grounds for the mandatory exclusion** of tenderers, related to their personal situation (para. 1), **repeating the respective provision of art. 45 (1) of the previous public sector Directive.** Article 57 provides for **grounds for the discretionary (facultative) exclusion of tenderers (paras 4 and 5)[37], as well, expanded if compared to the respective provision of the previous Directive, due to the detected need to adapt the previous Directives to the relevant settled case – law of the CJEU[38]; the grounds for the discretionary exclusion, which may be transposed by Member States as mandatory grounds for mandatory exclusion, are mostly related to the professional (mis)conduct of tenderers, which impairs their integrity and reliability, distortion of competition and conflict of interests.**

By granting this discretion to Member States, it is obvious that the EU legislator keeps in mind the CJEU case – law according to which each Member State is best placed to identify, **in the light of historical, legal, economic or social considerations specific to it,** situations which may endanger the application of the principles of EU law.

A novelty of the new Directive is the possibility granted to economic operators which fall into one of the grounds for exclusion, **irrespective of their nature as mandatory or facultative**, to provide **evidence[39] which are sufficient to prove its reliability to**

[37] The same obligation, with regard to the transposition into domestic law of the grounds for exclusion due to corruption, is laid down in article 54 (4) of Directive 2004/17/EC (Utilities Directive), however in this Directive, this latter obligation is restricted because of the actors who have to apply such exclusions. It is only mandatory for the contracting entities that are public contracting authorities.

[38] For example, C-465/2011, case of Forposta regarding the grave professional misconduct

[39] Such evidence may be the payment of or the commitment to pay compensation in respect of any damage caused by the criminal offence or misconduct, the clarification of the facts and circumstances in a comprehensive manner, the active collaboration with the investigating authorities and the establishment of concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct, such as the severance of all links with persons or

perform the contract, if selected despite the existence of a ground for exclusion (para. 6). For this purpose, the measures taken by the economic operators shall be **evaluated** taking into account the gravity and particular circumstances of the criminal offence or misconduct. If such evidence is considered as sufficient, the economic operator concerned **shall not be excluded** from the procurement procedure. Where the measures are considered to be insufficient, the economic operator shall receive a statement of the reasons for that decision[40].

In any case, the contracting authority or other competent administrative or judicial body, has **the burden of proof, i.e. to demonstrate, by appropriate means, that the tenderer has been guilty of, for example, grave professional misconduct, violations of competition or involvement in a situation of conflict of interests** within the meaning of art. 24 which **cannot be effectively remedied by other less intrusive measures, which impair its solvency.**

According to para. 7 of art. 57 Member States shall specify in their **national legal orders,** by law, regulation or administrative provision, having regard to EU law, the implementing conditions for this article[41].

The said provisions aim at the achievement of the desired result, the primary goal of public procurement law, which is the award of the contract to the tenderer that will deliver the highest (possible) quality at the lowest (possible) price. As cited in recital 101 of the new public sector Directive, contracting authorities may exclude economic operators who seem unreliable, conditionally their reasoning **focuses on the type of misconduct which might put into question their integrity. A basic tool of review** of the grounds of an optional exclusion – or even of the national law providing for an obligatory exclusion on these grounds - **is the principle of proportionality, which, as expressly cited, requires that minor irregularities should only in exceptional cases lead to the exclusion of economic operators,** keeping, however, in mind that repeated cases of minor irregularities can give rise to doubts about the reliability of an economic operator, which might justify its exclusion. The actual effectiveness of the said provisions remains to be seen.

VII. The CJEU case-law under the light of the new Directives

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organisations involved in the misbehaviour, appropriate staff reorganisation measures, the implementation of reporting and control systems, the creation of an internal audit structure to monitor compliance and the adoption of internal liability and compensation rules **(recital 102 of the Directive).**

[40] The anticipated result is lengthy judicial procedures before the national courts.

[41] Greece has transposed art. 57 by art. 73 and 74 of Law 4412/2016 as amended by art. 22 para 19 of Law 4466/2016, which provide for an administrative procedure granting the competence to the contracting authorities, which decide following a compound consultative process.

Taking into account the similarities of the previous and the new Directives as per the grounds for exclusion, as well as their differences, as highlighted above, the CJEU case – law as expressed in the Impresa Edilux case presented above, still finds, or it should find, de lege ferenda, in my view, ground for application. **The crucial issue arising is the compatibility of the integrity pacts and the legality protocols to EU law, an issue affected, among others, by the transposition of the grounds for the discretionary exclusion as grounds for the mandatory exclusion.**

Legality protocols such as the one judged by the CJEU in the Impresa Edilux case may be demanded as a prerequisite for participating in a tendering procedure. Failure to include a declaration of acceptance of such a clause in the tender submitted, could lead to the exclusion of the tenderer in relation to the grounds for mandatory exclusion, while such a failure, in relation to the grounds for discretionary exclusion, could lead to an investigation led by the contracting authority as per the reasons of the failure to produce the said declaration, in the context of a prior hearing of the concerned tenderer.

It is self – evident, that in both cases, if a ground for exclusion is to be applied, irrespective of its nature as mandatory or discretionary, the concerned participant should be granted the possibility to provide **evidence, sufficient to prove its reliability to perform the contract, despite the existence of a ground for exclusion.**

In my view, taking into account the CJEU relevant case – law and its application of the **principle of proportionality**, the **discretion** attributed by the Directive to Member States and contracting authorities has the meaning to **strike the balance** between, on one hand, to avoid the unjustifiable – and thus unnecessary – exclusion of economic operators from tendering procedures, which both, violates their right to economic freedom and turns out to be at the expense of the public interest and, on the other hand, not to render the exclusion of corrupt participants to a tendering procedure significantly difficult, since this would essential annul the provisions of the Directive on the exclusion grounds of tenderers.

VIII. The use of integrity pacts / legality protocols in relation to conflicts of interests

The above conclusion is useful particularly in identifying, establishing and treating conflicts of interests. Another novelty of the new Directive is that it includes, for the first time, **explicit provisions on conflicts of interests** (art. 24)[42], having included a minimal definition, highlighting the basic features while avoiding to define in detail the notion of conflict of interests, granting some discretion to Member States.

The provision on conflicts of interests focuses on the substance and is more oriented to the **effectiveness** of the **appropriate measures** to be adopted by national legislations, granting a wide discretion to Member States to treat the issue, according to their own **historical, legal, economic or social considerations specific to it,** a manifestation of the principle of subsidiarity, which has been opted in the particular case due to the major differences observed in Member States in relation to this issue. However, the discretion attributed to Member States is **limited** by the obligation inflicted upon them **to adopt measures and the adopted measures to be appropriate and effective.**

Conflict of interests is a broad notion covering "accidental" situations as well as cases of corruption, very hard to identify and establish, particularly when the case is not the existence of family ties. The minimal in wording and wide in essence definition of a conflict – of - interests situation, in order to cover **the direct as well as the indirect influence** exercised during a tendering procedure and, in this context, any situation that **affects or may be perceived as affecting** competition and equal treatment, make **significantly difficult to establish the existence of such a situation.** The difficulty is being magnified if it is only on the part of the contracting authority to gather evidence on the existence of such a situation.

The Green Paper on the modernisation of EU public procurement policy Towards a more efficient European Procurement Market[43], which has been the basis for the provisions of the new Directive[44] and a useful tool for its interpretation, refers to the conflict of interests as the existence of a professional, personal or economic interest of persons involved in a tendering procedure, which may, or may be perceived to, influence the performance of their duties in a fair and impartial manner, as well as the possibility of such persons to influence the decisive process of the contracting

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[42] "*Member States shall ensure that contracting authorities take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators.*

The concept of conflicts of interest shall at least cover any situation where staff members of the contracting authority or of a procurement service provider acting on behalf of the contracting authority who are involved in the conduct of the procurement procedure or may influence the outcome of that procedure have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure".

[43] Brussels, 27.1.2011 COM(2011) 15

[44] See also CJEU C – 324/98, Telaustria and Telefonadress, decision of 7 December 2000, [2000], E.C.R. I – 10745, 10794 and C-74/09, Batiments et Ponts v. Berlaymont 2000 [2010] [2010] E.C.R. I - 07271

authority for his personal interest. Such a conflict of interest does not necessarily lead to corruption, but it may lead to **corrupt conduct.** Identifying and resolving conflicts of interest is therefore key to prevent fraud. It has to be emphasised that a conflict of interest constitutes, **objectively and on itself a serious irregularity regardless of the intentions of the parties concerned and whether they were acting in good or bad faith[45].**

The Green Paper stressed the need to provide for **specific measures** in order to ensure the **detection and treatment** of such situations as well as to adopt ***"safeguards** to prevent or resolve such situations. These safeguards could include requiring **declarations of absence of conflict of interest** as well as a certain degree of **transparency and accountability of procurement officials** with regard to their personal situation, naturally in full compliance with data protection rules and standards. …".*

In this context, in my opinion, integrity pacts and legality protocols included in the tendering procedure as presented previously and as a part of the contract, may prove to be a useful and effective tool in preventing, identifying and remedying conflicts of interests in public procurement.

IX. Conclusions

Integrity pacts and integrity clauses are part of the soft law mechanisms and tools consisting the 'ethics infrastructure' developed for preventing or limiting corruption in public contracting. A major domain of EU anticorruption strategy is public procurement, since the primary objective of EU Public Procurement Law is the acquisition of goods and services, under the best possible terms. This aim is at risk in situations where the personal, economic or other interest of members of a contracting authority or public officials prevails.

The CJEU case-law developed on the discretion granted to Member States (para. 2) to provide for grounds for exclusion of candidates in relation to their financial standing, professional conduct, fulfillment of tax and insurance obligations, conduct during the tendering procedure, etc, has been further developed in the case of IMPRESA EDILUX (C-425/14, judgment of 22 October 2015), raising the issue of legality clauses / legality protocols, in the context of which it ruled in favour of their compatibility to EU Public Procurement Directives regarding the commitments and declarations concerning the honest conduct of the candidate or tenderer towards the contracting authority and cooperation with law enforcement, since such

[45] See judgment of 15 June 1999 in Case T-277/97 Ismeri Europa Srl v Court of Auditors, paragraph 123, concerning the procurement rules by EU institutions.

commitments and declarations are proportionate to the aim of preventing organised crime from infiltrating the public contract awards sector. On the contrary, according to the CJEU, declarations related to the distortion of competition go beyond what is necessary to safeguard the principle of competition in the public procurement sector and are in breach of the principle of proportionality.
The involvement of private parties in the fight against corruption becomes more active under the new Directives, in so far as one of their major novelties is the possibility granted to economic operators which fall into one of the grounds for exclusion, either mandatory or facultative (as provided in art. 57), to provide evidence, sufficient to prove their reliability to perform the contract, if selected despite the existence of a ground for exclusion (self-cleaning measures).

Two issues of interest arise in this context: first, the contracting authority or other competent administrative or judicial body, bares the burden of proof, i.e. to demonstrate, by appropriate means, that the tenderer has been guilty of, for example, grave professional misconduct, violations of competition or involvement in a situation of conflict of interests within the meaning of art. 24 which cannot be effectively remedied by other less intrusive measures, which impair its solvency. Second, unreliable economic operators, in the context of self-cleaning, have to focus their reasoning on the type of misconduct which might put into question their integrity and the effectiveness of the measures adopted short and long term. The basic tool of review of the grounds of an optional exclusion is the principle of proportionality, which requires that minor irregularities should only in exceptional cases lead to the exclusion of economic operators, keeping, however, in mind that repeated cases of minor irregularities can give rise to doubts about the reliability of an economic operator, which might justify its exclusion.

Of particular interest is the situation of conflict of interests, a broad notion. The minimal in wording and wide in essence definition of a conflict – of - interests situation, in order to cover the direct as well as the indirect influence exercised during a tendering procedure and, in this context, any situation that affects or may be perceived as affecting competition and equal treatment, make it significantly difficult to establish the existence of such a situation, in particular if it is only on the contracting authority to prove the existence of such a situation. Acknowledging these difficulties, the Green Paper had stressed the need to provide for specific measures in order to ensure their detection, treatment and prevention, among which it proposed the use of declarations of absence of conflict of interest as well as a certain degree of transparency and accountability of procurement officials.

Though the actual effectiveness of the provisions of the new Directives remains to be seen, legality protocols such as the one of the aforementioned Impresa Edilux case may be demanded as a prerequisite for participating in a tendering procedure.

Failure to include a declaration of acceptance of such a clause in the tender submitted, could at least lead to an investigation led by the contracting authority as per the reasons of the failure to produce the said declaration.

In this context, taking into account the CJEU relevant case – law and its application of the principle of proportionality, the discretion attributed by the Directives to Member States and contracting authorities as per the exclusion grounds of tenderers, has the meaning to strike the balance between, on one hand, avoiding the unjustifiable – and thus unnecessary – exclusion of economic operators from tendering procedures, which both, violates their right to economic freedom and turns out to be at the expense of the public interest and, on the other hand, not rendering the exclusion of corrupt participants to a tendering procedure significantly difficult, since this would essentially annul the provisions of the Directives on the exclusion grounds of tenderers. Integrity pacts and legality protocols included in the tendering procedure and as a part of the contract to be signed, may prove to be a useful and effective tool in preventing, identifying and remedying conflicts of interests in public procurement.